



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

March 12, 2007

Honorable Henry Waxman
Chairman

Honorable Tom Davis
Ranking Minority Member

Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Waxman and Ranking Minority Member Davis:

I am writing to set forth the concerns of the Council on Environmental Quality (CEQ) regarding the deposition notice that the Committee recently served on Philip Cooney, former Chief of Staff of CEQ. Based on conversations with Committee staff and our review of Committee Rule 22, we understand that the deposition will be "under oath," will be "transcribed or electronically recorded," and will be conducted by Committee staff attorneys. Yet, although Mr. Cooney will be providing information about his activities as a CEQ official, we understand that, pursuant to Rule 22, "[o]bservers or counsel" from CEQ "may not attend." These proposed procedures are inconsistent with longstanding practice followed by the legislative and executive branches and would undermine important Executive Branch institutional interests.

Allowing Committee staff to depose Executive Branch representatives on the record would be an extraordinary formalization of the congressional oversight process and would give unelected staff powers and authorities historically exercised only by Members of Congress participating in a public hearing. We recognize that the Committee's staff plays a significant role in the oversight process, including investigating matters and preparing reports on the investigations. We also recognize that limited resources prevent the Committee from calling each person with potentially relevant information to testify at a hearing and that the Committee has a legitimate interest in collecting information prior to a hearing. Yet these interests hardly justify delegating to staff attorneys the authority to take sworn, on-the-record testimony from a coordinate branch of Government outside the context of a hearing. On the contrary, Congress and the Executive Branch have traditionally accommodated committee staffs' need to speak with agency officials by scheduling *informal* (not transcribed or under oath) interviews or briefings. We believe this decades-old practice properly balances the constitutional interests of Congress and the Executive Branch.

Indeed, we are concerned that depositions would ultimately impede the oversight process and provoke unnecessary conflicts between Congress and the Executive Branch. The frank, candid, and more fluid conversations that often occur in informal, off-the-record interviews and that can quickly clarify issues and resolve ambiguities would likely disappear in a deposition. Aware that their every word and gesture was being recorded and fearing that poor phrasing or an incomplete memory might provoke claims of "lying under oath" or "misleading Congress," witnesses could become more reticent. And determined to "make a clear record" of their committee's interests, congressional staff could become more strident and confrontational in their questioning. Depositions, in essence, seem designed to promote tensions between Congress and the Executive Branch.

We also strongly object to the attempt to exclude CEQ representatives from the deposition. Longstanding Executive Branch policy and practice has been that agency representatives attend congressional staff interviews of agency officials. The need for CEQ presence at the Cooney deposition is obvious. Mr. Cooney will be providing information in his official capacity about his activities at CEQ. Naturally, CEQ has a strong interest in ensuring that the information provided on its behalf is accurate, complete, and correct, and that any ambiguities or confusion are promptly resolved. It also has an interest in quickly identifying—and correcting—any potential problems that might be identified through the oversight process. Moreover, CEQ has a fundamental and well-recognized interest in ensuring that its personnel are not pressed into revealing privileged information belonging to the Executive Branch, such as internal Executive Office of the President deliberative communications, *see United States v. Nixon*, 418 U.S. 683, 705-06 (1974); *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974), or responding to inquiries that are beyond Congress's oversight authority, *see Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959). Last, but certainly not least, as an employer CEQ has a strong interest in providing reassurance and support to staff who are called to Congress to provide information about their work-related activities. This support should be provided whether or not the individual is currently employed by CEQ.

It is standard and appropriate practice for government counsel or other representatives to accompany Executive Branch officials who testify at a congressional oversight hearing or at depositions in civil litigation. There is no basis for speculating that the presence of government representatives impedes these important proceedings or prevents witnesses from speaking honestly. Nor would allowing a CEQ representative to attend the deposition create a conflict of interest. We make it clear to CEQ personnel that CEQ counsel represents CEQ, not their personal interests. This is, of course, fully consistent with the practice in civil litigation, where Justice Department attorneys, representing Executive Branch officials in their official capacity, represent the government rather than the officials personally. It is understood that there is no conflict of interest in that context.

In closing, allow me to reiterate that we recognize the importance of the Committee's oversight responsibilities and we stand ready to assist the Committee in any way we can, consistent with our constitutional and statutory obligations. However, for the reasons stated above, we request that CEQ counsel be allowed to attend today's meeting with Mr. Cooney—whether it be conducted as a deposition under Rule 22 or as an informal meeting. Please do not

hesitate to contact me directly if you have any questions or concerns, or your staff may contact
CEQ Deputy General Counsel Ted Boling.

Sincerely,

A handwritten signature in cursive script that reads "Dinah Bear". The signature is written in dark ink on a light-colored, textured paper.

Dinah Bear
General Counsel



United States Department of State
Washington, D.C. 20520

MAY 11 2007

Dear Mr. Chairman:

I am writing in further response to your May 4 letter to Secretary Rice, in which you requested that Mr. Simon Dodge of the Department's Bureau of Intelligence and Research be made available to your Committee for questioning on May 9. I understand that the Committee has since decided to postpone this interview until May 14. Mr. Dodge has previously provided testimony to the Senate Select Committee on Intelligence on the same subject matter of your proposed questioning. As an accommodation, we have agreed to make Mr. Dodge available for appropriate questioning by Committee staff, but we do so without prejudice to our right, in response to future requests for either documents or testimony, to raise appropriate objections to the Committee's jurisdiction to investigate intelligence matters or to duplicate previous inquiries conducted by other congressional committees.

Your staff has informed us, however, that Department counsel or other Department representatives will be barred from attending the interview. The Department strongly objects to this policy. The proposed interview will seek information about Mr. Dodge's official activities as an intelligence analyst at the Department of State. There are important interests served by having a Department representative attend such interviews.

Fundamentally, the Department has a strong interest in ensuring that the information provided by its employees on its behalf to the Congress is accurate and complete, and in working to help its employees resolve any ambiguities, miscommunication or confusion that may arise in the course of the interview. The Department representative can also help follow up on questions that may be raised in the course of the interview that the employee cannot answer. The Department also has a responsibility to ensure that

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Committee on Oversight and Government Reform,
House of Representatives

classified or potentially privileged information is properly addressed in the course of an interview. These are often not matters that the employee can address without advice and assistance. Finally, the Department has an interest in ensuring that its employees are fairly treated and properly supported throughout the process. In most cases, our employees feel more comfortable when Department counsel is present, particularly when being questioned by several committee staff attorneys. For these and other reasons, it has long been the practice that agency counsel or other representatives are permitted to attend committee interviews of agency officials.

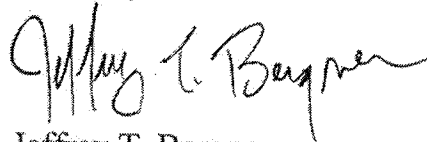
Your staff has asserted that the principal purpose of excluding agency representatives from the interview is to ensure that the employee feels free to speak candidly. As you know, agency representatives routinely accompany and support agency employees, not only when they are interviewed by committee staff, but also when they testify in congressional hearings, in civil litigation, and in other contexts. No one could reasonably argue that this routine practice deters witnesses from speaking honestly in these settings. Government employees have an obligation to tell the truth in committee proceedings, and they are so advised by agency counsel. In this case, Mr. Dodge has advised Department officials that he has no objection to attendance of an agency representative at the interview and would not be impeded from speaking candidly if an agency representative were present.

Permitting agency employees to retain private counsel to accompany them to committee interviews is not a satisfactory solution. The cost of private counsel would be prohibitive in most cases, and private counsel could not in any event protect or promote the important Departmental interests I have identified.

Accordingly, we urge that your Committee reconsider its new policy of barring agency representatives from this and similar interviews of agency personnel. Other committees in the current Congress do not have such a policy, and agency representatives have accompanied employees to interviews by your committee in the past. The Department of State remains committed to facilitating legitimate, effective, and informed Congressional oversight of its activities. We believe that barring Department representatives from committee interviews of Department personnel will undermine rather than enhance such oversight.

If you nonetheless insist on barring Department representatives from the interview in this case, we have advised your staff that we will allow Mr. Dodge to appear for questioning, provided he is permitted to consult agency counsel outside the room as necessary during the course of the interview. We are willing to accept this arrangement in this case because Mr. Dodge has advised that he is willing to appear without Department counsel and he has already testified on the subject at issue in the past. This agreement should not be construed as an indication that the Department will accept exclusion of Department representatives from similar interviews in the future.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jeffrey T. Bergner".

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs



United States Department of State

Washington, D.C. 20520

JUN 01 2007

Dear Mr. Chairman:

I am writing in response to your May 23 letter requesting interviews with Department of State employees Douglas Rohn and Deborah Glasberg, in connection with your Committee's investigation of issues related to Iraq's alleged efforts to obtain uranium from Africa and its nuclear threat. The Department is prepared to make these or other appropriate individuals available to be interviewed by Committee staff with agency counsel present. In order for the Department to respond to this request, and to facilitate preparations for any such interviews, I ask that you identify in writing the subjects on which you would like to question these individuals.

You have advised that the Department may provide counsel for these employees during the interviews, but only if counsel is present to advise the employees of their rights, not to represent the Department, as outlined in your May 21 letter on this issue. While we agree that federal employees should be able to have personal legal representation if necessary at these interviews, Department of State attorneys are not authorized to represent agency employees in their personal capacities. As you have recognized, agency counsel generally have an ethical obligation to represent the agency by which they are employed. See District of Columbia Rules of Professional Conduct, Rule 1.6(j) ("The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.") The Department of State has no regulations authorizing Department attorneys to serve as personal counsel for agency employees, and even if it did, significant conflict-of-interest issues would be presented if Department attorneys were routinely asked to take on this role in the context of Congressional oversight.

The Honorable

Henry A. Waxman, Chairman,
Committee on Oversight and Government Reform,
House of Representatives.

In any event, the arrangements you propose for personal representation of the employee do not address the important interests in having Department counsel attend such interviews on behalf of the Department. As I explained in my May 11 letter on this subject, the Department's interests and obligations include ensuring that classified or potentially privileged information is properly addressed during the course of the interview and ensuring that the information provided by its employees on its behalf is accurate and complete. These Departmental interests and obligations cannot be fulfilled by an attorney representing an employee in his or her personal capacity.

Your May 21 letter suggests that Department counsel may deter employees from providing truthful and complete testimony when the Committee is engaged in oversight related to the actions of an agency head or senior agency officials. We can assure you that Department counsel would encourage interviewees to provide truthful and accurate information. Indeed, attorneys have an ethical obligation not to engage in deceit or misrepresentation and not to assist a client in any criminal or fraudulent conduct, to include knowingly providing false information to a Congressional committee. See District of Columbia Rules of Professional Conduct, Rule 1.2 (e) (attorneys may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"); Rule 8.4(c) (attorneys may not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"). In our view, the presence at an interview of agency counsel, who are typically career government lawyers and who would face serious repercussions for participating in any knowing misrepresentations to a Congressional committee, operates to enhance candor and completeness, not to impede it.

As you know, agency counsel routinely accompany and support agency employees in proceedings related to civil litigation and in Congressional hearings without any suggestion that their presence defeats the truth-seeking function. Moreover, most career Department employees lack familiarity with the oversight process and have little if any experience working with Congressional committee staff. In our view, requiring employees to appear alone and in private for a transcribed interview by one or more Committee lawyers, without support or assistance from Department representatives, will in many cases increase employee anxieties and raise employee concerns about appearing and providing information. For all of these reasons, we believe that the presence of agency counsel will make it

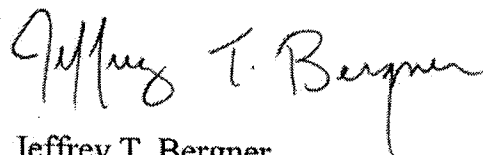
easier, rather than harder, for the Committee to obtain accurate and complete information.

Your May 21 letter also asserts that Committee Rule 22, governing the procedure for depositions, bars attendance of agency counsel. However, as I understand it, your proposal is to question Mr. Rohn and Ms. Glasberg in transcribed interviews, as was done in the recent interview of Department employee Simon Dodge, rather than in depositions subject to Rule 22. So far as we are aware, no Committee rule bars a Department attorney from attending such interviews, nor is there any rule requiring that a deposition format be employed. Of course, the Department's view remains that informal briefings by agency employees, rather than formal transcribed interviews with court reporters, are the best way for the Department to accommodate Congressional requests for information about its activities.

For these reasons, I ask that you reconsider your policy of excluding agency counsel or other agency representatives from the oversight process generally, and specifically from the proposed interviews of Mr. Rohn and Ms. Glasberg. Although I understand that Mr. Rohn previously agreed to appear for an interview by Committee staff on June 1, the Department has advised your staff of the need to postpone this interview pending your consideration of the issues identified in this letter. I regret any inconvenience this rescheduling may cause, but my staff and Department counsel were not previously aware of the scheduling of this interview.

Secretary Rice and the Department of State remain committed to facilitating legitimate oversight efforts. The Department's ability to be represented and participate meaningfully in the oversight process is a critical concern to us, however, and we hope that we can reach an understanding with the Committee that allows the Department to do so.

Sincerely,



Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 12 2007

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Waxman:

I am responding to your March 30, 2007 letter requesting copies of ten documents and transcribed interviews by Committee staff with five EPA employees from the Region 9 office in San Francisco. EPA respects your role as Chairman and is committed to providing the Committee the information necessary to satisfy its oversight activities to the extent possible, consistent with Constitutional and statutory obligations. While EPA identified important Executive Branch confidentiality interests in the documents you requested in our letters dated April 4, 2007 and April 5, 2007, as an accommodation, EPA provided copies of these documents to you for oversight purposes. Through this accommodation, EPA does not waive any confidentiality interests in these documents or similar documents in other circumstances. I appreciated the opportunity to discuss some of EPA's concerns with your request to interview five EPA employees during a conference call with your staff on April 3. In this letter, I am outlining our concerns further.

First, as you know, EPA's consideration of a permit for the BHP Billiton Cabrillo Port facility is an ongoing regulatory action, raising particular concerns regarding the confidentiality and impartiality of agency deliberations. It is critical for policy makers to obtain a broad range of advice and recommendations from Agency staff and to be able to properly execute their statutory obligations under the Clean Air Act and other environmental statutes without undue influence by outside parties. Disclosing pre-decisional information at this time could significantly compromise the ability of Agency employees to independently and objectively evaluate the public comments and prepare a final decision. Further disclosure of information at this stage of the deliberations and in the format you request could raise questions about whether the Agency's decision was being made or influenced by proceedings in a legislative or public forum rather than through the established administrative process.

Second, your request for transcribed interviews raises concerns. As we explained in our telephone conference with Committee staff on April 3, 2007, EPA could accommodate the Committee's oversight interests with informal briefings by appropriate officials. Informal

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briefings are the traditional accommodation and long-standing practice in this context, as opposed to interviews. We recognize the importance of the Committee's need to inform itself in order to perform its oversight functions, but we remain concerned, for example, that interviews would not effectively satisfy our respective needs. EPA believes the long-standing practice of informal briefings properly balances the interests of Congress and the Executive Branch. In our experience, briefings often generate the kind of candid, back-and-forth conversations between Agency employees and Committee staff that can provide meaningful information in furtherance of the Committee's oversight activities.

Your request further describes the interviews as formal, transcribed interviews. Transcribed interviews would be a significant departure from the long-standing practice of accommodation between Congress and the Executive Branch. We are concerned that the use of formal interviews by Committee counsel, transcribed by a court reporter, rather than the customary informal briefings, have the potential to be overly adversarial and to intimidate Agency staff.

Third, we are concerned as well that staff are being asked to speak regarding official duties without the presence of Agency counsel or other representatives. During further discussions on April 4, 2007, Committee staff explained that the transcribed interviews would be conducted by several Committee staff attorneys for an undetermined period of time and would include a court reporter. Moreover, we understand that the employees would be permitted to be accompanied at the transcribed interview only by personal counsel. Since these transcribed interviews seek information about these career employees' official activities, we respectfully believe the proposed procedure excluding Agency representatives and counsel is inappropriate. It does not adequately protect the need of the Executive Branch to ensure the accuracy and completeness of representations, to address any identified deficiencies in Agency procedures, or to protect the confidentiality and integrity of the Agency's deliberations and legal advice. It is appropriate for Agency counsel and representatives to accompany EPA employees who appear before Congressional committees. These procedures continue to be of particular concern and are inconsistent with the long-standing practice of having Agency representatives present.

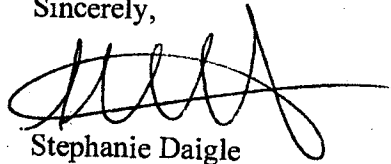
The request for interviews without Agency personnel, but with personal counsel, also raises concerns that career staff you have asked to interview may need to hire counsel at their personal expense. This proposal of transcribed interviews could impose undue burdens and hardship on agency staff to hire personal counsel. Requiring career Agency employees to retain private counsel while speaking in their official capacity would be an extraordinary burden on career staff and could unnecessarily distract employees from their official duties. Since the employees would be providing information about their official activities at EPA, the Agency has a strong interest in providing support to its employees who are called to provide information to Congress regarding their Agency activities.

Finally, the Agency has significant concerns regarding interviews of Agency lawyers. Requiring Agency attorneys to provide information regarding confidential advice provided to clients, or information obtained from clients, puts career attorneys in an untenable position. In order for these employees to effectively perform their functions, their clients must have confidence in their ability to share information candidly, and to obtain candid advice in reply.

Placing counsel in the position of being questioned regarding the advice provided to their clients certainly jeopardizes their ability to maintain the trust and confidence of their clients and it undermines a willingness to seek the advice of counsel in the future. This could have dire consequences for the Agency's ability to effectively and legally administer its statutory obligations.

Let me restate that we recognize the importance of the Committee's oversight responsibilities and are interested in finding a mutually acceptable accommodation. For the reasons we have outlined above, EPA strongly objects to interviews of Agency employees as you requested. As we explained to your staff on April 3, 2007, EPA is willing to arrange briefings with Committee members or designated staff as a measure to meet your oversight needs and would welcome the opportunity to further discuss your request. If you have any questions, please contact me or your staff may contact Tom Dickerson of my staff at (202) 564-3638.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stephanie Daigle', written over a horizontal line.

Stephanie Daigle
Associate Administrator