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Contempt of Congress Against Franklin L. Haney

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105TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 105–792

CONTEMPT OF CONGRESS AGAINST FRANKLIN L. HANEY

REPORT

OF THE

COMMITTEE ON COMMERCE

together with

ADDITIONAL AND MINORITY VIEWS

ON THE

CONGRESSIONAL PROCEEDINGS AGAINST MR. FRANKLIN L. HANEY FOR WITHHOLDING SUBPOENAED DOCUMENTS

OCTOBER 7, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

69–006 WASHINGTON : 1998

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LETTER OF TRANSMITTAL

DEAR MR. SPEAKER: At several points during a Committee investigation into the circumstances surrounding the planned relocation of the Federal Communications Commission to the Portals office complex, the Committee sought certain records from Mr. Franklin L. Haney, whose company is a general partner in the Portals partnership.

Despite more than five months of repeated attempts to obtain Mr. Haney's cooperation, Mr. Haney refused to provide the records voluntarily, forcing the Subcommittee on Oversight and Investigations to authorize the issuance of subpoenas duces tecum to Mr. Haney and three related companies under his control. Mr. Haney did not dispute that he had possession or control over all of the subpoenaed documents, but he nonetheless failed to produce any responsive documents on the subpoena return date—even after his meritless objections concerning pertinency, attorney-client privilege, and confidentiality as to some of the documents were heard and overruled by the Subcommittee, in the presence of Mr. Haney's attorney, at an open Subcommittee meeting on June 17, 1998.

Given his willful refusal to comply with the subpoenas and the Subcommittee's rulings on his objections, the Subcommittee proceeded to find Mr. Haney in contempt and reported the matter to the Full Committee for appropriate action. On June 24, 1998, the Full Committee met in open session to consider the Subcommittee contempt report, and voted to adopt and submit the enclosed report to the House of Representatives with a recommendation that the full House cite Mr. Haney for contempt and refer the matter to the designated U.S. Attorney for prosecution under the Federal criminal contempt statute.

Three weeks after the Full Committee action, Mr. Haney reversed his position and agreed to produce all documents responsive to the subpoenas. Mr. Haney's subsequent production of records to the Committee appears to meet his obligation of full compliance. Accordingly, I have no present intention of bringing this privileged report and accompanying resolution before the House. I nonetheless believe it is important that this Committee report, including the additional and minority views, be filed with the House, so that it may serve as useful precedent in future disputes with private or governmental parties concerning the prerogative of the Committees of the House to require the production of information pertinent to a lawful congressional investigation.

Sincerely,

TOM BLILEY, *Chairman,*
Committee on Commerce, U.S. House of Representatives.

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CONTEMPT OF CONGRESS AGAINST FRANKLIN L. HANEY

OCTOBER 7, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLILEY, from the Committee on Commerce, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

INTRODUCTION

After five months of attempting to gain documents and other information voluntarily, the Subcommittee on Oversight and Investigations of the Committee on Commerce voted on April 30, 1998, to authorize the issuance of subpoenas in furtherance of the Committee's investigation into the circumstances surrounding the planned relocation of the Federal Communications Commission (FCC) to the Portals—a relocation that has become embroiled in controversy over the possible use of improper or illegal influence by certain key figures in the $400 million deal. Pursuant to that authorization, Commerce Committee Chairman Tom Bliley signed and had served, on June 4, 1998, four subpoenas demanding that Franklin L. Haney—whose company Tower Associates II, Inc., is a general partner in the partnership that owns the Portals buildings—and three companies under his control produce specified documents before the Subcommittee at its business meeting on June 17, 1998.

In the cover letter accompanying these subpoenas, Chairman Bliley stated that Mr. Haney would be given an opportunity to raise any legal objections he may have to the subpoenas and have them ruled upon at that time by the Subcommittee, but that he should be prepared to comply on June 17, under threat of contempt, with the rulings on those objections. Chairman Bliley also stated that

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Mr. Haney should provide his formal legal objections to the subpoenas, in writing, by noon on June 9, 1998, including a document-specific log of any material being withheld on grounds of attorney-client privilege. Mr. Haney failed to meet that deadline. Approximately one hour before the scheduled business meeting on June 17, the Committee received a letter from Mr. Haney's attorney setting forth his client's legal objections to each category of subpoenaed documents, but failing to include any privilege log. The objections focused on issues of pertinency, attorney-client privilege, and attorney-client confidentiality, which were similar to the general objections the Committee had received in response to its numerous voluntary attempts to secure documents from Mr. Haney since December of last year.

After debate and due consideration of these objections, and based on legal counsel provided by the Congressional Research Service, the House General Counsel's Office, and Committee counsel, the Subcommittee overruled all of Mr. Haney's objections. When Mr. Haney's attorney stated that his client would not comply at that time with the Subcommittee's ruling, the Subcommittee proceeded to hold Mr. Haney in contempt of Congress, and directed the Subcommittee chairman to report and refer the matter to the full Committee.

Mr. Haney's refusal to produce the subpoenaed documents is without legitimate basis and is a direct affront to the lawful investigative functions of Congress. The House of Representatives must not permit such defiance to go unchallenged or unpunished. To do so not only would undermine this particular investigation into the Portals, but also would set a damaging precedent for other ongoing or future oversight by House committees by sending a signal to would-be obstructionists that the House will not act to enforce its constitutional rights to obtain all information pertinent to its lawful investigations. Upon adoption by the Commerce Committee and the House, this report and resolution would direct the Speaker to certify and refer the matter to the U.S. Attorney for the District of Columbia for prosecution in accordance with the statutory provision for contempt of Congress, 2 U.S.C. § 192. That offense carries a sentence of no less than one month and no more than one year in prison, plus fines up to $100,000.

FACTS, BACKGROUND, AND CHRONOLOGY

THE COMMITTEE'S INQUIRY INTO THE FCC'S PLANNED MOVE TO THE PORTALS

In October 1997, *Business Week* reported, in a detailed investigative account, about certain troubling circumstances surrounding the planned relocation of the FCC to the Portals—entitled "Did Gore Open A Door? A friend of Al, a sweet real estate deal from the feds, and a $230,000 campaign contribution." In particular, the article suggested that, at the request of Mr. Haney and his partners, there were significant and uncommon changes made in 1996 to the Portals lease with the General Services Administration (GSA). The article also suggested that the FCC dropped its longstanding and vigorous opposition to the move after Mr. Haney became involved in the project in the Fall of 1995. The article quoted

a lawyer involved in the negotiations as stating: "It was remarkable. They [the FCC] were adamantly opposed, and then suddenly, boom, in early 1996, they were for it." The article described Mr. Haney as a Tennessee real estate developer and a "longtime friend of Vice-President Al Gore and his family," who—one month after closing the deal with GSA and joining the Portals partnership—"contributed $230,000 to the Democratic National Committee and five state Democratic parties."

Several weeks after the publication of this article, and while pursuing an unrelated oversight matter involving the Department of Energy, Committee staff was told by Mr. Bernie Wunder, former managing partner of the lobbying firm Wunder, Knight, Levine, Thelen & Forscey (the Firm), that one of its top partners—lawyer/lobbyist Peter Knight, who served as campaign manager for the 1996 Clinton-Gore Re-Election Committee—billed and received in early 1996 a $1 million "performance" payment from an unnamed client for certain work performed in 1995. Subsequently, in a *Time* magazine article, Mr. Haney acknowledged that he had paid Mr. Knight a fee of $1 million for, according to the magazine, "general legal work on the [Portals] project." However, Mr. Haney and Mr. Knight now both claim that the $1 million fee was for roughly a dozen different projects, including the Portals, over a three-year time period commencing in June of 1995 and ending this year.

After the *Time* magazine article appeared, Committee staff attempted to contact Mr. Haney on several occasions to confirm whether he was the source of the $1 million payment and, if so, for what services the payment was made, but Mr. Haney did not respond to these repeated inquiries. Because of Mr. Haney's failure to respond to the Committee's informal overtures, on November 7, 1997, Commerce Committee Chairman Tom Bliley and Subcommittee Chairman Joe Barton sent the first of several letters to Mr. Haney requesting information about these allegations. In particular, the chairmen referred to and repeatedly quoted from the *Business Week* and *Time* articles, and then stated: "If you paid Mr. Knight $1 million in one lump sum as a performance fee [on the Portals], we would have serious questions about the services for which you were paying Mr. Knight on this federal contract, which involves an agency within the Committee's oversight responsibilities." In a subsequent letter explaining further the Committee's interest in this matter, the chairmen told Mr. Haney's attorney that "[t]his Committee has both the right and the duty to inquire as to whether this planned relocation is being conducted to further the efficient and effective execution of the FCC's statutory responsibilities, or whether the relocation has been influenced by other, less legitimate considerations." (Copies of all correspondence between the Committee and Franklin L. Haney are appended to the end of this report.)

While Mr. Haney produced a limited number of documents in response to the initial request for information,[1] he subsequently has refused to provide any further information, whether in the form of documents, responses to written questions, a staff interview, or

[1] Specifically, Mr. Haney produced a copy of the $1 million check, the invoices received from the Firm, the engagement letter between Mr. Haney and the Firm, and several documents reflecting his personal communications with the FCC on the Portals matter.

even a log of those documents being withheld from the Committee and the grounds therefor. These refusals have been blanket ones, without any serious attempts by Mr. Haney at even partial compliance or compromise, and without any recognition of the rights of Congress to such information. Mr. Haney also refused to consent to Mr. Knight and other individuals employed by the Firm providing certain documents or being interviewed by Committee staff, even on non-privileged matters, by invoking broad client confidentiality restrictions.[2]

Because of the Subcommittee's inability to gather information voluntarily from key individuals with knowledge of the events in question, the Subcommittee voted on April 30, 1998, to authorize subpoenas for documents and testimony on this matter. Pursuant to that vote, four subpoenas were served upon Mr. Haney on June 4, 1998, requiring the production on June 17 of certain categories of documents within his possession or custody or that of the three companies under his control.[3] Most of the documents covered by

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[2] The Firm's documents ultimately were obtained on June 17 and June 18, 1998, following the service of a subpoena on the Firm's managing partner and the Subcommittee's overruling of the objections raised by the Firm on Mr. Haney's behalf. The fact that the Firm agreed at the Subcommittee's June 17 meeting to produce the subpoenaed documents in its possession does not, however, relieve Mr. Haney of his independent duty to produce all responsive documents in his own possession, especially given the lack of any evidence that Mr. Haney's document production would be or is co-extensive with the Firm's production.

[3] Mr. Haney previously had refused to comply with similar document subpoenas served upon him on May 13, 1998, contending that "[b]oth the House rules and the caselaw interpreting the contempt statute require the return of the subpoena be made to a duly convened committee [as opposed to the Committee offices], which may consider the objections of the witness and rule thereon, thereby providing the due process to which he is entitled in determining whether his compliance is lawfully required."

After consulting with the House Parliamentarian and the House General Counsel, and reviewing past practices of this and other committees of the House, the Committee determined that this procedural objection was without merit. There is no requirement, in the House rules or elsewhere, that subpoenas be returnable to a "duly convened committee." Nonetheless, to expedite production of the documents and to satisfy Mr. Haney's demand for "due process," on June 4, 1998, Chairman Bliley signed and had served new subpoenas returnable to a Subcommittee meeting at 10:30 a.m. on June 17, 1998. By cover letter of June 4, Chairman Bliley informed Mr. Haney that the Subcommittee would convene at that time to consider his legal objections and rule thereon, precisely as requested by Mr. Haney's counsel. Chairman Bliley also stated, as noted above, that Mr. Haney should provide his formal legal objections to the subpoenas, in writing, by noon on June 9, 1998, including a document-specific log of any material being withheld on grounds of attorney-client privilege.

Mr. Haney failed to meet this deadline. Instead, on June 16, 1998, the day before the Subcommittee was to meet, Mr. Haney's counsel sent another letter to Chairman Bliley in which he suggested, for the first time, that the Subcommittee needed to convene a hearing, rather than a meeting, so that the "rules and procedures governing committee hearings will apply." He did not specify which rules and procedures he was referring to, nor did he provide any explanation as to how such rules and procedures would benefit his client. Finally, he demanded that the Chairman "provide us with the details of the procedure to be followed on June 17, 1998. Once we have the details of such procedure, we will then be able to interpose Mr. Haney's objections to the Subcommittee's subpoenas in a way that provides for their mature consideration by Subcommittee members before a quorum meets to address any issues thus raised."

However, after consulting again with the House Parliamentarian and the House General Counsel, the Committee determined that there was nothing procedurally defective with respect to the June 4, 1998 subpoenas or the June 17, 1998 business meeting format. Indeed, Mr. Haney's interpretation would imply that all congressional information-gathering must take place in a formal hearing setting—an interpretation that would be completely inconsistent with longstanding congressional practice and would, as a practical matter, be highly disruptive to the effective performance of Congress' constitutional legislative and oversight responsibilities. The Committee also notes that, to the extent that Mr. Haney's process concern focused on the existence of a quorum of the Subcommittee, Mr. Haney's counsel was specifically advised the day before the meeting that a quorum of the Subcommittee was necessary to conduct any business and would be present to consider Mr. Haney's objections to the subpoenas—and that, in fact, the Committee's rules require a larger quorum of members for meetings than they do for hearings. Mr. Haney's counsel did not, at that time or any time thereafter, raise any further, specific procedural questions or concerns.

Furthermore, Mr. Haney's attempt to dictate the format, process and sequence of a congressional investigation is utterly without foundation. Mr. Haney had no right to demand a meeting, much less a hearing, of the Subcommittee. Nonetheless, having been given an unprecedented

the subpoenas had been requested previously by the Committee, and on more than one occasion over the prior six months, without success. Furthermore, as noted earlier, Mr. Haney ignored Chairman Bliley's request for written legal objections and a privilege log by June 9, waiting until the morning of the Subcommittee meeting to produce a cursory two-page list of objections without any supporting legal memorandum, analysis, or privilege log.

At the Subcommittee meeting on the subpoena return date, Chairman Barton explained in detail the scope of the Committee's investigation in his preliminary statement:

> As the Members are aware, since last November, the Committee has been conducting an investigation into the planned relocation of the Federal Communications Commission to the Portals, including the circumstances surrounding the lease arrangements for the FCC headquarters and the FCC's decision-making with regard to the move, the efforts of Franklin L. Haney and his representatives to influence those lease arrangements or the FCC's decision-making, and the circumstances surrounding a $1 million payment from Franklin L. Haney—a general partner in the Portals—to Peter Knight for services related in part or whole to the Portals.

Following Chairman Barton's remarks, Mr. Haney's attorney was given the opportunity to explain his client's legal objections, and was questioned about them by Subcommittee members for more than one hour. During that questioning, Mr. Haney's attorney admitted that his client was withholding non-privileged documents relating to the Portals project and the services performed by Mr. Knight for the $1 million fee,[4] and unequivocally stated that his client would not provide a privilege log for any of the allegedly privileged documents being withheld from the Subcommittee. After the members exhausted their questioning of Mr. Haney's counsel, Mr. Burr moved to overrule all of Mr. Haney's objections and order full compliance with the subpoenas. That motion was fully debated and approved by the Subcommittee on a 9–6 vote.

Following the overruling of his objections, Chairman Barton ordered Mr. Haney to comply with the Subcommittee's ruling, but

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opportunity to appear personally before the Subcommittee, as requested by his counsel's letter of May 20, Mr. Haney chose to ignore the deadline set by the Chairman and raise a new procedural objection at the last minute. As the Supreme Court has remarked with respect to similar gamesmanship, "[s]uch a patent evasion of the duty of one summoned to produce papers before a congressional committee cannot be condoned." *United States* v. *Bryan,* 339 U.S. 323, 333 (1950).

[4] Mr. Haney's counsel stated that, because of his procedural questions about the June 17 meeting, he did not believe that his client was under any compulsion to comply with the subpoenas on the return date, even for admittedly pertinent and non-privileged documents. While Mr. Haney's counsel did agree to produce, at some unspecified future time, non-privileged documents relating to the Portals project, this commitment did not and should not affect the determination of contempt, especially in light of Mr. Haney's defiant refusal to provide all other responsive records and his failure to date to provide the Committee with any of these non-privileged documents. As the Supreme Court has made clear, the act of contempt occurs when there is a willful refusal to produce the subpoenaed documents on the subpoena return date. See *United States* v. *Bryan,* 339 U.S. 323, 330 (1950) ("[W]hen the Government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in the subpoena she intentionally failed to comply, it made out a prima facie case of wilful default."); see also *Quinn* v. *United States,* 349 U.S. 155, 165–66 (1955). There is no question that Mr. Haney's actions have laid the predicate for a referral and prosecution for criminal contempt under 2 U.S.C. § 192. *Quinn,* 349 U.S. at 166.

Mr. Haney, through his counsel, refused to commit to a course of compliance—even though he was specifically advised that such refusal could lead to his being held in contempt of Congress by the Subcommittee at that time (consistent with Chairman Bliley's June 4 letter to Mr. Haney).[5] Mr. Haney's counsel then was dismissed from the witness table, and the Subcommittee proceeded to consideration of a resolution to hold Mr. Haney in contempt. After full debate by the members, the resolution was approved on a 9–7 vote.

AUTHORITY AND LEGISLATIVE PURPOSE

Mr. Haney did not contest the authority and valid legislative purpose of the investigation either at the Subcommittee meeting or in his written objections filed on June 17—in fact, his counsel conceded during questioning that this Committee had the right to inquire into the stated subject matter of the investigation. Nonetheless, in earlier correspondence relating to the Committee's voluntary requests for information, Mr. Haney's attorney did raise questions about the jurisdiction of this Committee to investigate the circumstances surrounding the Commission's planned relocation to the Portals. Accordingly, a brief discussion of the Committee's authority to investigate this matter is in order, even though jurisdictional objections were not raised in response to the subpoenas themselves.

As the Subcommittee chairman stated during his preliminary statement at the June 17 business meeting, and in the presence of Mr. Haney's counsel: "Our jurisdiction to investigate [these] matters is clear, since it is concurrent with the jurisdiction of the full Committee, which is the authorizing committee for the FCC and is charged with oversight of the agency's 'organization and operations'" (quoting Rule X, Clause 2(b)(1) of the U.S. House of Representatives). While this Committee does not have primary jurisdiction over GSA, it certainly does have the right to inquire into GSA actions that affect the "organization and operations" of the Commission. Indeed, this Committee has in the past held hearings on GSA actions involving the Commission and other agencies within the Committee's jurisdiction.[6] Accordingly, the jurisdiction of the Committee to investigate this matter is not subject to credible challenge.

With respect to a valid legislative purpose, the Subcommittee chairman addressed that issue at the June 17 meeting as well, stating:

> [W]e are not here to make allegations of wrongdoing against any party. Rather, we are here to reaffirm the

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[5] Chairman Bliley's June 4 letter to Mr. Haney contained the following explicit warning:

> Finally, please be advised that, should the Subcommittee overrule your objections to the subpoenas at its meeting, you will be ordered to comply with them immediately. If you do not do so, the Subcommittee—with my full backing—will proceed immediately, at that same meeting, to consideration of a resolution to hold you in contempt and to refer the matter to the full Committee with a recommendation for similar action. Once such a contempt finding is made by the Subcommittee, it cannot be cured by subsequent compliance. Thus, to avoid being held in contempt of Congress and ultimately prosecuted therefor, you must bring all the subpoenaed documents to the Subcommittee on June 17, and be prepared to comply at that time with any adverse ruling on your objections.

[6] The Committee's views on the jurisdictional question also were explained fully to Mr. Haney's counsel in a November 21, 1997 letter from Chairman Bliley.

> Subcommittee's right to obtain all information relevant to our inquiry, so that we can answer these outstanding questions, make informed judgments about whether misconduct has occurred, and if so, what legislative actions may be necessary to correct it or prevent its reoccurrence. For example, we may need to make or recommend statutory changes in the [FCC]'s administrative structure or the powers and duties of the Chairman and the Managing Director, or [take] more specific Portals-related actions.

Given Chairman Barton's remarks and the lack of any objection on this ground by Mr. Haney, there is no basis upon which to challenge the Committee's legislative purpose in conducting this oversight project.

THE SUBPOENAED DOCUMENTS

The subpoenas to Mr. Haney and his three companies—Tower Associates II, Inc., the Franklin L. Haney Company, and Building Finance Company of Tennessee—seek identical categories of documents, as follows:

> (1) All records that relate to Franklin L. Haney's or the Franklin L. Haney Companies' retention or hiring of, or the decision to retain or hire, Peter Knight, WKLTF, or James Sasser for counsel or services regarding the Portals or the relocation of the FCC.
>
> (2) All records that relate to any payments or fees made to James Sasser for services, efforts, lobbying, or other work undertaken or provided regarding the Portals or the relocation of the FCC, from January 1, 1994, through the present, including but not limited to all bills or invoices submitted by any of the foregoing.
>
> (3) All records that relate to the services, efforts, lobbying, or other work undertaken or provided, or to be undertaken or provided, by Peter Knight, WKLTF, or James Sasser regarding the Portals or the relocation of the FCC.
>
> (4) All records that relate to the services, efforts, lobbying, or other work undertaken or provided, or to be undertaken or provided, by Peter Knight, WKLTF, or any other person or entity for the $1 million fee billed to the Franklin L. Haney Company in January 1996.
>
> (5) All records that relate to the $1 million fee billed by Peter Knight and/or WKLTF to the Franklin L. Haney Company in January 1996, not produced in response to the above request.
>
> (6) All records that relate to any fee arrangement with Peter Knight, WKLTF, or James Sasser for work undertaken or provided, or to be undertaken or provided, by any of the foregoing regarding the Portals or the relocation of the FCC, including but not limited to all records that relate to the nature, negotiation, agreement, billing, payment, structure, purpose, or allocation of such fee arrangement.
>
> (7) All records that relate to any contact, communication, understanding, or agreement (whether written, electronic,

or oral) between any two or more of the following individuals or entities regarding the Portals or the relocation of the FCC: (i) Peter Knight; (ii) WKLTF; (iii) James Sasser; (iv) former FCC Chairman Reed Hundt, or any other official or employee at the FCC; (v) the Office of the Commissioner, Public Building Service, General Services Administration (GSA), or any official or employee thereof; (vi) the Office of the GSA Administrator, or any official or employee thereof; (vii) the Office of the GSA Regional Administrator for the National Capital Region, or any official or employee thereof; (viii) the Office of General Counsel, GSA, or any official or employee thereof; (ix) Robert Peck; (x) the Executive Office of the President (including but not limited to the Office of the Vice President), or any official or employee thereof; (xi) Franklin L. Haney; (xii) John Wagster; (xiii) T.J. Mancuso; or (xiv) any one or more of the Franklin L. Haney Companies.

(8) All warranties and certifications that relate to the Portals and that are executed, signed, or co-signed under the provisions of 41 U.S.C. §254(a) (or any other similar statute or regulation governing contingent fee representations) by Franklin L. Haney, any one or more of the Franklin L. Haney Companies, Parcel 49C Limited Partnership, or any other company or partnership in which Franklin L. Haney or any one or more of the Franklin L. Haney Companies have a financial interest, and all records that relate to any such warranty or certification.

(9) All records that relate to the negotiation of the supplemental lease agreements signed by Parcel 49C Limited Partnership and GSA in January and March of 1996.

(A copy of each subpoena is appended to the end of this report.)

As is evident from those descriptions, all of the requests relate directly to the involvement of Mr. Haney or his representatives in the Portals matter, or to the $1 million fee from Mr. Haney to Mr. Knight.

OBJECTIONS TO THE SUBPOENAS BY MR. HANEY

A. CLAIMS REGARDING PERTINENCY OF DOCUMENT REQUESTS

Mr. Haney has made several pertinency objections to the subpoenas, which will be addressed in turn below, following a brief discussion of the scope and nature of the pertinency requirement with respect to congressional investigations.

The federal contempt statute, 2 U.S.C. § 192, provides that a committee's questions or subpoena requests must be "pertinent to the subject under inquiry." In determining matters of pertinency, the courts have required only that the specific inquiries or document requests be reasonably related to the subject matter under investigation. *Sinclair* v. *United States*, 279 U.S. 263, 279 (1929); Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 305 (D.D.C. 1976). As the American Law Division of the Congressional Research Service stated in its recent memorandum to the Committee on the validity of the Haney subpoenas:

> Because of the breadth of congressional investigations, the courts have long recognized that pertinency in the legislative context is broader than that of relevance under the law of evidence. "A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates all possible CASES which may arise thereunder and the evidence must be responsive to the scope of the inquiry which generally is very broad." *Townsend* v. *United States*, 95 F.2d 252, 261 (D.C.Cir.), *cert. denied*, 303 U.S. 664 (1938) (emphasis in original).

Memorandum from Morton Rosenberg, Specialist in American Public Law, the American Law Division, Congressional Research Service, to the Honorable Tom Bliley, Chairman of the House Committee on Commerce, and the Honorable Joe Barton, Chairman of the Subcommittee on Oversight and Investigations, dated June 16, 1998, at 10 [hereinafter referred to as "the CRS Memorandum"]. (A copy of this memorandum is appended to the end of this report.)

As the above makes clear, pertinency is not a rigid concept, but rather is one that is flexible enough to permit an investigation to pursue all related leads. *See Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 509 (1975); *see also Senate Select Committee on Ethics* v. *Packwood*, 845 F.Supp. 17, 21 (D.D.C. 1994) ("Yet where, as here, an investigative subpoena is challenged on relevancy grounds, the Supreme Court has stated that the subpoena is to be enforced 'unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the . . . investigation.'").

Turning to Mr. Haney's specific pertinency objections, he has objected to providing all of the records relating to the $1 million fee, claiming that the fee also covered projects other than the Portals and that such other information is not pertinent to our investigation. On several occasions, the Committee has attempted to explain to Mr. Haney and his counsel the pertinency of this and similar voluntary requests made during this investigation. For example, in an April 16, 1998 document request to Mr. Haney, Chairman Bliley stated:

> [A]ny objection to producing documents relating to the details of the $1 million fee, and the work performed by Mr. Knight for that fee, would be equally baseless. Despite the stunning coincidence between the date of the invoice and the signing of a key Portals lease agreement, you claim—without providing any supporting information—that the $1 million fee was not solely for Mr. Knight's work on the Portals, but for a variety of projects. While the Committee's jurisdiction is founded on the Portals matter, it is incumbent upon the Committee, and within the legitimate scope of our investigation, to test your claim by reviewing all documents that will shed light on the nature and purpose of the $1 million payment.

Similarly, at the June 17 Subcommittee meeting, Chairman Barton stated the following in the presence of Mr. Haney's counsel:

> The juxtaposition of the questions under inquiry with the list of subpoenaed documents, I think, makes clear the pertinency of our requests. To date, the Subcommittee has received conflicting evidence about the nature and purpose of the $1 million fee, as well as the degree of involvement of Mr. Haney and his representatives in securing certain lease terms or the FCC's agreement at the time to move. The demanded documents will help us get to the truth.

Moreover, Committee counsel and Mr. Haney's attorney discussed the pertinency of these particular records at considerable length in telephone conversations on June 16, 1998.

Despite all of these explanations, Mr. Haney continued to interpose this pertinency objection at the June 17 meeting, and made clear his refusal to comply with the Subcommittee's ruling on his claim of pertinency. The Subcommittee, in making that determination, relied upon its own analysis of the need for such materials, as well as the CRS Memorandum, which concluded in relevant part (at page 10):

> It has been claimed, without tangible verification, that the payment was for a number of assignments that have been or would be undertaken by Mr. Knight over the three year period of the retainer agreement. The coincidence of the payment and the signing of the supplemental lease agreement between GSA and the Portals partnership has raised what appears to be legitimate concerns about the nature and purpose of the payment, which the conflicting evidence thus far gathered by the Subcommittee has not allayed. In response, Mr. Haney has supplied unconfirmable denials of pertinency. In this posture, the current record would appear to provide a strong foundation for a court to find that Mr. Haney has been informed of the pertinence of the subpoena requests.

The Committee need not take Mr. Haney's "unconfirmable denials" at face value. The most direct way for the Committee to test the assertions by Mr. Knight and Mr. Haney with respect to the $1 million fee is to see what the other alleged projects were, what level of services were provided, when they were provided in relation to the payment, and whether these other projects were ever completed. The subpoenaed documents certainly are pertinent to that legitimate investigative task.[7]

Mr. Haney's other pertinency objection relates to any and all records concerning his relationship with, and representation by, Mr. Sasser on the Portals matter. Mr. Haney has not articulated to any degree why he believes such records are not pertinent to the Committee's investigation into whether improper influences were brought to bear on GSA and FCC by Mr. Haney or his representa-

[7] During discussion on the pertinency of the non-Portals projects allegedly performed for the $1 million fee, Mr. Haney's counsel also argued that these records were business sensitive in nature and that disclosure to the Subcommittee would be harmful to Mr. Haney's business interests. Mr. Haney did not, however, raise this issue in his written legal objections filed on June 17, presumably because it is clear that the sensitive nature of records is not a legal basis upon which private parties can withhold documents from Congress. This Committee routinely requests and receives business sensitive (and attorney-client privileged) records from private parties, and takes all appropriate steps to ensure their confidentiality.

tives—one of whom was Mr. Sasser, the former United States Senator and current U.S. Ambassador to China. Prior to the issuance of the subpoenas, Chairman Bliley explained to Mr. Haney the pertinency of these requests in an April 16, 1998 letter, stating:

> On a separate but related matter, the Committee has received information that, in addition to Mr. Knight, you also retained former Senator James Sasser to represent you on the Portals, and that Mr. Sasser met with GSA and FCC officials, including then-FCC Chairman Reed Hundt, to discuss this matter. In light of the questions surrounding your fee arrangement with Mr. Knight, I am interested in learning the nature of your fee arrangement with Mr. Sasser, and the details of Mr. Sasser's efforts to influence the GSA lease and the FCC's relocation.

In light of this notice, and the lack of any detailed rebuttal by Mr. Haney or his counsel, the claim that these records are not pertinent to this investigation is without merit.[8]

B. CLAIMS OF ATTORNEY-CLIENT PRIVILEGE

Mr. Haney has made a sweeping claim of entitlement to withhold whole categories of documents on grounds of attorney-client privilege. For various reasons described in more detail below, the Subcommittee decided to overrule this claim and demand production of all requested records.

With respect to Mr. Haney's claim of privilege, we start with the jurisdictional proposition that there is no constitutional, statutory or common law bar to the Subcommittee demanding even explicitly privileged materials. The historic position of the House of Representatives is that committees of Congress are not bound to recognize any non-Constitutional privilege, such as the attorney-client privilege. Rather, as the CRS Memorandum makes plain (at page 11):

> The precedents of the House of Representatives and the Senate, which are founded on Congress' inherent constitutional prerogative to investigate, establish that acceptance of a claim of attorney-client or work product privilege rests in the sound discretion of a committee, regardless of whether a court would uphold the claim in the context of litigation * * *[9]

[8] Mr. Haney's attorney also has intimated in past correspondence with the Committee on this matter—although not in response to the subpoenas—that documents relating to communications with GSA, as opposed to the FCC, are not pertinent to the Committee's investigation. However, as stated above, actions taken by GSA that affect the FCC fall within the Committee's jurisdiction and the scope of this investigation.

[9] This Committee, in particular, has been a strong proponent of this view. As then-Chairman Dingell stated in a June 1983 Committee document on this very subject: "[T]he position of the Subcommittee has consistently been that the availability of the attorney-client privilege to witnesses before it is a matter subject to the discretion of the Chair." Committee on Commerce Print 98–I (98th Congress, 1st Session). See also the Opinion of the Senate Subcommittee on Nuclear Regulation, July 19, 1989, at 12–13 ("As an independent branch of government with such constitutional authority, the Congress must necessarily have the independent authority to determine the validity of non-constitutional evidentiary privileges that are asserted before the Congress.").

An earlier CRS memorandum elaborates on the rationale for such a conclusion, emphasizing the problematic consequences of any contrary view:

> Indeed the suggestions that the investigatory authority of the legislative branch of government is subject to non-constitutional, common law rules, developed by the judicial branch to govern its proceedings arguably is contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedure and is therefore difficult to reconcile with the congressional authority granted each House of Congress to determine its own rules.

Memorandum of Morton Rosenberg, Specialist in American Law, the American Law Division, CRS, dated September 3, 1982, at 21–22 (published in Committee on Commerce Print 98–I, at 23–24 (98th Congress, 1st Session).

That said, most congressional committees have looked to analogous judicial authority in determining whether to recognize a particular claim of privilege—a practice from which there is no need to deviate in this particular instance, for it appears to be without question that Mr. Haney's claim of privilege would not be sustained by any court of law.

Mr. Haney's blanket claim of privilege is unacceptable and prevents any balancing of interests

The attorney-client privilege, while long established in the law, has never been particularly favored. As Dean Wigmore, the father of the law of evidence, has aptly pointed out: "[The privilege] is nonetheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 Wigmore, Evidence, § 2291, at 554 (McNaughton rev. 1961). Accordingly, for the privilege to apply, the claimant affirmatively must establish (1) a communication, (2) made in confidence, (3) to an attorney, acting in such capacity, (4) by a client, and (5) for the purpose of seeking or obtaining legal advice (*ibid.*)—subject to a strict standard of waiver, as well as numerous other exceptions that have been carved out by the courts in an effort to reduce the truth-frustrating impact of the privilege in certain situations. See the CRS Memorandum, at 12–18.

Accordingly, the burden of establishing the existence of each element of the attorney-client privilege rests with the party asserting the privilege—not the party seeking to gain the information. *FTC* v. *Lukens Steel Co.,* 444 F. Supp. 803, 806 (D.D.C. 1977) ("The party seeking the benefit of the privilege has the burden of demonstrating its applicability."); see also E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine,* at 29–30 (American Bar Association, 3d ed. 1997).

While the fact that Mr. Knight, Mr. Sasser and other individuals hired by Mr. Haney are licensed attorneys raises questions about the potential applicability of the attorney-client privilege, the key words here are "potential applicability." The federal courts have been quite clear that "the attorney-client relationship does not create an automatic 'cloak' of protection . . . draped around all occur-

rences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client." *United States* v. *Goldfarb,* 328 F.2d 280, 281–82 (6th Cir.), *cert. denied,* 377 U.S. 976 (1964); see also *The Attorney-Client Privilege, supra,* at 24. Rather,

> the privilege must be asserted against giving particular testimony or producing particular documents. Blanket assertions of privilege are not countenanced. Thus, the privilege may not be raised against testifying generally or engaging in any discovery at all. It must be raised communication by communication or document by document.

The Attorney-Client Privilege, supra, at 24 (citing cases).[10]

Thus, in order to facilitate this determination, "courts have required the parties asserting the privilege to create a privilege log or index, document by document, identifying each document for which the privilege is claimed and the basis for the claim of privilege." *The Attorney-Client Privilege, supra,* at 33. Congressional committees also follow this common practice when faced with refusals to produce responsive documents.[11]

The record in this case can leave little doubt that Mr. Haney utterly failed to carry his burden on this issue. The Committee made repeated requests that Mr. Haney provide a log or index of those documents over which he claimed a privilege, but he refused to do so.[12] This failure left the Subcommittee without any information to test the assertions of privilege and no record upon which to find a valid claim of privilege in Mr. Haney's favor. Mr. Haney's actions also prevented the Subcommittee from balancing whatever valid claims of privilege he may have had against the Subcommittee's investigative need. In short, the privilege was Mr. Haney's to assert, prove, and protect, yet he took no concrete steps to do so. The Subcommittee's decision to overrule his blanket claims of privilege was therefore proper, and consistent with the practice of courts throughout the country. See, *e.g., International Paper Co.* v. *Fiberboard Corp.*, 63 F.R.D. 88, 94 (D.Del. 1974) (denying claim of privilege due to lack of specificity, and stating: "An improperly asserted claim of privilege is no claim of privilege at all. . . ."); *The Attorney-Client Privilege, supra,* at 23–34.[13]

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[10] See also the CRS Memorandum, at 13–14 and n.8 ("Blanket assertions of the privilege have been deemed 'unacceptable,' and are strongly disfavored.") (internal citations omitted).

[11] This Committee routinely requires logs from both governmental and private parties who claim some entitlement to withhold requested information from the Committee—whether the claim is one of attorney-client privilege, executive privilege, enforcement sensitive, or otherwise. Even the White House routinely provides such logs to the Committee when dealing with Presidential decision-making records or sensitive foreign policy documents. The Committee should neither expect nor require any less from Mr. Haney.

[12] When pressed on this matter at the Subcommittee meeting, Mr. Haney's counsel simply stated that he was aware of case law supporting his client's refusal to produce a log. However, he did not supply such case law to the Committee, either at the Subcommittee meeting or in his June 17 letter listing Mr. Haney's formal objections to the subpoenas, and the Committee—despite its own research—is not aware of any such court decisions.

[13] Relatedly, Mr. Haney has claimed the work-product doctrine as an additional basis upon which to withhold some of the same categories of documents. The reasons discussed above for overruling Mr. Haney's claim of attorney-client privilege apply equally to his claim of work-protection, and thus need not be separately discussed. The Committee notes, however, that Mr. Haney's claim of work product protection raises the additional question of whether the services he received from Mr. Knight and his other lawyers were "in anticipation of litigation," as required under federal rules and case law in order to invoke this doctrine.

Mr. Haney failed to demonstrate any privileged relationship with Mr. Knight

Even if Mr. Haney had produced a privilege log of communications between him and Mr. Knight, there is substantial reason to believe that such communications would not be recognized as privileged by the federal courts for one simple reason: the communications do not appear to have been made in furtherance of obtaining *predominantly legal* advice from Mr. Knight. As the CRS Memorandum explains (at page 15):

> the case law has consistently emphasized that one of the essential elements of the attorney-client privilege is that the attorney be acting as an attorney and that the communication be made for the purpose of securing legal services. The privilege therefore does not attach to incidental legal advice given by an attorney acting outside the scope of his role as attorney. "'Acting as a lawyer' encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice" (quoting *Zenith Radio Corp.* v. *Radio Corp. of America,* 121 F. Supp. 792, 794 (D.Del. 1954) (emphasis supplied)).

In order to ascertain the capacity in which an attorney is acting on behalf of a client, the courts routinely permit the party seeking the documents to question the party withholding the documents (or his attorney) on such issues as "the general nature of the attorney's services to his client, the scope of [the attorney's] authority as agent and the substance of matters which the attorney, as agent, is authorized to pass along to third parties." CRS Memorandum at 15–16.

Consistent with that authority, Subcommittee members attempted to question Mr. Haney's attorney about the nature of the services provided by Mr. Knight, but he refused to answer certain questions. Instead, he simply stated that Mr. Knight was hired to perform the full range of legal services that a person usually hires an attorney to perform, and would not elaborate further. Thus, again, when given the opportunity to establish a privileged relationship with Mr. Knight, Mr. Haney balked. This failure alone warrants a finding against the validity of his privilege claims.[14]

Furthermore, the other evidence gathered by the Committee—including the records of Mr. Knight's firm—raises serious questions as to whether Mr. Knight was hired to provide predominantly legal advice. While the retainer letter between Mr. Knight and Mr. Haney discusses both "legal" and "strategic" counsel, there is little, if any, evidence of Mr. Knight providing legal advice to Mr. Haney,

[14] As the Committee on Foreign Affairs stated in its contempt report involving the refusal of the Bernsteins to answer questions about their representation of Ferdinand Marcos: "Having been given numerous opportunities to raise their objections and to make their case, including providing written submissions as well as oral statements, the Bernsteins made no effort to establish that their services were legal rather than business in nature." H. Rep. No. 99–462, *reprinted at* 132 *Cong. Rec.* 3031 (February 27, 1986).

or Mr. Haney seeking legal advice from Mr. Knight. Thus, the Subcommittee agrees with the legal conclusion contained in the CRS Memorandum (at page 18):

> In short, based on the record now before the Subcommittee, the claims of attorney-client [privilege] would not likely be sustained by a reviewing court. In particular, Mr. Haney has failed to supply the essential elements necessary to support a privilege assertion, including evidence that the relationship with Mr. Knight was predominantly for legal, rather than business, advice, or that the "strategic" advice was not meant to be communicated to third parties. In the absence of a detailed and descriptive privilege log that could set forth specific facts that, if credited, would be sufficient to establish each element of the privilege claimed, it is unlikely that a reviewing court would [accept] the claims.

C. CLAIM OF CLIENT CONFIDENTIALITY UNDER BAR ASSOCIATION RULES

Mr. Haney also has claimed, as a basis for refusing to provide certain subpoenaed documents, a local bar rule (Rule 1.6 of the D.C. Rules of Professional Conduct) that prohibits attorneys from disclosing any confidences or secrets *of their clients* without the client's consent, a court order, or otherwise as required by law. But as the nature of the rule should make clear, it imposes an ethical duty *on the attorney,* not the client—the latter of whom is free to divulge whatever information he or she chooses. Because Mr. Haney is the client in this case, he is not under any ethical duty to withhold these documents from the Committee, and he can face no adverse consequences by doing so since he would not be revealing any confidences of a client.[15]

Even if Mr. Haney could claim the protection of this rule in some other context, the rule itself does not explicitly address requests from Congress. While there does not appear to be any judicial precedent for the rule's application in the legislative arena, federal courts consistently have found, in analogous contexts, that general confidentiality provisions—even if mandated as a matter of *federal* law—cannot be used to shield information from Congress, unless these statutes expressly bring Congress within their ambit. See, e.g., *F.T.C.* v. *Owens-Corning Fiberglass Corp.,* 626 F.2d 966, 970 (D.C. Cir. 1980) (citing other cases for same proposition).

Furthermore, it is important to stress that this rule is not a common law privilege that shields client information from all disclosures—just voluntary ones. See Memorandum of Geraldine R. Gennet, House General Counsel, to the Honorable Tom Bliley, Chairman of the House Committee on Commerce, and the Honorable Joe Barton, Chairman of the Subcommittee on Oversight and

[15] Although he repeatedly raised this rule as a basis for his client's withholding of certain categories of documents, Mr. Haney's counsel also apparently conceded under questioning that Mr. Haney could not legitimately claim the protection of this rule for documents in his own possession. Thus, it is still unclear upon what basis Mr. Haney is refusing to produce the non-privileged documents in his possession, such as information relating to his retention of Mr. Sasser, their fee arrangement and billing history on the Portals, and the non-Portals project records allegedly detailing work performed for the $1 million fee.

Investigations, dated June 16, 1998, at 2–3 [hereinafter referred to as "the General Counsel Memorandum"]. (A copy of this memorandum is appended to the end of this report.) Thus, the rule expressly permits disclosure upon court order or as required by law. In the civil or criminal litigation context, an attorney therefore must challenge information requests, including subpoenas, by making a motion to quash the discovery to the appropriate judicial official. If that fails and the court orders compliance, the attorney can provide the information without concern of disbarment or other professional sanctions. Similarly,

> [o]nce the Chair in a congressional proceeding overrules the objection, the period when disclosure would be "voluntary" is past. Once the subcommittee overruled [his] objection, [Mr. Haney] was bound to obey its direction, and follow its ruling as a commandment of disclosure, in the words of the [Bar] Code, "required by law." [His] resistance to doing so was contempt of Congress.

Contempt Report of Committee on Foreign Affairs, H. Rep. No. 99–462, *reprinted at* 132 *Cong. Rec.* 3033 (Feb. 27, 1986) (*citing Quinn* v. *United States,* 349 U.S. 155, 165–66 (1955)).[16]

Finally, the notion that a state or local ethics rule established by a professional organization can impede a congressional investigation has been rejected in the past by both Houses of Congress. As the Committee on Foreign Affairs stated in its contempt report involving the Bernstein brothers, who also claimed this bar rule as a basis for withholding information from its respective subcommittee, it is "well-established that no professional or bar association rule can override Federal law, such as the Congress' inherent constitutional investigatory power." H. Rep. No. 99–462, *reprinted at* 132 *Cong. Rec.* 3033 (Feb. 27, 1986).[17] This Committee agrees, as should the entire Congress.

HOUSE RULES REQUIREMENTS

A. COMMITTEE CONSIDERATION

On Thursday, April 30, 1998, the Subcommittee on Oversight and Investigations met in open session and, by a roll call vote of 9 yeas to 6 nays, authorized the issuance of subpoenas ad testificandum and subpoenas duces tecum in connection with the Subcommittee's ongoing Portals investigation, including subpoenas duces tecum for the records of Franklin L. Haney and three companies under his control.

On Wednesday, June 17, 1998, the Subcommittee on Oversight and Investigations held an open business meeting to receive subpoenaed documents in connection with the Subcommittee's ongoing Portals investigation. The Subcommittee, by a roll call vote of 9 yeas to 7 nays, adopted a resolution finding Franklin L. Haney in

[16] See also the General Counsel Memorandum, at 5–9 (concluding that bar association rule is satisfied by issuance of subpoena and overruling of objections to production).

[17] See also the Opinion of the Senate Subcommittee on Nuclear Regulation, July 19, 1989, at 13 n.5 (rejecting claim by attorney of ethical duty to withhold requested information, and stating: "We believe this Subcommittee's determination [regarding the validity of privileges] would qualify under the Model Code as 'required by law.'")

contempt for failure to comply with the subpoenas duces tecum served on him, and directing the Chairman of the Subcommittee to report such finding to the Committee on Commerce for such action as the Committee deems appropriate.

On Wednesday, June 24, 1998, the Full Committee on Commerce met in open session to consider a Report finding Franklin L. Haney in Contempt of Congress and directing the Speaker of the House of Representatives to certify the Report of the Committee on Commerce with respect to Franklin L. Haney to the U.S. Attorney for the District of Columbia and, by a roll call vote of 26 yeas to 18 nays, adopted and reported the Report to the House.

B. ROLLCALL VOTES

Clause 2(l)(2)(B) of Rule XI of the Rules of the House requires the Committee to list the recorded votes on the motion to report a measure to the House and amendments thereto. The following are the recorded vote on the motion to adopt and report the Report to the House, including the names of those Members voting for and against, and the recorded votes on the motions considered in connection with the Report.

COMMITTEE ON COMMERCE – 105TH CONGRESS
ROLL CALL VOTE #53

MEASURE: Report finding Franklin L. Haney in Contempt of Congress and directing the Speaker of the House of Representatives to certify the Report of the Committee on Commerce with respect to Franklin L. Haney to the U.S. Attorney for the District of Columbia.

MOTION: Motion by Mr. Klink to postpone Committee consideration of the Report until the Subcommittee has held a public hearing to receive testimony from Reed Hundt, Emily Hewitt, Franklin Haney, Steven Grigg, and Peter Knight.

DISPOSITION: NOT AGREED TO, by a roll call vote of 21 yeas to 24 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Bliley		X		Mr. Dingell			
Mr. Tauzin		X		Mr. Waxman	X		
Mr. Oxley		X		Mr. Markey			
Mr. Bilirakis		X		Mr. Hall	X		
Mr. Schaefer		X		Mr. Boucher	X		
Mr. Barton		X		Mr. Manton	X		
Mr. Hastert				Mr. Towns	X		
Mr. Upton		X		Mr. Pallone	X		
Mr. Stearns		X		Mr. Brown	X		
Mr. Paxon		X		Mr. Gordon	X		
Mr. Gillmor		X		Ms. Furse	X		
Mr. Klug				Mr. Deutsch	X		
Mr. Greenwood		X		Mr. Rush	X		
Mr. Crapo		X		Ms. Eshoo	X		
Mr. Cox		X		Mr. Klink	X		
Mr. Deal		X		Mr. Stupak	X		
Mr. Largent		X		Mr. Engel	X		
Mr. Burr		X		Mr. Sawyer	X		
Mr. Bilbray		X		Mr. Wynn	X		
Mr. Whitfield		X		Mr. Green	X		
Mr. Ganske		X		Ms. McCarthy	X		
Mr. Norwood				Mr. Strickland	X		
Mr. White		X		Ms. DeGette	X		
Mr. Coburn		X					
Mr. Lazio							
Mrs. Cubin		X					
Mr. Rogan		X					
Mr. Shimkus		X					

6/24/98

COMMITTEE ON COMMERCE -- 105TH CONGRESS
ROLL CALL VOTE #54

MEASURE: Report finding Franklin L. Haney in Contempt of Congress and directing the Speaker of the House of Representatives to certify the Report of the Committee on Commerce with respect to Franklin L. Haney to the U.S. Attorney for the District of Columbia.

MOTION: Motion by Mr. Stupak to insert text into the Committee Report concerning the chronology of certain events.

DISPOSITION: NOT AGREED TO, by a roll call vote of 19 yeas to 26 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Bliley		X		Mr. Dingell			
Mr. Tauzin		X		Mr. Waxman	X		
Mr. Oxley		X		Mr. Markey			
Mr. Bilirakis		X		Mr. Hall	X		
Mr. Schaefer		X		Mr. Boucher	X		
Mr. Barton		X		Mr. Manton	X		
Mr. Hastert		X		Mr. Towns			
Mr. Upton		X		Mr. Pallone	X		
Mr. Stearns		X		Mr. Brown	X		
Mr. Paxon		X		Mr. Gordon	X		
Mr. Gillmor		X		Ms. Furse	X		
Mr. Klug				Mr. Deutsch	X		
Mr. Greenwood		X		Mr. Rush	X		
Mr. Crapo		X		Ms. Eshoo	X		
Mr. Cox		X		Mr. Klink	X		
Mr. Deal		X		Mr. Stupak	X		
Mr. Largent		X		Mr. Engel	X		
Mr. Burr		X		Mr. Sawyer	X		
Mr. Bilbray		X		Mr. Wynn			
Mr. Whitfield		X		Mr. Green	X		
Mr. Ganske		X		Ms. McCarthy	X		
Mr. Norwood		X		Mr. Strickland	X		
Mr. White		X		Ms. DeGette	X		
Mr. Coburn		X					
Mr. Lazio							
Mrs. Cubin		X					
Mr. Rogan		X					
Mr. Shimkus		X					

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COMMITTEE ON COMMERCE – 105TH CONGRESS
ROLL CALL VOTE #55

MEASURE: Report finding Franklin L. Haney in Contempt of Congress and directing the Speaker of the House of Representatives to certify the Report of the Committee on Commerce with respect to Franklin L. Haney to the U.S. Attorney for the District of Columbia.

MOTION: Motion by Mr. Bliley to adopt and report the Report to the House.

DISPOSITION: **AGREED TO,** by a roll call vote of 26 yeas to 18 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Bliley	X			Mr. Dingell			
Mr. Tauzin	X			Mr. Waxman		X	
Mr. Oxley	X			Mr. Markey			
Mr. Bilirakis	X			Mr. Hall	X		
Mr. Schaefer	X			Mr. Boucher		X	
Mr. Barton	X			Mr. Manton		X	
Mr. Hastert	X			Mr. Towns			
Mr. Upton	X			Mr. Pallone		X	
Mr. Stearns	X			Mr. Brown		X	
Mr. Paxon	X			Mr. Gordon		X	
Mr. Gillmor	X			Ms. Furse		X	
Mr. Klug				Mr. Deutsch		X	
Mr. Greenwood	X			Mr. Rush		X	
Mr. Crapo	X			Ms. Eshoo		X	
Mr. Cox	X			Mr. Klink		X	
Mr. Deal				Mr. Stupak		X	
Mr. Largent	X			Mr. Engel		X	
Mr. Burr	X			Mr. Sawyer		X	
Mr. Bilbray	X			Mr. Wynn			
Mr. Whitfield	X			Mr. Green		X	
Mr. Ganske	X			Ms. McCarthy		X	
Mr. Norwood	X			Mr. Strickland		X	
Mr. White	X			Ms. DeGette		X	
Mr. Coburn	X						
Mr. Lazio							
Mrs. Cubin	X						
Mr. Rogan	X						
Mr. Shimkus	X						

6/24/98

COMMITTEE ON COMMERCE—105TH CONGRESS VOICE VOTES

Measure: Report finding Franklin L. Haney in Contempt of Congress and directing the Speaker of the House of Representatives to certify the Report of the Committee on Commerce with respect to Franklin L. Haney to the U.S. Attorney for the District of Columbia.

Unanimous consent request: A Unanimous Consent Request by Mr. Bliley provided that, among other things, the nine technical and conforming amendments agreed to by staff are hereby made to the Report, and the Committee will be permitted to include in the Report all sections required to be in committee reports pursuant to the Rules of the House.

Disposition: Agreed to, without objection

C. OTHER HOUSE RULES REQUIREMENTS

Pursuant to clause 2(l)(3)(A) of Rule XI of the Rules of the House of Representatives, the Subcommittee on Oversight and Investigations and the Full Committee on Commerce met and made findings that are reflected in this report.

Pursuant to clause 2(l)(3)(D) of Rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

The Committee finds that the provisions of clause 2(l)(3)(B) of Rule XI (pertaining to new budget authority, entitlement authority, and tax expenditures) and clause 2(l)(3)(C) of Rule XI (pertaining to a Congressional Budget Office cost estimate) are not applicable to this report.

Pursuant to clause 2(l)(4) of Rule XI of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this report is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

Finally, the Committee finds that: (1) the provisions of section 5(b) of the Federal Advisory Committee Act (pertaining to the creation of advisory committees) are not applicable to this report; and (2) the report does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

CONCLUSION

To date, and in large part due to the uncooperativeness of Mr. Haney, the Subcommittee has been unable to resolve the truth of the allegations first raised last year in the *Business Week* and *Time* magazine articles. The evidence gathered so far paints an incomplete and conflicting picture with respect to the nature and purpose of the $1 million fee and the involvement of Mr. Haney and his representatives in securing certain changes to the Portals lease or the FCC's relocation to that site. At this point, the Committee is not prepared to say that Mr. Haney or any other party has engaged in illegalities, wrongdoing or misconduct. In fact, the very point of this contempt report is that Mr. Haney's recalcitrance has denied

the Committee key information regarding whether those allegations may be true.

As former Representative Solarz said with respect to his recommendation that the House hold the Bernstein brothers in contempt for their refusal to provide information on their representation of Ferdinand Marcos:

> At the time we began the hearings, we had no hard evidence that the allegations were accurate . . . . We have pursued this matter simply because we are interested in establishing the right of our committee and the Congress as a whole to obtain this kind of information. If the House does not turn over such witnesses to the Department of Justice, we could be creating a precedent that could potentially cripple the capacity of the Congress to fulfill its constitutional and legislative responsibilities . . . . 132 *Cong. Rec.* 3048 (Feb. 27, 1986).

The Subcommittee lawfully authorized and issued subpoenas for Mr. Haney's records—records that were pertinent to a valid congressional investigation within the scope of the Subcommittee's jurisdiction. In response to those subpoenas, Mr. Haney failed to provide *any* responsive records, including by his counsel's own admission clearly non-privileged documents relating to his negotiations with GSA over the Portals lease amendments. Mr. Haney's claims of privilege, confidentiality, and pertinence were properly overruled by the Subcommittee, as Mr. Haney failed to carry his burden of establishing any lawful right to withhold these documents from Congress. His refusal to comply with the subpoenas and the Subcommittee's rulings on his objections was willful and contemptible.

> Accordingly, the Committee recommends to the House the following resolution:
>
> Resolved, That pursuant to sections 102 and 104 of the Revised Statutes of the United States (2 U.S.C. §§ 192, 194), the Speaker of the House of Representatives certify the report issued by the Subcommittee on Oversight and Investigations and adopted by the full Committee on Commerce, detailing the failure of Mr. Franklin L. Haney to produce papers to the Committee on Commerce, to the United States Attorney for the District of Columbia, to the end that Mr. Franklin L. Haney be proceeded against in the manner and form provided by law.

APPENDIX A

ONE HUNDRED FIFTH CONGRESS

TOM BLILEY, VIRGINIA, CHAIRMAN

W.J. "BILLY" TAUZIN, LOUISIANA
MICHAEL G. OXLEY, OHIO
MICHAEL BILIRAKIS, FLORIDA
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J. DENNIS HASTERT, ILLINOIS
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TOM COBURN, OKLAHOMA
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JOHN D. DINGELL, MICHIGAN
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GENE GREEN, TEXAS
KAREN McCARTHY, MISSOURI
TED STRICKLAND, OHIO
DIANA DeGETTE, COLORADO

JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

November 7, 1997

VIA FAX and U.S. MAIL

Mr. Franklin L. Haney
Franklin L. Haney Company
605 Chestnut Street
Suite 200
Chattanooga, Tennessee 37450

Dear Mr. Haney:

The Committee on Commerce is the authorizing Committee for the Federal Communications Commission (FCC) and has oversight responsibilities with respect to the Commission. Based on recent press reports concerning the facts surrounding the relocation of the FCC Headquarters to the Portals, an office development in southwest Washington, D.C., we have several concerns with respect to this matter.

The Committee has been attempting to contact you by telephone this week but has not received a return telephone call despite leaving at least three messages over the course of this week. Mr. Mark Paoletta, the Committee's chief counsel for oversight and investigations, has been calling your office to gain some preliminary information on your involvement in the move of the FCC Headquarters to the Portals. Mr. Paoletta also wanted to inquire as to whether you paid Mr. Peter Knight, a lobbyist and former campaign manager for the 1996 Clinton-Gore campaign, a lump sum "performance" payment of $1 million for work related in any way to a contract between the General Services Administration (GSA) and Parcel 49C Limited Partnership (Parcel 49), the partnership which, according to press reports, owns the Portals office development and in which you are a participant. Finally, Mr. Paoletta wanted to arrange, if necessary, an interview with you on these matters.

According to a recent *Business Week* article, when the GSA selected the Portals (back in 1988) as the new home for FCC Headquarters, FCC officials voiced strong and immediate opposition to the move. Opposition within the FCC was so strong that a Federal Circuit Court noted the following in a decision concerning a lawsuit on this matter: "The trial record contained substantial evidence showing that, in the words of the trial court, 'FCC intended to take whatever steps were necessary to avoid going to Portals' . . . In sum, the record amply supports the trial court's

finding that the FCC launched 'a campaign to scuttle' and award to Parcel 49C." *Parcel 49C Limited Partnership v. United States, 31 F.3d 1147, 1151 (Fed. Cir. 1994).*

Further, according to the *Business Week* article, "Haney became involved in the Portals in the fall of 1995 by replacing a partner whose bankruptcy threatened to torpedo the project." According to the article and confirmed by a letter to the editor from a senior GSA official, Parcel 49C and GSA signed a supplemental lease agreement on **January 3, 1997.** According to the article, "Haney . . . converted the lease into a security, and sold the lease-backed bonds to institutional investors in an **April, 1996**, private placement. Weeks later, Haney contributed $230,000 to the Democratic National Committee and five state Democratic parties. An associate kicked in an additional $20,000." (emphasis added)

This Committee has been informed by the former managing partner of Mr. Knight's law firm (Wunder, Knight, Levine, Thelen & Forscey) that in **January 1996** Mr. Knight billed a client $1 million and received a $1 million check from a client in **April 1996.** (Copy of October 27, 1997 letter to Mr. Bernard J. Wunder attached). It has been reported in *Time* magazine that you acknowledged paying Mr. Knight a fee of $1 million for, according to the *Time* piece, "general legal work on the [Portals] project." It also has been reported in an *Associated Press* article that Mr. Knight in an interview acknowledged that you, according to this article, "hired his firm in 1995 to work on a variety of financing and real estate matters." If you paid Mr. Knight $1 million in one lump sum as a performance fee, we would have serious questions about the services for which you were paying Mr. Knight on this federal contract, which involves an agency within the Committee's oversight responsibilities.

In response to this Committee's request that Mr. Knight's law firm provide the identity of the client who paid Mr. Knight $1 million in April 1996, Mr. Dennis Thelen, the firm's managing partner, stated that he could not disclose the identity of the client based on the confidentiality restrictions of the District of Columbia's Rules of Professional Conduct. As set forth in Mr. Thelen's letter, "[a]ccording to those rules, that information can not be disclosed by us without either the consent of the client or a court order." In a telephone conversation with Mr. Thelen, Mr. Paoletta was informed that the client who had paid the $1 million fee had requested that the firm keep his/her identity concealed.

As noted above, Mr. Paoletta has attempted to contact you to inquire whether you had in fact made such a payment to Mr. Knight or his law firm; if so, for what services the payment was made; and, to arrange, if appropriate, an interview with you to elicit information on that payment and your role in the FCC's move to the Portals. Since you have not responded, it is necessary to pose these questions in writing, to request certain records, and to request that you make yourself available for an interview, if after review of your answers, the Committee determines that it is necessary to pursue this matter. Therefore, pursuant to Rules X and XI of the Rules of the House of Representatives, please provide responses to the following by November 14, 1997:

1) Did Franklin Haney (as defined below) make any payments to Mr. Peter Knight or his law firm in 1995, 1996, or 1997? If so, how much did Franklin Haney pay Mr. Peter Knight or his law firm in each of those years? Please provide the dates and the specific amounts of any such payments.

2) If such payments were made, please describe for what services such payments were made.

3) Please describe the fee structure of any payments made by Franklin Haney to Mr. Peter Knight or Mr. Knight's law firm, i.e., hourly rate, retainer, contingency or other sort of fee structure.

4) Please provide copies of all records relating to any written agreement between Franklin Haney and Mr. Knight or his law firm.

5) Will you authorize Mr. Knight or his law firm to release to the Committee the information requested in the attached October 27, 1997 letter to Mr. Bernard Wunder?

6) Did Franklin Haney contact anyone in the Executive Office of the President (including but not limited to the Office of the Vice President) or in the FCC regarding the Portals development or with respect to the negotiations between Parcel 49C and the GSA regarding the lease at the Portals?

   For each such contact, please state:

   a. the exact date and manner in which it occurred (*e.g.*, via telephone, meeting, dinner, etc.);

   b. the names of all individuals involved or present; and

   c. the specific purpose of the contact;

7) Please provide copies of all records relating to any communications, whether written, electronic or oral, between Franklin Haney and any official or employee of the FCC or the Executive Office of the President. When responding to this request, please separately identify all responsive records coming from the Office of the FCC Chairman.

In responding to the above requests, please note that the terms "records" and "relating" or "relate" should be interpreted in the manner described in the Attachment to this letter. The term "Franklin Haney" is defined for purposes of these requests as Mr. Haney himself, Franklin L. Haney Company or any of his other companies, including, but not limited to, any of his officers, directors,

employees, agents, and lobbyists, anyone else acting on Franklin Haney's behalf, or any of Franklin Haney's business partners, company subsidiaries, or joint ventures.

If you have any questions concerning this letter, please contact Mr. Mark Paoletta, chief counsel for oversight and investigations, at (202) 225-2927. Thank you for your prompt attention to this matter.

Sincerely,

Tom Bliley
Chairman

Joe Barton
Chairman
Subcommittee on
Oversight and Investigations

Attachments

cc. The Honorable John Dingell, Ranking Member
The Honorable Ron Klink, Ranking Member
Subcommittee on Oversight and Investigations

FRANKLIN L. HANEY COMPANY
DEVELOPERS

615 / 265-0537
CHESTNUT STREET TOWER, SUITE 200
605 CHESTNUT STREET
CHATTANOOGA, TENNESSEE 37450

November 10, 1997

VIA FAX AND U.S. MAIL

The Honorable Tom Bliley
The Honorable Joe Barton
Committee on Commerce
U.S. HOUSE OF REPRESENTATIVES
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Bliley and Chairman Barton:

I received your letter of November 7, 1997, this morning by facsimile. I have not ignored responding to your Counsel, Mark Paoletta.

When I received your Counsel's message last week, I was involved in an important family situation. Since then I have been seeking counsel. I will be back in touch as soon as I have received their advice on this matter.

Sincerely,

Franklin L. Haney

BRAND, LOWELL & RYAN
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: [illegible]
TELECOPIER: [illegible]

November 14, 1997

HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
The Honorable Joe Barton, Chairman
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley and Barton:

I have been retained by Franklin L. Haney in connection with the inquiries you directed to him on November 7, 1997.

Because my engagement has only recently been formalized and given the very short time within which to familiarize myself with the matter (less than one week), we are unable to respond by November 14, 1997, as your letter requested. Mr. Haney wants to be able to cooperate with all appropriate inquiries into the subject transactions, and in order to do so, I would request an extension of time, to December 2, 1997, within which to prepare a response.

In that connection, you refer to Rules X and XI of the Rules of the House of Representatives, which confer jurisdiction upon committees of the House and specify certain procedures for such committees in conducting oversight investigations. My initial review of Rule X indicates that jurisdiction over "public buildings and occupied or improved grounds of the United States" is conferred upon the House Committee on Transportation and Infrastructure. In that the stated subject of your inquiry is the contract between the General Services Administration and the real estate partnership which owns the property it is not immediately clear whether or how the Committee on Commerce has been delegated jurisdiction over this subject matter by the House. As

you are no doubt aware, the law imposes strict requirements on committees to establish that the subject matter is one the House has given to the Committee and that the specific questions or documents are pertinent to the subject under inquiry. A clarification from the Committee on these questions would greatly expedite and assist us in making the determinations we are required to make in this regard.

Sincerely,

Stan Brand

Stanley M. Brand

SMB:mob

ONE HUNDRED FIFTH CONGRESS

TOM BLILEY, VIRGINIA, CHAIRMAN

W. J. "BILLY" TAUZIN, LOUISIANA
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JAMES E. DEROSIER, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

November 21, 1997

Stanley M. Brand, Esq.
Brand, Lowell & Ryan, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Brand:

We are writing in response to your letter, dated November 14, 1997, in which you request an extension for your client, Franklin L. Haney, to respond to our information request dated November 7, 1997, and raise questions about the jurisdiction of the Committee on Commerce to conduct oversight on the matters involving the relocation of the Federal Communications Commission (FCC) to the Portals, a development project owned in part by Mr. Haney's company.

In your letter, you narrowly and erroneously assert that the subject matter of our inquiry is "the contract between the General Services Administration and the real estate partnership which own the property," and then state that it is "not immediately clear whether or how the Committee on Commerce has been delegated jurisdiction over this subject matter by the House."

As we made clear in the first sentence of our November 7 information request, this Committee is "the authorizing Committee for the Federal Communications Commission and has oversight responsibilities with respect to the Commission." The very next sentence states the subject matter of our inquiry: "Based on recent press reports concerning the facts surrounding the relocation of the FCC Headquarters to the Portals, an office development in southwest Washington, D.C., we have several concerns *with respect to this matter*" (emphasis added). The following two pages of our request to Mr. Haney sets forth in detail the issues surrounding the relocation of the FCC to the Portals and allegations about exceptionally large performance payments made by Mr. Haney to Mr. Peter Knight for work related to this federal contract -- which, by the contract's own terms, expressly involves an agency within the Committee's oversight responsibilities. While the company's contract is technically with the General Services Administration (GSA), the operable lease specified that the FCC was the intended occupant, and GSA formally assigned space in the Portals to the FCC several years ago, during the lease negotiations in question.

Under Rule X of the U.S. House of Representatives, the Committee on Commerce has primary jurisdiction over "the regulation of interstate and foreign communications." Clause 2(b)(1) of this same rule lays out the general oversight responsibilities of the standing committees with respect to all matters and agencies within their primary jurisdiction, and does so in unmistakably broad terms. Among other things, each standing committee is required to review, on a continuing basis, the "organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution" of those laws that fall within the committee's jurisdiction, and "any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee."

Given the above, we believe there can and should be no doubt over the jurisdiction of this Committee to investigate the matters surrounding the FCC's relocation to the Portals, and your client's involvement relating thereto. This Committee has both the right and the duty to inquire as to whether this planned relocation is being conducted to further the efficient and effective execution of the FCC's statutory responsibilities, or whether the relocation has been influenced by other, less legitimate considerations. Indeed, the Committee has previously considered this planned relocation during a hearing in June 1995, at which then-FCC Chairman Reed Hundt testified.

Your letter further asserts that the Committee is subject to "strict requirements" to show that the "specific questions or documents [requested] are pertinent to the subject under inquiry." But, as you surely must know, once this Committee establishes its jurisdiction over a particular area of inquiry, its investigative purview is substantial and wide-ranging. While the specific inquiries should be reasonably related to the subject matter under investigation, the suggestion that there are rigid nexus requirements imposed on the Committee's particular information requests does not comport with the broad concept of pertinency that exists in this context. Based on a review of the applicable legal authority and consultations with the House of Representatives' Office of General Counsel, we believe that the Committee is acting well within its authority and responsibilities in requesting the information contained in our November 7 letter -- a position with which the House's Office of General Counsel concurs.

Let us be very clear. We expect that all of the information requested in our prior letter will be provided promptly to the Committee. We grant your request for an extension until December 2, 1997 -- provided, however, that the "response" on December 2 contains all of the requested information and documents. In this vein, we should point out that, prior to the issuance of our November 7 letter, the Committee's chief counsel for oversight and investigations made numerous unsuccessful attempts to reach Mr. Haney and gather information on this matter informally. Furthermore, our November 7 letter contained a due date for responsive information by November 14. When we received your letter dated November 14, it provided *none* of the information we had requested. Instead, the letter questioned our jurisdiction to request the information, while making ambiguous promises about future cooperation.

Stanley M. Brand, Esq.
Page 3

We will not entertain any further delays. As the House of Representatives is in recess until the end of January 1998, Chairman Bliley has the full authority under Committee Rule 21 to unilaterally issue a subpoena for the requested documents and other information, including testimony from relevant witnesses, and will seriously consider doing so if we do not receive the requested information by December 2, 1997.

If you have any questions, please contact Mr. Mark Paoletta, chief counsel for oversight and investigations, at (202) 225-2927. Thank you for your prompt compliance with our requests.

Sincerely,

Tom Bliley
Chairman

Joe Barton
Chairman
Subcommittee on Oversight
and Investigations

cc: The Honorable John Dingell, Ranking Member
The Honorable Ron Klink, Ranking Member
Subcommittee on Oversight and Investigations

BRAND, LOWELL & RYAN
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

December 2, 1997

HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
The Honorable Joe Barton, Chairman
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley and Chairman Barton:

I am hereby transmitting to you documents responsive to your November 7, 1997 request to Franklin L. Haney.

Your letter defined "Franklin Haney" to include entities and persons over which Mr. Haney does not have control, and for documents which are not in Mr. Haney's possession. Our production is therefore limited to documents from the files of entities wholly owned or controlled by Franklin Haney. In the event that we discover any further documents responsive to your request, we will forward them immediately.

We are pleased to cooperate with the Committee's inquiry by providing these documents.

Sincerely,

Stan Brand

Stanley M. Brand

SMB:mob

Enclosure

BRAND, LOWELL & RYAN
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

December 8, 1997

HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
The Honorable Joe Barton, Chairman
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley and Chairman Barton:

I wanted to address two statements in your December 4, 1997 letter to Peter Knight, a copy of which was provided to me because it contained representations concerning conversations I had with your staff.

You state that I "as counsel for Mr. Haney and on his behalf – . . . agreed to formally waive the attorney-client privilege between Mr. Haney and your [Mr. Knight's] firm with respect to this matter." I have done no such thing.

I did provide to the Committee a copy of the check, expense invoices and retainer agreement. That is because the fact of representation and the nature of the fee arrangements, including the amount paid, have generally been held not to be "communications" the privilege protects.

Having provided these documents because I did not consider them within the privilege, I informed the staff that I had no objection to their seeking any similar documents from the firm relating to the fact of representation, the nature of the fee, or the amount paid. Clearly, my doing so under the circumstances is not a waiver.

Secondly, a subcommittee spokesman is quoted in the Washington Times on December 5, 1997 stating that "Mr. Haney's response fell far short of a good faith compliance with the committee's information request."

As I explained to Mr. Paoletta, the documents provided responded to each and every item in your November 7, 1997 letter. Indeed, the documents I provided are more fully descriptive of the arrangements you questioned than any narrative response that could have been provided. I am unaware of any authority that the House has conferred on its committees to issue written interrogatories. In the absence of such authority, I provided the best thing available – the documents containing the information you requested.

Based on the foregoing, I believe the subcommittee spokesman's accusation of bad faith, non-compliance is inappropriate and misleading.

Sincerely,

Stan Brand

Stanley M. Brand

SMB:mob

ONE HUNDRED FIFTH CONGRESS

TOM BLILEY, VIRGINIA, CHAIRMAN

W.J. "BILLY" TAUZIN, LOUISIANA
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JAMES E. DEROSIRAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

December 15, 1997

VIA FAX and U.S. MAIL

Mr. Franklin L. Haney
Franklin L. Haney Company
605 Chestnut Street
Suite 200
Chattanooga, Tennessee 37450

Dear Mr. Haney:

We are writing to express our grave concerns over your lack of cooperation with this Committee's investigation into the very serious matter of whether the planned relocation of the Federal Communications Commission ("FCC") to the Portals -- a development project in which you have a financial interest -- has been improperly influenced by political considerations.

On November 7, 1997, we wrote to you requesting certain documents and other information about your involvement in this matter and your relationship to Mr. Peter Knight, a former top aide and major fundraiser for Vice President Al Gore. In particular, we were attempting to learn the services for which you paid Mr. Knight $1 million in April 1996, based on a January 3, 1996 bill he had sent to you. The date of this bill is the exact same day that the Portals developers signed a key supplemental lease agreement with the General Services Administration ("GSA").

In response to our November 7 request, your attorney initially questioned our jurisdiction to even investigate this matter, and then requested an extension of time until December 2 to prepare a response to our request. We granted that extension, but did so with the express condition that we expected full compliance with all of our specific information requests by that date. Thus, we were extremely dismayed to learn that your December 2 response failed to adequately answer most of the specific questions posed to you. Even more troubling was the fact that you used the extension period to distribute documents and other information responsive to our request to individuals in the press prior to producing them to this Committee. Indeed, you appear to be more forthcoming in your selective dealings with the press than you have been in your dealings with this Committee.

In press reports, you (and/or your spokesman) have acknowledged that the $1 million payment was for work Mr. Knight did on your behalf relating, at least in part, to the Portals. However, you so far have declined requests by Committee staff to identify any of the other projects that Mr. Knight's $1 million bill allegedly covered. Moreover, you have refused to specify what services or efforts Mr. Knight undertook on your behalf to earn this extraordinary fee relating to at least one federal contract, the Portals. You also have been unwilling to describe the fee arrangement governing the $1 million payment in any greater detail than is contained in the engagement letter between you and Mr. Knight -- which simply states that the fee will be determined by agreement in the future. And your response with regard to contacts you had with FCC officials on this matter -- which you limited by only providing documents reflecting such communications -- was misleading in its omission of at least two key meetings you had with FCC officials and Mr. Knight in 1995. Based on information provided by the FCC, the Committee has learned that you had a meeting with FCC Chairman Reed Hundt, Mr. Knight, and other FCC officials on October 10, 1995 -- just seven weeks before the FCC formally accepted assignment to the Portals. In addition, we have learned that you attended another meeting with an FCC official in Mr. Knight's office, sometime prior to this October 1995 meeting with Chairman Hundt. It still remains unclear from your initial response whether you had any other contacts with the FCC on this matter, or with the White House.

Furthermore, the documents that you did provide to this Committee on December 2 raise more questions than they answer. These documents confirm that you paid Mr. Knight a one-time fee of $1 million in April 1996 for certain undefined "legal services." Notably, the $1 million check is made payable to Mr. Knight personally, and does not include the roughly $263 in firm-related expenses that also were contained on the January 3, 1996 bill. Though Mr. Knight and his firm also billed you for other monthly firm expenses starting as early as November 1995, you did not produce any records evidencing that these other bills have ever been paid. In addition, the formal engagement letter from Mr. Knight to you outlining the terms of his representation is dated October 23, 1995, and specifically states that "[t]his engagement will commence on June 1, 1995" -- yet Mr. Knight's $1 million bill was for legal services rendered in "1994 and 1995."

The invoices to you by Mr. Knight are interesting for another reason as well, because they indicate that you were not paying Mr. Knight a monthly retainer or an hourly rate for his legal services. Indeed, with the exception of the $1 million billed in January 1996 for legal services, you apparently have not paid Mr. Knight or his firm for any of the professional time spent on your behalf -- both before and after the $1 million payment. Furthermore, none of the records produced by you reflects how or when the $1 million figure was arrived at or agreed upon, or what specific legal services Mr. Knight provided, or was to provide, for the payment of such a large fee. As noted above, your spokesman has indicated in the press that the $1 million was for Mr. Knight's efforts on "nearly a dozen" projects, including the Portals. However, the October 23 engagement letter clearly states that Mr. Knight's firm will "bill the Haney Company on a project-by-project basis," so an agreement to pay a one-time fee for work on a variety of projects would appear to be flatly inconsistent with the terms of the formal engagement letter. This apparent inconsistency -- coupled

with other information provided to the Committee that suggests the $1 million was a performance-based fee related to the successful completion of a specific task -- raises questions that warrant a more complete exploration of the work underlying this $1 million payment.

In an attempt to resolve all these outstanding issues in a less formal and more efficient manner, Committee staff requested to conduct an interview of you. Through counsel, you declined to make yourself available for such an interview. Furthermore, it appears from your counsel's most recent letter to me, dated December 8, 1997, that you are not willing to provide complete, written responses to the questions posed in my November 7 information request either. In these respects, your behavior is most unusual, as this Committee has a long history of requesting and receiving the voluntary production of information through such means. Your refusals, in conjunction with the other facts outlined above, strongly suggest an intent by you and your representatives to impede the Committee's investigation into this matter. If it is true that -- as your spokesman has said publicly -- "there's just nothing" to the allegations of political influence, we simply do not understand why you are so unwilling to be interviewed or to provide written information about the details of this matter to this Committee.

In light of your failure to adequately answer our original questions and your refusal to be interviewed, we are requesting that, pursuant to Rules X and XI of the House of Representatives, you answer in writing the questions set forth below and produce the following documents, by close of business Monday, December 22, 1997. These requests are, of course, voluntary. However, please be advised that, should you fail to provide satisfactory written responses to the questions set forth below or fail to produce all responsive records requested, we will be forced to consider more formal means of securing this information, including, if necessary, the issuance of a subpoena to compel your public testimony on these matters before the Subcommittee on Oversight and Investigations.

1) Please state the date when Franklin Haney (as defined below) first contacted Mr. Knight for the purpose of securing his professional services, and the date when Franklin Haney retained Mr. Knight or his law firm for such services.

   a. With regard to the Portals project, please describe the type(s) of "strategic and legal counsel" for which you were retaining Mr. Knight (e.g., government relations/strategy, financing, transactional, real estate, or partnership matters).

   b. Also with regard to the Portals, please describe why you hired Mr. Knight in particular, including a description of the relevant expertise Mr. Knight possessed to provide you with "strategic and legal counsel" on this specific matter.

2) Did Franklin Haney (as defined below) make any payments to Mr. Knight or his law firm in 1994? If so, how much did Franklin Haney pay Mr. Knight in that year?

Please provide the dates and specific amounts of the payments.

a. If not, did Mr. Knight or his law firm undertake any efforts or work on behalf of Franklin Haney (as defined below) in 1994, whether or not any payments were made for such work?

3) Did Franklin Haney (as defined below) make any payments to Mr. Knight or his law firm relating in whole or in part to the Portals or the FCC's relocation, other than the $1 million payment documented in your initial response?

a. Did Franklin Haney (as defined below) make any payments to Mr. Knight for the expenses billed on the invoices produced to the Committee in your initial response? If not, why not?

4) Please describe in detail the work or efforts undertaken by Mr. Knight or his law firm on behalf of Franklin Haney (as defined below) that relate to the Portals or the FCC's relocation, and provide all records relating thereto.

a. Please also state whether Mr. Knight was paid or requested by Franklin Haney (as defined below) to lobby or otherwise contact GSA or FCC officials relating to the Portals.

b. Please also state whether Mr. Knight was paid or requested by Franklin Haney (as defined below) for work or efforts undertaken with regard to the supplemental lease agreement signed by GSA and the Portals developers on January 3, 1996.

5) Please identify the specific project(s) that Mr. Knight or his law firm worked on for Franklin Haney (as defined below) relating to the $1 million fee billed in January 1996, and for each project, please state whether it involved any contractual arrangement with the federal government. Please also describe in detail the work or efforts undertaken by Mr. Knight or his law firm for this fee, and provide all records relating thereto.

a. If the $1 million payment was for work on a variety of projects, please explain the inconsistency between this fee arrangement and the engagement letter between Franklin Haney and Mr. Knight dated October 23, 1995.

b. If the $1 million payment was for work on a variety of projects, please indicate which portion of the $1 million was related to each of the projects, and describe how the allocation was determined.

6) Please describe the fee structure relating to the $1 million payment and any other payments made by Franklin Haney (as defined below) to Mr. Knight or his law firm that relate to the Portals or the FCC's relocation, i.e., hourly rate, retainer, contingency or other sort of fee structure, and specifically state whether the $1 million payment was contingent or conditioned upon the successful completion of a certain task(s) or project(s).

7) Please describe in detail how the $1 million fee paid by you to Mr. Knight in April 1996 was arrived at, and when and how this fee arrangement was agreed to between you and Mr. Knight.

   a. Please also describe why the bill for this amount was sent to you on January 3, 1996 (i.e., what was the triggering event underlying the issuance of this bill at that particular time?).

   b. Please also describe why the check was made payable to Mr. Knight personally, rather than to his law firm (i.e., did Mr. Knight request that you do so, or was this arrangement part of your agreement with him?).

   c. Please also explain why Mr. Knight's firm continued to bill you for expenses even after the issuance of the one-time $1 million bill for all legal services.

8) Please provide all records relating to any contact, communication, understanding, or agreement between Franklin Haney (as defined below) and Mr. Knight or his law firm relating to the $1 million fee, the work underlying that fee, the Portals, or the FCC's relocation.

9) Please provide all records relating to any contact, communication, understanding, or agreement between Franklin Haney (as defined below) and any of the following individuals, provided that it relates to the Portals: (i) Mr. Peter Knight or any partner or employee of his law firm; (ii) The Honorable James Sasser; (iii) FCC Chairman Reed Hundt, or any official or employee at the FCC; (iv) any official or employee in the Office of the Commissioner, Public Building Service, GSA; (v) Mr. Robert Peck; (vi) any official or employee in the Office of the GSA Administrator; and (vii) any official or employee in the Executive Office of the President (including but not limited to the Office of the Vice President).

10) Please provide copies of all warranties or certifications executed, signed, or co-signed under the provisions of 41 U.S.C. § 254(a) by Franklin Haney (as defined below), or any partnership in which Franklin Haney has a financial interest, that relate to the Portals.

11) Did Franklin Haney (as defined below) contact, or receive contact from, any official or employee in any of the following entities regarding the Portals project or the FCC's relocation: (i) the Executive Office of the President (including but not limited to the Office of the Vice President), (ii) the Office of the Commissioner, Public Buildings Service, GSA, (iii) the Office of the Administrator, GSA, or (iv) the FCC?

For each such contact, please state:

a. the exact date and manner in which it occurred (*e.g.*, via telephone, meeting, dinner, etc.); and

b. the names of all individuals involved or present.

In responding to these requests, please note that the terms "records" and "relating" or "relate" should be interpreted in the manner described in the Attachment to this letter. The term "Franklin Haney" is defined for purposes of the requests as you, Franklin L. Haney Company, or any of your other companies (or subsidiaries thereof), including but not limited to any of your officers, directors, employees, agents, lobbyists, or anyone else acting on you or your companies' behalf.

Finally, there is the issue of to what degree you will object to Mr. Knight's voluntary provision of information on this matter to the Committee, as we recently requested in a letter to Mr. Knight dated December 4, 1997 (attached). Mr. Brand's December 8 letter states that he agreed on your behalf to the disclosure by Mr. Knight of information relating to "the fact of representation, the nature of the fee, or the amount paid." Given the seriousness of the questions being raised regarding the very public matter of the FCC's relocation to the Portals, and in order to permit the Committee's investigation of this matter to proceed without undue delay, we believe it is incumbent upon you to not object to Mr. Knight's voluntary production to the Committee of all information requested in the attached letter to him, and any other information relating to his or his firm's efforts on your behalf that relate to the Portals or the FCC's relocation. Please respond to this request in writing.

If you have any questions concerning these requests, please contact Mr. Mark Paoletta, chief counsel for oversight and investigations, at (202) 225-2927. Thank you for your prompt attention to this matter.

Sincerely,

Tom Bliley
Chairman

Joe Barton
Chairman
Subcommittee on Oversight
and Investigations

Attachments

cc. The Honorable John Dingell, Ranking Member
The Honorable Ron Klink, Ranking Member
Subcommittee on Oversight and Investigations
Stanley M. Brand, Esq., Counsel for Franklin Haney

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December 22, 1997

HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
The Honorable Joe Barton, Chairman
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley and Chairman Barton:

We respect you and your Committee's power and its important responsibility to investigate matters of public concern within the Committee's jurisdiction. Our efforts to cooperate voluntarily with your Committee's investigation, however, have been publicly mischaracterized by spokesmen for your Committee, and a hostile political environment has been created which clearly affects our further efforts at voluntary cooperation.

Your letter of December 15, 1997, to Franklin Haney makes several assertions and statements that I feel compelled to correct for the record.

First, the charge of "lack of cooperation" is refuted by the documents that we produced to your Committee. While it may be repetitive to do so, I believe it is necessary to lay the Committee's request for information "side-by-side" with the data that we provided to demonstrate that we voluntarily complied with your request. The following "side-by-side" analysis illustrates our compliance with your previous request for information.

Committee Request	Mr. Haney's Response
1. Did Franklin Haney pay Peter Knight; if so, how much?	Copy of the check.
2. Please describe the services rendered for such payment?	Copy of the retainer letter.
3. Describe the fee structure.	Copy of retainer letter and check.
4. Provide copies of records relating to agreement.	Copy of retainer letter, invoices for expenses and checks.
5. Will you authorize Mr. Knight or his law firm to release the same information specified above?	Yes.
6. Please identify Mr. Haney's contacts with anyone in the Executive Office of the President or the FCC	Copies of letters and phone logs of calls with Reed Hundt.
7. Please provide copies of any communications between Mr. Haney and the FCC or the EOP.	No other documents found.

As this comparison demonstrates, we have complied with your request for information.

Your December 15, 1997, letter describes your investigation as concerning whether the FCC's relocation to The Portals "has been improperly influenced by political considerations," yet your initial inquiry to Mr. Haney was whether payment of legal fees to Mr. Knight was a prohibited "performance fee." In providing the documentation that you asked for, including the retainer agreement for "legal and strategic services" (which contains no mention or reference to any performance fee), we had thought that your inquiry would be at an end. To be told the inquiry has shifted to whether the FCC's move was influenced by "political considerations," whatever that term means, seems a not too subtle attempt to now shift the focus of the inquiry, because the answers that we supplied leave the original inquiry at a dead end.

Since your Committee has apparently been engaged in this inquiry for some time, your Committee must know that Mr. Haney formally entered the Portals project (i)

well after the government lost a law suit before two federal courts, both of which ordered the award selection restored to Parcel 49C; (ii) well after the lease was signed and (iii) well after the amendment to the lease was signed. As your Committee must also know, the additional space in The Portals had been sought by the FCC and GSA since 1994, also well before Mr. Haney entered the transaction. Given the facts, I can only conclude that these purported and non-specific "political considerations" are mere chimera raised only after it became clear that the original allegation of a performance fee did not pan out.

Finally, the Committee's letter asserts that it finds it "most troubling" that we provided information to the press prior to the time that we provided the same information to the Committee. Of course, we were forced to respond to press inquiries, because the Committee released its November 21, 1997 letter to the press. The Committee cannot seriously contend that Mr. Haney, as a private citizen, may not defend himself against allegations in the press precipitated by the Committee's release of its letters. Furthermore, it is not improper, nor a crime, to provide information to the press. Indeed, the Committee's complaint that the press got the information first as being the "most troubling" feature of our response -- even compared to the Committee's "dismay" that it considered our response inadequate -- suggests disappointment, because the Committee did not get the chance to release that information as it had released other information. That surprising admission is strong evidence of the hostile political environment surrounding the arrival of the Committee's letter.

Despite our good faith efforts to allay the Committee's concerns, the Committee's letters accuses Mr. Haney of intending to "impede the Committee's investigation into this matter." Such a charge is not only untrue and inflammatory, but it is also one key reason why we have declined, and continue to decline, to have Mr. Haney interviewed in this hostile political environment.

The threat to subpoena Mr. Haney to a hearing is one you, of course, are empowered to carry out. Candidly, we view the threat of a public hearing, accompanied by an on-the-record transcript, and the rules of procedure applicable to such hearings, as preferable to the campaign of unsubstantiated accusation and innuendo which we have experienced to date.

Sincerely,

Stanley M. Brand

SMB:mob

ONE HUNDRED FIFTH CONGRESS

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

April 16, 1998

VIA FACSIMILE and U.S. MAIL

Mr. Franklin L. Haney
Franklin L. Haney Company
605 Chestnut Street
Suite 200
Chattanooga, Tennessee 37450

Dear Mr. Haney:

As you are aware, the Committee on Commerce has been conducting an investigation into the circumstances surrounding the planned relocation of the Federal Communications Commission (FCC) to the Portals development complex -- a project in which you are a financial partner -- and, in particular, your retention of Mr. Peter Knight to assist you on this project.

I last wrote to you on December 15, 1997, seeking records and written answers to certain questions relating to your fee arrangement with Mr. Knight, the efforts undertaken by him on your behalf, and the extraordinary $1 million lump-sum payment you made to him. You responded, through your counsel, that you were unwilling to provide this information voluntarily. Nor have you even responded to my staff's subsequent request, made two months ago, that you provide the Committee with a log or index of those documents being withheld. Finally, you also have refused to consent to Mr. Knight's disclosure to this Committee of what you claim to be privileged, confidential, or irrelevant information in his knowledge or possession.

To date, you have not articulated to the Committee any legitimate basis for withholding the requested information. To the extent that the very narrow attorney-client privilege might provide a basis for the Committee to consider a request to not produce some of this information, you have not done so to date, leaving me with no recourse but to request that you produce all requested records in your possession or control. Furthermore, as your counsel surely knows -- indeed, as he already has conceded -- the attorney-client privilege generally does not cover communications regarding the nature of the fee arrangement or the fee itself. Nor does the privilege cover communications made by you or Mr. Knight to outside parties, such as the FCC or the General Services Administration (GSA). These two areas -- the fee arrangement and the efforts made by you and Mr. Knight to

influence the FCC and GSA -- are the crux of the Committee's investigation and fall outside of any recognized privilege.

In addition, any objection to producing documents relating to the details of the $1 million fee, and the work performed by Mr. Knight for that fee, would be equally baseless. Despite the stunning coincidence between the date of the invoice and the signing of a key Portals lease agreement, you claim -- without providing any supporting information -- that the $1 million fee was not solely for Mr. Knight's work on the Portals, but for a variety of projects. While the Committee's jurisdiction is founded on the Portals matter, it is incumbent upon the Committee, and within the legitimate scope of our investigation, to test your claim by reviewing all documents that will shed light on the nature and purpose of the $1 million payment.

On a separate but related matter, the Committee has received information that, in addition to Mr. Knight, you also retained former Senator James Sasser to represent you on the Portals, and that Mr. Sasser met with GSA and FCC officials, including then-FCC Chairman Reed Hundt, to discuss this matter. In light of the questions surrounding your fee arrangement with Mr. Knight, I am interested in learning the nature of your fee arrangement with Mr. Sasser, and the details of Mr. Sasser's efforts to influence the GSA lease and the FCC's relocation.

In order for the Committee to fulfill its responsibilities to conduct oversight of this entire matter, I am requesting that you provide the Committee with the records listed below by Friday, April 24, 1998. If I do not receive a satisfactory response by that time, I will ask the Subcommittee on Oversight and Investigations to authorize the issuance of a subpoena to obtain all necessary materials.

1) All records relating to Franklin Haney's decision to retain, or reasons for retaining, Mr. Peter Knight for counsel or services with regard to the Portals development project or the relocation of the FCC.

2) All records relating to any payments or fees made by Franklin Haney to Mr. Knight from January 1, 1994, through the present.

3) All records relating to the services, efforts, lobbying, or other work undertaken or provided, or to be undertaken or provided, on behalf of Franklin Haney by Mr. Knight with regard to the Portals or the FCC's relocation.

4) All records relating to the services, efforts, lobbying, or other work undertaken or provided, or to be undertaken or provided, by Mr. Knight for the $1 million fee billed on January 3, 1996.

5) All records relating to the $1 million fee, or any other fee arrangement between

Franklin Haney and Mr. Knight relating to the Portals or the FCC's relocation, including but not limited to the negotiation, agreement, billing, payment, structure, purpose, or allocation of such fee or fees.

6) All records relating to the services, efforts, lobbying, or other work undertaken or provided, or to be undertaken or provided, on behalf of Franklin Haney by Mr. James Sasser with regard to the Portals or the FCC's relocation.

7) All records relating to the nature of the fee arrangement(s) between Franklin Haney and Mr. James Sasser, including but not limited to all records relating to the actual fees billed and/or payments made.

8) All records relating to any contact, communication, understanding, or agreement (whether written or verbal) between Franklin Haney and any of the following individuals, provided that it relates to the Portals or the FCC's relocation: (i) Mr. Peter Knight; (ii) The Honorable James Sasser; (iii) former FCC Chairman Reed Hundt, or any other official or employee at the FCC; (iv) any official or employee in the Office of the Commissioner, Public Building Service, GSA; (v) any official or employee in the Office of the GSA Administrator; (vi) any official or employee in the Office of the GSA Regional Administrator for the National Capital Region; (vii) Mr. Robert Peck; and (viii) any official or employee in the Executive Office of the President (including but not limited to the Office of the Vice President).

9) All records relating to any contact, communication, understanding, or agreement (whether written or verbal) between Mr. Peter Knight or Mr. James Sasser and any of the following individuals, provided that it relates to the Portals or the FCC's relocation: (i) The Honorable James Sasser; (ii) Mr. Peter Knight; (iii) former FCC Chairman Reed Hundt, or any other official or employee at the FCC; (iv) any official or employee in the Office of the Commissioner, Public Building Service, GSA; (v) any official or employee in the Office of the GSA Administrator; (vi) any official or employee in the Office of the GSA Regional Administrator for the National Capital Region; (vii) Mr. Robert Peck; and (viii) any official or employee in the Executive Office of the President (including but not limited to the Office of the Vice President).

10) All records relating to any warranty or certification executed, signed, or co-signed under the provisions of 41 U.S.C. § 254(a) (or any other similar statute or regulation governing contingent fee representations) by Franklin Haney, or any partnership in which Franklin Haney has a financial interest, relating to the Portals.

In responding to these requests, please note that the terms "records" and "relating" or "relate" should be interpreted in the manner described in the Attachment to the letter. In addition, the term

"Franklin Haney," as used above, is defined as Franklin Haney individually, the Franklin L. Haney Company, and any other company, partnership or similar entity controlled in whole or in majority part by Franklin Haney or the Franklin L. Haney Company, including but not limited to all officers, directors, employees, agents, lobbyists, or anyone else acting on Franklin Haney's or the preceding entities' behalf. The term "Mr. Peter Knight" or "Mr. Knight," as used above, is defined as Mr. Peter Knight individually, his law firm, and any partner, associate or employee of Wunder, Knight, Levine, Thelen & Forcey (or any of its legal predecessors). The term "Mr. James Sasser" or "The Honorable James Sasser," as used above, is defined as Mr. James Sasser individually, any law firm with which he was associated during the time period of his representation of Franklin Haney, and any partner, associate or employee of any such law firm.

If you have any questions about this letter or my requests, please contact Mr. Tom DiLenge, Committee Counsel for Oversight and Investigations, at (202) 225-2927. I await your prompt reply.

Sincerely,

Tom Bliley
Chairman

Attachment

cc. The Honorable John Dingell, Ranking Member
The Honorable Joe Barton, Chairman
Subcommittee on Oversight and Investigations
The Honorable Ron Klink, Ranking Member
Subcommittee on Oversight and Investigations
Stanley M. Brand, Esq., Counsel for Franklin Haney

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April 24, 1998

HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley:

This responds to the most recent request from your Committee to Mr. Franklin Haney for certain documents and information. First, as I have done with respect to each such request, I must respond to the gross mischaracterizations of our prior responses, as well as the remarkable unsubstantiated and inflammatory conclusions contained in the letter.

The letter asks for documentation concerning what the letter describes as "the extraordinary $1 million dollar lump sum payment" to Mr. Knight. Indeed, there is nothing "extraordinary" about the payment; as the documentation, which we have already provided reflects, the retention of Mr. Knight covered a three-year period and concerned a variety of projects. You have now asked that we provide documents relating to these other projects -- to satisfy the Committee that what the letter describes as the "stunning coincidence" between the date of the invoice and the signing of the supplemental lease agreement, is not evidence of some prohibited fee arrangement. The letter concedes that these other projects are not even within the "jurisdiction" of the Committee. The law interpreting the congressional investigative power simply does not permit the Committee to bootstrap itself into a generalized inquiry of other projects (some not even involving the government, much less an agency within your committee's oversight responsibility) simply because the letter describes the fee as "extraordinary."

A witness asked to provide documents to a congressional committee is entitled to a demonstration that the material sought is "pertinent" to the subject under inquiry. 2 U.S.C. § 192. The Committee has the burden to show that the documents sought are pertinent with the degree of "explicitness and clarity that the Due Process Clause requires . . ." *Watkins v. United States*, 354 U.S. 178, 209 (1957). Because 2 U.S.C. § 192 is a criminal statute, pertinency must be shown with "indisputable clarity," *Watkins*, 354 U.S. at 214 and "to be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise [documentation] sought relate to it." *Id.*

There is no meaningful explanation in the letter of how the topic under inquiry -- FCC relocation and the fee arrangement with Mr. Knight -- relates to the other projects on which Mr. Knight has worked, yet the Committee is seeking to "review [ ] all documents that will shed light on the nature and purpose of the $1 million payment." Such a sweeping demand simply is not supported by the cases interpreting the congressional investigative power.

I also note that the letter represents the subject of the inquiry as "efforts made by you and Mr. Knight to influence the FCC and GSA . . ." Yet the latter agency is not within the Committee's oversight responsibility. The caselaw requires, as an element of proving "pertinency" that "a clear chain of authority from the House to the questioning body is an essential element of the offense." *Gojack v. United States*, 384 U.S. 702, 716 (1966). As you know, it is the GSA that has the legal authority to determine where an agency will be located, the terms of the government's occupancy and the myriad other issues concerning the lease. The question is "not whether Congress could investigate all aspects of [the Portals], or whether it could delegate such study to a committee . . . The problem is simply whether Congress gave authority to this particular committee extensive enough to cover the subject matter of this particular inquiry." *United States v. Kamin*, 136 F.Supp. 791, 801 (D. Mass. 1956). In the foregoing case, the court found that the statutory delegation to a committee to study the operation of government activity at all levels to determine its efficiency and economy did not encompass an inquiry into private industry, even though those private firms were doing Government work. *Id.* at 802. To interpret the committee's charter to investigate the economy and efficiency of the government as including the work of private firms, the court reasoned, would give the Committee virtually limitless jurisdiction.

The courts have consistently declined to confer such limitless authority on committees and absent the kind of explicit explanation describing the "topic under inquiry . . . and the connective reasoning whereby the precise [documents] relate to it," *Watkins*, 354 U.S. at 215, we simply cannot agree to provide the broad ranging documents the Committee is seeking. We believe the foregoing caselaw renders at least the Committee's request for non-Portals related information unenforceable and

severely restricts even the Portals documents to those which can be demonstrated to be integral to the Committee's jurisdiction over "regulation of interstate and foreign communications" H.R. Rule X, cl. 1(e)(14), Rules of the House of Representatives, or to oversight of "Federal agencies and entities having responsibilities" for administering laws within the committee's jurisdiction. H.R. Rule X, cl. 2 (b)(1), *id.*

This question of pertinency necessarily precedes any discussion of whether, having demonstrated the pertinency of the requested documents, they are nonetheless subject to attorney client privilege. In this regard, I must repeat what I have stated in each response to the Committee: We have provided all the documentation that exists regarding the fee arrangement and the fee itself, including the retainer agreement, all the invoices, and the checks. We have also provided copies of letters and communications with Mr. Hundt (phone log and letter) and have not claimed any privilege for documents evidencing communications between Mr. Haney and the Executive Office of the President (none exist). The Committee either refuses to recognize the distinction between the fee arrangement and the substantive communications concerning the representation or are attempting none too subtly to eviscerate the privilege by trying to assert that the substantive lawyer-client communications all relate to the fee.

The fact is that the Committee asks Mr. Haney to disgorge lawyer-client communications, a host of other business transactions in which Mr. Haney is involved, including non-government transactions, and to assume the burden of proving that the fee is legitimate without any evidence that it is not -- all without any showing that any law, rule or standard of conduct has been violated. Repeated incantation of the term "performance fee" is not evidence of one, and the letter's characterization, without factual or legal basis, of the fee as "extraordinary" simply doesn't entitle the Committee to rummage through Mr. Haney's businesses without the kind of showing that the caselaw requires.

It is not only a violation of Mr. Haney's rights that is of concern, but we are also concerned that information which has previously been provided to the Committee finds its way quickly into the media. If the Committee is sincerely concerned about governmental efficiency, it would seem more fruitful for the Committee to look at the causes of the delay in moving the FCC to Portals, the cost to the taxpayers of that delay, who benefits from this costly waste of taxpayer dollars, how this delay manipulation is being achieved and by whom and what is their relationship to the Members of Congress involved in this process. Recent reports of the General Accounting Office make it clear that the FCC relocation is in the government's best interests. Why is money being wasted by delaying that relocation?

BRAND, LOWELL & RYAN

The Honorable Tom Bliley, Chairman
April 24, 1998
Page 4

Information previously provided to the Committee should have made it clear that no public issues requiring any investigation or hearing is warranted. However, as we said in response to the Committee's previous request and its now repeated threats to issue subpoenas, we view a public hearing, accompanied by the protections of House rules and procedures, as preferable to the process the Committee has followed to date.

In light of all the foregoing, we respectfully decline to provide voluntarily this material to the committee and reserve all our rights to contest the legality of any process issued by the Committee.

Sincerely,

Stanley M. Brand

Stanley M. Brand

SMB:mob

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May 20, 1998

HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley:

On May 13, 1998, subpoenas were issued to Mr. Franklin L. Haney and various Haney related entities for documents relating to the Portals and other matters. These subpoenas direct Mr. Haney and the named entities to produce these records "in Room 2125 of the Rayburn House Office Building . . . on May 20, 1998 at the hour of 12:00 p.m."

We must respectfully decline to produce records pursuant to these subpoenas in that neither the House rules nor the congressional contempt statute authorizes a committee to subpoena a witness to bring documents to a room in the Rayburn building. Both the House rules and the caselaw interpreting the contempt statute require the return of the subpoena be made to a duly convened committee, which may consider the objections of the witness and rule thereon, thereby providing the witness with the due process to which he is entitled in determining whether his compliance is lawfully required. Obviously, a witness cannot make the determinations he needs to make if the Committee is not convened for purposes of considering any objections he may have.

First, the House rules contemplate that the proper procedure for receiving subpoenaed documents can only occur "in committee." For example, House Rule XI, cl. 2(h)(1) provides that "[e]ach committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence which shall not be less than two." (emphasis added). Beyond the House rules, the caselaw interpreting the congressional

contempt statute, 2 U.S.C. § 192, makes clear that since it is the committee's power which is being exercised, it is the committee which must hear and consider the witness' objections to any subpoena. For example, in *Liveright v. Shelton*, 347 F.2d 473, (D.C. Cir. 1965) the Court reversed a contempt conviction because only the Chairman, after consultation with the Chief Counsel, determined to compel Liveright to testify, without consultation or consideration by the Subcommittee. In *Yellin v. United States*, 374 U.S. 113 (1963) the Supreme Court reversed a contempt conviction when the committee failed to hear and consider a request by a witness to appear in executive session as provided for in the rules. In that case, the witness request was considered and rejected by the Committee's staff director without any apparent action by the Committee. In rejecting the contempt conviction, the Court found that the Committee qua Committee failed to act on the witness request and instead the "Staff Director, who lacked the authority to do so, acted in the Committee's stead." *Yellin*, 374 U.S. at 119. Obviously, if the Committee is not properly convened to "receive evidence" it cannot consider a witness' objections, any more than the Committee in *Yellin* could do so when the request by the witness was considered only by the staff director.

As the Supreme Court has explained:

> The offense of contempt of Congress . . . matures only when the witness is called to appear before the Committee to answer questions or produce documents and willfully fails to do so. Until that moment, he has committed no crime.

United States v. Bryan, 339 U.S. 323, 341 (1950) (emphasis added).

In enlisting the aid of the courts under the congressional contempt statute to enforce subpoenas "Congress necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses," including the due process clause. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 510-11 m.16 (1974) *quoting Watkins v. United States*, 354 U.S. 178, 216 (1957). It is inconsistent with these proscriptions to summon a witness to bring documents to a "room" instead of a properly convened committee, which may hear and consider his objections. This is not because the Committee must accord the witness a right to testify, for a congressional subpoena may call for documents without testimony. *See* 2 U.S.C. § 192 (witnesses may be summoned "to give testimony or to produce papers . . ."). Rather it is so that a witness who objects to production can have the Committee consider and rule on such objections.

While we believe this infirmity in the subpoenas is fatal to their enforcement, there are nonetheless other serious issues raised by the subpoenas. For example, all of the records that relate to the fee arrangement between Mr. Haney and Peter Knight

BRAND, LOWELL & RYAN

The Honorable Tom Bliley
May 20, 1998
Page 3

have been provided, including the check, the invoices and engagement letter. As your Committee knows, we have asserted attorney client privilege for documents reflecting communications between Mr. Haney and Mr. Knight and others on the Portals project, although we have provided voluntarily what records that exist reflecting calls or meetings with Mr. Hundt or the FCC staff. In addition, we have told your Committee that no records exist reflecting any contact or communication with the Executive Office of the President. We are entitled, as a matter of due process, to tender these, and other objections to the subpoenas, to the Committee.

We simply do not understand why the Committee issued subpoenas knowing the foregoing or more importantly, why the Committee continues to pursue this matter after it has been conclusively established that Mr. Haney entered The Portals project well after two federal courts ordered the award selection restored to Parcel 49c, well after the lease was signed, and after the amendments to the lease were signed. Your Committee also knows that the lease amendment for additional space was accomplished at the government's request and that the fixed rent start date – not an unusual provision in government leases – was included in connection with the release of substantial delay claims by the partnership. The breadth of the subpoenas is wholly unjustified given these facts.

We have cooperated with your staff in arranging interviews with some witnesses. We still believe that this matter should be dropped because there are no legitimate subjects worthy of investigation nor any evidence which justifies further inquiry.

Sincerely,

Stanley M. Brand

SMB:mob

ONE HUNDRED FIFTH CONGRESS

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U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

June 4, 1998

**VIA HAND DELIVERY UPON COUNSEL
and U.S. MAIL**

Mr. Franklin L. Haney
Franklin L. Haney Company
605 Chestnut Street
Suite 200
Chattanooga, Tennessee 37450

Dear Mr. Haney:

I am writing to respond to the May 20, 1998 letter from your attorney, Mr. Stanley Brand, raising objections to the subpoenas duces tecum served upon you in connection with the Committee's ongoing investigation into the circumstances surrounding the planned relocation of the Federal Communications Commission to the Portals.

In that letter, your counsel claims that "the House rules and the caselaw interpreting the contempt statute require the return of the subpoena be made to a duly convened committee," so that the recipient may raise objections and receive the committee's ruling thereon before providing the requested documents. We have consulted with the House Parliamentarian and the House General Counsel regarding this claim, and let me assure you that neither the House itself, nor any federal court, has ever interpreted this rule to require the process outlined in your counsel's letter. Indeed, it has been a common practice of the committees of the House, including this Committee, to issue document subpoenas in the manner in which your subpoenas were issued by me.

Your counsel's view is based on an erroneous reading of House Rule XI, cl. 2(h)(1), which states that "[e]ach committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence which shall be not less than two." This rule merely defines the minimum number of members necessary to constitute a competent tribunal for the purposes of taking testimony and receiving evidence into the record of a formal committee proceeding. It says nothing about subpoenas, or the general information-gatheringroutinely conducted by Congress. Moreover, House Rule XI, cl. 2(m), which specifically governs the issuance of subpoenas, imposes no

requirement that information demanded by subpoenas be returnable to convened committees.

Your counsel's view likewise has no support in the purpose of House Rule XI. cl. 2(h)(1). which was enacted in response to *Christoffel v. United States*, 338 U.S. 84 (1949), where the Supreme Court held that. with respect to a statute defining perjury as false "testimony. declaration. deposition or certificate" before a "competent tribunal." there must be a quorum present to establish that a congressional committee is a "competent tribunal." The House rule was specifically designed to respond to the *Christoffel* decision by defining "the minimum number of members who must attend an investigative hearing" for purposes of constituting a competent tribunal. 4 Deschler's Precedents § 13.

It is clear, however, that the contempt statute. 2 U.S.C. § 192, unlike the perjury statute, does not require that the contempt take place before a "competent tribunal." The Supreme Court has in fact expressly so held, rejecting an argument very similar to the one now advanced by Mr. Brand on your behalf:

> Respondent attempts to equate [the contempt statute] with the perjury statute considered in the Christoffel Case by contending that it applies only to the refusal to testify or produce papers before a committee — i.e., in the presence of a quorum of the committee. But the statute is not so limited. In the first place. it refers to the wilful failure by any person "to give testimony or to produce papers *upon any matter under inquiry* before . . . any committee of either House of Congress," not to the failure to testify before a congressional committee. And the fact that appearance before a committee is not an essential element of the offense is further emphasized by additional language in the statute, which. after defining wilful default in the terms set out above, continues. "or who. *having appeared*, refuses to answer any question pertinent to the question under inquiry, shall be guilty of a misdemeanor, ..."

United States v. Bryan, 339 U.S. 323, 329 (1950) (emphasis in original). The Court also emphasized substance over form by rejecting the defendant's additional argument that "the Committee go through the empty formality of summoning a quorum of its members to gather in solemn conclave to hear her refuse to honor its demands" before contempt proceedings are proper. *Id.* at 334.

In short, nothing in the language or purpose of House Rule XI, cl. 2(h)(1) supports Mr. Brand's reading. His interpretation also would have absurd results since it would imply that all congressional information-gathering must take place before a convened committee. Such an interpretation is completely inconsistent with congressional practice and would, as a practical matter, make it impossible for Congress to carry out its constitutional responsibilities.

Furthermore, while a subpoena recipient certainly should be given an opportunity to present his or her objections to a committee before being held in contempt of Congress, it does not follow

that he or she is entitled to make a personal appearance before the committee. Again, as Mr. Brand knows, the normal practice is to submit objections in writing for the committee's consideration. Indeed, Mr. Brand followed that practice when he submitted his letter of May 20, 1998 (rather than, for example, having you appear and request that a quorum of the committee be convened to hear your objections).

Nonetheless, Mr. Brand has requested that you be permitted to appear before the Subcommittee on Oversight and Investigations (which authorized the issuance of your subpoenas) to raise your legal objections to the subpoenas and have them ruled upon. Although I am not required to do so, I am willing to honor your request in order to expedite the Committee's receipt of the subpoenaed documents. Accordingly, I am conveying subpoenas signed by me that command you to produce before the Subcommittee on June 17, 1998, all of the documents listed on the attachment to those subpoenas. In order for the Subcommittee to have a full opportunity to carefully evaluate and consider any legal objections you may have to these subpoenas at that time, you should provide such objections, in writing, by 12:00 noon on June 9, 1998.

With respect to your written objections, please be advised that blanket claims of attorney-client privilege will not be recognized by the Subcommittee, as they would not be in any judicial forum. E. Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, at 29-30 (American Bar Association, 3d ed. 1997) (citing cases). Contrary to Mr. Brand's assertion in his May 20 letter, you have yet to make any specific claims of attorney-client privilege with respect to either the subpoenaed documents or the repeated requests for voluntary production of documents made by the Committee over the past several months. Accordingly, the burden is on you to include with your written objections a document-by-document index of each document over which you claim the attorney-client privilege, with sufficient facts about the nature and contents of the document so that the Subcommittee can properly consider and test the claim of privilege. See *id.* at 33-34 (citing cases). For the privilege to attach in the judicial context, the document in question normally must reflect a communication made by a client seeking legal advice from a professional legal adviser acting in his capacity as such, and one that is made in confidence and has not been waived. *Id.* at 34-35. Your claims of privilege will be considered primarily against that judicial formulation, although the Committee retains the discretion to take into account additional factors in determining whether to recognize any particular claim, including its need for the documents and their unavailability from other sources, as has been the historic practice of the House of Representatives and the recent trend even in the judicial context.

Finally, please be advised that, should the Subcommittee overrule your objections to the subpoenas at its meeting, you will be ordered to comply with them immediately. If you do not do so, the Subcommittee -- with my full backing -- will proceed immediately, at that same meeting, to consideration of a resolution to hold you in contempt and to refer the matter to the full Committee with a recommendation for similar action. Once such a contempt finding is made by the Subcommittee, it cannot be cured by subsequent compliance. Thus, to avoid being held in contempt

of Congress and ultimately prosecuted therefor, you must bring all the subpoenaed documents to the Subcommittee on June 17, and be prepared to comply at that time with any adverse ruling on your objections.

I expect that you understand the seriousness of this matter and will act accordingly. If you have any questions, please contact Tom DiLenge, Committee counsel, at (202) 225-2927.

Sincerely,

Tom Bliley
Chairman

Attachments

cc: The Honorable John Dingell, Ranking Member
The Honorable Joe Barton, Chairman
Subcommittee on Oversight and Investigations
The Honorable Ron Klink, Ranking Member
Subcommittee on Oversight and Investigations
Stanley M. Brand, Esq., Counsel for Franklin Haney

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June 9, 1998

HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley:

We are in receipt of your June 4, 1998 letter, and accompanying subpoenas. We appreciate the efforts you have made to address our concerns, but we still have a number of procedural questions that we are trying to resolve and as soon as we have done so, we will be responding in an appropriate manner and in any event, prior to the June 17, 1998 date specified in the subpoenas.

Sincerely,

Stan Brand

Stanley M. Brand

SMB:mob

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June 15, 1998

HAND DELIVERED

The Honorable Tom Bliley, Chairman
The Honorable John D. Dingell, Ranking Minority Member
House Committee on Commerce
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley and Ranking Minority Member Dingell:

For the last seven months, the Committee majority has been investigating Mr. Franklin Haney's retention of Peter Knight in connection with his participation in the Portals project. We have attempted to convey to you in a variety of informal ways the facts surrounding this subject from Mr. Haney's standpoint, even asking for a public hearing to explain the transaction and respond to the Committee's questions. Despite our efforts, we have been met by threats of subpoenas, contempt of Congress and other dire measures.

We are hoping that a more formal and comprehensive proffer of the facts as Mr. Haney knows them will give you the ability to assess the issues you say you are investigating and render the threats of enforcement of subpoenas unnecessary, at least until facts are adduced which materially contradict those provided to you here.

Sincerely,

Stan Brand

Stanley M. Brand

SMB:mob
Enclosure

cc: The Honorable Joe Barton
The Honorable Ron Klink

Proffer of Franklin L. Haney, By and Through His Attorney

Franklin L. Haney, a private businessman, has 30 years experience in real estate, including the construction, purchase and leasing of government buildings.

Mr. Haney's particular expertise is the financing of government leased buildings. Sometime in late 1994 or early 1995, Mr. Haney became aware of the Portals project when he saw the lease sign displayed on the building while driving over the Fourteenth Street Bridge to Washington from National Airport. He had previously determined to pursue real estate lease opportunities with the federal government in Washington, D.C. Mr. Haney was put in contact with Steve Grigg of the Parcel 49C Limited Partnership, manager of the Portals project, because he had become aware of the Project and its status. Mr. Haney then sought to put together a complement of Washington attorneys who could represent him in connection with his efforts to obtain government leases and who could assist him in connection with handling the financing of such transactions, one of which could potentially be the Portals project. He engaged Peter Knight to represent him over a three year period with respect to Portals and several other projects, and former Senator James Sasser to assist in representing him on the financing aspects of the Portals project and other projects. He engaged John Wagster as counsel, former staff to the Senate Government Affairs and Budget Committee who had significant expertise in government lease issues and procedures as well. Mr. Haney also engaged bond counsel and attorneys to represent him in his negotiations with The Portals' partners.

Mr. Haney conducted his usual due diligence on the Portals project and learned that GSA had cancelled the lease awarded to Parcel 49C (in the face of FCC opposition to the relocation to Portals), that Parcel 49C had sued the GSA in the U.S. Court of Federal Claims in 1992, that the court ordered reinstatement of that award and completion of the procurement (which judgment was affirmed on appeal by the U.S. Court of Appeals for the Federal Circuit) and that the other major partner in Portals (Confederation Life Insurance Company of Canada) went bankrupt and entered receivership. He also learned that on August 12, 1994 the GSA had signed a lease pursuant to these court orders. Accordingly, before Mr. Haney's involvement in 49C, and before the engagement of Mr. Knight in 1995, Portals had a binding and enforceable lease with the GSA -- a fact which made it a virtual legal fait accompli that Mr. Haney would be able to participate in the transaction and be assured of an income stream to fund securitization of the lease if he chose to become involved. Mr. Haney's interest was that the United States Government had a binding obligation to fund the lease -- not which agency would ultimately occupy the space. He also learned that the Government was seeking additional space for the FCC at the Portals and had been since the original lease was signed. To this end, negotiations had been ongoing between GSA and Parcel 49C for a lease amendment.

The engagement of Mr. Knight in the spring of 1995, occurred after the GSA signed the lease with Parcel 49C in 1994. Mr. Knight's engagement to render legal and strategic advice to Mr. Haney on a number of Washington based and other projects over a three-year period contained no provision, written or oral, for any contingent or performance fee. As a government contractor with 20 years experience in the business of leasing space to the government, Mr. Haney is aware of the prohibitions on contingent fees and has consistently sought expert advice from attorneys knowledgeable in the government contracts area to assure that existing legal restrictions on such fees and other requirements are observed.

The amount of the Knight fee, $1 million dollars, was arrived at in discussions in 1995 between Mr. Knight and Mr. Haney, was based on a three-year engagement for a number of projects, and was neither excessive nor extraordinary. Mr. Haney was obligated to pay for this fee whether or not he became a partner in Parcel 49C. Mr. Knight was obligated to perform his services on the Portals projects and other projects without additional fees and he has been doing so. Some of the projects are still in process and are ongoing. There was no agreement that Mr. Haney would be invoiced for these fees at any particular point or upon the occurrence of any particular event.

Like many real estate developers and financeers, Mr. Haney does not always pay his bills currently but pays accumulated amounts owed when transactions close and provide funds. The payment of the fee on March 29, 1996 was also routine, emanating from funds made available at the closing of Mr. Haney's bond financing. Mr. Haney also made payment from the funds he received at this time to satisfy other obligations for other purposes unrelated to the Portals project.

At the request of Reed Hundt (then Chairman of the FCC), and after the supplemental lease agreement was signed, Mr. Haney met with Mr. Hundt but did not discuss the subject of whether FCC would relocate to the Portals.

Mr. Haney never sought or received assistance from the President, the Vice President or any senior staff in the White House, or the Vice President's office in connection with the Portals project.

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June 16, 1998

HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley:

Thank you very much for your prompt response of June 4, 1998, regarding Mr. Haney's objections to the face of the subpoena that your Subcommittee issued to him on May 13, 1998. We appreciate the Committee's efforts to address our concerns.

While we must point out some serious issues that your letter raises, we will also propose a constructive suggestion to resolve the impasse expeditiously in a fair way and in the public interest.

Your letter again raises important issues that must be clarified before any response to a demand for production is appropriately provided. More specifically, your letter directs Mr. Haney's attention to *United States v. Bryan*, 339 U.S. 323 (1950). Your letter cites to *Bryan* for the proposition that, in a proceeding for contempt pursuant to 2 U.S.C. § 192, the United States need not prove as an affirmative element of its case that a quorum of the inquiring committee was present at the time the witness was summoned to produce documents. *See* 339 U.S. at 729.

Importantly, however, *Bryan* proceeds to hold that a witness subpoenaed to produce documents before a congressional committee has the right to present as an affirmative defense in any proceeding brought pursuant to 2 U.S.C. § 192 that a quorum of the inquiring committee did not convene to receive the return of the subpoena. *Bryan* thus states:

> Every exemption from testifying or producing records thus presupposes a very real interest to be protected. If a privilege based upon that interest is asserted, its validity must be assessed. Since we assume in this case that the subpoenas refer to the production of papers before the Committee qua committee, **we agree that the respondent could rightfully have demanded attendance of a quorum of the Committee and declined to produce documents so long as a quorum was not present.**

Id. at 332 (emphasis added). Absent attendance of a quorum, an affirmative defense would be that any failure to produce documents or otherwise appear before the inquiring committee would not represent "willful" conduct subject to 2 U.S.C. § 192. *Id.* at 331.

The Supreme Court in *Bryan* then held that the witness could not assert such an affirmative defense unless she had perfected it before the Committee. It explained, "To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." *Id.* at 332. Accordingly, in his May 20, 1998 letter, Mr. Haney insisted that, consistent with House Rules and *Bryan*, the Subcommittee follow appropriate procedures in employing its compulsory investigative processes.

Unfortunately, your letter of June 4, 1998 still leaves open questions relating to the process which Mr. Haney will be afforded. As we will explain, *Bryan* requires these issues to be raised and resolved in advance of Subcommittee investigative processes. For instance, it is not clear from your letter whether, as *Bryan* requires, a quorum of the Subcommittee members will be convened at a hearing too, among other things, receive documents and hear objections from Mr. Haney under the subpoena. For instance, at page three, your letter repeatedly speaks of a "meeting" to be held on June 17, 1998. We do not know if, by the term "meeting," your letter meant a Subcommittee hearing at which a quorum of its members are present, and the rules and procedures governing committee hearings will apply, as *Bryan* requires. As before, the face of Mr. Haney's subpoena fails to state whether there will be a hearing of the Subcommittee with a quorum of its members on June 17, 1998.

Please provide us with the details of the procedure to be followed on June 17, 1998. Once we have the details of such procedure, we will then be able to interpose Mr. Haney's objections to the Subcommittee's subpoena in a way that provides for their mature consideration by Subcommittee members before a quorum meets to address any issues thus raised.

In that *Bryan* held the witness waived applicable protections because she failed to address the underlying issues fully at the time they arose, we would appreciate a

response to our inquiry before proceeding any further to file objections and produce any documents to which the Subcommittee may be entitled. As the Supreme Court explained, congressional subpoena processes should not be a "game of hare and hounds" (*id.* at 331), in which the procedures an inquiring committee follows and the bases of any concerns and objections a putative witness might have, are not addressed fully and candidly in advance. Indeed, *Bryan* determined that a witness' asking for such a full and fair airing of these issues in advance at a hearing on them betokens his utmost good faith. This is precisely what we are doing in this situation.

We would like to offer a procedural proposal which may provide a reasonable solution to the dilemma in which we find ourselves. We have become frustrated, as you no doubt have as well, in our inability to resolve the serious legal and procedural issues, which have arisen in the course of your inquiry. We have attempted to step back and consider whether there is a mechanism available that would both satisfy the legitimate needs of the Committee to obtain facts relevant to its inquiry and also protect the attorney client privilege and client confidences recognized under the code of professional responsibility and the caselaw.

We believe there is such a mechanism -- used before by congressional committees -- for revolving disputed issues of privilege between an investigating committee and a witness. That mechanism is the appointment of a master, chosen by mutual agreement, from among a list of experienced and recognized experts (including, for example, former federal judges) whose responsibility would be to examine the competing claims and recommend to the parties, perhaps after in camera inspection by the master, a resolution of the dispute. Obviously, such a procedure would be without prejudice to the committee to seek to enforce its subpoenas if it believed its rights were being unduly compromised or the right of the witness to further contest the subpoena. Without resorting to such a mechanism, I am concerned that we will be stalemated with no way, short of the cumbersome, uncertain, time-consuming and judicially disfavored procedure laid out in 2 U.S.C. § 192, to resolve our differences. I hope you will give serious consideration to this proposal as a means of mediating our currently divergent positions.

Once again, let me remind you that we have already provided your committee with substantial evidence responding to the issues you are investigating and there is other substantial evidence in the record which already established that the Portals paid no contingent fee in connection with the lease or that the extra space was sought by the government that no special favors were granted, that the rent start date was not unusual and was obtained in return for waiving millions in delay damages faced by the government. Therefore, we find it difficult to understand what legitimate issues are still unresolved concerning this matter.

BRAND, LOWELL & RYAN

Thank you very much in advance for your consideration of the issues presented herein.

Sincerely,

Stanley M. Brand

SMB:mob

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

June 16, 1998

VIA FACSIMILE

Stanley M. Brand, Esq.
Brand, Lowell & Ryan
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Brand:

We are in receipt of your June 16, 1998 letter, raising a further procedural question about how the Subcommittee plans to consider your objections to the subpoenas duces tecum served upon your client, Mr. Franklin Haney, on June 4, 1998.

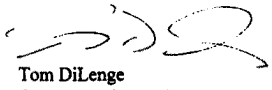
As Chairman Bliley's June 4 letter to your client made clear, we expected that, if your client had any objections to the validity of the subpoenas, they would be filed with the Committee by no later than June 9. Your last-minute decision to raise yet another meritless procedural objection, while avoiding any substantive legal arguments, suggests that your client is not serious about having the Subcommittee consider his legal objections to the subpoenas, but is rather only interested in creating more delay. I note that your claim that *U.S. v. Bryan* requires a *hearing* of the Subcommittee, as opposed to a meeting, is one that you did not raise in your May 20, 1998 letter objecting to the initial subpoenas. Nevertheless, we have consulted with the House Parliamentarian and the House General Counsel, and are convinced that neither the House rules nor federal case law require that Mr. Haney be permitted to appear before a hearing (or even a meeting) of the Subcommittee to raise objections to a subpoena duces tecum.

When we spoke on the telephone this afternoon, I explained to you the process and format of the Subcommittee's business meeting. I then asked you to explain exactly what outstanding procedural questions you had concerning tomorrow's meeting. You responded that you were not sure whether a quorum of the Subcommittee would be present. I pointed out that the quorum requirements for a meeting are actually greater than those for a hearing, to which you appeared to be satisfied. Thus, I expect that whatever procedural concerns you or your client may have had now have been satisfied. I note that had you simply returned my repeated telephone calls last week I could have allayed your procedural concerns much earlier.

We also discussed this afternoon your proposal to avoid enforcement of the subpoenas by appointing an independent party to review the responsive documents for claims of privilege. Although I rejected that offer as unprecedented for dealing with issues of non-constitutional dimension, I did suggest a possible compromise under which your client would immediately provide all non-privileged documents responsive to the subpoenas, and would permit Committee staff to review the documents over which your client claims a privilege, without prejudice to either side to later seek or withhold those documents. You said that you would discuss the proposal with your client and call me this afternoon, which you never did. I called you earlier this evening and left you a message, but you did not return my call.

I believe that the Subcommittee has conducted itself reasonably, and in good faith, in an effort to avoid a confrontation with your client over these subpoenas and address his procedural and substantive concerns. I expect that he will be prepared to comply with the rulings of the Subcommittee tomorrow.

Sincerely,



Tom DiLenge
Committee Counsel

cc: Reid Stuntz, Minority Staff Director

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115
June 16, 1998

Stanley M. Brand, Esq.
Brand, Lowell, & Ryan
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Brand:

As you know, I have been trying to reach you by telephone since last Tuesday, June 9th, to discuss the failure of your client, Franklin Haney, to provide any written objections to the subpoenas duces tecum served upon him on June 4th.

I called you twice on June 9th (the due date specified in Chairman Bliley's letter for such objections), once on June 10th, once on June 11th, twice on June 15th, and once again early this morning -- but, as of the time of this facsimile, I have not received any return phone calls from you or anyone on your behalf.

Given the nature of the Subcommittee's business meeting tomorrow, I had hoped to be able to receive your client's objections if not by the due date, then at least well in advance of the meeting so that you and I could discuss them to see if there were any areas of compromise or mutual agreement. Your actions, and those of your client, have prevented us from doing so to date.

Please call me at your earliest convenience so that we can discuss this matter.

Sincerely,

Tom DiLenge
Committee Counsel

cc: Reid Stuntz, Minority Staff Director

BRAND, LOWELL & RYAN
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

June 17, 1998

VIA FACSIMILE AND HAND DELIVERED

The Honorable Tom Bliley, Chairman
House Committee on Commerce
House Subcommittee on Oversight and Investigation
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Franklin L. Haney

Dear Chairman Bliley:

On behalf of my client, Franklin L. Haney and his companies, (Franklin L. Haney Company, Building Finance Company of Tennessee and Tower Associates II), he has the following objections to the subpoenas for documents dated May 20, 1998 and June 4, 1998 respectively (which are numbered to correspond to the numbered paragraphs of the attachment to the subpoenas):

1. Mr. Haney objects to providing any records relating to the retention of Peter Knight, other than the records which he has already provided concerning the payment of the fee, the invoices, and an engagement letter. He does not have any records that relate to "the decision to retain or hire Peter Knight, WKLTF or James Sasser." Finally, Mr. Haney objects to records relating to the retention of James Sasser as privileged communications protected by the attorney-client privilege, applicable bar rules protecting client secrets and also as not being pertinent to the subject matter under inquiry;

2. Mr. Haney has the same objections to this category of documents;

3. Mr. Haney objects to producing these records on the ground that they call for communications within the attorney-client and work product privileges;

BRAND, LOWELL & RYAN

The Honorable Tom Bliley, Chairman
June 17, 1998
Page 2

4. Mr. Haney objects to this category of documents because it calls for production of records relating to "other work" undertaken by Peter Knight which is unrelated to The Portals. As his counsel explained in his April 24, 1998 letter to the Committee, these documents are not pertinent to the subject matter of the Committee's inquiry in that they relate to non-Portals matters;

5. While Mr. Haney does not object to this category, he has already provided the Committee all that exists concerning the fee;

6. Mr. Haney has no further responsive documents concerning this category;

7. Mr. Haney objects to (i), (ii), (iii), (xii) and (xiii) within this category because they call for production of communications within the attorney-client and work product privileges; he has no documents responsive to items (iv), (v), (vi), (viii), (ix) or (x), other than those he has already provided to the Committee concerning Reed Hundt;

8. Mr. Haney does not have any documents responsive to this category, although he understands that Parcel 49C Limited Partnership has made the certifications available to the Committee; and

9. Mr. Haney has no objection to this category, except for communications with his attorneys, which he claims are privileged; Mr. Haney understands that all the other relevant documents concerning the lease have been provided by Parcel 49C.

I am presenting these objections for the record and in this letter I reassert and do not waive any of the rights which I have previously asserted in correspondence with the Committee.

Sincerely,

Stan Brand

Stanley M. Brand

SMB:mob

APPENDIX B

Subpena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To ..Mr. Franklin L. Haney.....

You are hereby commanded to produce the things identified on the attached schedule before the .....Sub... Committee on .Oversight and Investigations..... of the House of Representatives of the United States, of which the Hon. ..Joe Barton..... ..... is chairman, by producing such things in Room ....2123..... of the Rayburn House Office... Building ....., in the city of Washington, on June 17, 1998....., at the hour of ...10:30 a.m.....

To ..the U.S. Marshal or any staff member of the Committee on Commerce..... to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this .....4th..... day of .....June....., 19..98...

.....Tom Bliley.....
Chairman.

Attest: Robin H Carle
.....
Clerk.

Subpena for Mr. Franklin L. Haney

before the Committee on the Commerce Subcommittee on Oversight and Investigations

Served Stanley Brand 6/4/98

Carter C. Smith

~~Commerce Committee~~ House of Representatives

Subpena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To Mr. Franklin L. Haney, Franklin L. Haney Company

You are hereby commanded to produce the things identified on the attached schedule before the Sub Committee on Oversight and Investigations of the House of Representatives of the United States, of which the Hon. Joe Barton is chairman, by producing such things in Room 2123 of the Rayburn House Office Building, in the city of Washington, on June 17, 1998, at the hour of 10:30 a.m.

To the U.S. Marshal or any staff member of the Committee on Commerce to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 4th day of June, 1998.

Bill Bliley
Chairman.

Attest: Robin H Carle
Clerk.

Subpena for Mr. Franklin L. Haney,
Franklin L. Haney Company

before the Committee on the Commerce
Subcommittee on Oversight and
Investigations

Served Stanley Brand 6/4/98

Carlton C. Smith
Commerce Committee House of Representatives

Subpena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To Mr. Franklin L. Haney, Building Finance Company of Tennessee, Inc.

You are hereby commanded to produce the things identified on the attached schedule before the Sub Committee on Oversight and Investigations of the House of Representatives of the United States, of which the Hon. Joe Barton is chairman, by producing such things in Room 2123 of the Rayburn House Office Building, in the city of Washington, on June 17, 1998, at the hour of 10:30 a.m.

To the U.S. Marshal or any staff member of the Committee on Commerce to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 4th day of June, 19.98.

Tom Bliley
Chairman.

Attest: Robin H Carle
Clerk.

Subpena for Mr. Franklin L. Haney,
Building Finance Company of
Tennessee, Inc.

before the Committee on the Commerce
Subcommittee on Oversight and
Investigations

Served Stanley Brand 6/4/98

Carl C. Smith

Commerce Committee, House of Representatives

Subpena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To Mr. Franklin L. Haney, Tower Associates II, Inc.

You are hereby commanded to produce the things identified on the attached schedule before the Sub Committee on Oversight and Investigations of the House of Representatives of the United States, of which the Hon. Joe Barton is chairman, by producing such things in Room 2123 of the Rayburn House Office Building, in the city of Washington, on June 17, 1998, at the hour of 10:30 a.m.

To the U.S. Marshal or any staff member of the Committee on Commerce to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 4th day of June, 19.98.

Tom Bliley
Chairman.

Attest: Robin H Carle
Clerk.

Subpena for Mr. Franklin L. Haney,
Tower Associates II, Inc.

before the Committee on the Commerce
Subcommittee on Oversight and
Investigations

Served Stanley Brand 6/14/98

Chairman, Commerce Committee, House of Representatives

ATTACHMENT TO SUBPOENA

1) All records that relate to Franklin Haney's or the Franklin Haney Companies' retention or hiring of, or the decision to retain or hire, Peter Knight, WKLTF, or James Sasser for counsel or services regarding the Portals or the relocation of the FCC.

2) All records that relate to any payments or fees made to James Sasser for services, efforts, lobbying, or other work undertaken or provided regarding the Portals or the relocation of the FCC, from January 1, 1994, through the present, including but not limited to all bills or invoices submitted by any of the foregoing.

3) All records that relate to the services, efforts, lobbying, or other work undertaken or provided, or to be undertaken or provided, by Peter Knight, WKLTF, or James Sasser regarding the Portals or the relocation of the FCC.

4) All records that relate to the services, efforts, lobbying, or other work undertaken or provided, or to be undertaken or provided, by Peter Knight, WKLTF, or any other person or entity for the $1 million fee billed to the Franklin L. Haney Company in January 1996.

5) All records that relate to the $1 million fee billed by Peter Knight and/or WKLTF to the Franklin L. Haney Company in January 1996, not produced in response to the above request.

6) All records that relate to any fee arrangement with Peter Knight, WKLTF, or James Sasser for work undertaken or provided, or to be undertaken or provided, by any of the foregoing regarding the Portals or the relocation of the FCC, including but not limited to all records that relate to the nature, negotiation, agreement, billing, payment, structure, purpose, or allocation of such fee arrangement.

7) All records that relate to any contact, communication, understanding, or agreement (whether written, electronic, or oral) between any two or more of the following individuals or entities regarding the Portals or the relocation of the FCC: (i) Peter Knight; (ii) WKLTF; (iii) James Sasser; (iv) former FCC Chairman Reed Hundt, or any other official or employee at the FCC; (v) the Office of the Commissioner, Public Building Service, General Services Administration (GSA), or any official or employee thereof; (vi) the Office of the GSA Administrator, or any official or employee thereof; (vii) the Office of the GSA Regional Administrator for the National Capital Region, or any official or employee thereof; (viii) the Office of General Counsel, GSA, or any official or employee thereof; (ix) Robert Peck; (x) the Executive Office of the President (including but not limited to the Office of the Vice President), or any official or employee thereof; (xi) Franklin Haney; (xii) John Wagster; (xiii) T.J. Mancuso; or (xiv) any one or more of the Franklin Haney Companies.

8) All warranties and certifications that relate to the Portals and that are executed, signed, or co-signed under the provisions of 41 U.S.C. § 254(a) (or any other similar statute or regulation governing contingent fee representations) by Franklin Haney, any one or more of the Franklin Haney Companies, Parcel 49C Limited Partnership, or any other company or partnership in

which Franklin Haney or any one or more of the Franklin Haney Companies have a financial interest, and all records that relate to any such warranty or certification.

9) All records that relate to the negotiation of the supplemental lease agreements signed by Parcel 49C Limited Partnership and GSA in January and March of 1996.

Definitions and Instructions:

For purposes of the foregoing Subpoena Duces Tecum, the following definitions and instructions shall apply:

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

2. The terms "relating" or "relate" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

3. The term "Franklin Haney" means Franklin Haney, individually, and any agent, servant, representative, attorney, or other individual acting on behalf of Franklin Haney.

4. The term "Franklin Haney Companies" means the Franklin L. Haney Company, Tower Associates II, Inc., the Building Finance Company of Tennessee, and/or any other company, partnership, or similar entity controlled by Franklin Haney or any of the preceding entities, including any officer, director, employee, agent, representative, lobbyist, attorney, or other individual acting on behalf of any of the preceding entities.

5. The term "Peter Knight" means Peter Knight, individually, and any agent, servant, representative, attorney, or other individual acting on behalf of Peter Knight.

6. The term WKLTF means Wunder, Knight, Levine, Thelen & Forcey, its legal predecessor Wunder, Diefenderfer, Cannon & Thelen, and any partner, associate, employee, agent, representative, or other individual acting on behalf of either of the preceding entities.

7. The term "James Sasser" means James Sasser, individually, and any agent, servant, representative, attorney, or other individual acting on behalf of James Sasser.

8. The term "Portals" means any one or more of the buildings being developed by Parcel 49C Limited Partnership in southwest Washington, D.C.

9. The term "FCC" means the Federal Communications Commission.

10. The term "GSA" means the General Services Administration.

11. The subpoena duces tecum demands production of all records within the recipients' possession, custody, or control, including but not limited to all records within the possession, custody, or control of the recipients' agents, servants, representatives, attorneys, or other individuals acting on the recipients' behalf.

APPENDIX C

Congressional Research Service • Library of Congress • Washington, D.C. 20540

Memorandum June 16, 1998

TO : Honorable Tom Bliley, Chairman, House Committee on Commerce
Honorable Joe Barton, Chairman, House
Subcommittee on Oversight and Investigations,
Committee on Commerce

FROM : Morton Rosenberg
Specialist In American Public Law
American Law Division

SUBJECT : Assessment of Validity of Committee Subpoenas for Documents

---

In late 1997, based on investigative reports published in Business Week and Time magazine, and statements to staff during its investigation of Molten Metals Technology, the Subcommittee commenced an inquiry into the circumstances leading to the relocation of the Federal Communications Commission (FCC) headquarters to the Portals, an office development in southwest Washington. The Business Week report alleged that a result of the involvement in the Fall of 1995 of Mr. Franklin L. Haney, a Tennessee developer with purportedly close ties to Vice President Gore, as a general partner in the Portals project (known as the Parcel 49c Limited Partnership), the FCC's long and vigorous opposition to the move dissolved, a favorable lease arrangement was entered into between the General Services Administration (GSA) and the Portals partnership, and that shortly after the new lease arrangement was signed Mr. Haney contributed $230,000 to the Democratic National Committee and five State Democratic party organizations. Later, Mr. Bernard Wunder, a former managing partner at the law firm of Wunder, Knight, Levine, Thelen & Forcey, told Subcommittee staff that a partner in the firm, Mr. Peter Knight, had billed and received a $1 million "performance" payment from an unknown client. Mr. Knight, a lawyer-lobbyist and former staffer for Vice President Gore, was the campaign manager for the 1996 Clinton-Gore reelection campaign. Shortly thereafter Time magazine reported that Mr. Haney had confirmed that he had paid Mr. Knight a fee of $ 1 million for "general legal work on the [Portals] project".

On the basis of those reports and information, the Subcommittee initiated an investigation into the Portals matter pursuant to its oversight authority under Rules X and XI of the House of Representatives. Initial unsuccessful informal overtures for interviews and information from Mr. Haney was followed by formal requests to him from Chairmen Blilely and Barton for information on the allegations. In the initial communication, the Chairmen stated: "If you paid Mr. Knight $1 million in one lump sum as a performance fee, we would have serious qustions about the services which you were paying on this federal contract,

which involves an agency within this Committee's oversight responsibilities". A subsequent letter to Mr. Haney's counsel explained the Committee's interest and authority, noting that "this Committee has both the right and duty to inquire as to whether the planned relocation is being conducted to further the efficient and effective execution of FCC's statutory responsibilities, or whether the relocation has been influenced by other, less legitimate considerations". Letter to Stanley Brand dated November 21, 1997.

Mr. Haney has responded to some document requests which has established that Mr. Knight's law firm accepted Mr. Haney as a client by a letter of engagement dated October 23, 1995, which provided that the firm's representation would "include strategic and legal counsel concerning real estate projects of interest to the Haney Company". The period of engagement was to be from June 1, 1995 through May 30, 1998, and that the Haney Company would be billed on a "project-by-project basis at a rate to be determined". The firm advised that it would also bill for reasonable and customary out-of-pocket expenses which would be included on monthly statements. While there were monthly statements for firm expenses starting in November 1995, the first billing occurred on January 3, 1996, for $ 1 million, which the invoice indicated was the fee for "legal services rendered (1994 and 1995)". The date of the billing was coincident with the signing of the supplemental lease agreement between GSA and the Portals partnership which is said to be worth an additional $60 million to Portals partnership over the life of the lease. The bill was paid by check made out personally to Mr. Knight on April 1, 1996. The payment did not include other firm related expenses billed at the same time.

Committee interviews with officials and employees at the FCC and GSA also revealed that Mr. Knight contacted and met with FCC officials, including then-Chairman Reed Hundt, on behalf of Mr. Haney with respect to the Portals project, and GSA officials, and that former Senator, and now Ambassador to China, James Sasser, acting as attorney for Mr. Haney, attended meetings between Haney and officials at GSA and the FCC in which Mr. Knight may have participated. On December 4, 1997, the Committee requested that Mr. Knight provide information and documents with respect to his role and involvement in the Portals matter.

On December 8, 1997, Mr. Haney's counsel advised the Committee that the retainer agreement, expense invoices and payment check were submitted to the Committee because they are not covered by the attorney-client privilege and that their submission was not a waiver of the privilege where it is applicable. Subsequently, Mr. Haney directed Mr. Knight and his law firm, and Ambassador Sasser, not to reveal confidences acquired during their legal representation of him. On December 22, 1997, Mr. Knight's counsel advised the Committee that requests for documents regarding his representation of Mr. Haney, other than those submitted regarding his retention, bills for his fee, and payment, would be withheld as confidential communications covered by the attorney-client privilege. A privilege log covering 14 withheld documents was submitted. A similar claim was made by Ambassador Sasser on April 10, 1998.

On April 30, 1998, the Subcommittee authorized the issuance of subpoenas to further the investigation of the Portals matter, which were issued on May 13, 1998. The subpoenas demanded records from Mr. Haney personally and from three companies under his control relating to his involvement in the Portals project and the $1 million payment to Peter Knight for services relating at least in part to the Portals. On May 20, 1998, the return date of the subpoenas, counsel for Mr. Haney declined to produce the subpoenaed records

on the ground that the subpoenas were defective for failure to make them returnable to a "duly convened committee" so that the "witness" could have a forum to state his objections to compliance. "Due process" and House rules, it was argued, require receipt of subpoenaed documents "in committee". On June 4, 1998, the Committee rejected counsel's objection, noting that the very same argument had been rejected by the Supreme Court in *United States v. Bryan*, 339 U.S. 323, 329-330 (1950). However, the Chairman agreed to permit Mr. Haney to appear before a meeting of the Subcommittee to present his legal objections and have them ruled upon "in order to expedite the Committee's receipt of the subpoenaed documents". The subpoenas were reissued to provide a new return date of June 17, 1998, at which time Mr. Haney could make an oral presentation. A written summation of those objections was to be submitted by June 9. Subpoenas were also issued to Mr. Knight and to Mr. Dennis Thelen, managing partner of Mr. Knight's firm, returnable on June 17, with the same opportunity and conditions for submission of written and oral legal objections. As of close of business June 16, 1998, none of the subpoenaed parties had submitted written objections, although proffers of proposed testimony have been tendered, and an offer to utilize a jointly selected third party neutral to resolve document disputes has been made.

As indicated, apart from documentation with respect to fee information and payments, neither Haney nor his counsel have complied with either voluntary requests for specified records or with compulsory process for such information, and none of the subpoenaed parties has as yet submitted their invited written legal objections for consideration and evaluation. However, the extensive correspondence with various counsel since November 1997 would appear to establish that counsel contests the jurisdiction of the Committee over the subject matter; the uncertainty of the scope or breadth of the investigation; the burdensome and excessive nature of the requests; the pertinency of some of the requested documents to the matter under investigation; and the efficacy of the Committee's demands in the face of claims of attorney-client privilege and work product protections.

In view of the lack of appreciable movement on either side with respect to production, and the strong indication that the bulk of the documents sought will not be produced in a timely fashion, the Subcommittee believes that it may be necessary to seek a contempt of Congress citation pursuant to 2 U.S.C. 192, 194 (1994) to vindicate the authority and propriety of its demand.

You have asked that we review the legal positions of the Subcommittee and Mr. Haney's counsel as reflected in the correspondence and assess the weight of those conflicting positions with respect to the legal validity of the subpoenas. In response we submit the following with the caveat that in the absence of fully articulated legal arguments from the subpoena respondents, it may be difficult to anticipate all possible arguments that might be raised on their behalf beyond those suggested in the correspondence or nuances of those raised.

Discussion

Mr. Haney's objections may be usefully separated into two categories for discussion: those raising legal issues as to the legal sufficiency of the subpoena, and those that present claims of common law privilege.

1. Legal Sufficiency of the Subpoena

The offense of criminal contempt of Congress under 2 U.S.C. 192, 194 is established by meeting four principal elements: (a) jurisdiction and authority; (b) legislative purpose; (c) pertinency; and (d) willfulness. See, John C. Grabow, Congressional Investigation: Law and Practice, Chap. 3.4(b)(1988).

(a) **Jurisdiction and Authority.** In his letters of November 14 and December 22, 1997, and April 24, 1998, Haney's counsel questions the jurisdiction and authority of the Committee. In his November 14 letter, for example, he asserts that his "initial review of Rule 10 indicates that jurisdiction over `public buildings and occupied or improved grounds of the United States' is conferred on the House Committee on Transportation and Infrastructure. In that the stated subject matter of your inquiry is the contract between the General Services Administration and the real estate partnership which owns the property, it is not immediately clear whether and how the Committee on Commerce has been delegated jurisdiction over this subject matter by the House". In his April 24, 1998, letter counsel questions "whether Congress gave authority to this particular committee extensive enough to cover the subject matter of this particular inquiry" and argues that your Committee lacks the jurisdiction to seek "non-Portals related information" and "severely restricts even the Portals documents to those which can be demonstrated to be integral to the Committee's jurisdiction over `regulation of interstate and foreign communications' . . . or to oversight of `Federal agencies and entities having responsibilities' for administering laws within the committee's jurisdiction". Counsel also claims that the scope of the investigation has inappropriately expanded from its initial definition.

Counsel for Haney apparently misapprehends the nature and sources of congressional committee jurisdiction and authority. A congressional committee is a creation of its parent House and only has the power to inquire into matters within the scope of the authority that has been delegated to it by that body. Therefore, the enabling rule or resolution which gives the committee life or particular direction is the charter which defines the grant and the limitations of the committee's power. *United States v. Rumely,* 345 U.S. 41, 44 (1953); *Watkins v. United States,* 354 U.S. 178, 201 (1957); *Gojak v. United States,* 384 U.S. 702, 708 (1966). In construing the scope of a committee's authorizing rule or resolution, the Supreme Court has adopted a mode of analysis not unlike that ordinarily followed in determining the meaning of a statute: it looks first to the words of the resolution itself, and then, if necessary, to the usual sources of legislative history. As explained by the Court in *Barenblatt v. United States,* 360 U.S. 109, 117 (1959), "Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions." Similarly, in *Watkins, supra,* 354 U.S. at 209-215, the Court noted that for ascertainment of the subject of an investigation, one may look to a number of sources, including (1) the committee's authorizing resolution, (2) the resolution by which the full committee authorized the subcommittee to proceed, (3) the introductory remarks of the chairman or other members, (4) the nature of the proceedings, and (5) the chairman's response to the witness when the witness objects to the line of questioning on grounds of pertinency.

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Under House Rule X(e)(14), the Committee on Commerce is vested with jurisdiction over " the regulation of interstate and foreign communications". Rule X(2)(b)(1) directs each standing committee to

> Review and study on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee *and the organization and operation of the Federal agencies or entities having responsibilities in or for the administration and execution thereof,* in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed or eliminated. In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee (whether or not any bill or resolution has been introduced with respect thereto), and shall on a continuing basis undertake future research and forecasting on matters within the jurisdiction of the committee. (emphasis supplied)

There would appear little doubt that the oversight mandate of Rule X, coupled with the historic practice of the Commerce Committee in directly dealing with issues raised by the impact of actions of executive agencies not within the Committtee's jurisdiction on the effectiveness and efficacy of the operation and management of departments and agencies within its purview, permits the Committee to conduct the instant inquiry. The direction of Rule X plainly covers the "organization and operation" of the FCC, an agency that has "responsibilities in and for the administration and execution" of communications laws which fall within the Committee's jurisdiction. The Committee has both the right and obligation to determine whether the planned relocation is being conducted to further the efficient and effective execution of the FCC's statutory responsibilities and whether the relocation has been influenced by extraneous, and perhaps illegitimate, considerations. This same relocation was the subject of a Committee hearing in June 1995 when then FCC Chairman Reed Hundt testified. Hearing, "Reauthorization of the Federal Communications Commission", before the House Subcommittee on Telecommunications and Finance, Committee on Commerce, 104th Cong., 1st Sess. 6-50 (1995). As far back as 1976 the Committee's Subcommittee on Energy and Power, chaired by Mr. Dingell, held hearings on issues related to the relocation of the Federal Energy Administration and the General Services Administration's compliance with the National Environmental Policy Act. Numerous witnesses from GSA were called to testify. Hearing, "Proposed Relocation of FEA To Buzzard Point", before the House Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, 96th Congress, 2d Sess. (1976). The previous year the Commerce Committee held hearings dealing, in part, with a proposed relocation of the Securities and Exchange Commission headquarters and the role of GSA in the process. Hearing, "Securities Exchange Act Amendments", before the House Committee on Interstate on Foreign Commerce, 94th Cong., 1st Sess. (1975).

During the 1980's, a major issue confronted by the Committee's Subcommittee on Oversight and Investigation was the legal propriety and impact of the Office of Management

and Budget's (OMB) administration of Executive Orders 12291 and 12498, making OMB the central clearinghouse of all executive branch agency rulemaking, on agencies within the Committee's jurisdiction. Throughout that decade the Oversight Subcommittee held numerous hearings on alleged interference by OMB on agency policymaking at the Environmental Protection Agency and the Food and Drug Administration, among others, often calling OMB officials to testify. See, *e.g.*, Role of OMB in Regulation, Hearing Before the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce, 97th Cong., 1st Sess. (1981); "Infant Formula: The Present Danger," Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. (1982); EPA: "Investigation of Superfund and Agency Abuses (Part 3)", Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 81 (1983); "Investigation of the EPA: Report on the President's Claim of Executive Privilege Over EPA Documents, Abuses in the Superfund Program, and Other Matters" by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 9th Cong., 2d Sess. 285 (1984); "EPA's Asbestos Regulations," Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 99th Cong. 1st Sess. 109 (1985).

Finally, between 1992 and 1994, the Subcommittee on Oversight conducted an intensive inquiry into systemic problems within the Justice Department's envrionmental criminal enforcement program. The "purpose of the investigation was to discover whether DOJ officials were undermining the EPA's criminal enforcement program, which had taken years of Subcommittee and Committee work to establish". No jurisdictional question was ever raised to the Subcommittee's inquiry. "Damaging Disarray : Organizational Breakdown and Reform in the Justice Department's Enviromental Crimes Program", Staff Report of the House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, 103d Cong., 2d Sess. 1 (1994)(Committee Print No. 103-T).

In sum, then, the Committee has a long history and practice of including agencies without the Committee's technical jurisdiction whose actions impact the operations of agencies within its oversight purview. Such action is certainly not precluded by Rule 10, and appears a matter of a legislative common sense, efficiency and praticality. It is likely that a reviewing court would find that the Subcommittee's practice under Rule 10 "comes to us with a 'persuasive gloss of legislative history' . . . which shows beyond doubt that . . . the [House] has clothed" your Subcommittee with a broad mandate with respect to the scope of the hearings it has authorized and directed it to conduct. *Barenblatt v. United States, supra,* 360 U.S. at 117-18.

Haney's counsel also appears to raise an objection to the fact that as your Subcommittee's investigation has progressed, its scope has increased. "Your December 15, 1997, letter described your investigation as concerning whether the FCC's relocation to the Portals ' has been improperly influenced by political considerations', yet your initial inquiry to Mr. Haney was whether payment of legal fees to Mr. Knight was a prohibited 'performance fee.'" Letter of December 22, 1997. "There is no meaningful explanation in the [Committee's] letter how the topic under inquiry -- FCC relocation and the fee arrangement with Mr. Knight -- relates to the other projects on which Mr. Knight has worked, yet the Committee is seeking to 'review [ ] all documents that will shed light on the nature and purpose of the $1 million payment'". Letter of April 24, 1998. However, the courts have not limited congressional inquiry to its initial stated scope. In *Eastland v. United*

States Servicemen's Fund, 421 U.S. 491, 509 (1975), the Supreme Court recognized that a congressional investigation may lead "up some 'blind alleys' and into non-productive enterprises. To be a valid investigative inquiry there need be no predictable end result". More recently, in *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp. 17, 20-21 (D.D.C. 1994), *stay pending appeal denied*, 510 U.S. 1319 (1994), the court rejected a claim of overbreadth with regard to a subpoena for a Senator's personal diaries, holding that the Committee's investigation was not limited in its investigatory scope to its original demand "even though the diaries might prove compromising in respects to which the Committee has not yet foreseen". The court noted the long judicial acceptance of the breadth of congressional subpoenas and the analogy of a legislative inquiry to that of a grand jury:

> In determining the proper scope of a legislative subpoena, this Court may only inquire as to whether the documents sought by the subpoena are "'not plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties'". *McPhaul v. United States*, 364 U.S. 372, 381, 81 S.Ct. 138, 143, 5 L.Ed.2d 136 (1960)(quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87 L.Ed. 424 (1943)).
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> Senator Packwood's principal apprehension appears to be that somewhere within the diaries will be found evidence of other conduct presently not within anyone's contemplation (other than perhaps his own) that the Ethics Committee will deem to be senatorial misbehavior. Yet where, as here, an investigative subpoena is challenged on relevancy grounds, the Supreme Court has stated that the subpoena is to be enforced "unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the . . . . investigation". United States v. R. Enterprises, Inc.., 498 U.S. 292, 301, 111 S.Ct. 721, 727, 112 L.Ed.2d 795 (1991) . . . .
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> At this stage of its proceedings the Ethics Committee is performing the office of a legislative branch equivalent of a grand jury, in furtherance of an express constitutional grant of authority to Congress to keep its own house in order. It is well-established that such investigative bodies enjoy wide latitude in pursuing possible claims of wrongdoing, and the authority of the courts to confine their investigations is extremely limited. "The function of the grand jury is to inquire about all information that might possibly bear on its investigation until it has identified an offense or

> has satisfied itself that none has occurred". R. Enterprises, Inc., 498 U.S. at 297, 111 S.Ct. at 726.

845 F. Supp. at 20-21. See also *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946)(holding that determining whether a subpoena is overly broad "cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.").

(b) **Legislative Purpose.** The Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation. In *In re Chapman*, 166 U.S. 661, 669 (1897), the Court upheld the validity of a resolution authorizing an inquiry into charges of corruption against certain Senators despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated:

> The questions were undoubtedly pertinent to the subject matter of the inquiry. The resolutions directed the committee to inquire "whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." What the Senate might or might not do upon the facts when ascertained, we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.
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> Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.
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> We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.

166 U.S. at 699.

In *McGrain v. Daugherty*, 273 U.S. 135 (1927), the original resolution that authorized the Senate investigation into the Teapot Dome Affair made no mention of a legislative purpose. A subsequent resolution for the attachment of a contumacious witness declared that his testimony was sought for the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." The Court found that the investigation was ordered for a legitimate object. It wrote:

> The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. . . . .
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> The second resolution — the one directing the witness be attached — declares that this testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper". This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an admissible or unlawful object were affirmatively and definitely avowed.

Moreover, when the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of the Congress exceeds its power when it seeks information in such areas. *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969). In the past, the types of legislative activity which have justified the exercise of the power to investigate have included: the primary functions of legislating and appropriating, *Barenblatt v. United States*, 360 U.S. 109 (1959); the function of deciding whether or not legislation is appropriate, *Quinn v. United States*, 349 U.S. 155, 161 (1955); oversight of the administration of the laws by the executive branch, *McGrain v. Daugherty, supra*, 279 U.S. at 295; and the essential congressional function of informing itself in matters of national concern, *United States v. Rumely*, 345 U.S. 41, 43, 45 (1953); *Watkins v. United States, supra*, 354 U.S. at 200 n.3.

(c) **Pertinency.** The contempt statute provides that a committee's questions or subpoena requests must be "pertinent to the subject under inquiry." The Committee's inquiries must relate to a legitimate legislative purpose and fall within the grant of authority made by Congress to the committee. *United States v. Orman*, 207 F.2d 148, 153 (3d Cir.

1953). As previously indicated, the Subcommittee's investigation appears well within a valid legislative purpose.

In determining general questions of the pertinency of inquiries, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation. *Sinclair v. United States*, 279 U.S. 263, 279 (1929); *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 305 (D.D.C. 1976). Because of the breadth of congressional investigations, the courts have long recognized that pertinency in the legislative context is broader than that of relevance under the law of evidence. "A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence must be responsive to the scope of the inquiry which generally is very broad." *Townsend v. United States*, 95 F.2d 252, 261 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938)(emphasis in original). The *Watkins* court warned that a witness "acts at his peril" in deciding not to respond to a committee's questions or subpoena demands on grounds of pertinency, but that "a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent . . . with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of a criminal offense". *Watkins v. United States, supra*, 354 U.S. at 208-209. However, as previously discussed, *Watkins* suggests a variety of sources from which the subject matter of an investigation may be shown: (1) the declaration of the question under inquiry found in the authorizing rule or resolution of the committee or subcommittees, (2) the introductory remarks of the committee chairman or other members, (3) the response of the Chairman to the witness' pertinency objection, (4) the question itself, or (5) the "nature of the proceedings." *Id.* at 213.

In *Barenblatt, supra*, the Court rejected a pertinency objection, distinguishing the factual situation in *Watkins*, where "the question under inquiry had not been disclosed in any illuminating manner; and the questions asked . . . were not only amorphous on their face, but in some instances clearly foreign to the alleged subject of the investigation", with that before it where "[t]he subject matter of the inquiry had been identified at the commencement of the investigation as communist infiltration into the field of education" and the scope of the particular hearing "had been announced as `in the main communism in education and the experiences and background in the party by Frances X. Crowley.'" 360 U.S. at 123-124.

The identification of the subject matter of the present inquiry has been made clear in the extensive correspondence over the last seven months between the Subcommittee and Mr. Haney's counsel. Those communications have made it clear that the Subcommittee is concerned with Mr. Haney's involvement in the Portals project and his $1 million lump sum payment to Peter Knight for "strategic and legal counsel concerning real estate projects of interest to the Haney Company." It has been claimed, without tangible verification, that the payment was for a number of assignments that have been or would be undertaken by Mr. Knight over the three year period of the retainer agreement. The coincidence of the payment and the signing of the supplemental lease agreement between GSA and the Portals partnership has raised what appears to be legitimate concerns about the nature and purpose of the payment, which the conflicting evidence thus far gathered by the Subcommittee has not allayed. In response, Mr. Haney has supplied unconfirmable denials of pertinence. In this posture, the current record would appear to provide a strong foundation for a court to find that Mr. Haney has been informed of the pertinence of the subpoena requests.

d). **Willfulness.** Section 192 refers to witnesses who "willfully make default". The courts have long established that willfullness as used in the statute does not require the showing of a specific criminal intent, bad faith or moral turpitude. *Braden v. United States*, 365 U.S. 431, 437 (1961); *Barsky v. United States*, 167 F.2d 241, 251 (D.C. Cir. 1948). It deals only with intentional conduct. *United States v. Bryan*, 339 U.S. 323, 329-330 (1950). The requirement is satisfied if "the refusal was deliberate and intentional and was not a mere inadvertence or an accident". *Field v. United States*, 167 F.2d 97, 100 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948). With particular respect to failures to produce documents called for by a subpoena duces tecum, default occurs upon the return date of the subpoena. *United States v. Bryan, supra*, 339 U.S. at 330.

Based upon our review of the correspondence you have supplied and the demands of the subpoena in question, it is likely that a reviewing court would find that the statutory elements necessary for a contempt of Congress under 2 U.S.C. 192, 194 have been met.

2. Applicability of Common Law Law Privileges

Counsel for Haney, Knight, Thelen and Sasser generally object that a number of the subpoena requests intrude on matters protected by the attorney-client and work product privileges. However, the assertion of common law testimonial and evidentiary privileges in the congressional forum is problematic. The precedents of the House of Representatives and the Senate, which are founded on Congress' inherent constitutional prerogative to investigate, establish that acceptance of a claim of attorney-client or work product privilege rests in the sound discretion of a committee, regardless of whether a court would uphold the claim in the context of litigation, and that committee resolution of such claims have involved a pragmatic assessment of the needs of the individual committee to accomplish its legislative mission and the potential burdens and harms that may be imposed on the claimant of the privilege if it is denied.

Thus, in actual practice, the exercise of committee discretion whether to accept a claim of attorney-client or work product privilege has turned on a "weighing [of] the legislative need for disclosure against any possible resulting injury."[1] More particularly, the process of committee resolution of claims of privilege has traditionally been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of laws that fall within its jurisdiction,[2] against any possible injury to the witness. In the particular circumstances of any situation, a committee may consider and evaluate the strength of a claimant's assertion in light of the pertinency of the documents or information sought to the subject of the investigation, the practical unavailability of the documents or information from any other source, the possible unavailability of the privilege to the claimant if it were to be raised in a judicial forum, and the committee's assessment of the cooperation of the witness in the matter, among other considerations. A valid claim of privilege, free of any taint of waiver, exception or other mitigating circumstance, would merit substantial weight. But any serious doubt as to the validity of the asserted claim would diminish its compelling character. See, *e.g.*,

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[1] Hearings, "International Uranium Cartel", Subcomm. On Oversight and Investigations, House Comm. On Interstate and Foreign Commerce, 95th Cong., 1st Sess., Vol. 1, 123 (1977).

[2] See 2 U.S.C. 190d (1994).

"Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)", H.Rept. No. 104-598, 104th Cong., 2d Sess. 40-54 (1996); "Refusal of William H. Kennedy, III, To Produce Notes Subpoenaed By The Special Committee to Investigate Whitewater Development Corporation and Related Matters", Sen. Rept. No. 104-191, 104th Cong. 1st Sess. 9-19 (1995); "Proceedings Against Ralph Bernstein and Joseph Bernstein", H. Rept. No. 99-462, 99th Cong. 2d Sess. 13, 14 (1986); Hearings, "International Uranium Control", Before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 60, 123 (1977).

Moreover, the conclusion that recognition of non-constitutionally based privileges is a matter of congressional discretion is consistent with both traditional British parliamentary and the Congress' historical practice. See Morton Rosenberg, Investigative Oversight: An Introduction to the Law Practice and Procedure of Congressional Inquiry, CRS Rept. No. 95-464A, 43-55 (April 7, 1995). See also, Glenn A. Beard, Congress v. the Attorney-Client Privilege: A "Full and Frank "Discussion", 35 Amer. Crim. L. Rev. 119 122-127 (1997)("[C]ongressional witnesses are not legally entitled to the protection of the attorney-client privilege, and investigating committees therefore have discretionary authority to respect or overrule such claims as they see fit.") (Beard); Millett,The Applicability of Evidentiary Privileges For Confidential Communications Before Congress, 21 John Marshall L. Rev. 309 (1988).

The legal basis for Congress's practice in this area is based upon its inherent constitutional prerogative to investigate which has been long recognized by the Supreme Court as extremely broad and encompassing, and which is at its peak when the subject is fraud, abuse, or maladministration within a government department. *McGrain v. Daugherty,* 272 U.S. 135, 177 (1926); *Watkins v. United States,* 354 U.S. 178, 187 (1957); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 504 n.15 (1975). The attorney-client privilege is, on the other hand, a judge-made exception to the normal principle of full disclosure in the adversary process which is to be narrowly construed and has been confined to the judicial forum. *Westinghouse Electric Corporation v. Republic of the Philippines,* 951 F.2d 1414, 1423 (3d Cir. 1991). The privilege has been deemed subject to a variety of exceptions, including communications between a client and attorney for the purpose of committing a crime or perpetrating a fraud or other obstruction of law at some future time, and to a strict standard of waiver.[3] See generally, Paul R. Rice, Attorney-Client Privilege in the United States, chaps. 8:2-8:15 and 9 (1993)(Rice). Indeed, in reviewing the proliferation of exceptions to the privilege, a panel of the District of Columbia Circuit commented that "any belief in an absolute attorney-client privilege is illusory." *In re Sealed Case,* 124 F.3d 230, 234 (D.C. Cir. 1997) (holding that attorney-client privilege is qualified after death of client and may yield to the need for use of confidential communications in criminal proceedings). See also *In re Grand Jury Subpoena Duces Tecum, supra,* 112 F.3d at 921 ("the White House assumes the attorney-client privilege is more predictable than it actually is".).

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[3] However, at least two federal circuits have held that disclosures to congressional committees do not waive claims of privilege elsewhere. See, *Florida House of Representative v. Dept. of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992); *Murphy v. Department of the Army,* 613 F.2d 1151, 1155 (D.C. Cir. 1979).

Moreover, the work product privilege,[4] another judge-made evidentiary exception, has always been recognized as a qualified privilege which may be overcome by a sufficient showing of need. The Supreme Court indicated, in the very case in which it created the doctrine, that "[w]e do not mean to say that all [ ] materials obtained or prepared with an eye toward litigation are necessarily free from discovery in all cases."[5] Thus the courts have repeatedly held that the work product privilege is not absolute, but rather is only a qualified protection against disclosure,[6] and that the burden is on the party asserting it to establish its applicability.[7]

(a) Requirements for Claims of Attorney-Client Privilege

A claimant of privilege before a committee would have to establish that the relationship was one of attorney and client by revelation of specific facts and must demonstrate that the privilege has not been expressly or impliedly waived or subject to exception.

More particularly, with respect to the attorney-client privilege, a claimant must establish (1) a communication, (2) made in confidence, (3) to an attorney, (4) by a client, (5) for the purpose of seeking or obtaining legal advice. See, *e.g.*, 8 Wigmore, Evidence, Sec. 2292, at 554 (McNaughton rev. ed 1964); *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-359 (D. Mass. 1950). "The privilege does not extend, however, beyond the client's confidential communication to the attorney." *In re Fishel*, 557 F.2d 209, 211 (9th Cir. 1977). The only communications protected by the privilege, then, are those that will disclose what the client said in confidence to the lawyer. But it does not protect the *information* contained within communications. *Upjohn v. United States*, 449 U.S. 384, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."); Rice, *supra*, 5:1, at 288.

The burden of establishing the existence of the attorney-client privilege rests with the party asserting the privilege, *See, e.g., In re Grand Jury Investigation No. 83-2-35*, 737 F.2d 497, 450-51 (6th Cir. 1983). Blanket assertions of the privilege have been deemed "unacceptable," *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992)("a banket claim of privilege which does not specifiy what information is protected will not suffice."); *SEC v. Gulf & Western Industries, Inc.*, 518 F.Supp. 675, 682 (D.D.C. 1981), and are strongly disfavored. *In re Grand Jury Investigation No. 83-2-35, supra*, 737 F.2d at 454. The

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[4] Some courts refuse to call the doctrine a privilege at all. In *City of Philadelphia v. Westinghouse Electric Corp.* 210 F.Supp. 483, 485 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom. General Electric Corp. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), the court stated that the work product principle "is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case."

[5] *Hickman v. Taylor*, 329 U.S. 495, 511 (1974).

[6] See, e.g., *Central National Insurance Co. v. Medical Protective Co. of Forth Worth*, 107 F.R.D. 393, 395 (E.D. Mo. 1985); *Chepanno v. Champion International Corp.*, 104 F.R.D. 395, 396 (D. Ore. 1984).

[7] *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 656 (10th Cir. 1984); *Nutmeg Insurance Co. v. Atwell Vogel & Sterling*, 120 F.R.D. 504, 510 (W.D. La 1988).

proponent must conclusively prove each element of the privilege, but the mere fact that an individual communicates with an attorney does not make his communication privileged.[8]

Moreover, courts have held that communications by an attorney in response to the client are not automatically privileged. These courts have reasoned that an attorney's communication can be privileged only derivatively, if the disclosure of the attorney's communication would reveal the content of the client's communication to the attorney. *Rice, supra,* at 5:2, 306-312. Also, when advice to a client is based on information supplied to the attorney from the public record it has been held to be non-privileged:

> The attorney-client privilege does not extend to correspondence from an attorney to a client when that correspondence contains advice based upon public information rather than confidential information provided by the client . . . . In this case, it appears that the information which was sent to the office of the General Counsel consisted almost entirely of material which was in the public record. Therefore, the General Counsel's opinion is not protected from discovery by the attorney-client privilege.

Community Savings and Loan Ass'n v. Federal Home Loan Bank Board, 68 F.R.D. 378, 382 (E.D. Wisc. 1975). See also *In re Underwriters at Lloyds,* 666 F.2d 55, 57 (14th Cir. 1981)("Advice given by [the attorney was] based on information from non-privileged documents and therefore was not privileged."); *In re Sealed Case,* 737 F.2d 94, 99 (D.C. Cir. 1984)("It remains the client's burden, however, to present to the court sufficient facts to establish the privilege; the claimant must demonstrate with reasonable certainty . . . that the lawyer's communications rests in significant and inseparable part on the client's confidential disclosure."); *Thomas v. Pansy Ellen Products, Inc.,* 672 F.Supp. 237, 243 (W.D. N.C. 1987)("It is client confidences, not attorney advice that are protected by the privilege."). Similarly, documents not prepared by the client for the purpose of communicating with an attorney confidentially do not acquire protection simply by turning them over to an attorney. *Colton v. United States,* 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied* 371 U.S. 951 (1963)("[P]re-existing documents and financial records not prepared by the [clients] for the purpose of communicating with their lawyer in confidence . . . have acquired no special protection from the simple fact of being turned over to an attorney"); *Cosgrove v. Sears, Roebuck & Co.,* No. 81 Civ. 3432-CSH (SDNY, Mar. 30, 1982)(LEXIS, Genfed library, Dist. File)(diary not privileged because it was not made for the purpose of communicating with the attorney).

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[8] *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 912 (8th Cir. 1997)(rejecting applicability of common interest doctrine to communications at a meeting with White House Counsel's Office attorneys and private attorneys for the First Lady.); *United States v. Tedder,* 801 F.2d 1437, 1442-43 (4th Cir. 1986)(friend's communication with attorney held not privileged despite the fact that friend was both lawyer and colleague in the same firm when he spoke to her not as a professional legal advisor, did not seek legal advice from her, and did not expect communications to remain confidential); *United States v. Costanzo,* 625 F.2d 465, 468 (3d Cir. 1980)("[I]t is true that '[a] communication is not privileged simply because it is made by or to a person who happens to be a lawyer.'").

Counsel have raised objections based on the attorney-client privilege with request to documents relating to work done pursuant to the October 23, 1995 letter of engagement. However, it is not apparent that the subpoenaed parties have as yet to come forth with the specific threshold showing the foregoing brief summary of the pertinent case law requires to establish a valid claim of privilege. As indicated above, the courts have uniformly held that blanket assertions of privilege will not suffice. When a privilege claim is disputed, strict proof of the various elements of the claims are required to establish the predicate of the claim.

For example, the case law has consistently emphasized that one of the essential elements of the attorney-client privilege is that the attorney be acting as an attorney and that the communication be made for the purpose of securing legal services. The privilege therefore does not attach to incidental legal advice given by an attorney acting outside the scope of his role as attorney. "Acting as a lawyer" encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice."[9] The court in *SCM Corp. v. Xerox Corp.* pertinently discusses the process of sorting out matters that have both business and legal components:

> The mere mention of business considerations is not enough to compel the disclosure of otherwise privilege material....Here it is not clear that the decisions were the type in which business personnel defer to the recommendation of legal staff. Licensing decisions may contain a legal component, but are not inherently dependent on legal advice; they are essentially business decisions. Legal advice should remain protected along with "nonlegal considerations" discussed between client and counsel that are relevant to that consultation, but when the ultimate decision then requires the exercise of business judgment and when what were relevant nonlegal considerations incidental to the formulation of legal advice emerge as the business reasons for and against a course of action, those business reasons considered among executives are not privileged. They are like any other business evaluations and motivations and do not enjoy any protection because they were alluded to by conscientious counsel. To protect the business components in the decisional process would be a distortion of the privilege. The attorney-client privilege was not intended and is not needed to encouraged businessmen to discuss business reasons for a particular course of action...[10]

In order to ascertain whether an attorney is acting in a legal or business advisory capacity the courts have held it proper to question either the client or the attorney regarding the general nature of the attorney's services to his client, the scope of his authority as agent and the substance of matters which the attorney, as agent, is authorized to pass along to third

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[9] *Zenith Radio Corp. V. Radio Corp. Of America,* 121 F. Supp. 792, 794 (D. Del. 1954) (emphasis supplied).

[10] 70 FRD 508, 517 (D. Conn. 1976)

parties.[11] Indeed, invocation of privilege may be predicated on revealing facts tending to establish the existence of an attorney-client relation.

Several judicial precedents illustrate how probing the questioning may be to determine whether an attorney was in fact "acting as a lawyer." Thus in *In re John Doe, Esq.*[12], the court enforced two subpoenas against an attorney who represented two undisclosed principles in real estate property purchases. The subpoena required all the business records of the subject real estate company, all the records concerning the purchase and sale of the properties, and "direct[ed] petitioner [the attorney] to testify before the grand jury" regarding his knowledge of the business affairs of XYZ Realty, Inc., the subject real estate concern.[13] The district court found that petitioner had failed to meet his burden of establishing the existence of privileged communications and that, moreover, the privilege was inapplicable because some of the documents "relate to business not legal advice," and others to "petitioner's fee arrangements with his clients."[14] The questions "appeared to seek answers concerning only business advice which, though perhaps intended to be private, most certainly were not privileged."[15]

The district court *In re Arthur-Treacher's Franchisee Litigation*[16] found the following questions appropriate to ascertain whether or not the privilege was being invoked properly:

3. Who was present at that meeting?
4. Were other members of the Arthur Treacher's franchisee association present?
5. What was the purpose of this meeting?
6. Was the purpose to seek legal advice from the attorneys at Weil, Gotshal?
7. How many people were present at this meeting?
8. How long did the meeting occur?
9. On what date did the meeting occur?
12. What members of Arthur Treacher's franchisee association board were present?
13. Were any persons present who were not members of the board of Arthur Treacher's franchisee association?
15. Did you attend any meetings prior to March of 1980 for shich attorneys from Weil, Gosthal were present?
21. Who was at this meeting [most recent meeting of Arthur Treacher's Franchisee Association]?

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[11] *Colton v. U.S.*, 306 F.2d 633, 636, 638 (2d Cir. 1962); *U.S. v. Tellier*, 255 F.2d 441 (2d Cir. 1958); *J.P. Foley & Co., Inc. v. Vanderbilt*, 65 FRD 523, 526-27 (S.D.N.Y. 1974)

[12] 603 F.Supp. 1164 (E.D.N.Y. 1985).

[13] *Id.* at 1167.

[14] *Id.*

[15] *Id.* See also *In re Grand Jury Subpoena (Arnold McDowell)*, 566 F.Supp. 752 (D.Minn. 1983) requiring attorneys to produce documents relating to real estate transactions performed for clients including "file notes regarding a real estate transaction, including a description of what is to be included in the sale of property and the location of the property."

[16] 92 F.R.D. 429 (E.D. Pa 1981).

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22. What was the purpose of the meeting?
24. Was the purpose of the meeting to seek legal advice?
25. Were any persons present who were not members of the Arthur Treacher's Franchisee Association Board of Directors?
26. Were any persons present who were not members of the Arthur Treacher's Franshisee Association at this meeting?
41. Did anyone say "I would like your legal opinion of such and such an issue?"
42. Did anyone say "I'm going to give you the following facts on which you can give me legal advice"?

Courts have also invited privilege logs as an acceptable means of establishing a valid claim of privilege, but such logs must be sufficiently detailed and specific in their description to sustain each element of the claimed privilege. The recent ruling in *Bowne of New York City, Inc* v. *AmBase Corp*, 150 F.R.D. 465 (S.D.N.Y. 1993), is illustrative:

> [W]e must reject AmBase's argument because its privilege log, unsupported by any evidence, is inadaquate to sustain its claims. As noted recently,
>
> > "[t]he standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed. The focus is on the specific descriptive portion of the log, and not on the conclusory invocations of the privilege or work-product rule, since the burden of the party withholding documents cannot be "discharged by mere conclusory or ipse dixit assertions."
>
> Golden Trade S.r.L. v. Lee Apparel Co., 1992 WL at *5 (quoting, inter alia, von Bulow v. von Bulow, 811 F.2d at 146).
>
> The privilege list of AmBase, even if we assume it arguendo to be adequate as a log under Civil Rule 46 (e), cannot meet this standard for use on a discovery motion. The log lists, for each document, the date, author, addressees, "other recipients," whether the document was a letter or memorandum or set of notes or other type of document, a very skeletal description of "subject" and an identification of the type of privilege claimed. Thus, for example, the first entry of the log lists a document dated November 8, 1990 and sent from "Bruce Bean" to "Bill Feil," with a copy to " Jack Plaxe." According to the log, this document was a "[h]andwritten memo with memo from Scott Freeman to Bruce Bean" and its subject was "Proxy Statement." We are also informed that AmBase claims that this document--whether simply the Bean memorandum or the Freeman memorandum as well, we are not informed--comes under the attorney-client privilege. Nothing on the log informs us whether the document contains

> legal advice or was prepared to elicit legal advice from others. We are also not informed whether the document was intended to be kept confidential and whether it was in fact so held.
>
> Other entries on the first page of the log are even less informative. For example, the fourth listed document, dated January 22, 1991 is identified as "[h]andwritten [n]otes" by P.A.M. Shearer. The log does not list any addressee or other recipient and state only that the notes concerned "Pru-Bache." Although the work-product rule is invoked, we are not informed whether the notes were prepared in anticipation of litigation or for any other reason. The same type of summary appears as the ninth entry on the page, but since these "[n]otes" by Ms. Shearer are described as "undated," we have virtually no clue as to the basis for the claim of working product protection.
>
> The balance of the log is much the same . There simply is not enough information supplied to support the privilege claims of AmBase with regard to its documents, particularly in the absence of any supporting evidence.

150 F.R.D. at 474-75.

Even assuming any or all the documents are deemed covered by attorney-client privilege, it is likely that a reviewing court would hold that the privilege has been overcome. The *In re Sealed Case* court made it clear that the common law deliberative process privilege "disappears altogether when there is any reason to believe government misconduct [has] occurred". 121 F.3d at 738. See also *id.* at 746. ("Where there is reason to believe the documents sought shed light on government misconduct, 'the privilege is routinely denied', on the grounds that shielding internal government deliberations in this context does not 'serve the public's interest in honest, effective government'"). In the instant, situation the documents are sought to be utilized by a congressional committee with clear jurisdiction over the subject matter, and the documents may shed light on the question of misconduct. It is, therefore, possibly arguable that a reviewing court would find the *In re Sealed Case* court's rationale with respect to overcoming the deliberative process privilege in the face of a congressional investigation of misconduct applicable as well to a claim of attorney-client privilege. See also *In re Grand Jury Proceedings*, —F.Supp —, 1998 WL 271539 (D.D.C., May 27, 1998)(governmental attorney-client privilege is qualified in the context of a federal grand jury investigation and is overcome by a showing of need).

In short, based on the record now before the Subcommittee, the claims of attorney-client would not likely be sustained by a reviewing court. In particular, Mr. Haney has failed to supply the essential elements necessary to support a privilege assertion, including evidence that the relationship with Mr. Knight was predominately for legal, rather than business, advice, or that the "strategic" advice was not meant to be communicated to third parties. In the absence of a detailed and descriptive privilege log that could set forth specific facts that, if credited, would be sufficient to establish each element of the privilege claimed, it is unlikely that a reviewing court would except the claims.

(B) Requirements for Claims of Work Product Protection

The qualified immunity from discovery of an attorney's work product recognized by the Supreme Court in *Hickman v. Taylor,* 329 U.S. 495 (1947), is now codified in Rule 23(b)(3)of the Federal Rules of Civil Procedure.[17] The Rule provides that in a civil action there is qualified immunity from discovery when materials are:

1. "documents and tangible things;"
2. "prepared in anticipation of litigation or for trial;" and
3. "by or for another party or for that other party's representative."

To overcome the qualified immunity, the party seeking discovery must make a showing of: (1) substantial need for the materials; and (2) inability to obtain the substantial equivalent of the information without undue hardship. Upon such a showing, the qualified immunity from discovery is overcome and the court will order the materials produced. See generally, 8 Wright, Miller and Marcus, Federal Practice and Procedure, Sections 2021-2028 (1994).

The federal rules do not define what is meant by the term "litigation" or "in anticipation of." However, the Special Master's Guidelines for the Resolution of Privilege Claims, approved and adopted by the court in *United States v. American Telephone & Telegraph Co.,* 86 F.R.D. 603 (D.D.C. 1980), contain a detailed discussion of both phrases that reflect precedent to that time and has been influential since then. The Special Master defined "litigation" as including "a proceeding in a court or administrative tribunal in which the parties have the right to cross-examine witnesses or to subject an opposing party's presentation of proof to equivalent disputation." 86 F.R.D. at 627. On its face, the definition would not apply to Congress, which of course is not a court or administrative tribunal, or to a congressional investigative hearing which, while often confrontational, does not afford an opportunity for witnesses to cross-examine other witnesses or present rebuttal testimony as would be the case in the adversarial adjudicative forum. We are aware of no court that has held the work product doctrine applicable to a legislative proceeding. Recent federal appellate and district court rulings, discussed below, directly hold that it is not applicable. The definition is also consonant with the language of Rule 26(b)(3) which exclusively uses terms such as "party", "litigation", "trial" and "discovery" which are alien to the legislative hearing process. Wright, Miller and Marcus, *supra,* Section 2024 at 338-357; 86 F.R.D. at 627-30.

The "in anticipation" element was defined by the Special Master to mean "any time after initiation of the proceeding or such earlier time as the party who normally would initiate the proceeding had tentatively formulated a claim, demand, or charge. When the material was prepared by a party who normally would initiate such a proceeding, that person must establish

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[17] Rule 26(b)(3) provides in pertinent part: "Trial Preparation: Materials . . . .[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

the date when the claim, demand, or charge was tentatively formulated. When the material was prepared by a potential defendant or respondent, that person must establish the date when he received a demand or warning of charges or information from an outside source that a claim, demand, or charge was in prospect" *86 F.R.D. at 627.*

The courts have made it clear that while there is no requirement that litigation have already commenced in order for the work product doctrine to be operative, there must be "a more immediate showing than the remote possibility of litigation". *Garfinkle v. Arcada National Corp.*, 64 F.R.D. 688, 690 (SDNY 1974). "[F]or documents to qualify as attorney work product, there must be an identifiable prospect of litigation (*i.e.*, specific claims that have already arisen) at the time the documents were prepared." *Fox v. California Sierra Financial Services*, 120 F.R.D. 520, 525 (N.D. Calif. 1988). One appellate court recently recognized that "because litigation is an ever present possibility in American life, it is more often the case than not that events are documented with the general possibility of litigation in mind. Yet '[t]he mere fact that litigation does ensue does not, by itself, cloak materials' with work product immunity. The document must be prepared because of the prospect of litigation when the preparer faces an actual claim or potential claim following an actual event or series of events that reasonably could result in litigation". *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). Materials prepared in the ordinary course of business will not be protected from production, even if the party is aware that the document may also be useful in the event of litigation. *Smith v. Conway Organization*, 154 F.R.D. 73, 78 (SDNY 1994). *See also Litton Industries v. Lehman Bros. Kuhn Loeb, Inc.*, 125 F.R.D. 51, 54-55 (SDNY 1989).

In a 1997 Eighth Circuit decision, *In re Grand Jury Subpoena Duces Tecum, supra*, involving, *inter alia*, a White House claim of work product immunity in the face of a grand jury subpoena for notes taken by White House Counsel's Office attorneys during meetings with First Lady Hillary Rodham Clinton, a divided panel rejected the applicability of the work product doctrine on the ground that it had not been shown that the attorneys involved were preparing for or anticipating some sort of "adversarial proceeding" involving the First Lady. It held that neither the independent counsel investigation then in progress nor a possible congressional investigative hearing provided the element of "anticipation of litigation or trial" necessary to invoke the immunity:

> The White House's argument that its lawyers were preparing for the OIC's investigation is simply unpersuasive; as we have stated previously, the OIC is not investigating the White House, nor could it do so. White House officials may be under investigation on account of their individual acts, but we know of no authority allowing a client such as the White House to claim work product immunity for materials merely because they were prepared while some other person, such as Mrs. Clinton, was anticipating litigation. Cf. *In re California Pub. Utils. Comm'n*, 892 F.2d 778, 781 (9th Cir. 1989) (concluding that non-party to litigation may not assert work product doctrine).

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> As a fall-back position, the White House suggests that anticipated congressional hearings will suffice as well as anticipated litigation. The Restatement seems to agree with the White House. See Restatement § 136 cmt. h (stating that litigation "includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing"). Neither the White House, Mrs. Clinton, nor the Restatement cites any authority for this proposition, however, and we have discovered none. *Cf. P. & B. Marina, L.P. v. Logrande, 136* F.R.D. 50, 58-59 (E.D.N.Y. 1991) (finding letters from lobbyist to client not protected work product), aff'd, 983 F.2d 1047 (2d Cir. 1992) (table). Even if it could be said that the White House anticipated a congressional investigation of the White House itself, rather than merely of individuals who work at the White House, and even if we consider a congressional investigation to be an adversarial proceeding, the only harm that could come to the White House as a result of such an investigation is political harm. As in our discussion of the common-interest doctrine, we decline to endorse the position of the White House where it is based on nothing more than political concerns.

112 F.3d at 924-925. The 8th Circuit's rationale was adopted in a recent ruling by the District of Columbia District Court in *In re Grand Jury Proceedings, supra*, which dismissed claims of work product protection by the White House on the ground that preparation for possible congressional investigation was not in anticipation of an adversarial proceeding.

Rule 26(b)(3) provides heightened protection for "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation". This protection against disclosure, however, is not absolute and has been held to yield in appropriate circumstances. *In re John Doe Corporation,* 675 F.2d 482, 492 (2d Cir. 1982). Thus, when mental impressions are *at issue* in the case and the need for the material is compelling, they have been held discoverable. *Holmgren v. State Farm Mutual Ins. Co.,* 976 F.2d 573, 577 (9th Cir. 1992)(claim of bad faith in the settlement process); *Handguards Inc. v. Johnson & Johnson,* 413 F.Supp 926, 931-31 (N.D. Calif. 1976)(bad faith in instituting litigation). Courts have consistently denied the protection in such "at issue" cases where complete or partial lack of recollection of critical meetings or events has been claimed. *Erlich v. Howe*, 848 F.Supp 842, 492-93 (SDNY 1994); *Redvanly v. NYNEX Corp.,* 152 F.R.D. 460, 468-69 (SDNY 1993); *Doubleday v. Ruh,* 149 F.R.D. 601, 608 (E.D. Cal. 1993); *In re Worlds of Wonder Securities Litigation,* 147 F.R.D. 208, 212 (N.D. Cal. 1992). The protection has been denied where what was at issue was the reason a government prosecutor instituted an action. *Doubleday v. Ruh, supra,* 149 F.R.D. at 608 ("Here, plaintiff asserts that the main issue of her case is the affect [sic] defendants had on the district attorney's decision to prosecute."); *EEOC v. Anchor Continental, Inc.,* 74 F.R.D. 523, 526-28 (D.S.C. 1977)("However, there must be an exception to this [work product] rule when the Court's

in camera inspection reveals that the plaintiff, a branch of the United States government, has little faith in its case, has little evidence to go on and hopes to be able to prove the case through discovery or force a settlement upon a defendant who might not be able to stand the financial burden of defending itself".).

At this time the subpoenaed parties have made no showing supporting coverage under the work product doctrine.

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APPENDIX D

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MEMORANDUM

TO: The Honorable Tom Bliley
Chairman, Committee on Commerce

The Honorable Joe Barton
Chairman, Subcommittee on Oversight and Investigations

FROM: Geraldine R. Gennet
General Counsel

Kerry W. Kircher
Deputy General Counsel

Carolyn Betz
Assistant Counsel

DATE: June 16, 1998

RE: D.C. Rule of Professional Conduct 1.6 and the Congressional Subpoena Power

You asked whether an attorney may properly decline to comply with a valid subpoena issued to him by the Subcommittee on Oversight and Investigations ("Subcommittee") of the Committee on Commerce ("Committee"), on the basis of a District of Columbia rule of professional conduct that prohibits the revelation of the confidences or secrets of the attorney's clients.

For the reasons that follow, we conclude that the answer to your question is no.

Introduction

D.C. Rule of Professional Conduct 1.6 provides, in pertinent part, that

> (a) Except when permitted under paragraph (c) or (d), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of the lawyer's client;
> (2) Use a confidence or secret of the lawyer's client to the disadvantage of the client;
> . . . .
> (d) A lawyer may use or reveal client confidences or secrets:
> (1) With the consent of the client affected, but only after full disclosure to the client;
> (2)(A) When permitted by these Rules or required by law or court order . . . .

D.C. Rules of Professional Conduct, Rule 1.6.[1]

A violation of Rule 1.6 is considered professional misconduct, id., Rule 8.4(a), which may subject the attorney to the disciplinary authority of the D.C. bar. Id., Rule 8.5(a).

Discussion

1. As an initial matter, the D.C. Rules of Professional Conduct are exactly and only what they purport to be: rules of professional conduct, or ethics rules, that apply to attorneys who practice or are licensed in the District of Columbia. While a violation of Rule 1.6 may subject an attorney to bar discipline, the rule is not a substantive legal privilege or rule of evidence (like the attorney-client privilege) or a substantive rule of discovery. Indeed, the commentary to the rule carefully distinguishes Rule 1.6 from substantive laws of evidence. See D.C. Rule of Professional Conduct, Rule 1.6, Comment 5 ("This Rule is not intended to govern or affect judicial application of the attorney-client privilege or work product doctrine."); id., Comment 6

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[1] Rule 1.6 — which only applies to attorneys who practice in the District of Columbia or are members of the District of Columbia bar, D.C. Bar Rule X — is derived from Rule 1.6 of the ABA Model Rules of Professional Conduct (1983).

("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.").[2]

Accordingly, an attorney may not use Rule 1.6 as a basis for refusing to comply with a subpoena (whether judicial, congressional or otherwise), and we are aware of no case that holds to the contrary. At most, Rule 1.6 may obligate an attorney to object to a subpoena on available substantive grounds, e.g., attorney-client privilege or attorney work product. See id., Comment 26 ("If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, subparagraph (d)(2) requires the lawyer to invoke the [attorney-client] privilege when it is applicable."). See also ABA Formal Op. 94-385 (July 5, 1994) ("[In response to a government subpoena or court order] the lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available grounds (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer's obligations under Rule 1.6 apply.").[3] However, in such a case, the attorney's substantive objections would stand or fall on their own merits. Rule 1.6 would not be relevant.

2. Even if Rule 1.6 had some substantive content, it is a creature of state/local law. The Subcommittee's investigatory and subpoena powers, on the other hand, are grounded in the Constitution itself. See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425, 453 (1977); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975); Barenblatt v.

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[2] "The Comments are intended as guides to interpretation [of the rules], but the text of each Rule is controlling." D.C. Rules of Professional Conduct, Scope.

[3] Even if the rule does not impose such an affirmative obligation, an attorney may still feel compelled, as a practical matter, to raise all available objections in order to protect himself against an ethics complaint.

U.S., 360 U.S. 109, 111 (1959) ("The scope of [Congress'] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); Watkins v. U.S., 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function.").

As such, the Subcommittee's powers are constrained only by the Constitution itself and the rules of the House and the Committee. They cannot be constrained by state/local law, including professional rules of ethics. Indeed, the Supreme Court, on more than one occasion, has struck down state ethics rules that have been deemed to be inconsistent with federal law. See, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (state bar rule limiting admissions to state residents invalid under Privileges and Immunities Clause); In re Primus, 436 U.S. 412 (1978) (holding that application of state bar rule restricting client solicitation violated First and Fourteenth Amendments); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (state bar rule banning lawyer advertising invalid under First Amendment); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (bar association publication and enforcement of fee schedule invalid under Sherman Act); Sperry v. Florida, 373 U.S. 379 (1963) (holding that state bar licensing rule could not prevent attorney from engaging in conduct permitted by federal law).

Indeed, the courts have held that even confidentiality requirements mandated by federal law cannot be invoked to prevent Congress from obtaining access to information it seeks as part of a legitimate investigation. See, e.g., FTC v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 970 (D.C. Cir. 1980).

Historically, the House itself has taken the position that it need not recognize state

privileges,[4] and specifically that state bar rules do not excuse a subpoena recipient from compliance with a congressional subpoena . See, e.g., H. Rep. No. 99-462, reprinted at 132 Cong. Rec. H671 (Feb. 27, 1986) ("[I]t is well-established that no professional or bar association rule can override Federal law, such as the Congress' inherent constitutional investigatory power."); 132 Cong. Rec. H697 (Feb. 27, 1986) (remarks of Congressman Solarz) ("We cannot relinquish [Congress' power to obtain information] to a private group like [a state Bar]").[5]

3. Finally, and in any event, under Rule 1.6(d)(2), an attorney is relieved of the obligation to preserve client confidences and secrets when disclosure is "required by law." See D.C. Rules of Professional Conduct, Rule 1.6, Comment 26 ("The lawyer may comply with the final orders of the court *or other tribunal of competent jurisdiction* requiring the lawyer to give information

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[4] See, e.g., H. Rep. No. 99-462, reprinted at 132 Cong. Rec. H669-70 (Feb. 27, 1986) ("Consistently, congressional committees have acted on their authority to reject the applicability of claims of attorney-client privilege. . . . In recent years, the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce has repeatedly rejected — based on extensive research by the Library of Congress — claims of attorney-client privilege."); Memorandum from Steven R. Ross and Charles Tiefer, Office of General Counsel to the Clerk of the House, to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy on Commerce, Re: Requiring Production of Peer Review Records Declared Privileged by Tennessee Statute (March 17, 1992) (subcommittee has full authority to require production of records deemed privileged by state statute; contempt of Congress statute supersedes state law); Memorandum from Steven R. Ross and Charles Tiefer, Office of General Counsel to the Clerk of the House, to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy on Commerce, Re: Providing Patient Records to a House Investigation (Jan. 30, 1989) (committee may obtain records deemed privileged by state statute; "Supremacy Clause of the Constitution overrides state law because it is not possible for North Carolina law to circumscribe the power of Congress.").

[5] See also Glenn A. Beard, Congress v. the Attorney-Client Privilege: A "Full and Frank" Discussion, 35 Am. Crim. L. Rev. 119, 132 (1997) ("[E]ven a rule of confidentiality without an exception for legal compulsion could not override Congress's constitutional investigatory power.");132 Cong. Rec. H680-81 (Feb. 27, 1986) (Memo from Professor Stephen Gillers, New York University Law School, to Congressman Stephen Solarz (Feb. 19, 1986): "[state] ethics code[s] [are] subservient to federal law") ("Gillers Memo").

about the client.") (emphasis added). See also ABA Formal Op. 94-385 ("The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.") (construing Model Rule 1.6). Accordingly, a Committee or Subcommittee ruling that complied with applicable House and Committee rules and rejected an attorney's objections would render the attorney's disclosure "required by law," thereby eliminating any ethical dilemma for the attorney.

The Committee and Subcommittee are clearly tribunals of competent jurisdiction. See, e.g., Christoffel v. U.S., 338 U.S. 84 (1949) (congressional committee constitutes a tribunal of competent jurisdiction under District of Columbia perjury statute); U.S. v. Moran, 194 F.2d 623 (2d Cir. 1952). Moreover, under 2 U.S.C. § 192, compliance with a congressional subpoena is no longer voluntary once the Committee or Subcommittee has rejected a claim of privilege or other objection and required the witness to respond to a subpoena.

> Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under § 192. Thus if he raises an objection to a certain question . . . the committee may sustain the objection and abandon the question . . . . In such an instance, the witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent. Or the committee may disallow the objection and thus give the witness the choice of answering or not. Given such a choice, the witness may recede from his position and answer the question. And if he does not then answer, it may fairly be said that the foundation has been laid for a finding of criminal intent to violate § 192.

Quinn v. U.S., 349 U.S. 155, 165-66 (1955).

Thus, once the Committee or Subcommittee has rejected an objection, compliance is no longer voluntary, but is required by law (just as surely as a judicial order rejecting an objection and requiring disclosure legally requires compliance). See Memorandum from American Law

Division, Congressional Research Service, to the Honorable Donald W. Riegle, Re: Congressional Committee Practice with Respect to Witness Assertions of the Attorney-Client and Work Product Privileges, at 19-20 (July 7, 1994); Memorandum from Steven R. Ross and Charles Tiefer, Office of General Counsel to the Clerk of the House, to Subcommittee on Asian and Pacific Affairs, Re: Whether Compliance with Ruling of Subcommittee Chairman Is "Voluntary" (Dec. 11, 1985).[6]

This conclusion is consistent with long-standing congressional precedent. In December 1985, the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs issued a subpoena to New York attorney Joseph Bernstein. H. Rep. No. 99-462, reprinted at 132 Cong. Rec. H666 (Feb. 27, 1986). The subpoena sought testimony and documents "relating to the properties and companies allegedly linked" to Mr. Bernstein's clients, Ferdinand and Imelda Marcos. Id. at H667. Mr. Bernstein refused to comply with the subpoena, asserting both attorney-client privilege and confidentiality restrictions imposed by the New York bar rules.

The Subcommittee overruled the objection based on state ethics rules and required Mr. Bernstein to comply with the subpoena. Finding that the ethics rule permitted disclosure where required by law, the Subcommittee stated that Mr. Bernstein was required by law to comply with

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[6] See also S. Rep. No. 104-191, at 10 (1995) ("an order from a congressional committee is no less compulsory than an order from a court"); 132 Cong. Rec. H680 (Feb. 27, 1986) (Gillers Memo: "[a] claim that revealing secrets or confidences in response to a Congressional order to do so would put [the witness] in violation of the Code of Professional Responsibility is frivolous. . . . An order to answer a question, coming from a body with legal power to issue the order, imposes a legal duty that overrides the ethical duty."); Glenn A. Beard, Congress v. the Attorney-Client Privilege: A "Full and Frank" Discussion, 35 Am. Crim. L. Rev. at 132 ("Under the contempt statute, a lawyer is clearly 'required by law' to answer once a congressional committee has rejected his claim of privilege.").

the subpoena because "there is no opportunity, in disobeying the considered ruling of a congressional investigation, to await a further court order before deciding whether to comply." Id. at H670. Accordingly, "once the chairman of the subcommittee had ordered [Mr. Bernstein] to respond to the questions, [he was] under a nonvoluntary legal obligation to do so and could respond consistent with the requirements of the Bar code that they not do so simply on a voluntary basis." Id. at H686 (remarks of Congressman Leach).[7]

In 1989, the Senate Subcommittee on Nuclear Regulation subpoenaed from a District of Columbia attorney documents that related to a former client of the attorney. The attorney refused to comply on grounds of attorney-client privilege. The attorney also expressed concern that disclosing the documents might constitute a violation of applicable ethics rules. The Subcommittee summarily rejected the objection based upon the ethics rules:

> [O]ur reading of the Model Code of Professional Responsibility indicates that a lawyer may reveal confidences and secrets when "required by law or court order." We believe the Subcommittee's determination would qualify under the Model Code as "required by law."

Opinion of Senate Subcommittee on Nuclear Regulation at 13 n.5 (July 19, 1989).[8]

Finally, the Senate Special Committee to Investigate Whitewater Development Corporation and Related Matters ("Special Committee") briefly addressed the issue of whether

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[7] With respect to Mr. Bernstein's attorney-client privilege objection, the Subcommittee found that it was not bound by such common law privileges. 132 Cong. Rec. H669-70. Nevertheless, it went on to consider whether the privilege had been properly asserted, and determined that it had not been. Id. at H670. The Subcommittee then required Mr. Bernstein to comply, id., and, when he did not, the Subcommittee brought a contempt resolution to the floor of the House which was approved by a vote of 352-34. Id. at 3061-62.

[8] The Subcommittee also rejected the claim of attorney-client privilege and required the witness to comply.

disclosing confidential client information to a congressional committee was "voluntary" (although an explicit objection based upon ethics rules had not been raised). The Special Committee contrasted "voluntary" disclosure prohibited by ethics rules with "nonvoluntary" disclosure that is required by law. Refusal of William H. Kennedy, III, to Produce Notes Subpoenaed by the Special Committee to Investigate Whitewater Development Corporation and Related Matters, S. Rep. No. 104-191 at 10 n.7 (1995). The Special Committee found that where a congressional committee has ordered disclosure, an attorney's compliance with that order cannot be considered "voluntary" for three reasons:

> First, a court order and a congressional order stand on a similar jurisprudential footing: each is an order of a competent tribunal with plenary jurisdiction to rule on the privilege assertion. . . .
> . . . .
> Second . . . an order from a congressional committee is no less compulsory than an order from a court. . . .
> . . . .
> Third, the involuntariness of compliance with the Committee's order is clear from consideration of the potential consequences of defiance of the order. Mr. Kennedy's disobedience of the Committee's order subjected him to a serious risk of punishment.

Id. at 10 (1995).[9]

Conclusion

Rule 1.6 is not a substantive rule of evidence or discovery that may be relied on as a basis for refusing to comply with a Subcommittee subpoena. Moreover, as a constitutional matter, the Subcommittee's investigative authority may not be constrained by District of Columbia bar rules. Finally, were an attorney to rely on Rule 1.6, either directly or indirectly, as a basis for refusing to

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[9] The Special Committee ultimately rejected Mr. Kennedy's claims of attorney-client privilege. S. Rep. No.104-191 at 11-12.

comply with a Subcommittee subpoena, and were the Subcommittee to reject the attorney's objection(s), the Subcommittee's ruling would render the attorney's disclosure "required by law" within the meaning of Rule 1.6(d)(2), thereby relieving the attorney of his ethical obligation to preserve client confidences and secrets.

ADDITIONAL VIEWS

During the Subcommittee and full Committee meetings to consider holding Franklin L. Haney in contempt of Congress for his failure to produce subpoenaed records, several Members of the Minority made pointed criticisms of the Majority's handling of this investigation and these contempt proceedings. We believe that a rebuttal is required for the record.

Some in the Minority claim that we have proceeded too quickly and without attempts at compromise with Mr. Haney. But as the detailed correspondence between the Committee and Mr. Haney (attached as an appendix to the Contempt Report) reflects, the Committee made numerous, good faith attempts to secure relevant records and other information from Mr. Haney voluntarily, over a five month period of time, before even authorizing these document subpoenas—and even then we waited several more weeks before issuing them. Mr. Haney was given repeated opportunities to comply or seek a compromise with the Committee in order to avoid these compulsory requests, but he chose instead to attack our investigation publicly and stonewall our attempts to gather information in their entirety.

Even after we issued subpoenas, Mr. Haney proceeded in bad faith, refusing to turn over any responsive documents and raising meritless procedural claims at the last minute in an attempt to justify this contemptible behavior. It was not until the day before the Subcommittee contempt meeting that Mr. Haney made any attempt at compromise, but even then he insisted on dictating to this Committee what records were relevant to our inquiry and what records were "privileged" or "confidential," without providing the Committee with one piece of evidence to support these claims. And it was not until the middle of the full Committee contempt meeting that Mr. Haney finally produced some of the non-privileged materials and a privilege log—even though the Subcommittee already had overruled all of his objections to the subpoenas, including his unsupported claims of privilege, and had ordered full compliance. Thus, we now know that Mr. Haney has been withholding from this Committee for more than half a year information that even he conceded he had no right to withhold—documents relating to his contacts with government officials on the Portals project.

Simply put, that is not the way the process works. Mr. Haney, and apparently some in the Minority, seem to believe that the time for negotiation and compromise is after subpoenas have been issued and after the subpoena return dates have come and gone. We strongly disagree. Under Chairman Bliley's leadership, the Committee has issued subpoenas sparingly and only after voluntary attempts to secure information or compromise have proven unsuccessful. But once the Committee takes the extraordinary step of issuing subpoenas, we expect compliance with them to be timely

and full. Failure to do so after the Committee has considered and rejected all potential objections to the subpoenas is contempt, pure and simple, and subpoenaed parties must know that their refusals to cooperate carry a price.

The dissenters also have criticized our failure to permit Mr. Haney to testify at a public hearing prior to holding him in contempt. In fact, we offered Mr. Haney an opportunity to appear before the Subcommittee to raise objections to the subpoenas, but he chose to send his attorney instead (who was questioned at length by Subcommittee members). This process of hearing and considering objections to subpoenas in a public meeting, with full opportunity for debate, is virtually unprecedented in the Committee's history, and is a sign of the extraordinary due process afforded to Mr. Haney. Furthermore, enforcement of subpoenas for documents is not, and should not be, conditioned upon when or to what Mr. Haney testifies at a public hearing. As former Chairman John Dingell has said, permitting individuals to testify at a hearing prior to receiving all their relevant documents or conducting interviews with them is contrary to long-standing Committee investigative practices and would prevent full and fair questioning of the witnesses. Mr. Haney's testimony has been delayed precisely because of his refusal to produce the requested documents and be interviewed by Committee staff on this matter.

Apparently in a partisan attempt to undermine this investigation, certain Members of the Minority have attempted to re-write the history of congressional investigations to support their view that we are on a "fishing expedition" and a "partisan witch hunt." They have alleged on various occasions that we lacked "probable cause" to issues these subpoenas, that the subpoenas were overbroad, and that our investigation has uncovered no "evidence of wrongdoing" to justify enforcing them against Mr. Haney. With respect to the first two claims, we would urge all Members to review the legal analysis performed by the experts at the Congressional Research Service's American Law Division, which solidly refutes these claims and is appended to the Contempt Report.

As for the claim that we lack "evidence of wrongdoing," let us make three related points. First, regardless of what the evidence gathered to date shows or does not show, we do not understand its legal relevance to the question that was before the Committee—Did Mr. Haney have any lawful basis upon which to withhold the subpoenaed documents? Surely, the dissenters do not believe that lawful subpoenas can be ignored by subpoena recipients simply because those recipients (or certain Members) think that an investigation to date has not produced evidence of the recipients' wrongdoing. We have been seeking these records from Mr. Haney since the very beginning of our investigation, and we should not allow evidence gathered from others during the period of his recalcitrance to eliminate or reduce his independent obligation to provide all requested materials. To do so would reward delay and obstruction, and likely would encourage others to not provide prompt and complete cooperation with congressional investigations.

Second, the assumption underlying the dissenters' view—that evidence of wrongdoing is a condition precedent to the issuance and enforcement of congressional subpoenas—is demonstrably false. As

past practices of this and other committees of Congress show, the oversight jurisdiction and responsibilities of Congress are not confined to criminal violations. For example, this Committee's 1982 contempt report on Interior Secretary James Watt—which was not even prepared until six months after the full Committee voted to hold him in contempt—does not contain a single allegation of wrongdoing by Mr. Watt, nor any evidence of wrongdoing by him. Even in the contempt report held up by some in the Minority as a model—that involving the Bernstein brothers' failure to testify about their dealings with Ferdinand Marcos—there is absolutely no evidence of wrongdoing of any kind. In fact, virtually the entire factual section of that report consists of allegations contained in newspaper articles, without any discussion of the subcommittee's investigative efforts or findings as to whether those allegations were accurate (other than the issuance of subpoenas to the Bernstein brothers). In all of these examples, the question was not "What wrongdoing has been proven so far?," but instead was "On what basis is information being withheld from Congress?" That is what we have been asking throughout these contempt proceedings, and Mr. Haney's answers have been far from satisfactory.

Third, we take strong issue with the dissenters' one-sided characterization of the facts developed during the course of this investigation. Not surprisingly, the individuals involved in the events at issue, who have a strong interest in defending the Portals deal and their own involvement in it, have denied in Committee staff interviews or carefully worded testimonial proffers any improper or illegal conduct. But as we have gathered more documentation and begun the process of re-interviewing these individuals, it has become clear that there are many unresolved questions about the efforts of Mr. Haney and his representatives to influence government officials, and what impact those efforts may have had on agency decision making. For example, we now know that the FCC's Managing Director, the top administrative officer who was ostensibly in charge of the relocation issue, was never advised of private meetings between FCC political officials and Mr. Haney and his representatives, including Mr. Knight and Mr. Sasser. We also now know that FCC political officials overruled a January 1996 recommendation by the Managing Director that the Commission withdraw its conditional acceptance and instead reject the Portals space assignment. And each new set of documents we receive about the $1 million fee and the work performed for it raises more questions than it answers. (An earlier, more detailed rebuttal of some of the Minority's misleading and inaccurate statements with respect to this investigation is appended to these Additional Views as Attachment A.) Do the conflicting evidence and unanswered questions prove that anyone did anything improper or illegal? No. But do they warrant further investigation? Absolutely yes.

On the question of attorney-client privilege, we believe the Contempt Report makes clear that the Subcommittee's decision to overrule Mr. Haney's claims of privilege was based on a sound legal analogy to the judicial context, rather than on Congress' inherent right to reject even valid claims of privilege if necessary for the performance of its constitutional functions. Thus, the Subcommittee did what virtually every court in the country would have

done—we rejected blanket assertions of privilege devoid of any affirmative showing by Mr. Haney that the elements of the privilege were satisfied as to any particular document or that his relationship with Mr. Knight was based predominantly upon the solicitation or receipt of legal advice. We believe this determination is supported by the subsequent review of other materials over which Mr. Haney had vigorously claimed privilege—those that were recently produced to the Committee by Mr. Knight's law firm. We asked Mr. Morton Rosenberg—a Congressional Research Service expert on attorney-client issues whom the Minority often relied upon for legal advice when it ran this Committee—to review and analyze 35 of these claimed privileged documents. He found that 34 of the 35 claims of privilege likely would not be sustained by a reviewing court. Mr. Rosenberg's analysis, appropriately redacted, is appended to these Additional Views as Attachment B.

We also note that, as compared to our Minority predecessors on this Committee, we handled Mr. Haney's claims of privilege in a far more open, fair, and considered fashion. We have appended to these Additional Views, as Attachment C, an affidavit from the former chief counsel and staff director for then-Chairman Dingell, who explains the "process" by which the then-Chairman unilaterally ruled against all 30 claims of privilege raised by subpoenaed parties over a 10-year period.

Finally, in an attempt to paint the current investigation as part of a political smear campaign against a close confidant of the Vice President, Mr. Peter Knight, some in the Minority have taken to reciting or attaching to their correspondence one-sided and generally inaccurate commentary by one or two journalists who had criticized the Subcommittee's recent investigation into the Department of Energy's funding of Molten Metal Technology (another client of Mr. Knight's). They have ignored, however, the favorable reporting by the Washington Post, Time magazine, and other news organizations on this same matter. We also want to emphasize that the Subcommittee initiated the Molten Metal investigation at the urging of the Minority staff, and as an outgrowth of the Committee's overall programmatic review of the Office of Science and Technology. That review has led to numerous changes in the Office's management and operations, which we believe will improve the effectiveness of its technology development efforts.

The issue here is Mr. Franklin Haney's illegitimate refusal to provide subpoenaed documents. That is what the Contempt Report is about. For all of the above reasons, we strongly urge the adoption of the Contempt Report by the House of Representatives, followed by a speedy referral of this matter to the U.S. Attorney for the District of Columbia for prosecution under the criminal contempt statute.

TOM BLILEY.
W.J."BILLY" TAUZIN.
MICHAEL G. OXLEY.
MICHAEL BILIRAKIS.
DAN SCHAEFER.
JOE BARTON.
CLIFF STEARNS.
JAMES C. GREENWOOD.

MICHAEL D. CRAPO.
STEVE LARGENT.
RICHARD BURR.
BRIAN P. BILBRAY.
CHARLIE NORWOOD.
RICK WHITE.
JOHN SHIMKUS.
J. DENNIS HASTERT.
BILL PAXON.
CHRISTOPHER COX.
RICK LAZIO.
BARBARA CUBIN.

ATTACHMENT A

ONE HUNDRED FIFTH CONGRESS

TOM BLILEY, VIRGINIA, CHAIRMAN

W.J. "BILLY" TAUZIN, LOUISIANA
MICHAEL G. OXLEY, OHIO
MICHAEL BILIRAKIS, FLORIDA
DAN SCHAEFER, COLORADO
JOE BARTON, TEXAS
J. DENNIS HASTERT, ILLINOIS
FRED UPTON, MICHIGAN
CLIFF STEARNS, FLORIDA
BILL PAXON, NEW YORK
PAUL E. GILLMOR, OHIO
SCOTT L. KLUG, WISCONSIN
JAMES C. GREENWOOD, PENNSYLVANIA
MICHAEL D. CRAPO, IDAHO
CHRISTOPHER COX, CALIFORNIA
NATHAN DEAL, GEORGIA
STEVE LARGENT, OKLAHOMA
RICHARD BURR, NORTH CAROLINA
BRIAN P. BILBRAY, CALIFORNIA
ED WHITFIELD, KENTUCKY
GREG GANSKE, IOWA
CHARLIE NORWOOD, GEORGIA
RICK WHITE, WASHINGTON
TOM COBURN, OKLAHOMA
RICK LAZIO, NEW YORK
BARBARA CUBIN, WYOMING
JAMES E. ROGAN, CALIFORNIA
JOHN SHIMKUS, ILLINOIS

JOHN D. DINGELL, MICHIGAN
HENRY A. WAXMAN, CALIFORNIA
EDWARD J. MARKEY, MASSACHUSETTS
RALPH M. HALL, TEXAS
RICK BOUCHER, VIRGINIA
THOMAS J. MANTON, NEW YORK
EDOLPHUS TOWNS, NEW YORK
FRANK PALLONE, JR., NEW JERSEY
SHERROD BROWN, OHIO
BART GORDON, TENNESSEE
ELIZABETH FURSE, OREGON
PETER DEUTSCH, FLORIDA
BOBBY L. RUSH, ILLINOIS
ANNA G. ESHOO, CALIFORNIA
RON KLINK, PENNSYLVANIA
BART STUPAK, MICHIGAN
ELIOT L. ENGEL, NEW YORK
THOMAS C. SAWYER, OHIO
ALBERT R. WYNN, MARYLAND
GENE GREEN, TEXAS
KAREN McCARTHY, MISSOURI
TED STRICKLAND, OHIO
DIANA DeGETTE, COLORADO

JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

June 16, 1998

The Honorable John D. Dingell
Ranking Member
Committee on Commerce
2322 Rayburn House Office Building
Washington, D.C. 20515

Dear John:

I am writing to express my deep disappointment over your latest letter to me on the Committee's Portals investigation, which I understand your staff promptly distributed to the media. It is filled with countless inaccuracies, reckless accusations, and selectively misleading information -- all designed to portray the Committee's leadership in a negative light and to undermine an ongoing Committee investigation.

Questions surrounding the planned relocation of the Federal Communications Commission (FCC) to the Portals first came to our attention in an October 13, 1997 *Business Week* article. The article states: "If nothing else, the chain of events involving the Portals suggests that someone may have interceded to get a real-estate developer a sweet deal, which resulted in a larger [political] donation." As you know, since that article, and since the beginning of this investigation, there has been great concern among members of Congress regarding the wisdom of the FCC move given these unresolved questions. In fact, the FCC has continued to look to Congress to signal our support for the move, before the FCC will commit to participate. This stalemate is costing taxpayers more than $1 million a month in rental payments on the vacant Portals building. Given this situation, several senior members of this Committee and within Congress have suggested, and are considering, legislation to stop the FCC's move or the payments to the partnership. In light of some of the troubling facts that have come to light in this investigation, we may need to consider statutory changes to the FCC's administrative structure and the powers and duties of the FCC Chairman and Managing Director. It is imperative that we do what is within our power to answer these questions.

The purpose of the business meeting scheduled for tomorrow is to receive records that are responsive to duly authorized subpoenas and, if necessary, consider contempt for those who do not comply with the Committee's rulings. We have been attempting to obtain these records voluntarily since last December. However, we have been met with repeated refusals to provide such documents,

without explanation, detail, or legitimate efforts at compromise on the part of Mr. Haney and his associates. Because of those actions, I was left with no choice but to execute subpoenas for these documents.

As you know, and as you have stated in the past, it is this Committee -- not the private parties -- that determine what information is relevant for our investigative purposes. Furthermore, it is entirely proper and reasonable to request and, if necessary, to subpoena all relevant documents prior to any hearings on this matter. Having sat through many hearings and business meetings under your leadership, I am confident that, if you were confronted with similar conduct with respect to any of this Committee's efforts to gather records, you would have pursued the same course of action. I am disappointed that you have chosen this path of confrontation with respect to a legitimate investigation.

Unfortunately, your most recent letter is just another example in a recent pattern of attempts by the minority to subvert this Committee's oversight efforts and prevent the full truth from seeing the light of day. While your personal and partisan attacks are deeply disturbing and unwarranted, I am just as concerned about the institutional damage that the minority's actions may be causing, and the dangerous message they may be sending to private and governmental parties about their duty to comply with lawful requests of the Committee for information. I would have thought that you would share that concern, and would have considered such consequences before taking such reckless actions.

My staff has prepared for me a more detailed rebuttal of the charges contained in your letter, which is enclosed for your review. I would urge you to read it carefully before making any further public statements about this matter.

Simply put, John, I expected -- and I certainly deserve -- better from you.

Sincerely,

Tom Bliley
Chairman

Attachment

cc: Members of the Subcommittee on Oversight and Investigations

Committee on Commerce Memorandum

June 16, 1998

Re: Response of the majority staff to the June 11, 1998 letter from the minority on the Portals investigation

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The sheer number of inaccuracies and misrepresentations in the minority's letter prevents a point-by-point rebuttal, but the majority staff will attempt to address below, in detail, some of the more important flaws contained in the letter.

Specific Inaccuracies and Misrepresentations

1. *The Scope of the Subcommittee's Portals Investigation:*

The minority alleges that "the entire Subcommittee investigation is predicated on the possibility" of a contingent fee arrangement between Mr. Haney and Mr. Knight. To buttress its allegation, the minority selectively quotes from just one of the many letters the majority has sent to the private and governmental parties involved in this matter, while conveniently ignoring or overlooking the other questions the majority has repeatedly stated are under investigation. Chairman Bliley's and Chairman Barton's initial letters to Mr. Haney, the Federal Communications Commission (FCC), and the General Services Administration (GSA) all highlight an October 1997 article that appeared in one of the nation's most award-winning magazines, *Business Week*, which raised serious questions about whether the GSA-Portals lease and the FCC's move to that site may have been improperly influenced by political or other non-meritorious considerations. In case there was any doubt, in a subsequent November 21, 1997 letter to Mr. Haney's attorney explaining the Committee's interest in this matter, Chairman Bliley and Chairman Barton stated that "[t]his Committee has both the right and the duty to inquire as to whether this planned relocation is being conducted to further the efficient and effective execution of the FCC's statutory responsibilities, or whether the relocation has been influenced by other, less legitimate considerations." Similarly, in a follow up letter to Mr. Haney dated December 15, 1997, Chairman Bliley and Chairman Barton described the Committee's investigation as whether the planned relocation of the FCC "has been improperly influenced by political considerations."

In short, the majority has consistently described its investigation as one in which it is trying to better understand the facts, circumstances, and reasons surrounding this planned move of the FCC -- an agency that falls squarely within the jurisdiction of this Committee. While the $1 million payment to Mr. Knight certainly is related to this broader investigation, it in no way constitutes the "entire Subcommittee investigation." But when the minority's letter begins with the wrong premise -- as it clearly does -- it should come as no surprise that the conclusions reached in the letter are likewise flawed. In this sense, the minority appears to have taken a move right out of Mr. Haney's play book, which is to mischaracterize the purpose of the majority's investigation and then state that that purpose has been satisfied in Mr. Haney's favor.

2. *The Substance of Committee Interviews of Mr. Bernie Wunder:*

With respect to the minority's allegations about what Mr. Wunder said and did not say, the June 11 letter is characteristically inaccurate. Mr. Wunder did not say that "he used the term 'performance fee' only to denote" that the fee was not a retainer or for hourly work. In fact, when asked in his first interview with the Committee's majority and minority staff about what he meant by the term "performance fee," he said (according to contemporaneous staff notes): "For example, *if* this legislation gets passed, this contract signed, this provision included..." (emphasis added). Committee staff then questioned Mr. Wunder about whether he was aware of any other similar "performance" fees earned by members of his firm, to which he replied: "This was the largest performance-based incentive payment I have seen by far. I don't even remember seeing a half-million-dollar payment." When re-questioned at a second interview several months later, Mr. Wunder stated that he did not know whether the $1 million was a contingency fee, and did not mean to imply that a performance fee was the same thing as a contingency fee -- although he conceded that he himself had never received a performance fee for a failed outcome. Mr. Wunder also discussed at some length the fact that he used the term "performance fee" to denote payment for the completion of a particular project, as opposed to ongoing work. In this same vein, Mr. Wunder did not -- as the minority states in the June 11 letter -- confirm that other non-Portals work was done by Mr. Knight for Mr. Haney, only that it appeared so based on the continuing series of invoices for expenses. And Mr. Wunder did not know whether the $1 million fee was meant to cover any additional non-Portals work.

Most notable, however, was Mr. Wunder's recollection of his conversation with Mr. Knight around the time that Mr. Knight received the $1 million check in April 1996. Mr. Wunder said, according to contemporaneous staff notes, that Mr. Knight "came to see me right before the check came in" because "Peter wanted to take the money directly" rather than run the check through the firm, as required by the partnership agreement. He said that Mr. Knight was confused about when he would receive the money if it went through the firm because the check was received in 1996 but was for work done in 1995. Mr. Wunder, however, assured him that he would get the distributions in 1996, since the fee was for work done in 1995 and the firm's policy was that distributions were made based on "when the work was performed, not when it [the fee] was paid." This contemporaneous discussion between Mr. Wunder and Mr. Knight, supported by the invoice's reference to services rendered in 1995 and the Haney-Knight agreement to bill on a "project-by-project basis," appears flatly inconsistent with the current claims of Mr. Knight and Mr. Haney that the $1 million fee was to cover multiple projects for the time period 1995 through 1998.

3. *Accusations Against and About Mr. Bill Diefenderfer:*

As for Bill Diefenderfer, a former partner of Mr. Wunder's and Mr. Knight's, the minority's allegations go beyond inaccurate to downright reckless. Mr. Diefenderfer was not the original source of disclosure of the $1 million fee -- an allegation that minority makes in both its June 11 letter to Chairman Bliley and Chairman Barton and its recent June 9 letter to Mr. Diefenderfer, despite the fact that minority counsel was told by the majority staff weeks ago that her understanding was absolutely false. Indeed, and as the minority staff has always known, the majority staff questioned

Mr. Knight, in the presence of the minority staff, about allegations he had received a $1 million payment from one of his clients, back in September 1997 -- *long before* anyone on the Committee spoke to Mr. Diefenderfer about this allegation.

Even more pernicious is the additional allegation the minority staff has been peddling to people outside of the Committee -- that Mr. Diefenderfer has been leaking the actual $1 million invoice and check "all over town." While Mr. Diefenderfer certainly can defend himself against such allegations -- which, if they had been made outside of the congressional context, would likely be considered slanderous -- the majority's understanding of the facts is that neither Mr. Diefenderfer nor any of his lawyers or accountants has ever had possession of the $1 million invoice.

Furthermore, the implication in the minority's June 11 letter that the minority staff has been unable to interview Mr. Diefenderfer on this matter and that the majority is "afraid to hear from [him] in the minority's presence" is typically outrageous. Not only was the minority invited to the majority staff's interview with Mr. Diefenderfer, but it is the majority's understanding that minority counsel conducted her own telephone interview with Mr. Diefenderfer – during which the minority apparently failed to ask basic questions about his knowledge and conversations about the $1 million payment, but instead accused him of leaking information about the fee. In fact, Mr. Diefenderfer stated as much in his June 15 reply to Mr. Dingell and Mr. Klink. According to Mr. Diefenderfer:

> Subsequent to my interview by majority staff I was contacted by telephone by a woman who represented herself as a lawyer working for you gentlemen. She [minority counsel] proceeded to interview me by phone. During the interview she affirmatively stated that I had possession of a copy of the check reflecting the $1 million payment in question to the firm. I told her that I did not have a copy of that check nor did I ever have a copy of that check in my possession. She reminded me that I could be summoned to testify under oath to that statement. I informed her that I would welcome that opportunity. Subsequent to that conversation I verified that the lawyers and accountants representing me in my financial discussions with my former firm do not and never did have a copy of that check in their possession.

It also should be pointed out that Mr. Diefenderfer's interview with Committee staff occurred before either he or the Committee staff knew who the source of the payment was. Now that the source, Mr. Haney, has identified himself and expressly invoked client confidentiality provisions, Mr. Diefenderfer – after consultations with his former firm in which he requested authority to provide further information to the Committee but never received permission -- has declined to do so voluntarily.

The minority's apparent outrage at this fact is peculiar given its lack of any concern that the two key individuals with the most direct knowledge of the $1 million fee -- Mr. Haney and Mr. Knight -- also have refused to be interviewed, even on such a clearly non-privileged subject. The majority notes that the minority has not sent any letters to them requesting interviews.

4. *The Majority's Efforts to Obtain Relevant Information from Other Individuals:*

As for the minority's accusation that the majority has "systematically avoided" key witnesses such as Ms. Hazel, Mr. Grigg, Mr. Wagster and Mr. Hutchens, it would be laughable if it were not such a serious and inflammatory charge. The following are the *real* facts about each person the minority raised in its letter.

a. Ms. Jewelle Hazel

The minority is correct that the majority staff did not participate in the interview of Ms. Jewelle Hazel, Mr. Knight's executive assistant. But its suggestion that the majority purposely has avoided interviewing her because the majority did "not want to receive information that does not fit its preconceived scenario" is yet another baseless and unwarranted attack. It was the *majority* staff that initially requested to interview Ms. Hazel, but that request was turned down by the managing partner of Mr. Knight's firm because of Mr. Haney's refusal to consent. Because of that refusal, the majority included Ms. Hazel on the list of persons to be subpoenaed, which was authorized by the Subcommittee on April 30. During conversations with the minority staff leading up to that vote, the majority staff indicated its desire to secure information from Ms. Hazel. Minority counsel responded that she thought it was unnecessary to question a mere "secretary" and attacked the majority's motivations for doing so. It is interesting that the minority now believes that Ms. Hazel is such a critical witness.

Despite the opposition of the minority, and following the Subcommittee's authorization of a subpoena for Ms. Hazel, the majority staff -- in accordance with Chairman Barton's public pledge to work with the parties to avoid serving subpoenas if voluntary cooperation could be gained -- contacted the attorneys for Mr. Haney and Ms. Hazel to inquire again as to whether a voluntary interview of Ms. Hazel and other employees of the firm could be conducted with respect to non-privileged matters. After several rounds of telephone discussions, the majority staff invited the attorneys to a meeting to see if an agreement on the process and scope of interviews could be reached. After some reluctance, the attorney for Ms. Hazel finally agreed to attend, and the meeting took place on May 15. At that meeting, the majority staff explained its views with respect to the applicability of the attorney-client privilege to specific topics of potential questioning, and offered to limit the interviews to non-privileged matters. But no agreement was reached at that meeting, whether on the scope of the interview or whether Mr. Haney's attorney would be permitted to attend -- something that the majority staff did not believe was acceptable or proper, given the nature of this investigation. Subsequently, the majority staff placed several phone calls to Ms. Hazel's attorney, but was unable to get any firm response about whether she would agree to be interviewed. Finally, Ms. Hazel's attorney responded that she would agree to be interviewed, but -- at Mr. Haney's insistence -- would not answer certain *non-privileged* questions concerning the work performed for the $1 million fee on the grounds of "client confidentiality."

In essence, they wanted to use the confidentiality rules governing even non-privileged matters as both a sword and a shield -- waiving it when the answers suited their interests, but invoking it with respect to topics that might prove harmful. Thus, the minority's charges that the

majority staff "never followed up" on Ms. Hazel's interview and feared an interview with her are -- like so many other charges in the minority's letter -- without merit. The majority staff simply would not participate in a sham interview designed to frustrate, rather than serve, the truth-finding process. The majority should note that when the majority was apprised that the minority had set up an interview with Ms. Hazel, the majority staff contacted her attorney to gain an understanding of the ground rules for the interview, during which her attorney reiterated his refusal to permit questioning on matters Mr. Haney deemed "secret" (even if not privileged) and stated that he did not know whether Mr. Haney's attorney would be present for the interview. Moreover, given the majority's decision to subpoena further documents from Mr. Haney and Mr. Knight, the majority did not deem it advisable to conduct any such interview with Ms. Hazel prior to the receipt of those documents, as the documents likely would necessitate a re-interview of her.

b. Mr. Steven Grigg

Contrary to the implication of the minority's letter, the majority has, in fact, sought to gain information from Mr. Grigg, but he has refused to be interviewed. Because of that refusal, the majority requested records from him, and he has been cooperative in that effort. While Mr. Grigg may well be called to testify at some point, it will certainly not be before the Committee receives all of the documents requested from him. Once again, the minority's assertion in its June 11 letter that Mr. Grigg already "has supplied all documents requested" is simply false -- he still is in the process of responding to the majority's document request. But what is certainly known already is what Mr. Grigg has stated publicly -- that, even after the 1994 court ruling ordering GSA to proceed with the procurement, then-FCC Chairman Reed Hundt took actions designed to stop the move to the Portals. If true, that appears to be at odds with Mr. Hundt's public statements that he consistently supported the move after the court decision and did not change his views after Mr. Haney became involved in the project.

c. Mr. Wagster and Mr. Hutchens

The majority cannot believe that the minority truly thinks that Mr. Grigg and Mr. Haney – who have refused to be interviewed themselves and, in the case of Mr. Haney, has refused to consent to his other agents being interviewed about even non-privileged matters -- would permit their respective attorneys, Mr. Hutchens and Mr. Wagster, to be interviewed by Committee staff. If they are willing to do so, however, the majority staff certainly will interview them -- once the Committee has received all of Mr. Grigg's and Mr. Haney's documents.

5. *The Involvement of Mr. Haney and Mr. Knight in the Events in Question:*

In the June 11 letter, the minority also alleges that GSA has stated that the key supplemental lease agreement between GSA and the Portals partnership was not negotiated by Mr. Knight and Mr. Haney, and the minority suggests, by parroting a line repeatedly peddled by Mr. Haney's spokesperson, that Mr. Haney was not actively involved in the project until he became a partner in March of 1996 -- "a full three months after the supplemental lease agreement was signed." However, GSA documents and interviews clearly reflect the opposite: active involvement on the part

of Mr. Haney and his representatives, including Mr. Knight and Mr. Wagster, beginning in the summer of 1995. They had no fewer than half a dozen meetings or telephone calls with GSA officials between June 1995 and the signing of the supplemental lease agreement in January 1996, and apparently additional ones with lower level GSA employees during the same time period. GSA documents reflect that, in early August 1995, GSA and an attorney for Franklin Haney met to discuss "if GSA would agree to a fixed rent start date and a cap on the offsets permitted under the lease so as to facilitate bond financing."

The notes from a subsequent meeting -- held on August 14, 1995 in the GSA Administrator's Office with Mr. Haney, Mr. Sasser and Mr. Knight present -- reflect Mr. Knight leading off the discussion by saying that Mr. Haney was willing to make a loan commitment to the Portals partnership but "we need changes in [the] lease," which is then followed by a discussion of a fixed rent commencement date. Other GSA documents reflect that Mr. Knight followed up on this meeting with phone calls to GSA officials about the proposed lease changes, and at the very least attended the lease negotiation sessions -- including the final meeting on January 2, 1996 -- even if the details of the discussion may have been left to the contract lawyers and contract officers. Another set of notes from a meeting on September 22, 1995, between Mr. Haney's representatives and GSA, indicate that Mr. Haney's representatives "several times brought up issues regarding the importance of lease language specifying the FCC as the tenant agency." A participant in that meeting has confirmed this recollection of events in an interview with Committee staff, in the presence of both the majority and the minority staff, and also stated that, on one prior occasion in August of 1995, Mr. Haney and his representatives met with him to discuss the FCC tenancy issue, among other matters.

Even Mr. Haney and his own agents have conceded what the minority appears unwilling to admit or wants to hide. In a March 8, 1996 letter from Mr. Haney's attorney, Mr. Wagster, to GSA, he writes: "Much time was spent during our lease negotiations discussing exactly what provisions were necessary for that securitized financing, and when we concluded those negotiations with SLA #1 on January 3, both GSA and Haney thought the completed lease was sufficient for a securitized lease sale." Similarly, Mr. Knight admitted to the *Associated Press*, in an article from November 1997, that he was hired by Mr. Haney, in part, to work on (in the reporter's words) "an amended lease approved in January 1996 to move Federal Communications Commission staff to a new location." In addition, it is clear that Mr. Haney not only hired Mr. Knight and Mr. Sasser to work on Portals matters in the 1995 time period, but also entered into a written agreement in July 1995 with Lehman Brothers for "services for the negotiation of proposed amendments and the assignment of lease payments under" the GSA-Portals lease.

The minority's letter also conspicuously ignores the evidence gathered to date concerning the numerous contacts between Mr. Haney and/or his representatives, such as Mr. Knight and Mr. Sasser, with top FCC political officials in 1995 concerning the Commission's position on its proposed relocation to the Portals -- meetings that Mr. Andy Fishel, the FCC's top career officer who is charged by statute with the duty to perform the Commission's "administrative and executive functions" under the supervision of the Chairman, was not even informed about at the time or anytime thereafter. Given Mr. Fishel's long-time involvement in the Portals project and his

functions as FCC Managing Director, there are legitimate questions as to why he was not invited to attend these meetings -- most of which occurred off-site at Mr. Knight's office -- and even more questions as to why he was not informed about either the fact or substance of those discussions.

The minority's convenient omission of all the above facts in an attempt to buttress its defense of Mr. Haney and Mr. Knight is breathtaking, and suggests that the minority's claimed interest in a "fair, unbiased investigation" is more illusory than real. While the majority is not yet making any judgments on the evidence to date, the majority does believe that it is sufficient to warrant further investigation into the circumstances surrounding the Portals lease and the relocation of the FCC to that site.

Recent Proffers of Testimony

The majority obviously is aware of the coordinated effort to provide the Committee with a flurry of last-minute proffers from individuals with knowledge of the events in question, in an attempt to prevent the enforcement of valid and lawful subpoenas. With respect to these proffers, the majority wishes to make four points. First, the majority must question the completeness of these proffers, given that all of these individuals have been unwilling or unable to be interviewed by Committee staff about the matters contained in them or otherwise. Second, it appears that the proffers are carefully worded to make certain points without directly conflicting other facts known to the Committee (such as the evidence described above). Third, it appears that some of the information contained in the proffers actually conflict with other facts known to the Committee.

Finally, and most important, the majority fails to see the connection between what these proffers may or may not contain and the purpose of the upcoming Subcommittee meeting. Regardless of the content of these selective disclosures made under questionable circumstances, the simple fact is that the document subpoenas to Mr. Haney, Mr. Knight, and the Firm were lawfully authorized, issued and served, and unless there are valid legal objections to the production of the demanded records, they should be enforced by the Subcommittee. Nothing in these proffers raises any issues with respect to the validity of the subpoenas. Simply because Mr. Knight and Mr. Haney believe that there was no improper influence or wrongdoing involved in this matter does not relieve them from providing lawfully demanded records.

Potential Attorney-Client Privilege Issues

The minority ends its letter by stating that, "given the above investigative lapses by the majority," the Subcommittee is not in a position to "assess the privilege claims by the subpoenaed witnesses, nor are we able to say that all other investigative leads have been exhausted such that overriding attorney-client privilege claims is necessary." But as the foregoing has demonstrated, the "investigative lapses" that the minority complains about are the result of six months of stonewalling and lack of cooperation by Mr. Haney and his associates. Furthermore, the subpoenaed witnesses have yet to make any sufficiently specific claims of attorney-client privilege with regard to particular documents, so there is -- at this time -- no credible privilege claims for the Subcommittee to assess. As the minority surely knows, blanket or overly general assertions of privilege are routinely rejected

by the courts, and the burden on establishing privilege is on the claimant, not those seeking to secure the information. Thus, the majority rejects the minority's notion that Mr. Haney and his associates can withhold critical non-privileged information from the Committee and then claim that the Subcommittee does not have a sufficient basis to seek to override their claims of privilege.

Moreover, the assumption, contained throughout the minority's letter, that the Committee plans to override *valid* claims of privilege finds no support in any of the majority's letters or statements. To the contrary, the majority has made clear to the parties that it will look closely to analogous judicial authority when determining the validity of any specific privilege claim. Surely, the minority is not suggesting that Congress has to satisfy a *higher* burden than mere civil litigants in attempting to obtain information over which private parties claim a privilege.

The minority's letter also proceeds on the erroneous assumption that the only material these subpoena recipients are withholding would be protected by the attorney-client privilege. In fact, Mr. Haney and Mr. Knight have refused to provide certain categories of documents on the grounds of pertinency and jurisdiction as well. And because Mr. Haney so far has refused the Committee's repeated requests, beginning in January of this year, to even provide a log of the documents he is withholding, the majority is left with no choice but to proceed as planned on June 17. His actions to date have been utterly contemptible.

The Hypocrisy and Partisanship of the Minority's Complaints

Leaving aside all of the inaccuracies, the minority's letter is equally disturbing in its blatant hypocrisy. The standard to which the minority would now hold the majority's investigations is one that the minority apparently did not deem appropriate to apply to its own investigations when the minority ran this Committee. The majority has reviewed closely the past practices of this Committee with regard to the issuance and enforcement of investigative subpoenas, and believe that, if anything, the majority's approach to this investigation is more reserved and more responsible than those undertaken during Mr. Dingell's leadership. It is the majority's understanding that, during the substantial portion of Mr. Dingell's chairmanship, he routinely considered, and apparently always overrode, claims of attorney-client privilege, usually in the confines of his office without any written record of exceptional need or Subcommittee deliberation. The majority also recalls that, in 1981, the Committee vigorously pursued through the use of subpoenas documents relating to a decision making process *then in progress* by Secretary Watt, even though the Committee was conducting what Mr. Dingell described as a "legislative oversight" review with no evidence or even allegations of misconduct by Mr. Watt.

In its rush to undermine the majority's investigation, the minority clearly has been talking out of both sides of its mouth. For instance, the minority first claims that the majority is avoiding key witnesses because "it is easier to make allegations when unencumbered by facts." But then the minority quotes Chairman Barton as saying that the majority is not making any allegations of wrongdoing against any of the parties, with the implied suggestion that therefore the use of subpoenas in this circumstance is unwarranted. The minority was right the second time -- *we* [the majority] have not made any allegations of misconduct against any of the parties. Contrary to the

minority's apparent belief -- as demonstrated by the infamous David Baltimore investigation, in which Mr. Dingell's staff made public accusations of fraud and misrepresentation -- the majority does not believe that it is the role of the Committee to make serious and potentially criminal allegations against government officials or private parties, and then try to prove them (especially when the minority ultimately turn out to be wrong, as it was in the Baltimore case). Rather, the majority believes that, when allegations of possible misconduct or maladministration are raised publicly, or otherwise brought to the Committee's attention, by credible sources (as in this case with *Business Week*), it is the Committee's duty to investigate the matter to determine whether any such misconduct occurred and, if so, whether legislative action is necessary to correct it or prevent its reoccurrence.

As presumably the above discussion has made clear, the majority is growing increasingly dismayed over the purely partisan tactics engaged in by the minority with respect to the Committee's oversight matters. The contrast between the minority's overtly partisan public acts and the private communications among staff and Members is indeed shocking. For example, prior to the Subcommittee's April 30 subpoena authorization vote, the minority staff told the majority staff that Mr. Haney's complete refusals to cooperate probably warranted subpoenas and that the minority might be willing to support subpoenas that were more targeted than the majority proposed. At the minority staff's suggestion, the majority amended the authorization motion to include language that permitted the Committee to issue subpoenas for information up to and including what was voted upon, which would allow the staffs to discuss narrowing the scope of the subpoenas prior to their actual service. However, at the Subcommittee's public business meeting the next day, the minority's comments did not focus on the scope of the subpoenas. Rather, the minority asserted that the majority had no basis to issue any subpoenas, and claimed that the majority was on a partisan fishing expedition. And when the majority staff contacted the minority three days after the Subcommittee vote to follow up on its suggestion about limiting the subpoenas' scope, the majority staff was told "you should do what you want. No meeting [between the staffs] is necessary." Similarly, Mr. Dingell recently sent Chairman Bliley another inflammatory and partisan letter on the Portals investigation, charging that the majority was attempting to withhold meeting transcripts from the public, even though the majority was following the very policy that Mr. Dingell had instituted when he was chairman. And when the majority requested that the minority agree, in writing, to abide by the policy it had established, the minority refused to do so.

Likewise, with regard to the Committee's investigation into Molten Metal's contract with the Department of Energy, the majority began that investigation at the urging of the minority staff, who actually edited a draft of the Committee's first information request to the Department, which was supposed to be a joint letter for both the majority's and the minority's signatures. At the last minute, the majority staff was told that the minority could not sign the letter because of "political considerations," but the majority was assured that the minority would "support" the Committee's investigation. In fact, the majority staff was privately told by minority counsel, on several occasions throughout the investigation, that the circumstances surrounding the company's funding were highly suspicious. Nevertheless, during the four public hearings that were held on Molten Metal, the majority was routinely subjected to personal and partisan attacks from the minority for investigating this matter and holding those hearings. Not once, during four long hearings, did the minority raise

publicly any questions about the circumstances surrounding the Department's funding of this company.

Interestingly enough, when the minority decided to pursue its own investigation into whether the Clinton Administration issued a report on the lack of skilled workers as a "political payoff" -- in the words of the minority oversight counsel -- to Silicon Valley campaign contributors, minority counsel informed the majority that it had "no role" to play in that investigation. Yet, when the majority attempts to look at whether there was political influence with regard to Molten Metal's funding or the FCC's relocation, the majority is accused of partisan witch-hunting.

The majority believes that, with respect to the Committee's Portals investigation, serious questions remain unanswered about the conduct of all the various parties, including GSA, the FCC, Mr. Haney, Mr. Knight, and Mr. Sasser (who, despite being a sitting U.S. Ambassador and former Senator, also has refused to cooperate with the Committee's investigation, and whom documents show set up a meeting in the Executive Office of the President for him and Mr. Haney to discuss "the proposed move of the FCC to the Portals property."). Unfortunately, the majority's efforts to answer these questions have been slowed by Mr. Haney's contempt for this Committee's processes. As the minority's recent letter to GSA's Mr. Peck acknowledges, the Committee's interviews continue to raise further questions about the circumstances surrounding the planned relocation of the FCC to the Portals. These questions are not of concern to only the majority, but also to the FCC and the Department of Justice which, as the minority knows, has launched its own investigation into this matter. The majority therefore will continue to pursue vigorously all available sources of information, including Mr. Haney and Mr. Knight, and will hope that the minority will put aside partisanship, get its facts straight, and stop trying to defend those who are intent on obstructing the Committee's lawful attempts to gather relevant information.

ATTACHMENT B

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Memorandum June 23, 1998

TO : Honorable Tom Bliley, Chairman,
House Committee on Commerce
Honorable Joe Barton, Chairman, House Subcommittee
on Commerce
Attn: Tom DiLenge

FROM : Morton Rosenberg MR
Specialist In American Public Law
American Law Division

SUBJECT : Assessment of Validity of Assertions of Claims of Attorney-Client Privilege For Documents Produced by Wunder, Knight, Levine, Thelen & Forcey

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After being served with a subpoena for documents relating to his representation of Franklin Haney on June 4, 1998, Peter Knight, a partner in the law firm of Wunder, Knight, Levine, Thelen & Forcey (WKLTF), advised the Subcommittee that all the documents in question were in the custody and control of the firm. On June 8, the Committee issued a subpoena duces tecum to Dennis Thelen, the managing partner of the firm, as custodian of WKLTF's documents. Mr. Thelen was offered the same opportunity as Mr. Haney to provide written objections to the subpoena in advance of the return date, June 17, and to appear at the Subcommittee's business meeting to present his objections orally. Mr. Thelen submitted no written objections in advance, and on the day of the meeting supplied the Committee with a privilege log designated "Privilege Log of Franklin Haney Company documents (Documents Not In Knight Voluntary Production)". The log listed 35 documents purportedly covered by the attorney-client privilege and withheld at the direction of Mr. Haney.

After being given the opportunity to state his objections, the Committee rejected Mr. Thelen's objections, and after directing that he produce the documents, voted him in contempt under 2 U.S.C. 192, 194 upon his refusal to comply. However, after being voted in contempt, Thelen agreed to produce the documents and the contempt vote with respect to him was rescinded.

You have asked that we review the 35 documents initially turned over to assess whether the claims of attorney-client might have been sustained by a reviewing court.

In our memo to you of June 16, 1998, at pp. 13-18, we detailed the requirements the courts have established to sustain a claim of attorney-client privilege. In brief summary,

a claimant must demonstrate that a communication was made in confidence to an attorney, by a client, for the purpose of seeking or obtaining legal advice. The only communications protected by the privilege are those that will disclose what the client said in confidence to the lawyer and intended to be confidential. But where a client communicates information to his attorney with the expectation that the attorney will relay the information and communication to others, the communication is not protected. Moreover, the courts have held that communications *by an attorney to the client* are not automatically privileged. These courts have reasoned that an attorney's communication can be privileged only derivatively, if the disclosure of the attorney's communication would reveal the context of the client's communication to the attorney. Also, when advice to a client is based on information supplied to the attorney from the public record it has been held to be non-privileged. It is client confidences, not attorney advice, that are protected by the privilege. Thus, pre-existing documents and financial records not prepared by a client for the purpose of communicating with a lawyer in confidence are not protected. Further, the attorney must be "acting as a lawyer". The attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice.

We have reviewed the 35 documents listed in the log and found only one that would appear clearly protected by the privilege. The rest of the documents are arguably not seeking predominantly legal advice; or are informational letters from other attorneys which do not seek legal advice or assistance; or are communications transmitting public documents or information; or ones that seek the attorney to engage in other non-legal services for the client.

Document No. 6, a memo from Haney to Knight, dated April 19, 1996, discusses particular lease provisions for [redacted] project that the client believes are vital and states to Knight that "I would be pleased to discuss any of these issues with you at your convenience", an apparent solicitation of legal counsel.

Documents Nos. 1-5, 7-9, and 11-13 appear to be seeking largely business advice and services and not predominately legal services. Number 1, from Haney to Knight, dated April 1, 1996, discusses the Department of [redacted] need for transitional office space and the fact that the agency had set up a working group to contact Robert Peck of the General Services Administration (GSA) to "set up a meeting and lay out the issues". (Throughout the documents Peck appears as an important contact point with GSA whom Knight knows). Haney wants the agency to use the [redacted] as the "swing space" it requires and suggests that two things be done: set up a parallel group "to plan and implement [the Department's] long term space solutions"; and "stabilize the leases in [redacted] to make 250,000-300,000 square feet available for the Department". The direction is not entirely clear that it is seeking predominantly legal services from Knight.

Documents 2-5, 7-9, and 11-14, are handwritten notes to the file on meetings or telephone conversations between Knight and Trapasso and GSA and Treasury Department officials and for Haney on financial strategies on the structuring of various projects including [redacted] and Portals [redacted] Few, if any legal issues are raised.

Documents 17, 25-30, and 33-34 are a series of letters from Thomas J. Mancusso, a Haney attorney located in Denver, Colorado, that give reports to Haney on the progress of financing and refinancing negotiations with respect to Haney projects involving [redacted]. None of the documents are directed

CRS-3

to Knight as the primary recipient; all primarily or exclusively involve financing and leasing considerations, all are informational and indicate that Mancusso is the lead, if not sole, attorney responsible for the negotiations; and none task Knight with any responsibility for legal services. Document No. 34, undated, contains handwritten notes to the file on financing matters and his contacts with GSA official Peck.

Documents 10, 15, 16, 18-22 and 24 are transmissions of public documents or notes on public information from Knight or Trapasso to Haney. For example, Document 10 transmits information taken from publically available 10K and 10Q filings at the Securities Exchange Commission on [redacted] by Knight to Haney without comment.. Documents 20 and 21 are transmissions of photocopies of [redacted] debt issues of the [redacted] from an [redacted] publication. Document 19 is a fax transmission from Haney to Knight of a Washington Post article describing a congressional committee investigation involving "a $680 million mistake" by Robert Peck, administrator of GSA's real estate program, who has been a key contact of Knight's at GSA. The cover page states "FYI. Please contact to discuss". Document No. 22 is the transmission of an article from Haney to Trapasso dealing with court approval of a settlement of a real estate controversy. Haney's note states "Jody, wanted to share this additional information on [redacted] deal with you". None of the foregoing documents in any way requests either confidentiality or legal services. Documents 15, 24, and 35 are notes to the file on the composition of, and recent incumbents and appointees to, the [redacted] with no indication of involvement with any Haney project or relation to any legal services to be rendered. Document No. 16 is a note to the file containing political notes and comments about a local (Washington, D.C. area) county board of supervisors. Document No. 18 is a transmittal of an article relating the issuance of an IRS ruling on exempt bonds issued by the [redacted] which Haney in his cover note stated "This ruling shows there is no legal impediment to GSA/Treasury moving forward and provides a strong precedent for the policy justification".

Document No. 23 is a letter to Trapasso from Haney, dated December 16, 1996, dealing with the renewal of a lease by [redacted] The operative portion of the letter is a direction to Trapasso to contact "Bob Peck or other appropriate GSA officials" to inquire into the status of the lease and encourag[e] them to move forward as quickly as possible. Further delays increase the tension and are counterproductive". Document No. 32 is a memo to [redacted] urging him not to postpone extending the lease dispute GSA requests for such postponement. A copy of the memo was forwarded to Knight by Haney with a handwritten note on the memo indicating that [redacted] had in fact delayed the extension. There is no indication of an intent in either document that legal services were to be performed.

In summary, then, we conclude that, while the matter is not free from doubt, it is likely that a reviewing court would find that all the documents, except No. 6, are not protected by the attorney-client privilege.

ATTACHMENT C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT
DEPARTMENT OF
THE TRIAL COURT
Civil Action No. 95-7378-J

----------x

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

-against-

PHILIP MORRIS INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T INDUSTRIES P.L.C., LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., NEW ENGLAND WHOLESALE TOBACCO CO., INC., ALBERT H. NOTINI & SONS, INC., THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC., and THE TOBACCO INSTITUTE, INC.,

Defendants.

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AFFIDAVIT OF MICHAEL F. BARRETT, Jr.
IN SUPPORT OF DEFENDANTS' SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO COMMONWEALTH'S MOTION TO "DE-PRIVILEGE"
39,000 DOCUMENTS PRODUCED TO CONGRESSMEN BLILEY

Michael F. Barrett, Jr., being duly sworn, deposes and says as follows:

1. I am a graduate of St. John's University Law School, New York and earned a Master of Laws degree from Georgetown University Law School, Washington, D.C. From 1962 to 1966, I served in The Pentagon as a Captain in The Judge Advocate General's Corps, U.S.

Army and thereafter served as a trial attorney with the Federal Trade Commission and the Securities and Exchange Commission.

2. From April 1970 to March 1991, I was an attorney for the Committee on Commerce, U.S. House of Representatives. When I started working for that Committee it was known as the Committee on Interstate and Foreign Commerce; in 1975 it was renamed the Committee on Energy and Commerce; in 1995 it became the Committee on Commerce (the "Committee").

3. From 1991 to present, I have maintained an active practice advising clients on issues relating to Congressional investigations, including preparation for hearings and subpoena compliance. I have in the past been retained by Philip Morris in connection with Congressional hearings and subpoena compliance, but I did not advise Philip Morris or any other tobacco company with respect to the Committee or the Committee's 1997 or 1998 subpoenas for tobacco industry documents, nor did I have any communications with Chairman Bliley or anyone else on the Committee on Commerce or any committee staff member as to such 1997 or 1998 subpoenas.

4. From January 1981 to March 1991, I was Chief Counsel and Staff Director of the Subcommittee on Oversight and Investigations of the Commerce Committee. During this ten year period, all Commerce Committee subpoenas were issued by the Subcommittee. As Chief Counsel, I directly oversaw the issuance, administration and, where necessary, enforcement, of the more than 600 subpoenas issued by the Subcommittee during this ten-year period.

5. In approximately 30 instances during my tenure as Chief Counsel, claims of attorney-client privilege or attorney work product protection were asserted in response to Committee document subpoenas. Each time a claim of privilege was asserted, I discussed that claim with the Chairman of the Committee (who also served as the Chairman of the Subcommittee at that time).

6. During my 21 years of Committee service, it was the long-settled practice of the U.S. House of Representatives and of the Commerce Committee not to recognize the attorney-client privilege before a Congressional committee. In line with this practice and precedent, during

my tenure as Chief Counsel the Chair rejected each claim of privilege that I communicated to him. I then orally reported the Chair's ruling back to the witness who had raised the claim of privilege.

7. During my twenty one years of Committee service, I am unaware of any instance in which the Chair communicated his ruling in writing to the party claiming the privilege. All of the Chair's ruling and directions were, as a matter of practice, communicated to the witness orally.

8. I understand that certain questions now have arisen before this Court as to (i) whether the Chair of the Commerce Committee has the authority to issue final and binding rulings on claims of privilege; (ii) whether an individual has any right under the Committee's rules or procedures to appeal the Chair's ruling to the full Committee for a vote on the assertion of privilege; (iii) whether if documents are not produced despite the Chair's ruling on the assertion of privilege, the individual is in contempt; and (iv) whether an individual can take any further steps to challenge the Chair's ruling short of standing in contempt and committing an act that will support criminal prosecution. I address these questions in the following paragraphs.

9. First, there is no doubt that the Chair has the authority to issue rulings on claims of privilege and that the Chair's rulings are legally binding upon the witness. Indeed, so well-established is the Chair's authority that while I served as Chief Counsel, not one Committee Member or subpoenaed person ever questioned either the Chair's authority to make such rulings or the witness' obligation to comply with such rulings under pain of contempt. Notably, on the one occasion that the Committee referred a failure to produce documents to the House, and that contempt resulted in a criminal prosecution, the Committee did not revisit or re-examine the Chair's ruling that the Executive Privilege was not available; in deciding that the person was in contempt, the only question the Committee addressed was whether she had disobeyed the com-

mandment to produce. Likewise, in every instance in which the Committee during my tenure voted to recommend contempt proceedings against a particular witness, the only question considered by the Committee was whether the individual had failed to produce documents or give testimony; in no instance did the full Committee revisit or re-examine whether the Chair's ruling or direction on any objection to a subpoena was lawful or appropriate. Moreover, the Chair's ruling need not be in writing to be binding; indeed, in no instance during my time as Chief Counsel did the Chair, or anyone on his behalf, issue a written ruling on a claim of privilege.

10. Second, a subpoenaed person does not have the right to appeal the Chair's rejection of a privilege claim to the full Committee. The Committee's rules do not provide -- indeed, do not allow -- such an appeal. Rather, the Committee's rules provide that the decision to hold a Congressional hearing or to convene a Committee meeting is within the sole discretion of the Chair, with the limited exception that he must convene a meeting of the Members upon the petition of three Members of the Committee. Committee Rule 2(b)(1); House Rule XI(2)(c)(2). Those who are not members of the Committee -- for example, individuals aggrieved by the Chair's rejection of their claim of privilege -- do not have the right to request a hearing or the right to appear in any capacity at any hearing or meeting. Furthermore, I know of no occasions where an individual was allowed to plead his claim of privilege to the Committee after that claim was denied by the Chair. In fact, even in circumstances where the Committee is voting on whether to seek criminal prosecution for a contempt of Congress the Committee's rules do not provide a subpoenaed person with a right to be present, or even represented, at the Committee's meeting.

11. Third, from the time that documents are not produced despite the Chair's rejection of a claim of privilege, the individual is, as a matter of law, in contempt of Congress.

There is no appeal to the Committee (or to the entire House); later production of the documents will not cure the contempt; and the individual faces the possibility of criminal sanctions. Once a subpoenaed person disobeys the Chair's direction to produce pursuant to a subpoena, he or she has committed the act of contempt, and there are no further steps the individual can take to avoid being in contempt.

12. Thus, after the Chair's ruling that the privilege will not be recognized, the nonproduction of the documents at the time demanded by the subpoena or specified by the Chair puts the individual in contempt. The act of nonproduction following the Chair's rejection of the claim of privilege is itself the act of contempt; no further act -- such as a declaration by the Chair or the Committee that the individual is in contempt or an explicit statement by the individual that the documents will not be produced -- is needed to trigger liability for contempt. After the contempt has been committed, the Committee will meet and decide whether to refer the contempt to the whole House of Representatives, but the Committee does not revisit or re-examine the lawfulness or propriety of the Chair's ruling in administering a subpoena.

13. I have reviewed defendants' submissions to this Court concerning the Commerce Committee's 1997 and 1998 subpoenas to the tobacco companies, the Council for Tobacco Research and the Tobacco Institute including the Affidavit of Steven Parrish and the correspondence with Chairman Bliley. The procedure followed by Chairman Bliley is exactly the same procedure the Committee followed when I served on the Committee, except that Chairman Bliley's written rejection of the tobacco companies' privilege claims in connection with the Committee's second 1998 round of subpoenas was, to the best of my knowledge, the first time in twenty-five years that such a written memorialization of any Chair's ruling was provided.

Michael F. Barrett, Jr.

Sworn to before me this 25th day of May, 1998.

Notary Public

My Commission Expires October 14, 1998

MINORITY VIEWS OF REPRESENTATIVE RON KLINK

I am joined in my views by Representatives Dingell, Waxman, Markey, Boucher, Manton, Towns, Pallone, Brown, Gordon, Furse, Deutsch, Rush, Stupak, Engel, Sawyer, Wynn, Green, McCarthy, Strickland, and DeGette.

Although the subpoena to Mr. Haney was issued on a party line vote, one does not take lightly the decision by Mr. Haney not to comply with a Congressional subpoena. But we should also not take lightly the move to hold a private person in *criminal* contempt of Congress. Fundamental fairness to our citizens requires that this body demonstrates that all efforts have been made to provide the person with a full opportunity to provide personally his or her defense to the nation's elected representatives.

In this case there are three overwhelming reasons that forced our negative vote that we wish to lay before the Speaker:

(1) There has not been a shred of credible evidence of wrongdoing in the Portals matter. To the contrary, all of the information gathered by the Committee so far has suggested the opposite.

(2) The Committee has refused repeated requests by Mr. Haney, Mr. Knight and Steven Grigg, the primary developer of the Portals, to provide testimony at a Committee hearing prior to proceeding with the drastic step of a contempt proceeding.

(3) We cannot ignore the partisan political agenda of the majority in the development of this issue.

My statement made at the June 24 Committee meeting to consider the matter of contempt provides the details of this matter and is attached at the end of these views, but I want to summarize each of these three important points.

(1) There has not been a shred of credible evidence of wrongdoing in the Portals matter. To the contrary, all of the information gathered by the committee so far has suggested the opposite.

Although never clearly stated by the Subcommittee or Committee chairmen, the allegation before the Committee appears to be that Mr. Haney was involved in an improper or illegal attempt to influence government agencies to obtain a favorable supplemental lease for the Portals partnership and paid an improper contingency fee to his attorney. Members of the House who read the Majority report might wonder why the only evidence of impropriety cited in the report are two magazine articles that appeared in October 1997. (This is particularly curious in light of the FCC's attached October 6, 1997, rebuttal to the *Business Week* article that described the article as *"materially and demonstrably inaccurate in several critical respects."*) One might reasonably conclude that the Committee has not followed up on this matter over the past eight months. To the contrary, the Committee has received thousands of pages of requested documents from the General Services Administration (GSA), the Federal Communications Commission (FCC), the

White House, Mr. Haney, Mr. Knight and others concerning the Portals lease and the relocation of the FCC, and Committee staff has interviewed numerous government officials and private persons who negotiated the lease or were otherwise involved with the Portals. The reason the investigation is not mentioned is simple: none of the documents, nor any of the staff interviews revealed any impropriety in the negotiation of the lease, the hiring of Mr. Knight by Mr. Haney or in the actions of any of Mr. Haney's representatives. Subcommittee Chairman Barton admitted this in the June 24, 1998, Committee contempt meeting.

At that Committee meeting to consider the Majority report, Representative Stupak offered an amendment to include important material, outlining the scope of the investigation, which was missing in the Majority report. The text of the amendment is included at the conclusion of these views. One part of the amendment read as follows:

> Between the initial letter to Mr. Haney on November 7, 1997, and the present, Subcommittee staff has interviewed numerous officials of the Federal Communications Commission and the General Accounting Office. These include Reed Hundt, former FCC Chairman; Andrew Fishel, FCC managing director in charge of the FCC move since 1989; Jeff Ryan, operations management and services chief, who works with Mr. Fishel; Robert Peck, formerly an assistant to Mr. Hundt and a member of the legislative staff and currently the Public Buildings Commissioner at GSA; Paul Chistolini, deputy commissioner; Blair Levin, a former special assistant to Mr. Hundt; Jackie Chorney, a former legal advisor to Mr. Hundt; Sharon Roach and Barry Siegal, attorneys at the General Services Administration who negotiated the lease; Tom Pagonis, the contract officer for the Portals project; Bob Goodman, director of property acquisition and realty services; Bill Lawson, GSA's assistant administrator for public buildings; Douglas Benton, Mr. Goodman's successor; Thurman Davis, the former GSA administrator for the National Capital Region; and Barbara Silbey, a former special assistant to the GSA administrator.
>
> All of these officials have stated in their interviews that they had no knowledge of or any evidence of improper political influence by Mr. Haney or other misconduct by Mr. Haney or his representatives or of an illegal contingency fee.

Although the amendment was defeated on a party line vote, the Chairman of the Oversight and Investigations Subcommittee stipulated that the above statement concerning the interviews of government officials that Mr. Haney was alleged to have improperly influenced was true. He stated that a reason for withholding these facts from the House was the refusal of Representative Stupak to vote in favor of contempt, even if his amendment were adopted.

In addition to a lack of evidence of impropriety in the negotiation of the Portals lease, the Committee has actually received affirmative evidence of the propriety of the lease. The impartial General

Accounting Office reviewed the lease at Senator John McCain's request, and in a letter dated February 27, 1998, GAO concluded, *"The lease is in the best financial interest of the government and is preferable to FCC's staying in its current location."*

GAO also stated, *"No evidence came to our attention that GSA's solicitation of space for FCC was not in compliance with applicable laws and its own agency regulations governing the procurement of leased space, except for its cancellation of the SFO in February 1992."* GAO concluded that after the courts reinstated the improperly canceled solicitation, *"It appears that GSA followed the Court's decision and thereafter complied with applicable laws and regulations we reviewed in resuming the procurement process, and it subsequently awarded the lease to Portals II. Furthermore, the award to Portals II was consistent with the fiscal year 1988 lease prospectus for approximately 260,000 occupiable square feet."* GAO has looked at this project several times in the last five years and never found anything amiss.

The allegation of an improper contingency fee paid to Peter Knight in return for obtaining a supplemental lease has also found no support in the subsequent investigation of the matter. The only source cited in the Majority report for the proposition that the fee was a contingency fee is one of Mr. Knight's law partners, Bernard Wunder, a former Republican staffer on this Committee. Mr. Wunder had stated last year in a staff interview that Mr. Knight had received a "lump sum payment" or a "performance fee." In a subsequent staff interview in May, Mr. Wunder told committee staff that he did not intend the term "performance fee" to mean an illegal contingency fee, but rather to mean it was for work that was not covered by a monthly retainer or an hourly fee, an important fact also missing from the Majority's report. Mr. Wunder also stated that he knew that Mr. Knight had worked on other projects for Mr. Haney.

Mr. Haney and Mr. Knight have also denied the existence of a contingency fee in letters to the Committee and in proffers of testimony made to the Subcommittee. Both have contended that the fee covered multiple projects over a period of three years. Documents provided by Mr. Knight confirmed that work subsequent to the signing of the Portals lease was performed, and additional documents received recently pursuant to a subpoena to Mr. Knight's law firm again confirmed the existence of other projects. In an interview of Mr. Knight's executive assistant, who prepared the bill, she confirmed that Mr. Haney had been a client of Mr. Knight's for almost three years, that she frequently communicated with Mr. Haney, that she had set up separate files for his various projects, and that she billed him every month for expenses relating to work done on his projects, but had never billed him another fee after 1996.

In a proffer of testimony, Steve Grigg, the managing partner of the Portals project, stated that he asked for and negotiated the provisions in the supplemental lease that the Majority apparently believes to be the provisions demanded before a contingency fee was paid to Mr. Knight. Mr. Haney did not become a partner in the Portals development until March 26, 1996, over three months after the lease provisions in question were signed.

During the course of the meeting to consider the contempt matter, members of the Majority continually stated that these facts were irrelevant, and that all that mattered was a subpoena had been issued, and Mr. Haney had refused to comply. I do not agree. Mr. Haney has asserted that some materials were covered by an attorney-client privilege, and that other documents were not pertinent to the Portals investigation. In overcoming such claims of legal privilege that protect all American citizens, the Committee should show at least some need for the information.

The lack of any coherent allegation of impropriety backed by credible evidence, and the existence of considerable exculpatory evidence, provide no reason to proceed to contempt.

(2) The Committee has refused to take the reasonable step of hearings before proceeding with the drastic step of a contempt proceeding.

From the early days of this investigation, the parties and the Minority members have been asking for public hearings under oath, and the Committee repeatedly has refused to hold them. At the November 5, 1997, hearing on Molten Metal Technology, at which Chairman Barton first raised the issue of the $1 million payment to Mr. Knight, I asked for, and received, a promise from Chairman Barton—a public hearing at which Mr. Wunder, the apparent source of the allegation that some kind of illegal or improper fee was involved would testify. In that same hearing, under oath, Mr. Knight denied that he had received any type of contingency fee (p. 195), and Chairman Barton admitted that he was making no allegations of illegalities (p. 198). The hearing with Mr. Wunder has not been held.

As early as December 22, Mr. Haney's lawyer stated in a letter to the Committee that he would prefer a public hearing *"accompanied by an on-the-record transcript, and the rules of procedure applicable to such hearings, as preferable to the campaign of unsubstantiated accusation and innuendo which we have experienced to date."* This was in response to a letter threatening to subpoena Mr. Haney for testimony if he continued to refuse to submit to "voluntary" interview.

Mr. Knight, also requested a public hearing. On March 30, 1998, in a letter from his attorney Mr. Grigg requested a public hearing *"so that we could put these matters to rest. For a variety of reasons, we believe it is most appropriate to discuss these matters at a public hearing and not in an informal staff interview."*

At the June 24 meeting on the contempt matter, I offered a motion to postpone consideration of the contempt citation until the Committee had held a hearing to receive testimony from Mr. Haney, Mr. Knight, Mr. Grigg, Reed Hundt, formerly chair of the FCC, and Emily Hewitt, general counsel for the GSA. It was rejected on a party line vote.

Throughout the course of this investigation, Mr. Haney has never refused to testify at a hearing. To the contrary, in letters and statements from his attorney, he has welcomed an opportunity to testify. Yet the Majority refuses to hold a hearing so that Members could determine whether the documents sought by the Committee were necessary or the underlying allegations were sustainable.

In early May, it appeared that the Committee was about to hold a hearing at which Mr. Wunder and William Diefenderfer, a former law partner of Mr. Knight's, would testify about the fee Mr. Knight received from Mr. Haney. However, after Mr. Wunder informed Committee staff that he would not testify that the fee was an illegal contingency fee, the proposed hearing was cancelled. Similarly, the Committee has refused to call Mr. Knight or Mr. Knight's secretary Jewelle Hazel, who prepared the bills, both of whom have information about the fee arrangement. After an offer by Ms. Hazel's attorney to Committee staff, Minority staff set up an interview with Ms. Hazel. But the Majority staff refused to attend.

With respect to the negotiation of the Portals lease, none of the government officials involved in negotiation of the lease has been called to testify. Nor has the private sector individual, Mr. Grigg, who negotiated the lease, been called, despite his expressed willingness to testify. The General Accounting Office auditors, who have examined the entire leasing chronology, have also not been called.

It is unprecedented to our knowledge that an individual, particularly a private businessman being required to provide documents about on-going activities unrelated to the project under investigation, cited for contempt of Congress would not be first given an opportunity to testify before the Committee. For example, in this Committee, former Secretary James Watt appeared at two public hearings prior to his contempt citation. Whether or not such an opportunity is legally required, the refusal of the Subcommittee to hold a single hearing on this matter suggests that the Majority has little interest in obtaining the facts, and, more likely, is afraid that the testimony may rebut allegations of impropriety.

(3) We cannot ignore the partisan political agenda of the Majority in the development of this issue.

It is an unfortunate fact that this investigation is part of an overall program within this Congress of Republican-led investigations of high level administration officials and Democratic supporters. This pattern of politically motivated investigations is documented in a June 18, 1998, report by the U.S. House Democratic Policy Committee entitled "Politically-Motivated Investigations by House Committees."

The investigation of Mr. Haney has its roots in a previous investigation by the subcommittee of Mr. Knight's representation of the Molten Metal Technology company and its obtaining a contract with the Department of Energy. The interest in Molten Metal appeared to result from the involvement of Mr. Knight, a former longtime aide to Vice President Al Gore and the Clinton-Gore '96 campaign manager. Mr. Knight was one of two Washington lobbyist—the other was a Republican—hired by Molten Metal for strategic advice in obtaining government business. Molten Metal had a unique process for the treatment of mixed waste, and the Department of Energy was under great pressure to begin disposing of the wastes it had been generating.

In that investigation, a memorandum from counsels Mark Paoletta and Tom DiLenge to Chairman Joe Barton dated October 20, 1997, which stated that they had no real evidence of wrongdoing, nonetheless set out the reasons for holding hearings:

"(ii) it forces the key players to deny allegations of misconduct under oath"

* * * * * * *

"(v) will likely generate enormous press coverage, in light of the recent, high-profile news coverage of MMT's contracts with DOE."

The counsels urged holding the hearing despite this warning:

"The cons of holding such a hearing are (I) there is no smoking gun, which opens us up to partisan criticism for engaging in a witch-hunt or smear of Democrat officials, lobbyists, and fund-raising practices (the "everyone does it" defense)."

Although the hearings, as predicted, found no evidence of impropriety, the results for Molten Metal were catastrophic. The publicity from the hearings made it impossible to obtain $20 million in bond financing and drove the company into bankruptcy. After the hearings, 221 Molten Metal employees lost their jobs, including 45 in Chairman Barton's state of Texas. A planned $70 million plant in Bay City, Texas was put on hold.

The press soon caught on to the partisan nature of the investigation. Thomas Oliphant wrote in the *Boston Globe* on September 23, 1997:

"This sordid story could never have flown without the feeding frenzy that surrounds the vice president, but as an attempt at guilt by the associations of his associates it is as cheap as any of the shots that will in time come back to hit those who connived in launching it."

A similar conclusion was drawn by Jonathan Broder in Boston Magazine in February, 1998:

"Despite all the insinuations, Republican investigators have presented no evidence that Molten Metal's contributions to the DNC resulted in its winning government contracts."

After a final hearing on Molten Metal, George Lobsenz writing in The Energy Daily on February 18, 1998, concluded ("Facts Play Second Fiddle In Barton's Campaign Against Gore, MMT"):

"Barton has labored to sketch a conspiracy in which MMT hired a lobbyist, Peter Knight, a major Gore backer; cozied up to Grumbly, a Gore protégée; funneled campaign contributions to the Clinton-Gore campaign and qthen saw Grumbly boost its DOE funding from $1 million to $33 million despite uncertain results from the initial grants provided the company.

"A pretty sexy story, if you can prove the political connection. The problem is, Barton can't."

Lobsenz also noted:

"Last Thursday, Barton finally got around to giving Molten Metal Technology officials an opportunity to appear in person before his panel to answer the charges. But the uncomfortable truth for all concerned is that the facts of the case have long since ceased to matter because the damage has been done.

"The company, which was struggling commercially even before Barton's attacks, has laid off hundreds of employees and is scrambling to find new financing—and clean the mud off its reputation."

During the course of the disastrous Molten Metal investigation, the investigators were told of a payment made to Mr. Knight by

Mr. Haney, whose name is similar to that of William Haney, the former president of Molten Metal. We cannot ignore the political motivation of the subcommittee to focus upon Mr. Knight and Franklin Haney, who has been a long-time contributor to the Democratic Party and a one-time Democratic candidate for governor of Tennessee. Given the finding of GAO that the Portals lease was in the taxpayers' interest, and the utter lack of evidence of impropriety in the entire affair, we are led to believe that partisan politics is at the root of this investigation.

The following are my statements at the meetings of the Committee and Subcommittee to consider contempt, the amendment offered by Representative Stupak to the Report, and the October 6, 1997, response of the FCC to the *Business Week* article cited by the Majority.

RON KLINK.

STATEMENT OF RON KLINK
RANKING MEMBER
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE
COMMITTEE ON COMMERCE
June 24, 1998

Today we continue the unprecedented "Rush to Injustice" begun seven days ago when the Oversight and Investigations Subcommittee voted to recommend that Franklin Haney be held in contempt of Congress for refusing to produce documents. This extraordinary action -- so rarely taken by any Congressional committee and never taken without previous hearings in which the targeted parties themselves are allowed to provide testimony and never taken without a full opportunity for debate by all Members -- was tacked on at the last minute to a lengthy Committee mark-up meeting during an extraordinarily busy legislative week.

And there are even more extraordinary things to consider today. For one, we have before us a proposed Committee report recommending contempt which does not include in the report text a clear allegation of underlying wrongdoing by Mr. Haney or anyone else. Unlike all other contempt reports that we have read, there is not a descriptive chronology of the majority's full investigation. Perhaps it is because an accurate accounting of the full investigation would reveal that everyone we interviewed disputed the Business Week story that is the basis for this investigation.

Perhaps this is why the majority refuses to allow Mr. Haney to testify under oath. It appears afraid of a full debate. It appears afraid to hear what Mr. Haney would say in a hearing under oath. Certainly, it is easier to hide behind a Congressional dust-up over someone's refusal to provide documents than to listen to what that person has to say about the truth of the allegations.

Let me review this alleged investigation. The majority states that, based on a magazine article from last October, it is investigating "all aspects of the FCC's move to the Portals." It is not alleging misconduct, although the minority and some majority members are under the impression that the investigation has something to do with whether a contingency fee was paid to obtain a federal lease, changes in that lease and improper political influence related to Democratic campaign contributions. The targets of the investigation, Mr. Haney; his business partner; and Peter Knight, his attorney; have all asked to testify under oath about the lease and their activities. The majority has refused to hear from them. Every single government official from the FCC and the General Services Administration that the Subcommittee has interviewed has denied any political influence from Mr. Haney and Mr. Knight and described in great detail the history and basis of each provision in the contract. Let me repeat that -- every single one. Several of them don't even know who Mr. Knight is. Andrew Fishel the managing director of the FCC "in charge of the move of the FCC since 1989," responded to the Business Week article in a letter stating that the allegation of political influence in the Portals move was "a patent falsehood." I have attached his letter to my statement. Mr. Fishel has also been interviewed twice by staff. He has never changed his position.

The staff for the Public Buildings Subcommittee, which is the authorizing committee for GSA and this project, denies political influence. In an attempt to hasten the move of the FCC into the building and stop wasting taxpayer dollars, this Subcommittee's staff meets every two weeks with GSA and the FCC to attempt to resolve the FCC's many, many continuing objections to leaving its downtown location.

The General Accounting Office has looked at this project and lease three times for various Congressional opponents of the move. Its most recent finding was that it was in the public interest. GSA has now ordered the FCC to move.

There is another extraordinary proposal. In an attempt to claim that this investigation had something to do with legislation, Chairman Bliley claimed last week that unnamed "senior Members" of the Committee were considering legislation to stop the contracted payments of rent to the Portals partnership as justification for demanding these documents. The last time I looked at this issue, it was illegal and even unconstitutional for the Congress to attempt to legislate changes in legal contracts. Persons doing business in the United States -- even Democrats -- still have some due process rights. But it poses an interesting question. Can Congress hold people in contempt to further its own patently illegal action itself?

Let me review what has happened since last week. Mr. Haney's law firm provided 700 pages of documents which confirm what Mr. Haney has been saying for some time: Peter Knight and others in his firm worked on several other projects besides the Portals for Mr. Haney. As stated in the retainer agreement and evident in documents the Subcommittee has had for months, the work continued over a three-year period. As stated in the proffers of testimony from both Mr. Haney and Mr. Knight received last week and was also clear from documents received previously, Mr. Haney was never billed again for this work after he paid a $1 million fee in April of 1996.

Additionally, there have been no attempts to negotiate a settlement of this dispute prior to taking this extraordinary step of holding someone in contempt of Congress. The majority did not even bother to notify Mr. Haney's attorney that they were going to schedule consideration of contempt for today if he did not comply with their demands.

This cavalier behavior, which seems guaranteed to make the issue one of a refusal to produce documents instead of one of whether any substantive wrongdoing was committed, is unprecedented in Congressional or in this Committee's history. In fact, the paucity in the record of the Committee's other attempts to obtain the desired information is unprecedented. Because of Congress' extraordinary power to obtain information from both public and private parties, Committee chairmen have gone to great lengths -- particularly after the McCarthy years -- not to abuse their power. The opposite is happening here. For example, persons refusing to testify or produce documents are almost always given the opportunity to appear and provide testimony in a hearing. Mr. Haney, Mr. Knight and Steven Grigg, the primary developer of the Portals, have all asked to testify in public under oath. Instead, the Subcommittee has refused to hear from them, stating that witnesses cannot dictate the course of their investigation.

Let me go over some Congressional contempt history, starting with the document dispute with former EPA Administrator Anne Gorsuch. I have attached excerpts from that report to my statement. The Public Works Committee was investigating Superfund enforcement problems. The Subcommittee outlined in great detail all the steps -- including every meeting and phone call and meetings between the agency and the Chairman -- that were taken to try negotiate a solution to the dispute before moving to a contempt citation. That alone took eleven pages. The issue was clearly defined as were the questions the subcommittee was trying to answer. Several hearings were held, and transcripts were referred to. Unusual changes in federal regulations were documented. Ms. Gorsuch was allowed to appear and state her position on the record at one of the hearings, which was held on the return date of the subpoena.[1] None of that was done here.

A second contempt of Congress action came from the House Foreign Affairs Committee in 1986, when it recommended for contempt the Bernstein brothers for refusing to discuss their work for former Philippines president Ferdinand Marcos and his wife Imelda. The Bernsteins were accused of setting up a web of dummy corporations to hide the Marcoses' U.S. investments. These investments were said to involve government funds and perhaps U.S. aid. The investigation was based on press articles and an impeachment complaint filed in the Philippines. Again, the Bernsteins were subpoenaed to a Subcommittee hearing to produce documents and testify. This hearing was held in executive session. Majority and minority House counsels appeared. A recess was granted in the hearing and questions provided to the witnesses in advance so they could review them overnight with their counsel and return with their response.

A week later, the full Committee debated the contempt matter for "several hours." It made the executive session transcripts at which the key testimony had occurred available to the witnesses and for purposes of the committee's action. Counsel for the witnesses were allowed to appear again before the full Committee.[2] The vote was bipartisan.

In our own Subcommittee, in 1981, when former Interior Secretary James Watt was held in contempt for refusing to produce documents, there had been five hearings, including two in which Mr. Watt appeared to argue his position before the Subcommittee. Mr. Dingell held another hearing was held to hear from various expert witnesses on executive privilege. He also gave Secretary Watt two weeks to consider the results of his action before the contempt recommendation was provided to the Committee.

Mr. Chairman, two weeks ago Mr. Dingell sent a letter to you outlining his concerns with the overwhelming amount of information obtained by the Subcommittee during its nine-month investigation which is in opposition to your admittedly vague theories of wrongdoing. None of that information was included in the proceedings of the Subcommittee or the report before us today. The Subcommittee has refused repeatedly to hear on the record any of this testimony from

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[1]"Contempt of Congress," H.R. 97-968, Report of the Committee on Public Works and Transportation, 97th Congress, 2d Sess., Dec. 15, 1982, p. 16.

[2]"Proceedings Against Ralph Bernstein and Joseph Bernstein," H.R. 99-462, Report of Committee on Foreign Affairs, 99th Congress, 2d Sess., Jan. 21, 1986, p. 8.

Mr. Haney or anyone else. This is a travesty of justice and an abuse of power. I am ashamed.

STATEMENT OF RON KLINK
RANKING MEMBER
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON COMMERCE
June 17, 1998

It is with great sadness that I come today to this meeting. Sadness that this great Subcommittee has been reduced to initiating criminal contempt proceedings against private individuals when it cannot even today -- after nine months of investigation -- articulate the alleged wrong-doing that it is investigating beyond a letter yesterday from Mr. Bliley suggesting that if we don't get what we want, we hold people in contempt. Sadness that Mr. Bliley, despite Mr. Barton's statement to the contrary in the April 30 meeting, is now suggesting that the Committee intervene to stop the move of the Federal Communications Commission to the Portals building after the General Accounting Office's finding that the move is in the government's interest..

Sadness that a 10-page vitriolic and incoherent majority staff memos is used to respond to a letter from Mr. Dingell and myself last week questioning why the majority has ignored evidence that is favorable to the parties that are represented here before us today. Sadness that it appears that the majority has spent more time documenting alleged failing of the misconduct of the minority than it has ever had the misconduct and alleged illegalities of the parties before us.

Sadness that after the experience of the Molten Metal Technology investigation, the majority plows forward to further damage private businessmen because they happen to be Democrats or have associated with Democrats. Those hearings failed to accomplish anything except to put the company into bankruptcy, take jobs away from over 200 people, needlessly and permanently taint reputations and fatten the coffers of numerous attorneys.

I am disappointed and angry that, after citing numerous reports from the Congressional Research Service and others stating that Congress can overrule a variety of privileges, the chairman conveniently ignores the following statement in a document it provided to the Members. This is a quote from an excerpt of a December 3, 1997, CRS memorandum to the Government Reform and Oversight Committee on privilege claims:

> In actual practice, all committees that have denied claims of privilege have engaged in a process of weighing considerations of legislative need, public policy, and the statutory duties of congressional committees to engage in continuous oversight of the application, administration and execution of the laws that fall within its jurisdiction, <u>against any possible injury to the witness</u>. (P. 23)

There has been a great deal of discussion about the Subcommittee's prerogatives to have these documents, beginning in the Molten Metal hearing, in numerous letters and in the subpoena meeting, and the Subcommittee's reliance on precedence. But, although the chairman often cites precedence, there has been no balancing process. There has been <u>absolutely no discussion of</u>

injury to the witnesses that might be suffered by overriding this privilege, and how that injury might be minimized. As far as we know, there was been no meetings with counsel on how to limit any potential injury, no proposals of step-by-step document production or commitments of confidentiality until further action by the Subcommittee, no limitation on access, nothing. This Committee has frequently recognized and complied with witnesses' interest in keeping claimed proprietary information secret.

For example, in a recent memorandum to members concerning recess subpoenas for telephone records, Chairman Bliley promised the members that he would take "appropriate steps to protect the privacy and reputational interests of the individuals whose records are covered by the subpoenas." (June 8, 1998, memo) No such assurances have been ordered to the persons in this investigation or to any third parties that might be mentioned. The only concern that has beer expressed by the chairman is one of the Subcommittee's ego. In street terms, the Subcommittee has been "dissed", and no one is going to get away with that.

I am disappointed that this Subcommittee -- when confronted with proffers of expected testimony by all of the parties before us today plus the party who actually negotiated the lease agreement in question which deny all wrongdoing -- ignores them as "carefully worded to make certain points without directly conflicting other facts known to the Committee." Surely the majority knows that a proffer is a summary of testimony, not anticipated answers to every questions the Members may have. Steven Grigg's proffer is particularly useful because Mr. Grigg is the one who actually negotiated the supplemental lease in question. Mr. Grigg, who has asked for a public hearing, stated that he, not Mr. Haney, was responsible for the lease provisions that so interest the Subcommittee. But this proffer doesn't fit the Subcommittee's scenario of nefarious wrongdoing.

I am disappointed that the chairman has been reduced to -- again after nine months of investigation -- citing two October 1997 magazine articles instead of Committee subsequent work as the reason to continue this investigation. Since that time, we are aware of no new evidence to back up these stories, but we are aware of troubling information indicating those publications were wrong. In the April meeting to consider subpoenas of a wide variety of persons, Mr. Dingell challenged you to articulate the wrongdoing that you were investigating. You could not then, and you cannot today.

After rereading all the statements made by the chairman in public hearings, meetings and letters to the targeted parties, it appeared to me that the allegation of wrong-doing by the parties involved in the Portals development being investigated by the Subcommittee was that a contingency fee might have been paid to obtain a federal lease for property. Imagine my surprise to hear yesterday to find that the chairman denies that, but still cannot articulate the purpose of its investigation beyond a rambling statement about the scope of its jurisdiction over all aspects of the move of the Federal Communications Commission to a new consolidated headquarters. Now instead of determining whether the $1 million was an illegal contingency fee, I was even more surprised to hear yesterday that the majority thinks that its role is to determine if Mr. Knight was paid too much for three years of work on numerous projects for Mr. Haney. To cite a recent article in Legal Times, another respected publication on lobbying and lawyer-lobbyists:

> "I don't think you could conceive of a way to bill clients that hasn't happened," says William Cable, a lobbyist with Timmons and Co., which uses a flat-fee structure, charging every client $330,000 a year for a full-service lobbying package. . . . "The range is enormous, and I don't think there's any uniformity," observes Penelope Farthing, a partner at Patton Boggs. "It's not like there's a minimum wage."

"When Lobbyists Bill, Anything Goes," Legal Times, May 25, 1998.

$330,000 a year? Why, that is almost exactly what Franklin Haney paid Peter Knight.

No one knows better than the minority the vast scope of the Subcommittee's jurisdiction, although even I must ask when we became the Legal Fee Cop, with jurisdiction over the setting of private legal fees. No one questions whether the Subcommittee can look at all aspects of this move. The question is whether the Subcommittee should use its powers to hold people in criminal contempt of Congress for refusing to produce documents that are not only covered by attorney-client privilege, but are unrelated to the move in question. All of us are quite aware of the investigative dry hole that has resulted after months of interviews and the review of thousands of pages of documents. The chairman is reduced to citing old press articles with unidentified sources for the reason persons should be held in contempt, but we now know that basic allegations in those articles -- such as -- in the words of the majority -- "significant and uncommon changes" -- in the lease -- were not significant and uncommon. Business Week seems to be wrong. But perhaps we should bring their reporters before us and demand their sources because clearly they know more than the Subcommittee has been able to find out with all of its resources.

All of us also are aware of the General Accounting Office report that stated that the move is "in the interest of the Government and that further delay was costly to the American taxpayer." All of us know that GSA has now ordered the recalcitrant FCC to move into its new headquarters. At the April meeting, I pointed out that $51,000 per day of taxpayer money was being lost because of this dispute. The majority seems to be perfectly happy with that result.

MOTION

Offered by Mr. Stupak

I move that the following insert be made on Page 3 of the proposed report after the ninth line:

"Between the initial letter to Mr. Haney on November 7, 1997, and the present, Subcommittee staff has interviewed numerous officials of the Federal Communications Commission and the General Accounting Office. These include Reed Hundt, former FCC chairman; Andrew Fishel, FCC managing director in charge of the FCC move since 1989; Jeff Ryan, operations management and services chief, who works with Mr. Fishel; Robert Peck, formerly an assistant to Mr. Hundt and a member of the legislative staff and currently the Public Buildings Commissioner at GSA; Paul Chistolini, deputy commissioner; Blair Levin, a former special assistant to Mr. Hundt; Jackie Chorney, a former legal advisor to Mr. Hundt; Sharon Roach and Barry Siegal, attorneys at the General Services Administration who negotiated the lease; Tom Pagonis, the contract officer for the Portals project; Bob Goodman, director of property acquisition and realty services; Bill Lawson, GSA's assistant administrator for public buildings; Douglas Benton, Mr. Goodman's successor; Thurman Davis, the former GSA administrator for the National Capital Region; and Barbara Silbey, a former special assistant to the GSA administrator.

"All of these officials have stated in their interviews that they had no knowledge of or any evidence of improper political influence by Mr. Haney or other misconduct by Mr. Haney or his representatives or of an illegal contingency fee.

"The Subcommittee has interviewed Bernard Wunder and William Diefenderfer III. Mr. Wunder is a current law partner of Mr. Knight's, and Mr. Diefenderfer is a former partner. Neither one has stated that there was any improper behavior or other misconduct by Mr. Haney or his representatives or an illegal contingency fee. Mr. Wunder has stated to the Subcommittee that he knows Mr. Knight worked on non-Portals projects for Mr. Haney.

"As part of its investigation, the Subcommittee requested all documents relevant to the Portals relocation from various Federal agencies. The Subcommittee received and reviewed dozens of boxes of documents from the FCC, GSA and Mr. Grigg, who was the primary negotiator of the supplemental lease agreement in question. There is no reference or evidence in any of these documents to illegal or improper behavior of any kind by Mr. Haney or his representatives."

"The General Accounting Office also has reviewed the lease negotiations and terms. It has determined that the lease is in the taxpayers' interest. In a letter to Senator John McCain, dated February 27, 1998, GAO concluded, "The lease is in the best financial interest of the government and is preferable to FCC's staying in its current location."

Federal Communications Commission
Washington, D.C. 20554

October 6, 1997

The Honorable John McCain
Chairman
Committee on Commerce, Science and
Transportation
United States Senate
508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The October 13, 1997 issue of *BusinessWeek* contains an article that is materially and demonstrably inaccurate in several critical respects. Attached hereto are FCC responses detailing the various factual errors and omissions in the article. If your office has need of further information on this subject, please contact Blair Levin, Chief of Staff at (202) 418-1070.

Sincerely yours,

James F. Green
Acting Director
Office of Legislative and Intergovernmental
Affairs

Enclosures

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
E CHAIRMAN

October 6, 1997

Mr. Stephen B. Sheppard
Editor-in-Chief
Business Week
1221 Avenue of the Americas
New York, New York 10020

Dear Mr. Sheppard:

Enclosed are two documents.

The first is a letter from Andrew Fishel, Chief Administrative Officer of the FCC, the career civil service executive who has had primary reponsibility for overseeing the move since 1989. We ask that you print this in light of numerous deficiencies in your article published in the October 13, 1997 edition, alleging inaccurately that the FCC's attitude toward a proposed move from its current scattered quarters to a single building is associated with political campaign contributions.

The second document is a chronology of relevant events that is more accurate and complete than the chronology you printed.

I first talked to your reporter a little more than a week ago. After two conversations, I became concerned that she had jumped to a groundless conclusion and was unfamiliar with many key facts of the case. When I raised this concern with her editor I was assured that the story would simply lay out all relevant facts for the reader and let the reader decide. But you did not print the most relevant facts, namely:

-- that the FCC was committed by law to move to the Portals as of August 1994,

-- that the FCC itself has no power to alter this result,

-- that Congress and/or GSA even now can bar the FCC from moving if that is their desire,

-- that none of us at the FCC has had knowledge of any political contributions by the current developer,

-- that powerful lobbyists (who are clearly the reporter's source for the speculation in the story) have worked for years to block the FCC's move, so that they could keep the agency close to their own offices, and

-- that the FCC's focus at all times since 1994 has been to assure that we would have adequate quarters, space, and money to permit the consolidation of the agency in a single, modern building. Although previous FCC Chairmen and Commissioners opposed the agency's move to the new building in Southwest Washington, Chairman Hundt never did so. His willingness to move to the new location brought him and the agency the opposition of powerful Congressional figures, and powerful lobbying forces mustered by the agency's current landlord and the Federal Communications Bar Association. Meanwhile his insistence that the agency's space and money needs be met has brought him criticism from other corners of Congress. This is the true political controversy over the FCC's location; by contrast, at no time has the Chairman or the Agency been aware of, much less influenced by, the political contributions of any developer.

Indeed, the original bias of the reporter that was apparent from my first conversation with her was confirmed by the fact that the article did not include a single one of the many facts that undercut the reporter's bias.

To illustrate these points more specifically, I would like to mention a few examples of what is clearly selective reporting. While asserting that the GSA did not assign the FCC to the Portals until 1996, your author did not mention a 1994 document in which GSA agreed with the developer to use its best efforts to move the FCC to the Portals. Given GSA's exclusive power to lease property for the FCC, this agreement committed the FCC to the Portals. That in fact is what Chairman Hundt told Appropriations Committee Chairman Rogers in a public hearing in 1995.

The articles's inaccurate assertion that Chairman Hundt opposed the move until 1996 is based not on any statement to that effect by him or anyone at the agency. Instead it is based solely on the reporter's interpretation of Chairman Hundt's expressed concern at that time about whether the agency's space needs would be accommodated in the new building and about who would pay the millions of dollars required for the move. This concern, according to your article, dissolved in early 1996. You would have the reader believe that the FCC stopped expressing this concern because of a political contribution (which you failed to report was a fact unknown to anyone at the FCC). However, you neglected to report that the Chairman repeated his concern about the lack of funds for the move both to the press and to a Congressional committee in mid-1996 long after the date of the alleged political contribution.

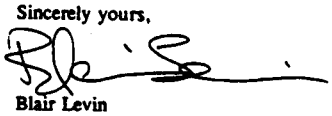
The Chairman's public statements in mid-1996 destroy the thesis of the article. There is simply no proof of a change in concern, focus, attitude or perspective on the move by the Commission at any time since August 1994, except insofar as the FCC's concerns about space and money in fact have been addressed.

You did report the Chairman's denial that the developer's contributions had any influence on the agency's attitude toward the move. But you did not report the Chairman's specific denial that he had knowledge of such alleged contribution. In fact, your article generates the false implication that he did know of the contribution.

Finally, you report, as if it were news, that House Telecommunications Subcommittee Chairman Billy Tauzin states that the FCC should not plan on moving to the new building. But you neglected to report that pressure against the move from Congressman Tauzin and other powerful corners of Congress (and publicly echoed by current Commissioner and former Chairman Jim Quello) has been continuous for many years. Nor did you report that counter-pressure from other parts of Congress to have the FCC move has also been continuous. And you did not report that because the FCC in fact has not moved, even now Congress has the power to force the FCC to move or to stay.

I hope that the points I have made here, and the more complete chronology I also enclose, will persuade you to print in full and in prominence the enclosed letter signed by Mr. Fishel.

Sincerely yours,



Blair Levin
Chief of Staff

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

October 6, 1997

Mr. Stephen B. Sheppard
Editor-in-Chief
Business Week
1221 Avenue of the Americas
New York, New York 10020

Dear Mr. Sheppard:

You allege in your article dated October 13, 1997 that the Federal Communications Commission agreed to move next year from its current inadequate eight Washington locations to a single consolidated building because of campaign contributions allegedly made in 1996 by one of the building's developers.

As the career civil service executive in charge of the move of the FCC since 1989, I can report to you that this allegation is a patent falsehood.

The first defect in your article is your failure to acknowledge that the FCC does not have and has never had any authority to lease its own buildings. All decisions about whether and where the FCC would consolidate from its multiple locations to a single building are made by the General Services Administration (GSA) and Congress. Even now the FCC has not moved into the new building, and if GSA or Congress do not want us to go, then we cannot and will not move.

Second, since August 1994, a court order and a GSA lease executed without the FCC's consent have committed the FCC to move to the new building.

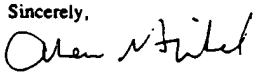
Third, the FCC's concern at all times since that date has been consistently focused on two goals: (i) the need for enough space to house all of our employees under one roof; and (ii) the need for money to pay for the move, which our already insufficient operating budget clearly cannot cover. Thus, on July 18, 1996 -- long after you allege the FCC stopped expressing concerns about the move because of a developer's political contribution (which no one at the FCC knew anything about) -- FCC Chairman Reed Hundt testified to Congress that given the absence of money to pay for the move, "the FCC must seriously examine" ceasing participation in the project.

In 1996 GSA leased enough space for the agency and in 1997 GSA agreed to pay for the FCC's move to the Portals out of its own funds. These actions seem to address the agency's two concerns. But it remains true, as always, that Congress has the power to decide whether and where the FCC moves.

Meanwhile, if you truly wish to investigate the politically charged debate in Congress on this issue, you should inquire into the activities of the FCC's current landlord, his legion

of lobbyists, and the special committee of communications lawyers who have made no secret of their desire to keep the FCC in their neighborhood.

Sincerely,



Andrew S. Fishel
Managing Director

Chronology of Events
Relevant to FCC's Possible Consolidation
To Single Building Called Portals in Southwest Washington, D.C.

May 21, 1994:

An FCC official interviewed in the National Journal states that: "All along, the Portals has attempted to portray this case as an effort by the FCC to try to get out of going to the Portals because we are an elitist agency that wants to be close to lawyers and lobbying and downtown restaurants. Having been in this job for all of five months, I can tell you that the farther away we could get from lobbyists would be fine with me. That aside, we were asked to sign a contract that was woefully deficient in serving our basic core needs, like how much space would be available, how soon we could move and when would we be able to accommodate all of our staff in one building. These are hardly motivations of an elitist organization."

August 1994:

The Federal Court of Appeals reinstates the lease procurement, in effect ordering General Services Administration (GSA) to negotiate a lease with the Portals developer, on grounds of FCC's misdeeds from 1987 to 1992 in connection with this project.

The GSA executes a lease for 287,000 square feet in Portals I. GSA commits to use its "best efforts" to place the FCC as the anchor tenant in the building. Given the GSA's exclusive authority to lease space for the FCC, this commitment bound the FCC to move to Portals. However, because the FCC's actual space requirements totaled more that 540,000 square feet (the FCC currently occupies 605,000 sq. ft.), GSA's action did not permit the FCC to consolidate its six Washington D.C. locations under a single roof.

The FCC immediately took appropriate steps to effectuate the move to the Portals. On August 19, 1994, Andrew Fishel, FCC Managing Director, notified all FCC employees that the GSA had entered into a lease to relocate the FCC headquarters to the Portals. Mr Fishel's memo provided details regarding the site and the expected occupancy time line. Additionally, to ensure that the requirements for the FCC to fulfill its obligations to the public, and best serve the needs of all FCC employees, Chairman Hundt convened a space planning task force to seek employee input and to keep them informed on the process.

September 23, 1994:

In its FY 1996 budget request to OMB the FCC sought monies for moving to the

Portals.

Based on independent space planning requirements report GSA submitted revised Prospectus to Congress requesting 545,076 sq. ft. for the FCC.

The House Buildings and Grounds Committee reviewed the FCC prospectus and approved 450,416 sq. ft. (94,630 sq ft. below the FCC's demonstrated space requirements).

January 31, 1995:

In a letter to GSA the FCC's Managing Director, Andrew Fishel, noted that "for the last several months [GSA] and the FCC have worked closely to satisfy the FCC's housing needs. Those efforts have been guided by our commitment to meeting the Government's obligations following the courts' orders related to [the Portals litigation]." In that letter, Mr. Fishel described the many reasons why the amount of space assigned to the FCC was inadequate to serve the needs of the FCC. The letter concludes, nonetheless, by stating a willingness to go to the Portals, specifically stating that "it appears to us that one logical next step for the Government would be to pursue further discussions with the developer. One aspect of such negotiations could certainly include further discussions regarding housing the entire FCC headquarters at the Portals site. In this regard, the FCC has no objection to considering relocating to a consolidated headquarters facility at the Portals, as long as the developer can meet all the FCC space needs (emphasis added) established in the Leo Daly study and jointly supported by the FCC, GSA and OMB in the prospectus submitted to Congress in September 1994. We sincerely hope that GSA decides to consider further negotiations, or takes some other reasonable action, to bring this matter to closure."

March 22, 1995:

In Testimony before the House Appropriations Committee on Commerce, Justice, State and Judiciary Chairman Hundt explained that the agency's request for $40 million in relocation expenses was necessary because "it is GSA's notion that we will move [to the Portals] and even though the building does not exist, we are currently under the impression that that move must be accomplished in this fiscal year. . . [T]here are upfront costs that have to be paid as part of any negotiation with a contractor, furnishings, for example, space allocation and planning. But based on what we have been told by GSA, this is the GSA plan." He went on to explain that "we [the FCC] do not represent ourselves in these negotiations and did not represent ourselves in the litigation."

May 5. 1995:

The FCC's Managing Director distributed a memorandum to all FCC headquarters employees providing an update that the GSA had submitted to Congress a request for approval for an increased amount of space to house the FCC. It was stated that if all Congressional approvals were obtained, and GSA was able to reach an agreement with the Portals builder, that the earliest moves of the FCC to Portals would be at least 18 months away.

June 19,1995:

In testimony before the House Telecommunications Sub-Committee the Chairman tells Congress the FCC will need funds for the move to the Portals and reiterates the need for adequate space. Chairman Hundt testified that "Assuming approval of the amount of space the FCC needs and GSA's ability to negotiate a lease that will satisfy the FCC's current space needs, the developer says that a building for the FCC could be constructed in about 18 mos . . . If we are ordered by Congress not to move to Portals or otherwise not to spend the relocation money, then we can use those funds to accomplish the other steps necessary to carry out the new mission you are giving us. Otherwise, we will likely need a supplemental authorization and appropriation."

July 27, 1995:

Robert Peck, who was then Deputy Director of the FCC's Office of Legislative and Intergovernmental Affairs, testified before the Public Buildings Committee that "we have taken several actions to plan for a possible relocation of the Commission to the Portals in the event that Congress authorizes a lease of sufficient space and appropriates the appropriate funds. Peck further testified that "by our actions we have indicated to GSA and to the Portals representatives our willingness to cooperate in a relocation to the Portals, if authorized by Congress."

August 1, 1995:

A Memorandum of Understanding was executed between GSA and the FCC to jointly fund the programming and space planning work required to document FCC's space requirements for the Portals building. The contract specifically contemplated planning for the Portals project and the FCC did that planning.

October 24, 1995:

The Senate Committee on Environment and Public Works approved a prospectus for 450,416 sq. ft. (94,630 sq ft. below the FCC's demonstrated space requirements).

October 25, 1995:

The FCC's Managing Director sent a memo to all employees immediately after the Senate Committee on Environment and Public Works authorized GSA to negotiate a lease for FCC at Portals. In that memo, he explained that "assuming GSA and the owners reach an agreement and sign a lease, a new FCC Headquarters building will be constructed at the Portals."

November 8, 1995:

GSA formally assigned space in Portals II to the FCC but noted that the most recent space planning studies demonstrated that the FCC would require more than the approved 450,000 sq. ft. GSA directed the FCC to complete the space planning study and upon their final review GSA would request additional space.

November 29, 1995:

The FCC conditionally accepted the Portals assignment contingent upon resolution of two issues: (i) the FCC obtaining funding for its relocation expenses and (ii) securing additional sufficient space to house all of its employees.

January of 1996:

GSA signed a supplemental lease, without the FCC's agreement or participation. The supplemental lease increased the leased space from 287,483 sq. ft. to 449,859 sq. ft. and also provided for options on an additional 85,000 sq. ft., which if exercised would meet the FCC's space requirements. This was a major step forward in meeting the FCC's space needs.

The FCC's Managing Director sent a letter to Mr. Lawson, the Assistant Regional Administrator for GSA, stating that "as evidenced by our partnering over the past year, the FCC has committed to and remains committed to consolidation of its headquarters facilities at the Portals. However, this commitment is predicated on two requirements: provision of adequate space for the FCC at the Portals and sufficient funding to facilitate the move from existing space to the Portals."

July 15, 1996:

At a press conference Chairman Hundt commented on the Appropriations Committee's failure to fund the moving expenses by stating that "They have put us between a rock and a hard place. We're not supposed to stay here (1919 M. Street)

but we don't have enough money to move... I don't know what we're going to do."

July 18, 1996:

Chairman Hundt testified to Congress that the FCC had no funds to cover moving expenses and therefore "under the current circumstances, the FCC must seriously examine the dire possibility of ceasing any further participation in a project that entails expending FCC funds."

July 15, 1997:

GSA agreed to pay the FCC's relocation expenses out of its own funds. The FCC agreed to continue to seek appropriations from Congress to reimburse GSA for these expenses. GSA also agreed that it would pay the rent obligations on the Portals space commencing July 1, 1997 until the FCC's occupancy of the building.

cc

The Honorable Ted Stevens
The Honorable Robert C. Byrd
The Honorable Judd Gregg
The Honorable John H. Chafee
The Honorable Max Baucus
The Honorable John Warner
The Honorable Robert C. Smith
The Honorable Dirk Kempthorne
The Honorable Christopher (Kit) Bond
The Honorable James M. Inhofe
The Honorable Craig Thomas
The Honorable Daniel P. Moynihan
The Honorable Harry Reid
The Honorable Bob Graham
The Honorable Barbara Boxer
The Honorable Bob Livingston
The Honorable David Obey
The Honorable Harold Rogers
The Honorable Alan B. Mollohan
The Honorable Jim Kolbe
The Honorable Charles H. Taylor
The Honorable Ralph Regula
The Honorable Michael P. Forbes
The Honorable Tom Latham
The Honorable David E. Skaggs
The Honorable Julian C. Dixon
The Honorable Bud Shuster
The Honorable James L. Oberstar
The Honorable Jay Kim
The Honorable John Cooksey
The Honorable W.J. (Billy) Tauzin
The Honorable James A. Traficant, Jr.
The Honorable John J. Duncan, Jr.
The Honorable Steve LaTourette
The Honorable Tom Davis
The Honorable Eleanor Holmes Norton
The Honorable Tim Holden
The Honorable Nick Lampson
The Honorable Pete V. Domenici
The Honorable Mitch McConnell
The Honorable Ben Nighthorse Campbell
The Honorable Dale Bumpers
The Honorable Frank R. Lautenberg
The Honorable Barbara A. Mikulski
The Honorable Ernest F. Hollings
The Honorable Slade Gorton
The Honorable Trent Lott
The Honorable Kay Bailey Hutchison
The Honorable Olympia J. Snowe
The Honorable John Ashcroft
The Honorable Bill Frist
The Honorable Spencer Abraham
The Honorable Sam Brownback
The Honorable Daniel K. Inouye
The Honorable Wendell H. Ford
The Honorable John D. Rockefeller
The Honorable John F. Kerry
The Honorable John B. Breaux
The Honorable Richard H. Bryan
The Honorable Byron L. Dorgan
The Honorable Ron Wyden
The Honorable Dan Schaefer
The Honorable Joe Barton
The Honorable J. Dennis Hastert
The Honorable Fred Upton
The Honorable Cliff Stearns
The Honorable Paul E. Gillmor
The Honorable Scott Klug
The Honorable Christopher Cox
The Honorable Nathan Deal
The Honorable Steve Largent
The Honorable Rick White
The Honorable James E. Rogan
The Honorable John M. Shimkus
The Honorable Rick Boucher
The Honorable Bart Gordon
The Honorable Eliot L. Engel
The Honorable Thomas C. Sawyer
The Honorable Thomas J. Manton
The Honorable Bobby L. Rush
The Honorable Anna G. Eshoo
The Honorable Ron Klink
The Honorable Albert R. Wynn
The Honorable Gene Green
The Honorable Karen McCarthy
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The Honorable Thomas J. Bliley, Jr.
The Honorable Edward J. Markey
The Honorable John McCain
The Honorable Conrad Burns

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