

DNC Document Production

The DNC's failure to comply fully and in a timely manner with the Committee's subpoena significantly hampered the Committee's investigation. The DNC delayed the production of documents, produced documents in a manner calculated to impede the effective examination of DNC officers and employees, and generally obstructed the Committee's investigation. More specifically, the DNC responded slowly to the Committee's long-anticipated subpoena, produced previously-gathered documents only on the eve of depositions at which they were to be used, and never fully complied with the Committee's subpoena. In so doing, the DNC's constant refrain was that the financial burden of complying with the Committee's lawful subpoena was too great. Alternatively, the DNC would urge that its resources were being diverted by grand jury subpoenas. All the while, the DNC could take comfort from the Committee's investigatory deadline, knowing that judicial enforcement of the Committee's subpoena was impossible.

The deadline imposed on this Committee lurked at all times behind the DNC's noncompliance. As discussed elsewhere in this report,¹ many organizations simply chose to ignore this Committee's subpoenas, with the hope that the time limit imposed on the Committee's investigation would render court enforcement of its subpoenas impossible -- and perhaps legally moot. The DNC could not pursue the same strategy and ignore this Committee's subpoena; the political costs of doing so would have been too great. The DNC still found its own ways to hinder the Committee's investigation by exploiting the Committee's investigatory deadline.

The Committee and the DNC engaged in many battles over document production. The purpose of this section of the report is not to describe every shortcoming in the DNC's production

¹ See, e.g., the section of this report on the noncompliance by nonprofit organizations with the Committee's subpoenas.

of documents in response to the Committee' subpoena. Nor is the purpose of this section to document tediously every meeting and phone call between Committee staff and the DNC's lawyers on issues that arose concerning document production. Rather, the Committee merely wishes to focus attention on a few serious issues that arose in the course of the DNC's alleged compliance with the Committee's subpoena, and which the Committee believes fairly illustrate a pattern of obstruction on the part of the DNC.

One case in particular -- the belated production of Richard Sullivan's files -- may even raise criminal issues. The Committee cannot exclude the possibility that these files were intentionally withheld, which would constitute the crime of obstruction of Congress. Indeed, the inconsistent, incredible explanations for the belated production of those files give weight to the possibility that they were deliberately withheld from the Committee.

The Committee's Subpoena

The Committee issued a subpoena to the DNC on April 9, 1997. The subpoena was served on April 10. The subpoena's return date -- the date by which the DNC was to comply with the subpoena -- was April 30, 1997.

This subpoena hardly came as a surprise to the DNC. As early as November 6, 1996, the day after the 1996 election, DNC General Counsel Joseph Sandler sent a memorandum to all DNC division directors, headed "**Immediate Attention**," which directed them to preserve DNC documents

and required DNC employees to prepare an inventory of their files.² The memorandum was drafted in apparent anticipation of congressional and law enforcement subpoenas.³

Moreover, the Committee gave a draft of the subpoena to the DNC's outside lawyers on March 18, 1997. By March 18, the DNC was thus aware that the Committee would request, at a minimum, documents already requested by grand jury subpoenas. The DNC was also permitted to comment on the draft subpoena, with an eye toward streamlining and expediting its document production. In some cases, the Committee even incorporated into the final subpoena suggestions made by the DNC's lawyers. In short, the DNC should have been well-prepared for the Committee's subpoena.

The DNC's Sluggish Response to the Subpoena

Despite having ample time to prepare to respond to the subpoena, the DNC responded sluggishly. Sandler testified that the DNC circulated a memorandum directing employees to search their files on or about April 24, 1997 -- less than a week before the subpoena's return date, and nearly two weeks after the Committee issued its long-anticipated subpoena.⁴

In fact, the DNC chose to ignore the subpoena's return date. Sandler testified that the DNC did not require its employees to finish searching their files pursuant to the April 24, 1997, search memorandum until nearly four months after the Committee's subpoena was issued -- and nearly one

² Memorandum from Joe Sandler, November 6, 1996 (Ex. 1).

³ Memorandum from Joseph E. Sandler, January 13, 1997 (Ex. 2). By January 13, 1997, the DNC had received at least two federal grand jury subpoenas.

⁴ Deposition of Joseph E. Sandler, August 22, 1997, pp. 113-14.

month after the Committee commenced public hearings. Sandler's testimony on this point contained an implicit suggestion that this Committee's subpoena was either ignored or given a "lower priority":

Q: All right. Mr. Sandler, you had indicated in one of your previous answers that DNC employees began reviewing their files for documents specifically responsive to this committee's subpoena on or about April 24th of this year?

A: Something -- yeah. I'd have to look at the search memo. That's right.

Q: Now, how long did that process take for employees to complete their search of their files?

A: It took a long time. It didn't -- it wasn't completed until a couple weeks ago. We set a deadline of July 31st. It was a Friday, around there was the -- we set an absolute deadline. A lot of people had turned stuff in already, but we made a point of having it wrapped up by then.

Q: So it was only within the past two weeks that the -- I mean, that the -- am I correct that the process of having employees of the DNC review their files in terms of responsiveness to our subpoenas lasted from approximately April 24th until approximately two weeks ago?

A: Two or three weeks ago. But I want to say that it was an ongoing process. There were continually materials being received. You asked us to focus again on certain things as a matter of the committee's priorities. And you have to keep in mind, Mr. Mattice, that the DNC has been simultaneously responding to 12 other subpoenas, most of which were issued by federal grand juries that can hardly be ignored or made a lower priority.⁵

The Committee concludes that the DNC was slow-walking its response to the subpoena, knowing that the DNC could use the allegedly more urgent subpoenas issued by federal grand juries as an excuse for delaying the Committee, even though the DNC knew the Committee's investigation would have to be concluded by the end of the year. The DNC's bad faith is patent.⁶

⁵ *Id.* at pp. 114-15 (emphasis added).

⁶ Moreover, as will be discussed in some detail later, the DNC's July 31, 1997 deadline for searching documents may have contributed to the late discovery of 4,000 documents from the files of Richard Sullivan. If Paul DiNino's testimony is

A Pattern of Gamesmanship

While the DNC waited for months for its employees to finish searching their files to respond to the Committee's subpoena, it began to produce some documents soon after the receipt of the subpoena. From the very beginning of this production, the Committee discerned a pattern of gamesmanship. Between April 25 and April 30, 1997, the DNC produced approximately 25 boxes of documents to the Committee. The Committee understood that these boxes contained documents previously produced to other governmental entities (such as grand juries) in response to their subpoenas. Although a smattering of these documents were relevant, most were of no value. The production included repetitive donor lists, thousands of pages of "The Hotline" (a political newsletter circulated by electronic mail), and non-consecutive spreadsheets containing donor information, which were virtually impossible to piece together in the form produced.

Because of the Committee's investigative deadline, depositions for DNC witnesses had to begin quickly. The shortage of relevant documents would impair the Committee's examination of DNC witnesses, many of which were scheduled for May. The Committee was concerned that the DNC's manner of production would result in having to constantly re-call witnesses as documents relevant to them trickled out of the DNC. Responding to the Committee's concern, the DNC agreed to produce documents relating to particular witnesses in advance of their depositions.

Unfortunately, even more gamesmanship ensued. The DNC's supposed compliance with its agreement smacked of bad faith; it routinely produced documents relevant to particular witnesses the

to be credited, he looked into one drawer of the only file cabinet in his office only when, in late July, the DNC sought to ensure that all files had been searched for responsive documents by the end of July. *See infra*, notes 35-38 and accompanying text.

afternoon before their deposition, even though the documents had been gathered by the deponents long before.

One representative example of this sort of egregious behavior concerns documents relevant to the testimony of DNC Deputy National Finance Director David Mercer. The Committee began to depose Mercer on Wednesday, May 14, 1997. On the afternoon of Tuesday, May 13, the DNC delivered two boxes of documents previously gathered by Mercer from his files. When the Committee could not conclude Mercer's deposition on May 14, his deposition was scheduled to resume on Tuesday, May 27, 1997, the day following Memorial Day. On the evening of Friday, May 23, 1997, the DNC produced four boxes of additional documents that the DNC represented had been previously gathered by Mercer from his files. During the continuation of his deposition on May 27, Mercer was shown one of the documents produced on the previous Friday, and he testified that the document had been produced by him to Sandler around "Christmastime" of 1996.⁷

The Committee concludes that the DNC's production of documents on the eve of a witness' second day of deposition testimony, when the witness had gathered the documents and given them to the DNC's counsel roughly six months earlier, was an obstructionist tactic. Unfortunately, the DNC frequently employed this tactic in the course of the Committee's investigation.

In the midst of this gamesmanship, the DNC informed the Committee in a meeting in the middle of June 1997 that 55 boxes of documents had been produced to other governmental entities in response to their subpoenas, but had not been produced to the Committee -- even though they had been specifically requested by the Committee's subpoena, and the Committee had been led to believe that the productions between April 25 and April 30 were comprised primarily of documents

⁷ Deposition of David Mercer, May 27, 1997, p. 59.

previously produced to other governmental entities. Even more surprising was that the DNC would not just copy the contents of these boxes and forward them to the Committee; rather, the DNC insisted on re-reviewing these documents and producing them incrementally -- allegedly to protect privileges, even though any alleged privilege would have been waived by the previous production to other governmental entities. The DNC produced the documents over the days leading up to the July 4 holiday; production of the 55 boxes was not complete until July 2, 1997 -- less than a week before the commencement of the Committee's public hearings, which were to open with the testimony of former DNC National Finance Director Richard Sullivan.

This dismal pattern of production continued throughout the Committee's investigation.

Richard Sullivan's File Cabinet: Possible Obstruction of Congress

On Monday, July 28, 1997, several DNC lawyers met with Committee counsel to discuss many of the document production problems. In the course of that meeting, they described documents then in the immediate "pipeline" to the Committee. In so doing, they specifically represented to the Committee that it would soon be receiving several boxes of "generic" Finance Division documents.

On Friday, August 1, 1997 -- one day after the Committee had concluded its July hearings and adjourned for the August recess -- a DNC lawyer called the Committee and informed it that the representation that the boxes were generic Finance Division documents may have been "mistaken." According to the DNC, it had just learned that a number of the boxes were actually from Richard Sullivan's files. Sullivan had been deposed in May and June, and had been the Committee's first witness in public hearings on July 9-10.⁸ The DNC promised that the documents would be produced

⁸ During the first day of Sullivan's deposition, he expressed concerns about his access to the documents that he left behind at the DNC. See Deposition of Richard Sullivan, June 4, 1997, pp. 13-27. At the same time, Sullivan's lawyer,

by Monday, August 4, as it clearly recognized the significance of failing to produce documents relating to the Committee's first public witness. Indeed, on that same day, August 1, DNC Chairman Roy Romer personally called Chairman Thompson to inform him of the same discovery and to apologize for the delay.

On Monday, August 4, 1997, the DNC delivered two boxes of documents from Richard Sullivan's files. The Committee estimates the total number of pages produced at 4,000. Committee staff quickly reviewed the documents, and discovered that the documents were among the most significant yet produced to the Committee. The documents included:

- Approximately 1,500 pages of Sullivan's handwritten notes, apparently taken during meetings or telephone conversations.⁹
- Sullivan's "Roger Tamraz" file.
- Sullivan's "Johnny Chung" file.
- Sullivan's "Mark Middleton" file.

Robert Bauer, expressed vague concerns to the Committee that the DNC had not produced all of Sullivan's documents to the Committee. In fact, Bauer later informed the Committee that, immediately following the second day of Sullivan's deposition, on June 5, 1997, he had spoken with Judah Best, a lawyer for the DNC, and advised Best that it appeared that the Committee had not received all of Sullivan's documents.

⁹ Sullivan acknowledged during the first day of his deposition testimony that he "worked off a legal pad" during his day; however, he also testified that he "did not take copious notes of meetings." Deposition of Richard Sullivan, June 4, 1997, p. 10. Sullivan also testified that he "would keep the legal pads for a period of two to three weeks as they were relevant to what I was working on, and then generally would throw them away." *Id.* In the light of the subsequent production of 1,500 pages of Sullivan's handwritten notes, which represent only those notes responsive to the Committee's subpoena, Sullivan's candor is called into serious doubt.

- Sullivan’s “Harold Ickes” file, which, among other things, included documents relating to possible fund-raising phone calls placed by the President and Vice President.
- Numerous call sheets prepared by the DNC for the First Lady.

The press was quick to pick up on the DNC’s belated production of such highly relevant files concerning a major witness. In a front-page article in *The Washington Post* on August 8, 1997, entitled “Senate Panel Probes DNC Files Delay,” reporter Bob Woodward quoted DNC Chairman Roy Romer as saying that the new Sullivan material was discovered on July 30 by Paul DiNino, the new DNC finance director who had replaced Sullivan.¹⁰ Woodward reported that he had interviewed DiNino, and that DiNino said that the new Sullivan documents were in a drawer in the only file cabinet in his office. Woodward’s article continued:

Asked why he waited more than five months to look in the drawer, DiNino said there was a new push at the end of July to make sure all DNC files had been reviewed. “I hadn’t looked in before . . . I don’t like paper anyway, and I didn’t need space for files. Richard [Sullivan] and I have different styles. Richard saved a lot of things. When he discovered the material July 30, DiNino said, he called DNC lawyers at once.¹¹

¹⁰ Bob Woodward, “Senate Probes DNC Files Delay,” *The Washington Post*, Aug. 8, 1997, p. A14.

¹¹ *Id.*

The Committee investigated the delay in producing the Sullivan files. The testimony on this subject was contradictory,¹² which raises disturbing inferences, especially given the proximity of the depositions to the events in question.

Joe Birkenstock's Testimony

The first witness to testify on this topic was Joseph Birkenstock, who was deposed on August 28, 1997. Birkenstock is a lawyer working for the DNC's Office of General Counsel, and he primarily handles document production issues relating to the various campaign finance investigations. He reports directly to Sandler.¹³

Birkenstock testified that he first became aware of the existence of the Sullivan files on Wednesday, July 30, 1997.¹⁴ On that day, he overheard DiNino and Scott Freda, formerly Sullivan's

¹² One day after the Woodward article, Marc Lacey and Alan Miller of *The Los Angeles Times* reported on their own interview with Paul DiNino. Marc Lacey & Alan Miller, "Delayed DNC Papers Irk Thompson," *The Los Angeles Times*, Aug. 8, 1997, p. A16. According to their report, DiNino said that he had "opened the drawers of the filing cabinet at some point after he first arrived at his DNC office on Feb. 20, and, in a cursory review, spotted brochures and other seemingly innocuous material." *Id.* The article continued:

"I opened the top drawer and it appeared to me to be very common items such as brochures," he said. "I opened another drawer that had legal pads with doodles on them."

DiNino said that when DNC officials recently urged staffers to search the premises again for papers sought under a Senate subpoena, he inspected the filing cabinet again on July 30 and discovered four boxes of relevant records.

Id. There are subtle inconsistencies between this account and that reported by Woodward.

¹³ Deposition of Joseph M. Birkenstock, August 28, 1997, p. 8.

¹⁴ *Id.* at p. 109.

administrative assistant and now the Finance Division’s chief of staff, talking about “a certain group of documents that they seemed unfamiliar with and seemed not to know whose responsibility they would be to search”¹⁵ So, Birkenstock called Freda and offered to resolve the issue by having “somebody from the document group come over with a bunch of boxes. We would just box the documents up and take them with us and put them into the production process.”¹⁶ Obviously, Birkenstock thought the documents were relevant from the snippets of conversation he allegedly overheard. Indeed, if DiNino’s testimony, discussed later, is to be credited, DiNino was certainly aware of the relevance of the documents prior to discussing them with Freda.

When the documents were retrieved by personnel from the General Counsel’s office, they filled four boxes -- roughly 12,000 pages.¹⁷ Two days later, Birkenstock realized the documents were Richard Sullivan’s, and “alarms went off” in his head.¹⁸

Birkenstock was asked how these documents were overlooked earlier. He explained that, on the day that Sullivan was leaving the DNC, Birkenstock met with Sullivan in an office located about two doors down from Sullivan’s office.¹⁹ Sullivan was leaving about eight boxes of documents in the room.²⁰ Birkenstock testified that he thought the eight boxes comprised the entire universe of Sullivan’s files:

¹⁵ *Id.*

¹⁶ *Id.* at pp. 113-14.

¹⁷ *See id.*

¹⁸ *Id.* at pp. 114-15.

¹⁹ *Id.* at p. 111.

²⁰ *Id.* at p. 112.

I asked him if all of these documents -- if this was all of the files he had at the DNC. As I recall his response -- I guess you are aware of his characteristic way of speaking in which he would kind of begin three -- or a handful of phrases and then finish one of them. So, again, I don't recall the specific words that he used, but, in general, I recall his response being, "To the best of my -- as far as I know -- as far as I can -- yes, these are all my files."²¹

Birkenstock re-affirmed that, "in general, what I was asking him was whether those were all of his files, and in general, I recall him responding that they were."²²

Richard Sullivan's Testimony

Sullivan's recollection differs significantly from Birkenstock's. Concerning the meeting they had on the day of Sullivan's departure, Sullivan testified as follows:

A: . . . I pointed out to him the boxes in which I assembled the documents from my office with the exception of the file cabinet and I pointed out the file cabinet to him.

* * *

Q: Why did you point the file cabinet out to him?

A: Because I had moved everything else but the file cabinet, all the -- a new finance director was coming in. So, I had moved everything out of my desk and on my desk and on a table that was in my office into another office. I did not move the file cabinet nor did I box -- nor did I place in any boxes the contents of the file cabinet. So, I pointed to the boxes in one room and then pointed to the file cabinet in the other room.²³

²¹ *Id.* at pp. 112-13.

²² *Id.* at p. 113. Sandler testified that, when Sullivan departed the DNC, Sullivan "assembled a number of boxes which he represented to ... Mr. Birkenstock constituted all of his files at the DNC." Deposition of Joseph E. Sandler, August 22, 1997, p. 100. Sandler said that the reason the file cabinet documents were not produced earlier was "that Mr. Sullivan didn't turn them over to Mr. Birkenstock when he left the DNC." *Id.* at p. 105.

²³ Deposition of Richard Sullivan, September 5, 1997, p. 215.

Sullivan repeated his claim that he pointed out the file cabinet to Birkenstock.²⁴

Paul DiNino's Testimony

Paul DiNino was deposed on September 16, 1997. He admitted to inspecting the file cabinet at least twice prior to July 30, 1997. He stated that he first opened the file cabinet sometime within a month or so of his arriving at the DNC on February 20, 1997.²⁵ He testified that he opened the file cabinet “[j]ust to see what was in there.”²⁶ According to DiNino, he opened two drawers of the four-

²⁴ *Id.* at p. 216. Sullivan also testified that, in response to one of the DNC’s search memoranda for documents to respond to various subpoenas, he believed he may have referenced his file cabinet as a location for potentially responsive documents on a schedule that he, like other DNC employees, was to return to Joe Birkenstock. *Id.* at p. 218; *see also id.* at p. 216 (provided schedule to Birkenstock). The DNC had resisted production of that schedule, asserting that the schedule was protected from disclosure by the work product doctrine. On the strength of Sullivan’s testimony about the contents of the schedule, the Committee asserted that any work product protection was waived, and sought the schedule again from the DNC. The DNC produced the schedule on September 11, 1997. One could reasonably read the schedule as corroborating, in some respects, Sullivan’s testimony. Among other things, the “Johnny Chung” file, which was in the file cabinet of documents belatedly produced to the Committee, appears to be referenced in that schedule (the schedule describes a responsive document as “Johnny Chung Luncheon List”). Its location is described as “File.” Although the reference is not as clear as the phrase “File Cabinet,” it is similar. Memorandum from Richard Sullivan to Joe Birkenstock, December 19, 1996, p. 2 (Ex. 3).

Further buttressing the probability that Sullivan’s account is truthful is that Sullivan told the Committee about his file cabinet on the first day of his deposition. *See* Deposition of Richard Sullivan, June 4, 1997, p. 12. If Sullivan were attempting to conceal the existence of these files, this would be odd. Moreover, given Sullivan’s reference to his file cabinet in the deposition on June 4 (in which a lawyer representing the DNC was present), and given that Sullivan’s lawyer informed a DNC lawyer on June 5 that he believed that the Committee may not have received all of Sullivan’s responsive documents, *see supra* note 8, it is difficult to comprehend the DNC’s continued “oversight” of Sullivan’s file cabinet.

²⁵ Deposition of Paul DiNino, September 16, 1997, pp. 22-23.

²⁶ *Id.* at p. 23.

drawer filing cabinet: the top drawer and the third drawer down.²⁷ In the top drawer, he saw “brochures,” and in the third drawer, he found “doodled legal pads.”²⁸ His concluding thought was, “It’s junk.”²⁹

A few months later, DiNino testified that he “opened the same drawers and I saw the same thing and I closed it. Again, that time it was probably more out of boredom than of curiosity.”³⁰

DiNino was pressed concerning his explanation for why he opened the same two drawers of the filing cabinet that he had previously opened and found to be junk. His answers are hard to accept:

Q: Do you know why it would be that you, on at least two occasions, opened drawers one and three but never looked in drawers two and four?

A: I wish I had an answer for you. No, I don’t.

Q: You said that through boredom or curiosity you looked in drawers one and three.

A: Mm-hmm.

Q: Curiosity never led you to two and four?

Q: My curiosity was pretty much killed in one and three. There was nothing in there.³¹

When even more questions were asked on this topic, it turns out that DiNino did have an answer for the Committee about why he opened only drawers one and three:

²⁷ *Id.* The file cabinet had four drawers, and DiNino testified that it stood about four or four and a half feet tall. *Id.* at p. 11.

²⁸ *Id.* at p. 23.

²⁹ *Id.*

³⁰ *Id.* at p. 26.

³¹ *Id.* at pp. 29-30.

- Q:** I guess my question would be I'm curious and maybe you can clarify why on a repeated number of occasions you'd looked through drawers one and three and not looked in drawers two and four.
- A:** Again, that's a good question. The first drawer is at eye level. The third drawers is at the level my hand is. I ask myself the same question.
- Q:** Okay. Now, the second time you looked at the drawers you said you were also bored or curious?
- A:** I'm a pacer. I opened the same drawers. They were at eye level and they were at the same level as my hand.
- Q:** I guess the point I don't understand is if you've looked at drawers one and three and you're curious, wouldn't you be looking in two and four?
- A:** If my curiosity was organized, I would have done that. I didn't. Had I, this would have been taken care of a long time ago.³²

The Committee finds this explanation -- that drawer one was at eye level and drawer three was at hand level -- preposterous. The file cabinet stood four to four and a half feet tall. DiNino was a man of normal height. Four feet tall is not eye level, and, more important, drawer three (which is the second drawer up from the floor) would have been far from hand level. Anyone reading DiNino's testimony in the presence of a four-drawer filing cabinet would find his explanation incredible.

Be that as it may, DiNino testified under oath that he did not open drawer two until July 30.³³ He testified that he never opened the bottom drawer, drawer four.³⁴ The reason he re-investigated the file cabinet was that, at a senior staff meeting on Tuesday, July 29, "it was announced that a woman on staff would be going around to every filing cabinet, assigning each filing cabinet a number,

³² *Id.* at pp. 34-35 (emphasis added).

³³ *Id.* at pp. 9-12; 35-36.

³⁴ *Id.* at pp. 12, 29.

and whoever's area that filing cabinet or box or whatever was in, they were responsible to have that filing cabinet searched."³⁵ This was part of "a final push at the DNC to get all the documents that complied with the subpoena" by Friday, August 1, 1997.³⁶ DiNino further testified that, when "the filing cabinets were numbered, I asked my assistant . . . if she would search the filing cabinet. And before I asked her to do that I wanted to make absolutely sure that there was nothing in there that she would stumble upon, so I investigated first."³⁷ When he opened drawer two, he discovered three documents that "complied with the document search that we were finishing up."³⁸

DiNino then called Freda into his office, and asked Freda to take care of the documents.³⁹ Originally, DiNino did not remember any further discussion on that day with Freda concerning the documents.⁴⁰ Later, DiNino testified that, after he called Freda into his office to take care of the

³⁵ *Id.* at p. 27.

³⁶ *Id.* Recall that the DNC did not require its employees to complete their search of their files to respond to the Committee's subpoena until July 31, 1997. *See supra*, note 5 and accompanying text.

³⁷ DiNino Deposition at pp. 35-36. This testimony is internally inconsistent: on the one hand, DiNino asserts that he asked his assistant if she would search the file cabinet; on the other hand, he asserts that *before* asking her to do so, he first investigated the file cabinets and discovered the Sullivan documents. Obviously, this discovery -- and DiNino's alleged instruction to Freda to handle the documents -- eliminated the need for asking his assistant to search the file. *See infra*, note 39 and accompanying text. Nevertheless, DiNino testified that he asked his assistant to search the file cabinet.

³⁸ *Id.* at p. 9; *see also id.* at pp. 11-12; 35-36.

³⁹ *Id.* at p. 9.

⁴⁰ *Id.* at pp. 15-16.

documents, Freda came back and said he had spoken with Joe Sandler, and that the documents would be taken care of.⁴¹

DiNino's recollection of events in this regard could be at odds with Birkenstock's. If DiNino called Freda into his office, it seems less likely that Birkenstock would have overheard Freda and DiNino conversing regarding the file cabinet. Moreover, DiNino does not seem to recall the conversation with Freda as one concerning who would be responsible for searching the newly discovered files, which seemed to be Birkenstock's recollection of the nature of the conversation between Freda and DiNino.⁴²

Paul DiNino resigned from the DNC within days of his deposition.⁴³

Conclusion

The testimony concerning the belated production of documents from Richard Sullivan's file cabinet is largely incredible. The many unanswered questions and contradictions require further exploration, because they raise the possibility that some individual or group within the DNC or acting on its behalf may have acted intentionally to withhold these documents from the Committee. If that

⁴¹ *Id.* at pp. 31.

⁴² The Committee sought to re-depose Freda and DiNino to try to sort out some of these contradictions. Counsel for Freda and counsel for DiNino each informed the Committee that their clients would not appear for a deposition without a formal subpoena. Just before the Committee requested that Freda and DiNino appear and testify voluntarily, the Committee had reached an understanding that no additional subpoenas for depositions would issue. Apparently, the minority advised the lawyers for DiNino and Freda of the understanding, resulting in DiNino's and Freda's unavailability (both had appeared voluntarily for depositions earlier -- Freda before the discovery of the file cabinet -- when the Committee was routinely issuing subpoenas).

⁴³ See Brian McGrory, "Democrats Name Finance Director," *Boston Globe*, Sept. 23, 1997, p. A4.

is the case, a crime may have been committed; the intentional withholding of documents from a Congressional committee constitutes obstruction of Congress.⁴⁴ The Committee thus urges the Justice Department to investigate.

The August 29, 1997 Order

Given the DNC's pattern of noncooperation, obstruction, and delay, Chairman Thompson issued an order on August 29, 1997. Among other things, the order required that the DNC produce all documents responsive to the Committee's April 9, 1997 subpoena by September 3, 1997. After recounting examples of the DNC's tactics in responding to the Committee's subpoena, the Chairman specifically determined that the "DNC . . . willfully refused to comply with the lawful subpoena the Committee issued on April 9, 1997"⁴⁵

The DNC simply ignored the order, and sought yet another meeting with the Committee to discuss document production issues. The meeting was held on September 4, and was attended by Chairman Thompson, Committee staff, DNC Chairman Roy Romer, and DNC in-house and outside counsel.⁴⁶

⁴⁴ See 18 U.S.C. §§ 1501, 1505.

⁴⁵ August 29, 1997 Order (Ex. 4).

⁴⁶ In the meantime, the DNC's pattern of obstructionism and gamesmanship continued. On Friday, September 5, 1997, the DNC produced approximately 20,000 documents gathered from the personnel within the "Office of the Chairman." Former DNC National Chairman Don Fowler was then scheduled to testify only four days later, on Tuesday, September 9, 1997, when he did, in fact, testify. Documents from the Friday afternoon production were used at the public hearings the following Tuesday, but would have been more useful had they been

In the course of this September 4 meeting, which largely consisted of the DNC's assertions that it was doing everything that it could to respond to the Committee subpoena and could not comply with the August 29, 1997 order, a repeated topic of conversation between the Committee staff and the DNC's lawyers was revisited: Why had the Committee received virtually no electronic mail ("e-mail") from the DNC?⁴⁷

The DNC explained -- for the first time -- that a computer system crash in March 1996 made all e-mail prior to that date unrecoverable. Moreover, the DNC further represented -- for the first time -- that no e-mail from March 1996 to November 1996 could be recovered unless the receiver failed to open a message. In sum, virtually no DNC e-mail could be recovered prior to the 1996 election. The loss of almost all e-mails from March 1996-November 1996 occurred, according to the DNC, because the DNC e-mail system, in the course of "backing-up," was overwriting on back-ups of previous e-mails, thereby erasing them.

According to Jack Young, of the staff of the DNC's Office of General Counsel, who attended the September 4, 1996 meeting, the DNC determined only during the first week of September that most e-mail for the period March 1996-November 1996 was not available. This late discovery suggests that the DNC was not looking for e-mail requested by the Committee until then --

produced in a timely manner, such as before Fowler's May 21, 1997 deposition.

Additional evidence of DNC obstructionism concerns DNC General Chairman Christopher Dodd. The DNC did not produce files relating to him until October 31, 1997, after Chairman Thompson had announced earlier that day that the hearings were being recessed subject to the call of the chair.

⁴⁷ The Committee believed that DNC e-mail might be a fruitful area for discovery, because users are often extremely candid in their e-mail messages.

underscoring that the DNC never intended to comply with the Committee's subpoena's return date, or even the DNC's self-imposed July 31 deadline.⁴⁸

The DNC Produces 15 Boxes as the Committee Closes the Investigation

On December 23, 1997, two days before Christmas and roughly a week before the Committee's deadline for concluding its investigation, the DNC produced 15 boxes of documents.⁴⁹ Because the investigation was ending on December 31, most of the staff had left or were in the process of leaving. Because the few remaining staff were drafting the Committee's final report (which was due by the end of January 1998), the Committee could not and has not reviewed the documents in the 15 boxes. Thus, the Committee cannot ascertain whether the December 23, 1997 production, like the belated production of Richard Sullivan's files, contains documents that would have been significant to the investigation. The Committee can state, however, that the December 23 production is emblematic of the DNC's dilatory and obstructionist tactics.

Conclusion

The DNC's response to the Committee's subpoena was rife with gamesmanship, hindrance, and obstruction. Engaging in such practices no doubt consumed much of the DNC's treasury, a fact

⁴⁸ The date of the DNC's discovery that e-mail from March 1996 to November 1996 was not generally recoverable was provided to the Committee only after repeated letters and phone calls to Young in the wake of the September 4 meeting. Young was asked three times during the September 4 meeting to explain precisely when the DNC learned that much of the e-mail could not be produced; indeed, both Chairman Thompson and Governor Romer asked the question directly. No answer was given in that meeting.

⁴⁹ A box holds approximately 3,000 pages of documents. Most of the boxes were at least two-thirds full, which means that the December 23 production contained approximately 30,000 to 45,000 documents.

that, ironically, the DNC has used to impugn investigations of its fund-raising practices.⁵⁰ The DNC also trumpets the raw numbers of documents produced -- but the manner of their production undercuts any claim they might make of full cooperation and good faith.⁵¹ In short, one of this

⁵⁰ Peter Kadzik, one of the DNC's attorneys, complained on the Cable News Network that, "I think that there is a strategy here to use the investigations to cripple the [DNC] and to benefit the Republican Party for the upcoming 1998 elections, and we're certainly not going to participate in that kind of a scheme." *Inside Politics*, CNN, December 12, 1997. Even the President has voiced this accusation, urging that the investigations are "obviously part of a strategy" to hobble Democrats, and complaining, "I've worked very hard this year to try to keep it [the strategy] from bankrupting the party." Jeanne Cummings, "From One Angle or Another, Half the Committees in House Plan to Probe Democrats' Fund Raising," The Wall Street Journal, December 24, 1997, p. A12.

Much of the President's "hard" fund-raising work could have been avoided if the DNC had been more forthcoming in responding to the Committee's subpoena. The DNC could have easily gathered and copied responsive documents and forwarded them to the Committee at modest expense. Instead, the DNC and its principal outside law firm, Debevoise & Plimpton, opted to pursue the expensive strategy of managing the document production to obstruct and run out the clock on this investigation. The Committee cannot estimate the legal fees consumed by Debevoise & Plimpton lawyers, who were constantly negotiating (in person, over the phone, and in letters) with the Committee over document production issues, re-reviewing documents already produced to the other governmental entities, *see supra* (discussing late June through early July production of 55 boxes previously produced to other governmental entities), and fighting losing battles over asserted "common interest" privileges. *See* the section of this report on fund-raising phone calls. Had the DNC and Debevoise & Plimpton been forthcoming and responsive to the Committee's subpoena, the DNC would have saved substantial resources.

⁵¹ In fact, the raw number of documents produced does not correlate in any way to a party's good faith. Lawyers refer to document productions in which boxes upon boxes of trivial, arguably non-responsive documents are produced (interspersed with significant, responsive documents) as a "boxcar" production -- as in handing over a "boxcar" of documents and letting the other party sift through the documents in search of the important, relevant documents. The DNC's approach has been consistent with this technique, and it has excused every oversight and delay by boasting about the number of documents it has produced -- and complaining about the expense of photocopying so many documents. The December 31, 1997 investigative deadline encouraged the use of this production

country's major political parties deliberately hindered the Committee in fulfilling the Senate's constitutional role for oversight and investigation, a sad event for the American public.

Sadder still is that the DNC was aided and abetted by an unreasonable deadline imposed on the Committee's investigation. The Committee concludes that no successful investigation involving unwilling parties may be undertaken with an unreasonable short-term cutoff date. No future investigatory committee should labor with such a burden. The realistic threat of seeking judicial enforcement of Senate subpoenas must be present to coerce compliance from those -- such as the DNC in this investigation -- who will not voluntarily cooperate.

tactic, because the DNC could easily calculate that it is difficult to find a needle in a haystack in a limited period of time.