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COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Burton Committee Executive Privilege

FRC ID:
9696

RESTRICTION CODES

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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005	Cover Sheet	Statement of Daniel J. Bryant...[1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	1	02/06/2002	
006	List	Boston Documents Subject to Executive Privilege Claim [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	1	01/14/2002	
007	Memorandum	Presidential Records Act and Executive Privilege Issues [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: POTUS - From: Alberto Gonzales	2	12/14/2001	
008	Letter	[Letter with attachment] [6 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: POTUS - From: John Ashcroft	6	12/10/2001	

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D C. 20530

February 13, 2002

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter, dated February 12, 2002, regarding the Committee's hearing on February 14, 2002, which will include testimony from Judge Edward Harrington. Judge Harrington was an Assistant United States Attorney in 1967 when he prepared a memorandum that we have identified as one of those responsive to the Committee's subpoena of September 6, 2001.

The Committee has subpoenaed four categories of Department of Justice prosecutorial documents: those relating to (i) the potential appointment of a special counsel for the campaign financing investigation; (ii) the investigation of Mark Middleton; (iii) the investigation of Ernest Howard; and, (iv) the investigation of certain individuals investigated and prosecuted by the Boston United States Attorney's Office (i.e., the Boston matter). In light of the particular facts and circumstances that existed at the time of the Committee's hearing on December 13, including the Committee's articulation of its informational needs and the information already provided by the Department to the Committee, and consistent with long-standing constitutional principles applicable to these extraordinarily sensitive Executive Branch documents, the President on December 12 asserted executive privilege as to those four categories of documents. The President also directed that the Department work with the Committee to continue to accommodate the Committee's informational needs to the extent appropriate and consistent with the constitutional separation of powers.

Since the President's assertion of privilege, the Committee has challenged the privilege assertion with respect to the fourth category, the ten Boston documents. As Judge Gonzales indicated in his January 10 letter, the Boston documents should be assessed in light of the unusual circumstances present here, where the Executive Branch has filed criminal charges alleging corruption in the FBI investigative process. Further, we appreciate the Committee's interest, as articulated in your letter, in learning what information Judge Harrington knew about the Deegan matter, including the evidence and the reliability of witnesses.

Based upon your February 12 letter, other Committee correspondence, and additional information provided by the Committee, the Committee has now demonstrated a particular and

critical need for access to the one Harrington memorandum sufficient to satisfy constitutional standards and we are prepared to meet with you and make it available for your review in advance of the hearing. Please note that much of the relevant underlying factual information contained in this memorandum has already been provided to the Committee pursuant to other document requests. I am advised that there are legally-mandated redactions in the Harrington memorandum relating to Rule 6(e) of the Federal Rules of Criminal Procedure.

We will contact Committee staff to discuss a convenient time for your review of the Harrington memorandum. In addition, we have previously offered to meet with the Committee to discuss all of the Boston documents, and we reiterate that offer here. It is our hope that we can continue to work with the Committee to meet its informational needs consistent with your interests and ours.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

COPY

THE WHITE HOUSE

WASHINGTON

January 10, 2002

Dear Chairman Burton:

Thank you for your January 3 letter. I have reviewed that letter and your January 3 letter to Attorney General Ashcroft. I will respond to both letters on behalf of the Executive Branch.

Thank you as well for your comments regarding our conversation of December 13. I understand and respect both your strong interest in pursuing the objectives of your Committee and your institutional perspective on privilege matters.

In response to your letters, I initially want to correct a misimpression about the Executive Branch's overall position on deliberative documents. Your letter states that Attorney General Ashcroft and I articulated to you an Executive Branch "policy" that "henceforth Congress would never receive deliberative documents from a criminal investigation or prosecution." There is no such bright-line policy, nor did we intend to articulate any such policy. As a general matter, the Executive Branch will treat requests for Department of Justice deliberative documents from closed matters in the same way it treats requests for Executive Branch deliberative documents more generally: through a process of appropriate accommodation and negotiation to preserve the respective constitutional roles of the two Branches. No bright-line rule historically has governed, or now governs, responses to congressional requests for the general category of Executive Branch "deliberative documents."

Of course, the Committee's subpoenas in this matter sought a very narrow and particularly sensitive category of deliberative materials -- prosecution and declination memoranda -- as well as the closely related category of memoranda to the Attorney General regarding the appointment of a special prosecutor. Absent unusual circumstances, the Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure. This traditional Executive Branch practice is based on the compelling need to protect both the candor of the deliberative processes by which the Department of Justice decides whether to prosecute individuals and the privacy interests and reputations of uncharged individuals named in such memoranda.

Moreover, with respect, congressional access to these kinds of sensitive prosecutorial decisionmaking documents would threaten to politicize the criminal justice process and thereby threaten individual liberty. The Executive Branch is appropriately concerned that the prospect of congressional review of prosecution or declination memoranda might lead prosecutors to err on the side of investigation or prosecution solely to avoid political criticism. This would, in turn, undermine public and judicial confidence in our law enforcement processes. In addition, prosecution and declination memoranda often require analyses and judgments of witness credibility, witness appearance, witness reputation, defense tactics, judicial quality, and strength of evidence; such sensitive analyses and judgments require confidentiality in order to ensure the

candor necessary for appropriate decisionmaking. For all of these reasons, the President's December 12 decision to assert executive privilege was entirely proper as a matter of constitutional law and practice.

It bears emphasis for purposes of this discussion, moreover, that laws *enacted by Congress* independently prevent the Executive Branch from disclosing significant portions of prosecution and declination memoranda -- *even to Congress*. In particular, Rule 6(e) of the Federal Rules of Criminal Procedure and the prohibitions contained in 18 U.S.C. 2510 *et seq.* (regarding wire and oral intercept information, generally referred to as Title III information) prohibit disclosure of grand jury and wiretap information.

In this matter, the Committee's subpoenas sought production of four categories of Department of Justice prosecutorial documents: those relating to (i) the potential appointment of a special counsel for the campaign financing investigation, (ii) the investigation of Mark Middleton, (iii) the investigation of Ernest Howard, and (iv) the investigation of certain individuals investigated and prosecuted by the Boston United States Attorney's Office. Your recent letters and statements in the press indicate that the Committee has now narrowed its focus to the fourth category of documents described above (the Boston documents). The Boston documents consist of ten prosecution memoranda. Significant portions of those memoranda cannot be disclosed lawfully due to the proscriptions of Rule 6(e) and Title III. And the traditional confidentiality and separation-of-powers principles outlined above also plainly apply to these memoranda.

However, the Executive Branch recognizes that in unusual circumstances like those present here, where the Executive Branch has filed criminal charges alleging corruption in the FBI investigative process, even the core principle of confidentiality applicable to prosecution and declination memoranda may appropriately give way, to the extent permitted by law, if Congress demonstrates a compelling and specific need for the memoranda. *See generally Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions").

Before the President's assertion of privilege and the December 13 hearing, the Committee had explained the general nature of its inquiry into corruption in the FBI's handling of informants in Boston, but it had not explained why these prosecutorial memoranda were necessary to that inquiry or, for example, how they might reveal evidence of corruption in the charging process or otherwise should be differentiated from ordinary prosecution and declination memoranda. As of the Committee hearing on December 13, therefore, there was no reason for the Executive Branch to analyze or respond to the Committee's subpoena for these Boston prosecution memoranda any differently from the campaign financing, Howard, or Middleton memoranda. That was particularly true since the subpoena for these Boston prosecutorial memoranda, issued only a week before the September 13 hearing at which the Attorney General was initially scheduled to testify, was a very late addition to the series of Committee subpoenas and requests seeking the other prosecutorial memoranda. Indeed, for that same reason, we were

surprised that the Committee's hearing, which was subsequently rescheduled from September 13 to December 13, focused only on the Boston documents.

As you know, the President's memorandum of December 12 asserting executive privilege expressly directed that the Administration work "with the Committee to provide such information as it can, consistent with these instructions and without violating the constitutional doctrine of separation of powers." Consistent with the President's directive and the statement of Committee interest that has been articulated since December 12, we are prepared to accommodate the Committee's interest in a manner that should both satisfy the Committee's legitimate needs and protect the principles of prosecutorial candor and confidentiality. Department of Justice attorneys will provide a confidential, oral description of the contents of the ten Boston documents to you and your staff and to the Ranking Member and his staff. The attorneys also will answer appropriate questions you may have about the documents. After the briefing, if you have additional requests, we will respond in a manner consistent with the President's December 12 directive, the requirements of law, and the longstanding practices of the Executive Branch.

I am hopeful that this proposed accommodation process will provide the Committee with the information it legitimately needs, while at the same time respecting and preserving the critical Executive Branch interest in the appropriate candor and confidentiality of prosecutorial decisionmaking. We look forward to concluding this matter appropriately and expeditiously in consultation with you and your staff.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Dan Burton, Chairman
Committee on Government Reform
United States House of Representatives
Rayburn House Office Building, Room 2157
Washington, DC 20515

cc: Members of Committee on Government Reform

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Draft February 12, 2002

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter, dated February 12, 2002, regarding the Committee's hearing on February 14, 2002, which will include testimony from Judge Edward Harrington. Judge Harrington was an Assistant United States Attorney in 1967 when he prepared a memorandum, which we have identified as one of those responsive to the Committee's subpoena of September 6, 2001.

The Committee has subpoenaed four categories of Department of Justice prosecutorial documents: those relating to (i) the potential appointment of a special counsel for the campaign financing investigation; (ii) the investigation of Mark Middleton; (iii) the investigation of Ernest Howard; and, (iv) the investigation of certain individuals investigated and prosecuted by the Boston United States Attorney's Office (i.e. the Boston matter). Consistent with longstanding constitutional principles and Department of Justice practices, the President asserted executive privilege as to those documents. The President also directed that the Department work with the Committee to continue to accommodate the Committee's informational needs to the extent appropriate and consistent with the constitutional separation of powers.

Since the President's assertion of privilege, ~~we are pleased that~~ the Committee has ~~focused on~~ only one of the four categories of subpoenaed documents: the Boston documents. As Judge Gonzales indicated in his January 10 letter, these are unusual circumstances where the Executive Branch has filed criminal charges alleging corruption in the FBI investigative process. Further, we appreciate the Committee's interest, as articulated in your letter, in learning what information Judge Harrington knew about the Deegan matter, including the evidence and the reliability of witnesses.

Based upon your February 12 letter, other Committee correspondence, and additional information provided by the Committee, we agree that the Committee has now demonstrated a particular and critical need for access to this document and we are prepared to meet with you and

contemporaneously make it available for your review in advance of the hearing. Please note that much of the relevant underlying factual information contained in this memorandum has already been provided to the Committee pursuant to other document requests.

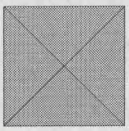
This accommodation is consistent with the President's guidance in asserting executive privilege. In addition, we have previously offered to provide the Committee an oral briefing as to the other Boston documents, and we reiterate that offer here. I am advised that there are legally mandated redactions in the Harrington memorandum relating to Rule 6(e) of the Federal Rules of Criminal Procedure. We will be in touch to discuss a convenient time for your review of this document.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

Members of the Committee



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Since the President's assertion of privilege, we are pleased that the Committee has focused on only one of the four categories of subpoenaed documents: the Boston documents. As Judge Gonzales indicated in his January 10 letter, these are unusual circumstances where the Executive Branch has filed criminal charges alleging corruption in the FBI investigative process. Further, we appreciate the Committee's interest, as articulated in your letter, in learning what information Judge Harrington knew about the Deegan matter, including the evidence and the reliability of witnesses.

Based upon your February 12 letter, other Committee correspondence, and additional information provided by the Committee, we agree that the Committee has now demonstrated a particular and critical need for access to this document and we are prepared to meet with you and

contemporaneously make it available for your review in advance of the hearing. Please note that much of the relevant underlying factual information contained in this memorandum has already been provided to the Committee pursuant to other document requests.

This accommodation is consistent with the President's guidance in asserting executive privilege. In addition, we have previously offered to provide the Committee an oral briefing as to the other Boston documents, and we reiterate that offer here. I am advised that there are legally mandated redactions in the Harrington memorandum relating to Rule 6(e) of the Federal Rules of Criminal Procedure. We will be in touch to discuss a convenient time for your review of this document.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

Members of the Committee

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Draft February 12, 2002

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter, dated February 12, 2002, regarding the Committee's hearing on February 14, 2002, which will include testimony from Judge Edward Harrington. Judge Harrington was an Assistant United States Attorney in 1967 when he prepared a memorandum, which we have identified as one of those responsive to the Committee's subpoena of September 6, 2001.

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Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

Members of the Committee

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 13, 2002

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter, dated February 12, 2002, regarding the Committee's hearing on February 14, 2002, which will include testimony from Judge Edward Harrington. Judge Harrington was an Assistant United States Attorney in 1967 when he prepared a memorandum that we have identified as one of those responsive to the Committee's subpoena of September 6, 2001.

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Since the President's assertion of privilege, the Committee has challenged the privilege assertion with respect to the fourth category, the ten Boston documents. As Judge Gonzales indicated in his January 10 letter, the Boston documents should be assessed in light of the unusual circumstances present here, where the Executive Branch has filed criminal charges alleging corruption in the FBI investigative process. Further, we appreciate the Committee's interest, as articulated in your letter, in learning what information Judge Harrington knew about the Deegan matter, including the evidence and the reliability of witnesses.

Based upon your February 12 letter, other Committee correspondence, and additional information provided by the Committee, the Committee has now demonstrated a particular and

critical need for access to the one Harrington memorandum sufficient to satisfy constitutional standards and we are prepared to meet with you and make it available for your review in advance of the hearing. Please note that much of the relevant underlying factual information contained in this memorandum has already been provided to the Committee pursuant to other document requests. I am advised that there are legally-mandated redactions in the Harrington memorandum relating to Rule 6(e) of the Federal Rules of Criminal Procedure.

We will contact Committee staff to discuss a convenient time for your review of the Harrington memorandum. In addition, we have previously offered to meet with the Committee to discuss all of the Boston documents, and we reiterate that offer here. It is our hope that we can continue to work with the Committee to meet its informational needs consistent with your interests and ours.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member



White House Legislative Affairs

1600 Pennsylvania Avenue
Washington, DC 20502
Phone: (202) 456-2230
Fax: (202) 456-1806

Date: _____

To: Brett

Pages: 3 **(Including Cover Sheet)**

Fax: 6-1647 **Phone:** _____

From: ✓ **Nicholas E. Calio** ____ **Michael Conway**

____ **Jack Howard** ____ **Jill Davie**

____ **Ginger Gregory Loper** ____ **Other:** _____

Comments:

Nick's comments —

Pls. Call me with questions.

— Mike



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 13, 2002

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

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Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

Members of the Committee

It is our hope that we could work with the Committee to meet its informational needs consistent with your interests and ours.

Brett,

You have to decide if this works. Under the circumstances, we need to understand our sincerity w/ Burton.

Nick

DAN BURTON, INDIANA
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
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DIANE E. WATSON, CALIFORNIA

BERNARD SANDERS, VERMONT,
INDEPENDENT

January 29, 2002

The Honorable Daniel J. Bryant
Assistant Attorney General
U.S. Department of Justice
Tenth and Constitution Avenue, N.W.
Washington, DC 20530

Dear Assistant Attorney General Bryant:

Pursuant to Rules X and XI of the of the House of Representatives, the Committee on Government Reform is holding a hearing entitled, "The History of Congressional Access to Deliberative Justice Department Documents." The hearing is scheduled for 10:00 a.m., February 6, 2002, in Room 2154 of the Rayburn House Office Building. I request that you testify at this hearing.

In the course of its investigations of several matters, the Committee made requests for deliberative Justice Department memoranda. The Justice Department and the White House informed the Committee that Congress would no longer be provided with access to any deliberative Justice Department memoranda. Justice Department staff indicated that it was attempting to return to the "policy" of the Justice Department prior to Attorney General Reno, which was, purportedly, that the Justice Department did not provide Congress with deliberative documents.

In response to what was clearly intended to be an inflexible policy, and after considerable negotiation, the Committee issued a subpoena for the earlier requested documents.[1] The inflexible position of the Justice Department and the White House was modified when a Justice Department witness testified on December 13, 2001, that a case-by-case analysis would be conducted in order to respond to congressional subpoenas for deliberative documents. Unfortunately, the witness was not able to explain what specific factors led the President to claim executive privilege over subpoenaed documents that relate to the Committee's investigation of Justice Department corruption in Boston.

[1] One subpoena had already been issued in response to a Justice Department staff suggestion that a "friendly" subpoena would help to break the logjam in what were, as the time, ongoing negotiations.

I request that you provide the Committee with testimony regarding:

1) All prior occasions when Congress has been permitted access to Justice Department deliberative documents. This includes, but is not limited to, all situations where Congress – either Members or staff – has been permitted to review documents without taking possession of them.

2) How your research was conducted and with whom you or your staff spoke in order to prepare for your testimony. The Committee would like to ensure that you have made a diligent effort to learn about previous examples in order to provide the Committee with comprehensive testimony regarding relevant precedent.

3) What specific factors led to the decision to recommend that President Bush invoke executive privilege over the documents subpoenaed pursuant to the Committee's investigation of Justice Department corruption in Boston. The Justice Department claims that it conducts a case-by-case analysis to determine whether to provide deliberative Justice Department records to Congress. Yet, at the December 13, 2001, hearing, Mr. Horowitz was unable to articulate what specific factors led the Justice Department to recommend that the Boston documents be withheld from the Committee.

4) Please provide answers to the questions I posed to Attorney General Ashcroft in my letter of September 7, 2001.

The Committee understands that there has been opposition within the Department to providing deliberative documents to Congress in the past. However, I believe that access to such documents has been permitted on numerous occasions, including prior to the Clinton Administration. Your testimony will assist the committee in developing a fuller understanding of the history of congressional access to deliberative Justice Department records.

If you wish to make an opening statement, it is requested that you provide 100 copies of your written testimony to the Committee no later than 24 hours prior to the time of the hearing. To facilitate printing of the hearing record, you should also provide a computer disk containing a copy of your written testimony. At the hearing, we will ask you to summarize your testimony in five minutes to allow the maximum time for discussion and questions.

Under the Congressional Accountability Act, the House of Representatives complies with the Americans with Disabilities Act. Persons requiring special accommodations should contact Robert Briggs at (202) 225-5074 at least four days prior to the hearing.

Please contact the Committee's Chief Counsel, James C. Wilson, at (202) 225-5074 if you have any questions or need additional information about this hearing.

Sincerely,

Dan Burton
Chairman

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CHAIRMAN
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BERNARD SANDERS, VERMONT,
INDEPENDENT

January 29, 2002

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Assistant Attorney General
U.S. Department of Justice
Tenth and Constitution Avenue, N.W.
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Sincerely,

Dan Burton
Chairman

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[illegible] L. MICA, FLORIDA
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House of Representatives

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WM. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA

BERNARD SANDERS, VERMONT,
INDEPENDENT

September 7, 2001

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Tenth & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear General Ashcroft:

Your staff has indicated that at the Committee's September 13, 2001, hearing, on behalf of Presiden: Bush, you will invoke executive privilege with respect to the documents sought by the Committee's September 6, 2001, subpoena. The Committee has an interest in determining relevant precedent pertaining to the decision made by the Justice Department and the President. The Committee also has an interest in determining if this type of information has been subject to Congressional review under previous Administrations. Therefore, please provide the Committee with the following information:

1. A description of all situations prior to the Clinton Administration when the Justice Department permitted Congress to review records or receive testimony containing deliberative prosecutorial information.

2. A description of all situations prior to the Clinton Administration when the Justice Department permitted Congress to review the types of documents currently being sought by the Committee, specifically, prosecution memoranda, declination memoranda, or memoranda to the Attorney General making recommendations regarding a specific criminal case.

3. A listing of all cases prior to the Clinton Administration when the President or his designee invoked executive privilege over records or testimony containing deliberative prosecutorial information. In addition, please specify cases when executive privilege was claimed over the types of records currently being sought

by the Committee. Please specify the outcome of the claim of executive privilege.

4. A listing of all memoranda or opinions of the Office of Legal Counsel which provide specific support for the position being taken by the Administration.

5. Copies of all deliberative materials provided to the Subcommittee on International Trade, Finance, and Security Economics of the Joint Economic Committee or the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee in the course of the investigation discussed in 8 U.S. Op. Off. Legal Counsel 252 (1984).

As these matters are of central importance to the Committee's hearing, please provide the requested information by 5:00 p.m. on Wednesday, September 12, 2001.

Sincerely,

Dan Burton
Chairman

cc: The Honorable Henry A. Waxman, Ranking Minority Member

DAN BURTON, INDIANA,
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
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January 17, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Ashcroft:

Pursuant to Rules X and XI of the Rules of the House of Representatives, the Committee on Government Reform is holding a hearing entitled "The History of Congressional Access to Deliberative Justice Department Documents." The hearing is scheduled for January 23, 2002, in room 2154 of the Rayburn House Office Building at 1:00 p.m. I request that Assistant Attorney General Dan Bryant testify at this hearing.

The Justice Department is withholding from the Committee a number of deliberative Justice Department memoranda. In explaining the decision to withhold these documents from the Committee, both Department and White House personnel have suggested that there is a longstanding policy against the release of these types of memoranda, and that Congressional access to these documents would cause substantial public harm. To evaluate the accuracy of these claims, the Committee is attempting to develop a fuller understanding of the history of Congressional access to deliberative Justice Department records. On September 7, 2001, I sent a letter asking four specific questions and making a specific request for documents which would assist the Committee in developing this record. I have received no response from the Justice Department. Mr. Bryant will be asked to answer the questions listed in the September 7, 2001, letter, as well as other questions regarding the history of Congressional access to Justice Department records.

If Mr. Bryant wishes to make an opening statement, it is requested that he provide 100 copies of his written testimony to the Committee no later than 24 hours prior to the time of the hearing. To facilitate printing of the hearing record, he should also provide a computer disk containing a copy of his written testimony. At the hearing, we will ask Mr. Bryant to summarize his testimony in five minutes to allow the maximum time for discussion and questions.

Under the Congressional Accountability Act, the House of Representatives complies with the Americans with Disabilities Act. Persons requiring special accommodations should contact Committee Chief Clerk Robert Briggs at (202) 225-5074 at least four days prior to the hearing.

Thank you for your assistance in this matter, and we look forward to Mr. Bryant's testimony.

Sincerely,

Dan Burton
Chairman

cc: The Honorable Henry A. Waxman, Ranking Minority Member

Department of Justice

STATEMENT

OF

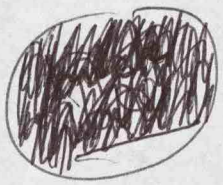
DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

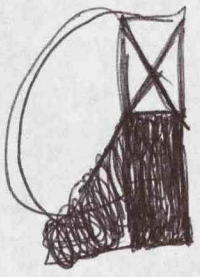
BEFORE THE

COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

PRESENTED ON

FEBRUARY 6, 2002





Statement of Daniel J. Bryant
Assistant Attorney General, Office of Legislative Affairs
Before the Committee on Government Reform
U.S. House of Representatives
February 6, 2002

Chairman Burton, Congressman Waxman, Members of the Committee: Good Morning. I welcome this opportunity to present testimony on behalf of the Department of Justice at this hearing regarding the history of congressional access to deliberative Department of Justice documents.

At the outset, I wish to remind the Committee of the Department's request to meet with the Committee about the Boston documents. It was and remains our hope that, in such a meeting, knowledgeable officials could confer with you about the nature of the documents. Such a meeting offers the potential for the Committee's oversight inquiry to move forward expeditiously.

Mr. Chairman, in preparation for this hearing I have made an effort to familiarize myself with the history of congressional access to deliberative Justice Department documents, and deliberative prosecutorial advice documents in general. I wish to clarify that the current dispute between this Committee and the Department of Justice pertains only to the narrow and especially sensitive sub-category of deliberative documents constituting advice memoranda regarding whether or not to bring criminal charges against certain individuals and advice memoranda to the Attorney General in connection with appointing a special prosecutor. This category of documents which the Committee has subpoenaed is a very small subset of all deliberative Department memoranda, and an even smaller subset of the total universe of information which is routinely requested by and provided to Congress.

There are a number of relevant propositions that emerge from a review of the history of congressional access to deliberative Justice Department documents.

First, it is apparent that the framers of the Constitution envisioned tensions arising between the branches in the course of their discharging their constitutionally-assigned responsibilities. In fact, such tensions reflect one of the fundamental checks and balances at the heart of our system of government based on the separation of powers. One such intentional check is immediately apparent: Congress has authority to obtain information from the Executive so as to enable it to carry out its legislative responsibilities. At the same time, the Constitution requires the Executive, in the words of Article II, Section 3, "to take care that the laws be faithfully executed," and in doing so, clearly contemplates the need to withhold certain information in order faithfully to fulfill this core Executive function.

Second, our tradition of government clearly envisions that the branches will work to resolve any inter-branch disputes that arise. The longstanding policy of the Executive Branch is to comply with congressional requests for information to the fullest extent that is consistent with its constitutional and statutory obligations. The policy is reflected in the Executive Branch's commitment to the accommodation process. That historic policy remains the policy of the Executive Branch today.

Third, the history of specific inter-branch accommodations can serve as a useful guide for present and future disputes, but past inter-branch accommodations are not themselves binding precedent. Each specific inter-branch accommodation is highly case-specific, and is, therefore, of questionable application to subsequent inter-branch disputes. Moreover, unlike case law, which involves a court arbitrating the resolution of the matter and handing down a ruling with clear precedential significance, disputes between Congress and the Executive have been left to the parties themselves to settle. Consequently, the Executive Branch's concern to safeguard certain documents from improper disclosure has manifested itself over the decades in a wide variety of ways, depending on the particular circumstances and exigencies present at the time of the dispute.

Fourth, throughout the history of inter-branch disputes regarding deliberative Justice Department documents, the Executive Branch has consistently maintained that the sub-category of prosecutorial documents at issue in our current dispute is presumptively privileged and should be protected. This position has been repeatedly articulated by the Executive Branch for decades and is supported by historical practice, scholarly commentary and case law. The reasons for this position are clear: The authority to prosecute criminal suspects is one of the core executive powers vested in the President by the Executive Power and Take Care Clauses of Article II of the Constitution. In order to assist the President in fulfilling his constitutional duty, the Attorney General and other Department decision-makers must have the benefit of candid and confidential advice and recommendations in making prosecutorial decisions.

The need for confidentiality is particularly compelling in regard to the highly sensitive prosecutorial decision of whether to bring criminal charges. If prosecution and declination memoranda are subject to congressional scrutiny, we will face the grave danger that prosecutors will be chilled from providing the candid and independent analysis essential to the sound exercise of prosecutorial discretion and to the fairness and integrity of federal law enforcement. As the Supreme Court described its concern about a chilling effect: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). The Court observed that "the importance of this confidentiality is too plain to require further discussion." Id. Just as troubling, the prospect of congressional review might force prosecutors to err on the side of investigation or prosecution simply to avoid public second-guessing. This would undermine public and judicial confidence in our law enforcement processes.

Disclosure of declination memoranda would also implicate significant individual privacy interests. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as

assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss.

In sum, government functions as the Constitution intended and the public interest is well served by safeguarding from disclosure those documents that advise whether or not to prosecute.

Mr. Chairman, as stated by Judge Gonzales, Counsel to the President, the Department of Justice is "prepared to accommodate the Committee's interest in a manner that should both satisfy the Committee's legitimate needs and [that] protect[s] the principles of prosecutorial candor and confidentiality." That is why Department officials have offered to meet with you about the Committee's interest in the Boston documents, and I reiterate that offer today.

Thank you.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

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Matt Martens (4-9412)
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FROM: Carl Thorsen
Deputy Assistant Attorney General
Office of Legislative Affairs

PHONE: 202-514-3951

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COMMENTS:

2 Letters.

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BERNARD SANDERS, VERMONT, INDEPENDENT

February 11, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Ashcroft:

Pursuant to Rules X and XI of the House of Representatives, the Committee on Government Reform is holding a hearing entitled "The California Murder Trial of Joe 'The Animal' Barboza: Did the Federal Government Support the Release of a Dangerous Mafia Assassin?" The hearing is scheduled for February 13 and 14, 2002, in Room 2154 of the Rayburn House Office Building at 10:00 a.m. each day. As my staff indicated in a telephone discussion with Justice Department staff earlier today, I request that the Justice Department provide a witness for each day of the hearing.

The Committee's hearing will focus on the 1971 murder trial of Joe Barboza in California, in which a senior Justice Department official and two agents of the Federal Bureau of Investigation appeared on Barboza's behalf. I ask that the Justice Department witness attend both full days of hearings, and be prepared to provide the Department's response to the testimony and address any issues relating to the Department's continued refusal to provide the Committee access to the subpoenaed Boston documents.

If the Justice Department witness wishes to make an opening statement, it is requested that he provide 100 copies of his written testimony to the Committee no later than 24 hours prior to the time of the hearing. To facilitate printing of the hearing record, he should also provide a computer disk containing a copy of his written testimony. At the hearing, we will ask the Justice Department witness to summarize his testimony in five minutes to allow the maximum time for discussion and questions.

Under the Congressional Accountability Act, the House of Representatives complies with the Americans with Disabilities Act. Persons requiring special accommodations should contact Committee Chief Clerk Robert Briggs at (202) 225-5074 at least four days prior to the hearing.

Thank you for your assistance in this matter.

Sincerely,

Dan Burton
Chairman

cc: The Honorable Henry A. Waxman, Ranking Minority Member

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INDEPENDENT

To:	Carl Thorsen	**From:**	Chairman Dan Burton
Fax:	305-2643	**Fax:**	(202) 225-5127
Phone:	514-1653	**Phone:**	(202) 225-5074
Pages:	3 (including cover sheet)	**Date:**	February 11, 2002

- **Comments:**

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BERNARD SANDERS, VERMONT,
INDEPENDENT

February 12, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Ashcroft:

I am writing in response to the February 8, 2002, letter from Assistant Attorney General Dan Bryant. In his letter, Mr. Bryant repeated his request that the Committee receive a Justice Department briefing regarding the subpoenaed Boston documents. Mr. Bryant then explains that one of the subpoenaed Boston documents was authored by Edward Harrington, who is scheduled to testify at the Committee's hearing on February 14, 2002, and contains information about the Deegan murder case.

As I have explained on a number of occasions, I will accept a briefing about the Boston documents only in conjunction with a contemporaneous review of those documents by Committee staff. I believe that a briefing alone would pose a number of problems, both for the Committee and the Justice Department. First, I am concerned that the Justice Department is trying to force the Committee to accept a faulty legal framework governing access to deliberative prosecutorial documents. Justice Department personnel have claimed that the Committee must show that the subpoenaed documents are "demonstrably critical to the responsible fulfillment of the Committee's functions" before it can receive access to the documents. This standard is overly burdensome, and for a number of reasons, should not govern the documents at issue. Second, on a more practical note, I believe that a briefing is inadequate in this case because the Justice Department staff providing the briefing will likely understand less about the Boston case than the staff receiving the briefing, and therefore, are likely to omit significant facts from the briefing. Finally, the Justice Department was willing to advise the President to claim executive privilege before it had attempted to understand why Congress wanted the subpoenaed documents. On a practical level, this indicated to the Committee that accommodation was not important to the Justice Department. Thus, the Committee has real concerns about the Department's offer to provide a briefing in lieu of a review of the actual evidence.

I also want to address the specific document discussed by Mr. Bryant in his February 8 letter. Based on the description in Mr. Bryant's letter, the document drafted by Judge Harrington has great relevance to the Committee's hearing. Judge Harrington is testifying before the

Committee on February 14, and the committee has a great interest in knowing what Judge Harrington knew about the evidence in the Deegan murder case, including, but not limited to, the evidence in the case, the reliability of witnesses in the case, and whether key witnesses in the case were government informants. Perhaps as important, Judge Harrington was a prosecutor in a 1968 trial of Raymond Patriarca, and it is important to understand the facts pertaining to this prosecution as well. It appears that the Justice Department agrees that it is essential that the Committee receive the Harrington memorandum in advance of the February 14 hearing, and that the Committee can clearly meet even the high threshold of proof being demanded (inappropriately, in my view) by the Justice Department. If that is the case, please provide the Committee with access to the document now, without a briefing.

While I appreciate the fact that the Justice Department has admitted that one of the 10 withheld documents has great relevance to the Committee's upcoming hearing, the Department's admission reveals the flaws with its approach to this entire matter. The Justice Department only recognized the importance of the Harrington document once the Committee announced that Judge Harrington was testifying at an upcoming hearing. The Department did not know that Committee staff interviewed Judge Harrington almost two months ago, and did not have the benefit of the Harrington memorandum for that interview. The other nine memoranda being withheld by the Justice Department likely have just as much relevance to the Committee's investigation as the Harrington memorandum, except that the Justice Department is unwilling to recognize that fact.

I believe that the Committee's investigation of Justice Department corruption in Boston is far too important to be wasting time with procedural gamesmanship. Rather than seeing this as an opportunity to establish precedents to place roadblocks in the way of Congressional oversight, the Justice Department should see this case as an opportunity to come clean and right past wrongs. I hope you will agree, and that you will provide the Committee with access to the subpoenaed Boston documents.

Sincerely,

Dan Burton
Chairman

cc: Members, Committee on Government Reform

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Date: February 12, 2002

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TO: Brett Kavanaugh **DATE:** February 12, 2002

OFFICE #:

FAX #: 456-5104

PAGES: 5 (including coversheet)

SUBJECT: Burton

COMMENTS: Here are the hearing invitation letter and the letter I just described in my voice mail regarding our request for a meeting to discuss the Boston documents in general and the Harrington document in particular. Please call.

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February 12, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Washington, D.C. 20530

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As I have explained on a number of occasions, I will accept a briefing about the Boston documents only in conjunction with a contemporaneous review of those documents by Committee staff. I believe that a briefing alone would pose a number of problems, both for the Committee and the Justice Department. First, I am concerned that the Justice Department is trying to force the Committee to accept a faulty legal framework governing access to deliberative prosecutorial documents. Justice Department personnel have claimed that the Committee must show that the subpoenaed documents are "demonstrably critical to the responsible fulfillment of the Committee's functions" before it can receive access to the documents. This standard is overly burdensome, and for a number of reasons, should not govern the documents at issue. Second, on a more practical note, I believe that a briefing is inadequate in this case because the Justice Department staff providing the briefing will likely understand less about the Boston case than the staff receiving the briefing, and therefore, are likely to omit significant facts from the briefing. Finally, the Justice Department was willing to advise the President to claim executive privilege before it had attempted to understand why Congress wanted the subpoenaed documents. On a practical level, this indicated to the Committee that accommodation was not important to the Justice Department. Thus, the Committee has real concerns about the Department's offer to provide a briefing in lieu of a review of the actual evidence.

I also want to address the specific document discussed by Mr. Bryant in his February 8 letter. Based on the description in Mr. Bryant's letter, the document drafted by Judge Harrington has great relevance to the Committee's hearing. Judge Harrington is testifying before the

Committee on February 14, and the committee has a great interest in knowing what Judge Harrington knew about the evidence in the Deegan murder case, including, but not limited to, the evidence in the case, the reliability of witnesses in the case, and whether key witnesses in the case were government informants. Perhaps as important, Judge Harrington was a prosecutor in a 1968 trial of Raymond Patriarca, and it is important to understand the facts pertaining to this prosecution as well. It appears that the Justice Department agrees that it is essential that the Committee receive the Harrington memorandum in advance of the February 14 hearing, and that the Committee can clearly meet even the high threshold of proof being demanded (inappropriately, in my view) by the Justice Department. If that is the case, please provide the Committee with access to the document now, without a briefing.

While I appreciate the fact that the Justice Department has admitted that one of the 10 withheld documents has great relevance to the Committee's upcoming hearing, the Department's admission reveals the flaws with its approach to this entire matter. The Justice Department only recognized the importance of the Harrington document once the Committee announced that Judge Harrington was testifying at an upcoming hearing. The Department did not know that Committee staff interviewed Judge Harrington almost two months ago, and did not have the benefit of the Harrington memorandum for that interview. The other nine memoranda being withheld by the Justice Department likely have just as much relevance to the Committee's investigation as the Harrington memorandum, except that the Justice Department is unwilling to recognize that fact.

I believe that the Committee's investigation of Justice Department corruption in Boston is far too important to be wasting time with procedural gamesmanship. Rather than seeing this as an opportunity to establish precedents to place roadblocks in the way of Congressional oversight, the Justice Department should see this case as an opportunity to come clean and right past wrongs. I hope you will agree, and that you will provide the Committee with access to the subpoenaed Boston documents.

Sincerely,

Dan Burton
Chairman

cc: Members, Committee on Government Reform

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ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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BERNARD SANDERS, VERMONT,
INDEPENDENT

February 11, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Ashcroft:

Pursuant to Rules X and XI of the House of Representatives, the Committee on Government Reform is holding a hearing entitled "The California Murder Trial of Joe 'The Animal' Barboza: Did the Federal Government Support the Release of a Dangerous Mafia Assassin?" The hearing is scheduled for February 13 and 14, 2002, in Room 2154 of the Rayburn House Office Building at 10:00 a.m. each day. As my staff indicated in a telephone discussion with Justice Department staff earlier today, I request that the Justice Department provide a witness for each day of the hearing.

The Committee's hearing will focus on the 1971 murder trial of Joe Barboza in California, in which a senior Justice Department official and two agents of the Federal Bureau of Investigation appeared on Barboza's behalf. I ask that the Justice Department witness attend both full days of hearings, and be prepared to provide the Department's response to the testimony and address any issues relating to the Department's continued refusal to provide the Committee access to the subpoenaed Boston documents.

If the Justice Department witness wishes to make an opening statement, it is requested that he provide 100 copies of his written testimony to the Committee no later than 24 hours prior to the time of the hearing. To facilitate printing of the hearing record, he should also provide a computer disk containing a copy of his written testimony. At the hearing, we will ask the Justice Department witness to summarize his testimony in five minutes to allow the maximum time for discussion and questions.

Under the Congressional Accountability Act, the House of Representatives complies with the Americans with Disabilities Act. Persons requiring special accommodations should contact Committee Chief Clerk Robert Briggs at (202) 225-5074 at least four days prior to the hearing.

Thank you for your assistance in this matter.

Sincerely,

Dan Burton
Chairman

cc: The Honorable Henry A. Waxman, Ranking Minority Member

DAN BURTON, INDIANA
CHAIRMAN

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BERNARD SANDERS, VERMONT,
INDEPENDENT

To: Carl Thorsen

Fax: 305-2643

Phone: 514-1653

Pages: 7 (including cover sheet)

From: Chairman Dan Burton

Fax: (202) 225-5127

Phone: (202) 225-5074

Date: January 3, 2002

- **Comments:**

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FAX COVER SHEET

DATE: 1/14/02

TO: Brett Kavanaugh

PHONE NO.

FAX NO. 456-5104

FROM: FAITH BURTON

PHONE NO. 514-1653

FAX NO. 305-2643

NO. OF PAGES: 1 (EXCLUDING COVER)

COMMENTS: Privilege Log per your conversation w/ Pat.

Boston Documents Subject to Executive Privilege Claim

1. Memorandum Re: Whether to Prosecute Raymond Patriarca, December 2, 1965.

2. Memorandum Re: Whether to Prosecute Raymond Patriarca and Two Additional Named Individuals, June 6, 1967.

3. Memorandum Re: Whether to Prosecute Raymond Patriarca and Six Additional Named Individuals, August 11, 1969.

4. Memorandum Re: Whether to Prosecute Howard Winter and Twenty Additional Named Individuals, January 29, 1979.

5. Memorandum Re: Whether to Prosecute Gennaro Angiulo and Six Additional Named Individuals, August 25, 1983.

6. Memorandum Re: Whether to Prosecute the First National Bank of Boston and One Additional Named Individual, December 11, 1984.

7. Memorandum Re: Whether to Prosecute the First National Bank of Boston, December 20, 1984.

8. Memorandum Re: Whether to Prosecute the First National Bank of Boston, January 8, 1985.

9. Memorandum Re: Whether to Prosecute Robert Carrozza and Six Additional Named Individuals, September 18, 1989.

10. Memorandum Re: Whether to Prosecute Raymond Patriarca and Seven Additional Named Individuals, March 7, 1990.

TO: ANNE WOMACK
FROM: KAVANAUGH

6-0126

the weekly Standard

EDITORIAL

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Next Wednesday, January 23, Rep. Dan Burton's House Committee on Government Reform will hold a hearing on the "history of congressional access to deliberative Justice Department documents," Burton having served a subpoena for certain such documents on Attorney General Ashcroft in early September, and President Bush having subsequently directed Ashcroft to ignore the demand on grounds of "executive privilege." Rep. Burton has cast himself the hero in this controversy —a government-in-the-sunshine crusader against recalcitrant executive branch officers eager to conceal official malfeasance and corruption. And Burton's is the construction of events that most people outside the Bush administration now seem eager to accept.

The *New York Times*, for example, claims alarm over the "expansion of executive authority" implicit in a "blanket presidential order denying access to records that were routinely made available in the past." The House Republican leaders have given Burton leave to pursue precisely this argument by formal means—against their own party's White House. Senate Republicans haven't made a peep in the president's defense. And congressional Democrats proclaim themselves goose-pimply with respect for, even awed by, Burton's courage and consistency here. Henry Waxman, ranking minority member of the Government Reform committee, says, "I agree with Chairman Burton." Rep. Barney Frank, who for some reason fancies himself qualified to judge such stuff, marvels at Burton's "genuine intellectual integrity."

It is true that Burton is consistent. He is consistent in his view that any confidential executive branch information he is curious to peek at is confidential executive branch information that Congress has a right to obtain and make public. Burton is consistent in his view that invocations of executive privilege that frustrate his curiosity are *ipso facto* improper and invalid. And he is consistent in his willingness to employ the full powers of his committee's "oversight" authority in order to affect, to his liking, real-time government decision-making traditionally reserved to the president and his appointees. Since assuming the Government Reform committee chairmanship in 1995, Dan Burton has fired somewhere in the neighborhood of *seven hundred* subpoenas down Pennsylvania Avenue, a great many of them, as in the present case, seeking disclosure of deliberative memoranda prepared by Justice Department prosecutors in connection with criminal investigations still underway.

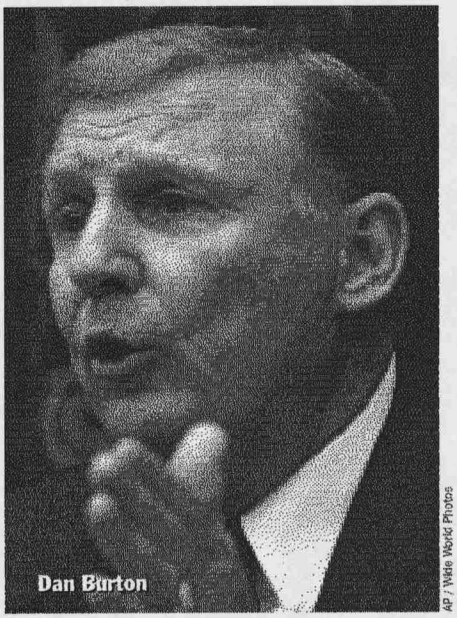
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No, as a matter of fact, they're not. "You are hereby commanded," the Government Reform Committee's September 6 subpoena informs Attorney General Ashcroft, to deliver unto Dan Burton, in unredacted form, every extant document relevant to internal Justice Department deliberations, past or present, over whether to prosecute 14 specifically named individuals—and whether to refer a fifteenth, unnamed individual, who happens to be former Vice President Gore, to an outside special counsel. Henry

Waxman is okay with all this. Burton, he says, is "clearly entitled to receive" the material in question, and the Bush administration's refusal to turn it over "conflicts with the fundamental democratic principles of our nation." For reasons Waxman does not explain, the Clinton administration's refusal to turn over the very same records concerning Gore—which Burton originally subpoenaed in August 2000, over vehement Democratic objections—did not conflict with the fundamental democratic principles of our nation. Go figure.

And go figure, too, Dan Burton's contention that Congress's unlimited prerogative to review decision-making memoranda prepared by executive branch prosecutors "cannot be seriously disputed." The *New York Times*'s potted account of history notwithstanding, Burton has it exactly backwards: The truth is that no American president has ever *failed* to dispute such a subpoena as his. Various presidents dating back to Thomas Jefferson have reluctantly complied with subpoenas issued by federal courts in connection with ongoing criminal trials. Various presidents dating back to George Washington have reluctantly provided Congress with confidential executive branch documents concerning ongoing civil investigations. And various presidents have released confidential but purely factual information, purged of prosecutorial deliberation, from the case files of criminal investigations that have already been closed. But faced with a congressional oversight committee's subpoena for "live" and otherwise non-public criminal case records—or for memoranda justifying even ancient decisions about whether or not to indict a criminal suspect—no chief executive has ever surrendered.


Dan Burton

AP / Wide World Photos

No chief executive, that is, except Bill Clinton, who in this respect, as in so many others, badly betrayed the presidency as an institution. As a matter of constitutional and common law, Clinton's infamously promiscuous and almost invariably unsuccessful litigation of frivolous executive privilege claims left the confidentiality of White House and cabinet department decision-making vulnerable as never before to invasion by officers of the federal courts. And while it is not clear that any of the relevant judicial rulings rendered *congressional* subpoenas like Dan Burton's legally enforceable, here too, in practice, Clinton managed to mortgage a necessary authority of his office. The president has a responsibility, flowing from the Constitution's due process clause, to ensure that the federal government's administration of criminal justice is never compromised by exposure to the pressure of popularly elected legislators. Specifically, the president has a responsibility to ensure that Justice Department prosecutors are allowed to make up their minds whether to indict someone without worrying that Dan Burton's Government Reform Committee will shortly put them on the griddle for it.

Rep. Burton regularly sought access to prosecutorial decision memoranda prepared by Janet Reno's Justice Department. These inquiries President Clinton *should* properly have doggedly resisted on grounds of executive privilege. Instead, he all too often capitulated.

President Bush should not make the same mistake. The bulk of Burton's latest subpoena seeks evidence now before a federal grand jury investigating a grotesque scandal involving the FBI. For more than 20 years beginning in the 1960s, it seems, the Bureau's Boston office, in order to preserve access to a group of prized Mafia informants, actively concealed evidence of its favored mobsters' serious crimes, including murder, and kept mum while at least one clearly innocent man went to prison in their stead. Dan Burton is rather vague about what role the House Government Reform Committee might play in rectifying this miscarriage of justice. But he is certain he will find it once John Ashcroft forks over a series of years-old "declination memos"—formal legal analyses explaining why federal prosecutors long ago decided not to indict certain people allegedly belonging to the New England mob.

Disclosure of these documents cannot be harmful, Burton argues; all the case files in question are "closed." But that's the whole point, of course: Why those files were closed—whether decisions not to prosecute FBI mob informants in Boston were illegal and corrupt—is the very question now directly before the grand jury. No consideration of constitutional law or basic prudence suggests that a House committee chairman may appropriately review and publicize otherwise secret federal grand jury evidence even as it is being presented and considered. And any man who cannot see why it might not be a good idea for this particular House committee chairman to get his mitts on such stuff is a fool. Or worse.

George W. Bush was correct to assert executive privilege against Dan Burton's subpoena. And he should stick to his guns no matter what—not to effect an "expansion" of presidential authority, but merely to restore a healthier pre-Burton, pre-Clinton status quo.

—David Tell, for the Editors

the weekly Standard

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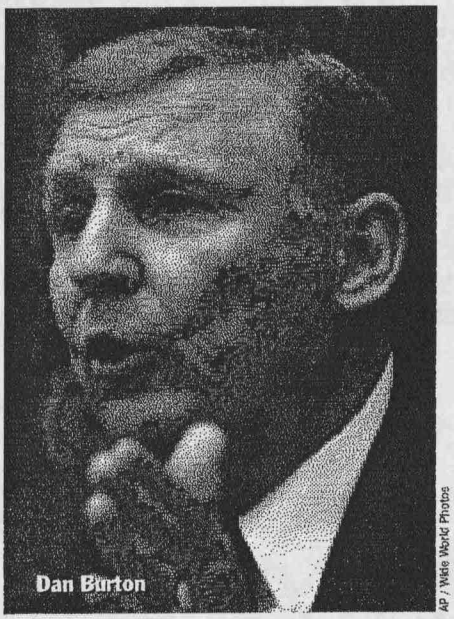
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—David Tell, for the Editors

the weekly
Standard

To Brett Kavanaugh

Of White House Counsel's Office

Fax N° 456-1647

From Catherine Titus, Publicity Director - 202.496.3351

Date Tuesday, January 15, 2002

N° pages (including this) 3

Advance Article Attached

We thought you would be interested in David Tell's editorial for the January 21, 2002 issue.

1150 17th Street, NW Suite 505 Washington, DC 20036
202-293-4900 (fax) 202-293-4901
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the weekly Standard

EDITORIAL

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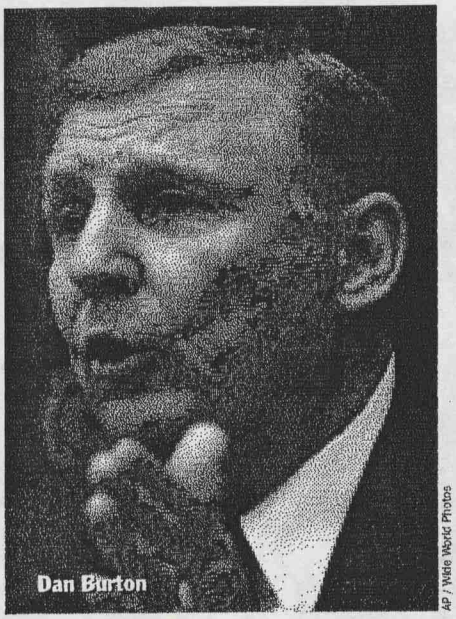
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Dan Burton

AP / Wide World Photos

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—David Tell, for the Editors

the weekly
Standard

To Brett Kavanaugh

Of White House Counsel's Office

Fax N° 456-1647

From Catherine Titus, Publicity Director - 202.496.3351

Date Tuesday, January 15, 2002

N° pages (including this) 3

Advance Article Attached

We thought you would be interested in David Tell's editorial for the January 21, 2002 issue.

1150 17th Street, NW Suite 505 Washington, DC 20036
202-293-4900 (fax) 202-293-4901
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the weekly Standard

EDITORIAL

Dan Burton, Wrong Again

Next Wednesday, January 23, Rep. Dan Burton's House Committee on Government Reform will hold a hearing on the "history of congressional access to deliberative Justice Department documents," Burton having served a subpoena for certain such documents on Attorney General Ashcroft in early September, and President Bush having subsequently directed Ashcroft to ignore the demand on grounds of "executive privilege." Rep. Burton has cast himself the hero in this controversy —a government-in-the-sunshine crusader against recalcitrant executive branch officers eager to conceal official malfeasance and corruption. And Burton's is the construction of events that most people outside the Bush administration now seem eager to accept.

The *New York Times*, for example, claims alarm over the "expansion of executive authority" implicit in a "blanket presidential order denying access to records that were routinely made available in the past." The House Republican leaders have given Burton leave to pursue precisely this argument by formal means—against their own party's White House. Senate Republicans haven't made a peep in the president's defense. And congressional Democrats proclaim themselves goose-pimply with respect for, even awed by, Burton's courage and consistency here. Henry Waxman, ranking minority member of the Government Reform committee, says, "I agree with Chairman Burton." Rep. Barney Frank, who for some reason fancies himself qualified to judge such stuff, marvels at Burton's "genuine intellectual integrity."

It is true that Burton is consistent. He is consistent in his view that any confidential executive branch information he is curious to peek at is confidential executive branch information that Congress has a right to obtain and make public. Burton is consistent in his view that invocations of executive privilege that frustrate his curiosity are *ipso facto* improper and invalid. And he is consistent in his willingness to employ the full powers of his committee's "oversight" authority in order to affect, to his liking, real-time government decision-making traditionally reserved to the president and his appointees. Since assuming the Government Reform committee chairmanship in 1995, Dan Burton has fired somewhere in the neighborhood of *seven hundred* subpoenas down Pennsylvania Avenue, a great many of them, as in the present case, seeking disclosure of deliberative memoranda prepared by Justice Department prosecutors in connection with criminal investigations still underway.

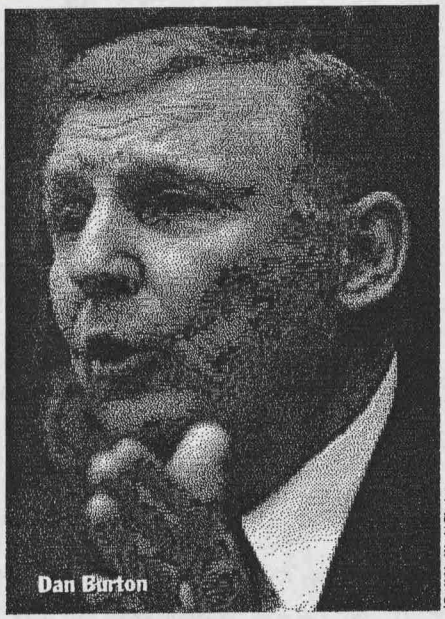
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COPY

THE WHITE HOUSE

WASHINGTON

December 14, 2001

MEMORANDUM FOR HARRIET MIERS

FROM: ALBERTO R. GONZALES

SUBJECT: MEMO TO THE PRESIDENT

Attached is a memo to the President regarding executive privilege and the Presidential Records Act.

Because of the sensitive nature of these documents I suggest that the staffing be limited to the Chief of Staff.

Thank you.

THE WHITE HOUSE

WASHINGTON

December 14, 2001

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: PRESIDENTIAL RECORDS ACT AND EXECUTIVE PRIVILEGE ISSUES

Following up on our conversation this morning, you should be aware of the following points relating to the Presidential Records Act and to executive privilege.

1. *Executive Order Applying Presidential Records Act.* On November 1, you issued an executive order relating to the Presidential Records Act. The Presidential Records Act provides that records of former Presidents are subject, with certain exceptions, to release by the National Archives beginning 12 years after the end of a Presidency. Consistent with binding Supreme Court precedent, the Act also provides, however, that both the current President and the relevant former President retain the right to assert constitutional privileges after that 12-year period. Therefore, both the current President and the former President have the ability, and arguably the responsibility, to review records from the former President's administration before their release in order to make privilege determinations.

Despite repeated mischaracterizations in the media and in Congress, your November 1 executive order merely established appropriate procedures for former and current Presidents to review hundreds of thousands of pages of Presidential records and make privilege determinations.

Several aspects of the order warrant mention.

First, contrary to some commentary, the order does not indicate whether or under what circumstances a current or former President should assert privilege. That decision is left to the current and former President. Instead, the order merely establishes procedures -- including procedures for notice to the current and former Presidents when a request is received for release of documents and time periods within which the review must be completed. *Second*, consistent with disclosure practices of former Presidents that existed long before this Act took effect, we anticipate that former Presidents rarely will invoke privilege to prevent disclosure of records. *Third*, in an important innovation, the order indicates that the current President will generally defer to the decision of the former President regarding his records. When combined with the probability that former Presidents are likely to assert privilege only rarely, the order actually should facilitate release of a former President's records. *Fourth*, when a former President decides to assert executive privilege, the denied requester (rather than the former President) must initiate litigation with respect to that privilege assertion. That is the procedure employed in Freedom of Information Act litigation, and was the most appropriate model for this order in our judgment.

Historians are concerned that the order imposes procedures that will stop or delay the release of Presidential records. We have been meeting with historians and Members of Congress to explain the order and to reassure them that the order will actually facilitate the release of Presidential records consistent with the Constitution.

2. *Claim of Executive Privilege Over DOJ Documents.* On December 12, consistent with the recommendation of the Attorney General and me, you invoked executive privilege to prevent release of certain Department of Justice prosecutorial documents to the House Committee on Government Reform. The documents in question fell into three broad categories: (i) documents relating to the possible appointment of a special prosecutor to investigate former Vice President Gore; (ii) prosecutorial declination memoranda relating to two individuals whom the Committee believes should have been prosecuted; and (iii) a limited number of prosecution and declination memoranda relating to possible charges against certain individuals by the Boston U.S. Attorney's office, an office where there have been allegations of FBI corruption in the past.

As a general matter, these kinds of deliberative and sensitive prosecutorial documents are at the core of executive privilege because they reflect internal deliberations and implicate the reputation and potential criminal prosecution of individuals. Although the Clinton Administration on very rare occasion relaxed the general policy against congressional access to these kinds of documents, it has been the longstanding practice of the Executive Branch not to disclose these kinds of documents to Congress absent some truly extraordinary circumstance. The Attorney General and I agree with that long-standing principle, recognizing that there may be accommodations short of disclosure that can be appropriate in particular cases.

Almost all of the negative reaction from Chairman Burton's Committee focused on the Boston documents. We believe this may be because the other documents are too politically sensitive. Although the privilege applies equally to all of the documents, it is easier politically to attack only the Boston recommendations relating to an over 10-year-old matter. We have advised the Department of Justice to ensure that the Committee has all necessary and appropriate information on this matter, while also protecting the core privilege concerns as to the very few highly sensitive prosecutorial documents. In that regard, the Department already has provided thousands of pages of documentation to the Committee regarding this matter. In addition, we have offered to brief the Committee regarding the documents. Finally, there is an ongoing Justice Department investigation of the same FBI corruption allegations, so there can be no suggestion that the Administration is not pursuing allegations of any FBI wrongdoing.

Of course, the invocation of executive privilege does not foreclose the possibility that some means might be found to accommodate the needs of Congress. For example, the Committee may now accept a briefing. Consistent with your invocation of the privilege, we will explore the possibility in the weeks ahead.

128680/

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ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5074
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www.house.gov/reform

December 18, 2001

The Honorable John Ashcroft
Attorney General
U.S. Department of Justice
Tenth and Constitution Avenue, N.W.
Washington, D.C. 20530

RECEIVED
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2001 DEC 18 P 2:43
EXECUTIVE
SECRETARIAT

Re: Request for Documents

Dear General Ashcroft:

Pursuant to its authority under Rules X and XI of the House of Representatives, the Committee on Government Reform hereby requests certain records.

Please produce the following items, in unredacted form, to the Committee:

1. All records relating to contacts between Frank Orcto and Joseph Salvati;

2. All records relating to contacts between Frank Oreto and Marie Salvati;

3. All records relating to then-FBI Special Agent H. Paul Rico's handling of witness John "Red" Kelley;

4. All records relating to then-FBI Special Agent Robert E. Sheehan's handling of witness John "Red" Kelley;

5. All records relating to then-Attorney-in-Charge, Strike Force Against Organized Crime, Edward F. Harrington's handling of witness John "Red" Kelley;

6. All records relating to the Rhode Island Supreme Court's finding that FBI Special Agent H. Paul Rico suborned perjurious testimony during the 1970 trial of Maurice R. "Pro" Lerner. *See Lerner v. Moran*, 542 A.2d 1089 (R.I. 1988);

7. All records relating to the Rhode Island Supreme Court's finding that FBI Special Agent H. Paul Rico committed perjury during the 1970 trial of Maurice R. "Pro" Lerner. *See Lerner v. Moran*, 542 A.2d 1089 (R.I. 1988);

8. All investigative files relating to Victor J. Garo.

Please produce the requested items by January 4, 2002. If you have any questions about this matter, please have your staff contact the Committee's Chief Counsel, James C. Wilson, at (202) 225-5074.

Sincerely,

Dan Burton
Chairman

cc: The Honorable Henry Waxman, Ranking Minority Member

Source: All Sources > News > By Individual Publication > W > **The Washington Post**
Terms: **"executive privilege" and confidential /3 advice** (Edit Search)

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The Washington Post, April 9, 1978

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April 9, 1978, Sunday, Final Edition

SECTION: Outlook; C5

LENGTH: 1947 words

HEADLINE: The **Executive Privilege** For Fight: A Way Out;
It's Time to End The Long Impasse Between Congress And the Presidency

BYLINE: By Edward H. O'Connell

BODY:
IN 1791, A MILITARY expedition in northern Ohio led by Gen. Arthur St. Clair was trounced by the Wabash Indians. Of St. Clair's 1,500 men, 600 were killed and 300 wounded, while the Indians lost fewer than 70 braves.

Investigating this U.S. military disaster the following year, the House of Representatives asked Secretary of War Henry Knox to produce the original instructions for the expedition. As a result, President Washington called a Cabinet meeting to discuss whether he should turn over such secret documents to the Congress. So was born the debate about whether and when the executive branch may refuse information to others, particularly the Congress, a debate which badly needs to be resolved today.

The conflict was relatively muted for many years because executive privlege claims were rarely made; in the more than 150 years between 1792 and the early 1950s, the president and the Congress squared off on the issue only 27 times. But the dispute has intensified dramatically in recent years. Just since 1954, the two branches have locked horns over **executive privilege** claims at least 59 times, and the prospect is for more fights ahead unless reasonable new procedures are developed. In part, the intensified battle results from the growth of the executive branch, and particularly the White House. While President Washington personally paid his nephew to serve as his secretary, as of 1977 the White House had at least 455 employees, all of whose activities are sometimes claimed as part of the "**confidential advice** or policy making process." In part, it also stems from the Congress' frustration in trying to control the growing complexity of the governmental process.

But perhaps most of all its stems from Congress' determination to reassert its place as a co-equal branch in a government in which power increasingly has accumulated in the hands of the president.

All of these factors, of course, came to a head in the Watergate trauma, with President Nixon's abuses of **executive privilege** claims. In the heat of that battle, it would have been impossible to settle on any new rules for the executive to hand over information to the Congress. But now, with Watergate behind us and with the White House and the Congress controlled by the same party, the time is ripe for a solution.
Hamilton's Convenient View

IT NEED SCARCELY be said that there are legitimate cases in which the executive branch

should keep information strictly confidential. The Manhattan Project's development of the atomic bomb and our early breaking of the Japanese code during World War II come readily to mind. Unfortunately, though, **executive privilege** is also just as easily claimed to cover a Teaport Dome or a Watergate.

The history of the **executive privilege** debate is, in fact, a tortuous one, starting with President Washington's 1792 Cabinet meeting with Secretary of State Thomas Jefferson, Secretary of the Treasury Alexander Hamilton, Attorney General Edmund Randolph and Secretary Knox over the House request for St. Clair's instructions.

According to the notes kept by Jefferson, the Cabinet agreed that while the House could make the inquiry, at some point the president might want to withhold "papers of so secret a nature," and therefore administration members ". . . were to exercise a discretion" as to what they should give Congress. As a matter of history, they ". . . agreed in this case, that there was not a paper which might no be properly produced."

Jefferson's notes, however, are revealing on a more basic question when the discusses some of Hamilton's comments at the meeting:

". . . as to his Department, the act constituting it had made it subject to Congress in some points, but he thought himself not so far subject, as to be obliged to produce all the papers they migt call for. They might demand secrets of a very mischievous nature. (Here I thought he [Hamilton] began to fear they would go on to examining how far their own members and other persons in the government had been dabbling in stocks, banks, etc., and that he probably would choose in this case to deny their power; & in short, he endeavored to place himself subject to the House, when the Executive should propose what he did not like and subject to the Executive when the House should propose anything disagreeable.)"

In other words, Jefferson noted that Hamilton had opened the possibility for the use of this "discretion" for his own ends. The seeds for selective manipulation of what information would be given to Congress were sown by one of the Founding Fathers.

In 1796, President Washington did withhold from the House certain information regarding the Jay Treaty, but there is a question as to whether this was under **executive privilege** or was done on jurisdictional grounds, since this information was given to the Senate under its advice and consent power.

From then until 1950 there were 26 principal conflicts between the executive and the Congress, involving material ranging from the Jefferson administration's confidential information and letters relating to the Burr conspiracy to Civil Service Commission records on job applicants during the Truman years. These were settled in the political arena, with the ebb and flow of congressional power vis-a-vis presidential power deciding the extent to which the executive turned over the requested information.

In 1954, however, President Eisenhower, in reaction to the excesses of the Army-McCarthy hearings, drafted a letter that had the effect of claiming uncontrolled presidential discretion to withhold information in the "public interest." In the next six years there were 34 instances in which his administration, with relative impunity, refused information sought by Congress.

During the Kennedy and Johnson administrations there was almost an impasse in this new assertion of power. Kennedy used it personally once, and his administration refused to provide information on only three other occasions.Johnson personally never claimed the power, and his administration used it only twice.

President Nixon vowed to follow the Kennedy-Johnson example, but in his first four years of office he formally invoked the claim of privilege four times, and his administration refused documents or testimony at least 15 other times. Between 1972 and 1974, Nixon formally

exercised the claim four more times, and President Ford exercised it twice during his administration.

Conflicting Theories

THROUGHOUT THIS history there have been conflicting legal theories, ranging from an assertion of absolute executive discretion to a claim that there is no such privilege at all, that it is "a myth."

The Constitution is silent on the question. At best the president can claim an implied power under Article II, Section 3, requiring him to "take care that the laws be faithfully executed." There hasn't even been a determination as to whether, assuming the privilege exists, it is a personal privilege to the president or others can claim it on his behalf.

Recently, however, th Supreme Court, in *United States v. Nixon,* did strike down the claim of an unqualified **executive privilege,** at least as weighed against the "constitutional duty of the judicial branch to do justice in criminal proceedings." Conversely, Congress' authority has been deemed less than absolute by the U.S. Court of Appeals in *Senate Select Committee on President Campaign Activities v. Nixon.* This case was unusual, however, in that the material desired (the Nixon tapes) was in fact in the hands of the House Judiciary Committee. That appeared to be a major factor in denying further judically authorized access by Congress.

In all these conflicts, the executive makes no distinction between access by Congress and public disclosure, which are entirely different questions. The executive fails to recognize that Congress, as an equal partner under the Constitution, also has an interest in protecting "confidential information." What it does not have is an interest in keeping embarrassing or illegal acts of the executive from outside scrutiny.

Actually, congressional committees infrequently desire sensitive information and routinely accede to deletion of senstive matters in requested information. Congress' overall record is good. People seem to forget, for example, that the initial "leak" of the Pentagon Papers to The New York Times and The Washington Post was made by a former executive employee only after he had tried for several months without success to get several members of the Senate to make the papers public.

Rep. John Moss (D-Calif.), in a study in the mid-1950s, found that "leaks" or selected classified material had become almost an operating tool of the executive branch, and he concluded that of the two, Congress was the safer repository of information. Nevertheless, the possibility does exist that sensitive information could be, and in fact has been, released.

Both the House and Senate have strict rules controlling sensitive information from the executive. If secret or confidential business or proceedings are disclosed, the offending member would be liable to expulsion.

However, the executive branch can claim that all of these procedures must be read in light of the Gravel case. That case held that the Constitution's speech-and-debate clause confers an absolute immunity from criminal prosecution on members of Congress and their aides for acts pursuant to their "legislative function." In this case, Sen. Mike Grave (D-Alaska), who read classified documents (the Pentagon Papers) into the public record at a congressional subcommittee meeting, was immune from criminal prosecution.

A New Procedure

WHAT RESULTS, then, is a classic separation-of-powers dilemma, with the likelihood of more conflicts to come. What is needed is a new procedure that would operate before such conflicts emerge, a set of rules which both sides agree to in advance.

Such rules are feasible and could be adopted into law. They could, for example, allow a Cabinet-level executive, under limited circumstances, to request that "confidential

information" sought by Congress be given to it on the condition that the information not be publicly disclosed. By accepting such information, the Congress could be required to set up procedures to protect it.

There could also be a provision whereby, at the request of a Cabinet officer, the president would be authorized to determine that certain information was so sensitive that disclosure even in confidence to Congress as a whole would be dangerous to the "public interest." However, if there were a suspicion that this information might involve a cover-up of high-level impropriety, the Congress could subpoena it for an "in camera" review by either the speaker of the House or the president pro tempore of the Senate, who would determine what essential information should be given to the requesting committee. If either the president or agency head did not cooperate fully with this subpoena, these facts could be certified to the House Judiciary Committee for its consideration in any impeachment proceedings.

In this way, the Congress and executive branch would be establishing a procedure which would both meet the information needs of Congress and the recognized needs for confidentiality in certain areas of the executive.

Nearly two centuries of conflicts in this area culminated in Watergate. Now, with today's relative peace between the two branches, we ought finally to set some guidelines and rules to this never-ending controversy and insure that **executive privilege** never again escalates to national scandal.

GRAPHIC: Picture, ST. CLAIR'S DEFEAT - This military disaster led to the first confrontation over **executive privilege** in the United States. Library of Congress

Source: All Sources > News > By Individual Publication > W > **The Washington Post**
Terms: **"executive privilege" and confidential /3 advice** (Edit Search)
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BERNARD SANDERS, VERMONT,
INDEPENDENT

January 3, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Ashcroft:

I write in response to the December 19, 2001, letter from Assistant Attorney General Dan Bryant. I appreciate Mr. Bryant's effort to follow up on matters relating to the Committee's December 13, 2001, hearing. However, his letter did little to diminish the concerns that I and a number of the Committee's members have about the Justice Department's refusal to provide the Committee with access to subpoenaed records.

It appears that Mr. Bryant's letter was an attempt to explain the efforts the Justice Department has made to accommodate the Committee's interests. Mr. Bryant also stated that the Department "will be prepared to make a proposal as to how further to accommodate the Committee's needs as soon as you inform us in writing of the specific needs the Committee has for additional information." This is encouraging, but as I will explain, I have a number of concerns about your offer.

As you know, since Spring of 2001, this Committee has been negotiating with the Justice Department to obtain access to a number of Justice Department memoranda. In an effort to obtain access to those records, my staff and I have met with you, Deputy Attorney General Larry Thompson, White House Counsel Alberto Gonzales, Assistant Attorney General Michael Chertoff, Assistant Attorney General Dan Bryant, and a number of other Justice Department and White House staff. In the course of those discussions, my staff and I offered a number of compromises that would satisfy our needs as well as the Justice Department's interests. These offers were never even entertained by the Department. Indeed, before you even learned why the Committee was interested in reviewing the subpoenaed documents, you announced a blanket policy that Congress would never again have access to deliberative documents. While the statements you and Judge Gonzales made to me were modified by Mr. Horowitz during the December 13, 2001, hearing when he referred to a case-by-case analysis, it was quite clear that in no case would deliberative Justice Department documents be provided to Congress. Put simply, if you were prepared to advise the President to invoke executive privilege over the

Boston documents, there is little likelihood that you would ever permit Congress to receive deliberative memoranda.

Given the fact that you rebuffed any offers of compromise for the past eight months, you can see how I find the Department's current offers to accommodate the Committee curious. In fact, during a meeting with senior Justice Department and White House staff in September 2001, my staff noted that the Justice Department had never asked why the Committee was seeking the disputed deliberative memoranda. Your staff indicated that the Committee's articulation of its need was irrelevant to the Department's analysis. It appears that you continued to consider our need for the documents irrelevant, and even advised President Bush to claim executive privilege over the subpoenaed documents without a clear understanding of why the Committee needed them. I am unable to understand why you would do this, unless, of course, the needs of Congress are not relevant to your decisionmaking. I am surprised, and more than a little dismayed, that you would advise the President to claim executive privilege for the first time in his administration without even understanding why the Committee was seeking the records.

Given that you and your staff informed me earlier that the Justice Department was implementing a new blanket policy that Congress would no longer be provided with deliberative documents, I also find it strange that you are now asking for an articulation of the Committee's need for the Boston-related documents. If indeed there is a blanket policy in place, the Committee's needs for the documents are irrelevant to the Department. Of course, your prior articulation of a blanket policy was undermined at the December 13, 2001, hearing by Mr. Horowitz's representation that the Department conducted a case-by-case analysis of requests for deliberative documents. However, there is no indication that the Justice Department conducted any serious "case-by-case" analysis in this instance, as the Department did not even seek input from the Committee prior to recommending that the President invoke executive privilege. Therefore, you can understand why I might conclude that the Justice Department is not truly interested in the Committee's needs for the subpoenaed documents, and has asked for an articulation of the Committee's needs only to make it appear as if the Department was engaged in negotiations with the Committee.

At any rate, in the interest of continuing my efforts to work with the Justice Department – efforts which have been underway since Spring 2001 – I will provide you with a brief summary of the Committee's needs for the subpoenaed documents. It is my hope that once you fully understand the Committee's needs for the documents, you will advise the President to withdraw his claim of executive privilege. In a general sense, in order to understand whether the Justice Department served the ends of justice, Congress must understand in certain situations why prosecutorial decisions are made. This requires a review of documents for two reasons: first, Congress cannot rely on a verbal briefing because the briefing may leave out material, intentionally or unintentionally, that is germane to the needs of Congress; and second, Congress cannot rely on a verbal briefing because there are times when the person providing the briefing will have a less developed sense of factual predicates than the individuals receiving the briefing. More specifically, the Committee subpoenaed documents pertaining to Justice Department misconduct in handling of informants because it is concerned that: (1) the Justice Department, including the FBI, was using its powers in a corrupt manner, and that this abuse led to the

imprisonment of Joseph Salvati for thirty years for a crime he did not commit, as well as a number of other equally horrific episodes, including murders; (2) Justice Department personnel may have covered up corrupt conduct over a course of many years; (3) until Judge Mark Wolf compelled the Justice Department to take this matter seriously, it did not appear eager to conduct, or capable of conducting, a review of its own past misdeeds; and (4) the fact that the Justice Department has constituted a task force to conduct a criminal investigation does not relieve Congress of its obligation to investigate the matter, and determine whether new legislation is needed to address the problems within the Justice Department.[1]

In his December 12, 2001, memorandum, President Bush stated that "I believe that congressional access to these documents would be contrary to the national interest[.]" It eludes me how it is in the national interest to cloak this dark chapter of the Justice Department's history in secrecy. Rather, I believe that once you understand the scope of Justice Department malfeasance in its handling of organized crime investigations in New England, it will become clear that Congress should receive access to these documents so that it can fully understand what mistakes were made, and enact appropriate remedies so that it never happens again.

With this in mind, I have a few observations about Mr. Bryant's letter. The letter makes it appear that some in the Department are more interested in a press strategy than serious negotiations with the Committee.

First, Mr. Bryant noted that "[w]e have not objected to the Committee's undertaking its own investigation[.]" It appears that Mr. Bryant made this statement to show how reasonable and accommodating the Department has been. However, it speaks volumes about the Justice Department's attitude regarding Congressional oversight that it believes that it has the right to "object" to the Committee undertaking an investigation. This is particularly puzzling when you will not permit Committee staff to speak with your task force supervisor. As you, of all people should know, Congress is an equal branch of government, with a power of inquiry the Supreme Court has described as "broad," and which "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins v. United States*, 354 U.S. 178, 187 (1957). I am unaware of any objections raised by you when deliberative documents were sought during Senate investigations. Indeed, I can only speculate how you might have reacted if, when you served in the Senate, the Reno Justice Department had informed you or your former colleagues that it would not "object" to an oversight investigation of pressing national importance.

Second, Mr. Bryant wrote that the Department has provided "[m]ore than 3800 pages" in response to our request. In his hearing testimony on December 13, 2001, Criminal Division Chief of Staff Michael Horowitz also repeatedly invoked the number of pages provided to the Committee. The fixation of Justice Department staff on the number of pages provided in response to Committee requests is troubling. Of course, the Committee does not subpoena

[1] A detailed explanation of why the Committee is seeking the specific documents under subpoena can be found on the Committee's website, where it has been posted since September 2001. See: http://www.house.gov/reform/newindex/subpoena_items.htm. Further explanation of the Committee's needs for the documents will be made at public hearings.

documents by the pound, and the number of documents provided by the Justice Department is irrelevant. It is my hope that your prosecutors and investigators do not accept similar representations from defendants and their lawyers who may seek to withhold documents from the Justice Department during criminal investigations. The fact is that the Committee is seeking a small universe of deliberative Department documents, and you are refusing to provide them.

Mr. Bryant's characterizations of past efforts to accommodate the Committee are also misleading. He indicates that the Committee's need for the Conrad memorandum was accommodated by the Committee's interview of Attorney General Reno on October 5, 2000. Neither you nor Mr. Bryant were present for the interview with Attorney General Reno, so you may not understand how her interview was less-than-satisfying for the Committee.[2] The fact that your staff holds up the Reno interview as an example of the fulsome accommodation provided by the Justice Department shows why the Committee is skeptical of your offers.

Mr. Bryant or Mr. Horowitz could have assisted the Committee by following up on questions which were posed at the Committee's December 13, hearing, which were not answered. For example, Mr. Horowitz stated that he would inform the Committee "promptly" as to whether we would be receiving a privilege log for the records the Justice Department is withholding on the basis of privilege. Mr. Horowitz also informed Congressman Tierney that he would determine whether he could inform the Committee about who participated in the decision to advise President Bush to claim executive privilege in this matter. In addition, in a September 7, 2001, letter, I asked you a number of questions regarding the precedent for withholding this type of information from Congress. Those questions have not been answered. It is interesting that Mr. Bryant sent a four-page letter regarding the Department's efforts to accommodate the Committee without answering one single outstanding question from the Committee's hearing.

Unfortunately, Mr. Bryant's letter does little to further the process of accommodation. Rather, it distracts from the key issues. Therefore, let me list the key issues facing us over the coming months.

- The Committee is conducting an important investigation relating to serious allegations of wrongdoing in the FBI. This investigation is being negatively impacted by the Justice Department's new policy of secrecy regarding deliberative documents. It has also been negatively impacted by liberal redactions in key documents and an absolute refusal to even entertain a meeting to discuss sensitive matters involving informants. Both Department and Committee investigations have been made more complex by the refusal of the Justice

[2] Ms. Reno explained that she had refused to appoint a campaign fundraising special counsel because she had concluded that "there is no reasonable possibility that further investigation could develop evidence that would support the filing of charges for making a willful false statement." She provided virtually no information beyond that statement to explain why she rejected Robert Conrad's recommendation to appoint a special counsel. When asked why she was refusing to provide the Conrad memorandum, she stated that it was "part of a pending investigation." Yet, when she was squarely asked "are the issues raised in [Conrad's] memo still under investigation," Attorney General Reno answered "I can't tell you that." So, not only did Attorney General Reno fail to provide any explanation of her decisionmaking, she refused to even state whether the Conrad memo dealt with open or closed cases.

Department to allow Task Force Supervisor John Durham even to have a conversation with Committee lawyers.

- The new Justice Department policy would effectively eliminate real Congressional oversight of the Department. There are times when Congress should be permitted access to all of the facts, not just some of the facts. The Department's focus on the number of pages provided to the Committee belies a belief that it is appropriate for Congress to learn some facts, but not all of the facts. It is impossible for the Congress to investigate wrongdoing in the Justice Department without access to the types of documents sought by the Committee. Yet, rather than engage the Committee in an process of compromise and accommodation, you have created a blanket policy of secrecy that will forever bar Congress from receiving deliberative Justice Department memoranda, regardless of how serious the allegations of wrongdoing.

- The Justice Department has lowered this iron veil of secrecy at the very time that it has received broad new powers to combat terrorism. While I am supportive of the new powers granted to the Justice Department, I believe that they must be subject to careful review by Congress. The policy you have created will make such oversight virtually impossible.

- The President's claim of executive privilege is surprisingly broad in its scope. Moreover, it is not supported by relevant caselaw.

- As you saw at the Committee's December 13, 2001, hearing, this Committee is united across party lines in opposition to the Justice Department's new policy. Moreover, this Committee is not the only concerned party:

> "Dan Burton, a Republican and chairman of the Government Reform Committee, and Henry Waxman, its ranking Democrat, do not agree on much. But both men feel strongly, as do we, that Mr. Bush should defuse the present constitutional clash by withdrawing his unwarranted privilege claim." "Misusing Executive Privilege," *The New York Times*, December 15, 2001.

> "President Bush sought to hoodwink the House Government Reform Committee and the American public last week when he invoked executive privilege to thwart a congressional investigation of abuses in the Boston FBI office. . . . The President is forcing a constitutional confrontation with Congress. Republicans and Democrats should join in the defense of accountable and transparent government, whether on the floors of Congress or in America's courtrooms." "Blinded Justice," *The Boston Globe*, December 18, 2001.

> "In a range of recent situations, the White House has had a choice between opening government to scrutiny or keeping the public in the dark. In each instance – from an investigation of the mob to the release of presidential papers, to secret military tribunals and secretive detention for terror suspects – George W. Bush has opted for the dark. That's unhealthy for any democracy." "Too Many Secrets Being Kept in Bush White House," *Newsday*, December 18, 2001.

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> "[T]he President said release of documents sought by the committee would 'inhibit the candor' prosecutors need in discussions about actual and prospective cases. It's a mystery why he thinks so. No previous President has sought to withhold such records . . . Protection of institutional prerogatives can trump party loyalty. Cooperation with the committee is not only the right thing to do, it may avoid an unwinnable fight." "Privilege Shouldn't Cover Up This Mess," *Boston Herald*, December 17, 2001.

Given these facts, the Committee has no alternative but to hold further public hearings regarding this matter. Our next hearing will focus on precedent, or the lack thereof, for the Department's new policy, and will be held on January 24, 2002 at 10:00 a.m. I request that Assistant Attorney General Dan Bryant testify at this hearing. Mr. Bryant will be asked to testify regarding all previous times that the Justice Department has made deliberative documents available to Congress. Mr. Bryant will also be asked to answer the questions originally posed in my letter to you of September 7, 2001.

Sincerely,

Dan Burton

Dan Burton
Chairman

cc: Members, Committee on Government Reform

UNITED STATES HOUSE OF REPRESENTATIVES
Committee on Government Reform
INDIANA REPRESENTATIVE DAN BURTON CHAIRMAN

ITEMS UNDER SUBPOENA AND THEIR SIGNIFICANCE

The dispute between the Committee on Government Reform and the Department of Justice goes to the heart of Congress' ability to conduct meaningful oversight of the Executive Branch. The following has been prepared to explain what types of documents are currently being sought by the Committee, and why they are being sought. It is the Committee's understanding that the Justice Department's new position will prevent Congress from reviewing any of the subpoenaed documents.

The Committee's Investigation of the FBI's Use of Informants in New England Organized Crime Investigations

The conduct being investigated by the Committee has led to over one thousand million dollars of civil law suits against the government and has contributed to the murders of a number of individuals. The events under review took place over almost four decades and can be described as one of the greatest failures of federal law enforcement in the history of the United States.

1. **Records Regarding Stephen Flemmi --** Stephen Flemmi is currently under indictment for murder and is likely to be prosecuted for murder in at least three states. While serving as an FBI informant for over two decades, Flemmi allegedly killed a number of individuals – perhaps well over twenty. He also allegedly killed, or participated in the killing, of witnesses who provided information to federal law enforcement authorities about his crimes. Notwithstanding extensive evidence readily available to federal law enforcement authorities, why was Flemmi not prosecuted for his many crimes prior to 1995? Why did the Justice Department choose not to prosecute Flemmi?

2. **Records Regarding James "Whitey" Bulger** – Bulger is currently number two on the FBI's "Ten Most Wanted" list. Along with his partner Stephen Flemmi, Bulger allegedly killed a number of people in the Boston area while serving as an FBI informant. Notwithstanding extensive evidence readily available to federal law enforcement authorities, why was Bulger not prosecuted for his many crimes prior to 1995?

3. **Records Regarding Joseph Barboza** – Joseph Barboza was described to the FBI Director on June 20, 1967, as "a professional assassin responsible for numerous homicides and acknowledged by all professional law enforcement representatives in this area to be the most dangerous individual known." The Justice Department had credible information that Barboza killed many people and was not prepared to be truthful in testimony before federal and state courts. The Committee would like to review deliberative memoranda discussing whether Barboza should be prosecuted for murders, why the government used a witness who would provide perjurious testimony, why the federal government was prepared to entertain using him as a top echelon informant after he had been placed in the witness protection program, and why the federal government helped defend Barboza after he was indicted for a murder committed while he was in the witness protection program. The documents sought would shed light on all of these questions.

4. **Records Regarding Jimmy "The Bear" Flemmi** – Jimmy Flemmi and his brother Stephen were being cultivated by the FBI to become informants. FBI Director J. Edgar Hoover was informed that "all he [Jimmy Flemmi] wants to do now is kill people" and that Flemmi "feels he can now be the top hit man in this area." The FBI was aware of a number of murders committed by Flemmi, was told that Flemmi was going to kill Edward "Teddy" Deegan, and that he had in fact participated in the killing of Deegan. The Justice Department also had knowledge that Joseph Barboza would not provide any information that would allow Flemmi to "fry." Why was Flemmi not prosecuted, and why did the FBI allow Joseph Salvati to spend thirty years in prison for a crime that was committed by two – and possibly three – of their informants? If prosecutors or subordinates of the Attorney General discussed the pros and cons of prosecuting a man they knew to be a multiple murderer, or if they discussed providing information to state prosecutors, or withholding information from state prosecutors, the Committee would like to obtain this information.

5. **Records Regarding Raymond Patriarca** – Raymond Patriarca was the highest ranking member of organized crime in New England. In the early 1960's, the FBI placed an illegal surveillance bug in Patriarca's principal place of business. The bug provided evidence of numerous crimes. The Committee would like to obtain information about deliberations regarding possible criminal prosecutions of Patriarca for a number of reasons. For example, if the Attorney General or his subordinates received advice regarding a criminal prosecution, it would be apparent that individuals other than the Director of the FBI and his subordinates were aware of the existence of the illegal bug.

6. **Records Relating to Gennaro Angiulo** – The Committee is interested in deliberations regarding decisions to prosecute Angiulo because there

is a high likelihood that such deliberations will shed light on additional improper conduct by federal law enforcement officials.

7. **Records Relating to Theodore Sharliss** – The Committee has recently been informed that Sharliss was an FBI informant. While serving as an informant, Sharliss allegedly participated in a successful plot to kill Joseph Barboza. Sixteen years after the Barboza murder, Sharliss provided information implicating J. R. Russo in Barboza's murder. Deliberations regarding potential prosecutions of Sharliss may shed light on why it took the federal government sixteen years to prosecute Russo for Barboza's murder, and the justification for placing him in the federal witness protection program. They may also shed light on whether the federal government was aware that Barboza was to be killed prior to the murder taking place, and whether they were aware that their own informant was plotting to set Barboza up to be murdered.

8. **Records Relating to J. R. Russo** – J. R. Russo was ultimately convicted of the murder of Joseph Barboza. It is unclear why he was permitted to remain unindicted for 16 years.

9. **Records Regarding Former FBI Agent H. Paul Rico** – In addition to Rico's involvement in helping to orchestrate the testimony of Joseph Barboza in the Deegan murder trial, he was later found by a judge to have suborned perjury and to have himself committed perjury in a trial in Rhode Island. Did anyone provide advice that Rico should be prosecuted for perjury, or referred to state prosecutors to be prosecuted for perjury? When Rico was brought out of retirement to assist in the government's investigation of then-judge Alcee Hastings, was his perjurious testimony discussed or brought to the attention of Justice Department personnel?

10. **Records Regarding Former FBI Agent John Connolly** – The Committee would like to learn whether the Justice Department considered indicting Connolly prior to his 1999 indictment.

11. **Records Regarding John Morris** – John Morris, a former FBI agent, has admitted taking money from one-time FBI informants Whitey Bulger and Stephen Flemmi. Did the Justice Department consider indicting him and, if so, why did it refrain from indicting him?

12. **Records Regarding Frank Salemme** – Frank Salemme and Stephen Flemmi were indicted for bombing and severely injuring a Boston attorney. Deliberations pertaining to the Salemme indictment and prosecution should shed light on why FBI informant Stephen Flemmi was not prosecuted. After Flemmi and Salemme were indicted, Flemmi was allegedly tipped off by an FBI agent and fled the country. Years later, he was allegedly contacted by the same FBI agent and informed that he could return to the United States, and that he would have nothing to fear regarding the indictment. Soon after Flemmi's return, the

indictment was dropped. What were prosecutors advising their superiors about the extraordinary treatment of informant Stephen Flemmi, and what were they thinking about the credibility of their cooperating witness Robert Daddeico, who kept changing his testimony to enhance the case against Salemme and weaken the case against Flemmi? The witness against Salemme and Flemmi, who is now apparently under government protection, even indicated at one point when he was being pressured by the government to provide additional testimony, that "he might have some things to say which the authorities would not want to hear." What were those things, and what advice did prosecutors give to their superiors about this witness?

13. **Records Regarding Robert Daddeico** – Daddeico allegedly changed his testimony a number of times against Salemme and Flemmi regarding the bombing of attorney John Fitzgerald. Deliberative documents pertaining to the decisions regarding proposed prosecutions of Daddeico should shed light on why Flemmi was permitted to escape prosecution for the bombing of Fitzgerald. They should also shed light on what prosecutors thought about how his stories changed to benefit FBI informant Stephen Flemmi.

Campaign Finance Investigation Subpoenas

14. **Records Regarding the Recommendations of Robert Conrad Regarding a Special Counsel to Investigate Campaign Finance Improprieties** – These documents were subpoenaed in 2000 and not produced to the Committee. The campaign finance investigation was the largest investigation in the history of the United States Justice Department and, at one time, Robert Conrad was the head of the Justice Department task force. It was also one of the largest investigations in Congressional history. There is no dispute that disclosure to Congress of information from the Freeh and La Bella memoranda was a positive step. The Conrad memorandum, and related memoranda, should be reviewed by the Committee as one of the final actions in closing out its investigation of campaign finance improprieties related to the 1996 election cycle.

15. **Records Relating to the Decision Not to Prosecute Mark Middleton** – A number of prosecutors associated with the campaign finance investigation at the Justice Department believed that there was a strong case against Middleton pertaining to the allegations made by Yah Lin "Charlie" Trie that he had given Middleton significant sums of cash while Middleton was employed in the White House. The money was allegedly provided for favors and access to the White House. The Committee has a legitimate reason to review this document as part of its extensive investigation of how the campaign finance investigation was conducted by the Justice Department.

Subpoena Pertaining to an Investigation of the Drug Enforcement Agency's

Handling of a Major Drug Investigation

16. **Records Regarding the Decision Not to Prosecute Ernest Howard –** Mr. Howard provided the Committee with inaccurate information and testimony. Significantly, Committee staff were informed by senior Justice Department personnel that the Department would not prosecute Congressional perjury cases unless there was unanimity between the political parties that Congress had been misled. The Committee has a legitimate reason for reviewing the declination memorandum to determine whether legislation should be introduced to clarify the Justice Department's erroneous understanding that one political party has veto authority over perjury prosecutions where Congressional testimony is at issue. [Note: This subpoena was issued previously in May of 2001.]

The above documents go directly to the heart of Congressional oversight of the Justice Department. It would not be appropriate to prevent Congress from performing a thorough investigation of these matters.

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BERNARD SANDERS, VERMONT, INDEPENDENT

January 11, 2002

Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20500

Dear Judge Gonzales:

Thank you for your letter of yesterday. I appreciate your offer to have Justice Department attorneys provide the Committee staff with a briefing regarding the prosecution and declination memoranda relating to the Committee's Boston investigation which were the subject of the Committee's September 6, 2001, subpoena. This is certainly a step in the right direction. I would be pleased to accept the offer of a briefing, but only as long as the briefing is provided in conjunction with a review of the relevant documents by Committee staff.

The Committee subpoenaed these documents on September 6, 2001, and was engaged in frequent discussions with Justice Department staff about the documents after that point. Rather than engage in a process of accommodation with the Committee, the Justice Department advised the President to make a broad claim of executive privilege. The President's claim of privilege has saddled Congress with a potentially crippling precedent. If the President's claim of privilege remains unchallenged, Congress may be barred from receiving a wide variety of Executive Branch deliberative documents in the future. Such a precedent would effectively eliminate meaningful oversight of the Executive Branch in cases of corruption, mismanagement, or other abuse. My colleagues in the Congress, including committee chairmen, find this unacceptable.

I believe that Justice Department staff may be able to provide the Committee with useful information in a briefing regarding the subpoenaed documents. However, I also believe that it is important for both the Committee and the Justice Department that Committee staff be permitted to review the documents. From the Committee's perspective, a review of the documents is essential because in the Boston case, the Committee is investigating serious allegations of misconduct by Justice Department personnel. The Committee cannot rely entirely on a briefing by Department personnel to provide it with satisfaction as to the contents of the documents. Similarly, to provide a briefing without a contemporaneous review of the documents needlessly exposes the Department personnel conducting the briefing to potential claims that the briefing

was not complete and truthful. The safest course of conduct, for both the Committee and the Department, therefore, is to conduct the briefing in conjunction with a review of the documents by Committee staff. After such a briefing and review has taken place, the Committee will be in a better position to assess whether it needs to have possession of the relevant documents.

I also want to take the opportunity to respond to several of the other points made in your letter. While I appreciate your arguments regarding the sensitivity of prosecution and declination memoranda, I believe that there have been a number of cases in the past where Congress has received access to these types of memoranda and other deliberative Justice Department memoranda. Therefore, I dispute your characterization that the "Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure."

In your letter, you also emphasize that the Executive Branch cannot provide Congress with information covered by Rule 6(e) of the Federal Rules of Criminal Procedure. I am aware of that restriction, and have frequently noted that the Committee has no desire to receive information that the Executive Branch cannot legally disclose.

I am hopeful that you will agree to my proposal to provide the Committee with a briefing regarding the Boston documents in conjunction with a review of the documents. Such an agreement will hopefully allow the Committee to proceed with its important investigation of Justice Department misconduct in organized crime investigations in New England.

Sincerely,

Dan Burton
Chairman

cc: Members, Committee on Government Reform

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ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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BERNARD SANDERS, VERMONT,
INDEPENDENT

To: Alberto Gonzales, Counsel

Fax: 202.456.6279

Phone: 202.456.2632

Pages: 3(including cover sheet)

From: Dan Burton, Chairman

Fax: (202) 225-5127

Phone: (202) 225-5074

Date: January 11, 2002

- **Comments:**

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BERNARD SANDERS, VERMONT,
INDEPENDENT

January 3, 2002

Joel!

Judge Alberto Gonzalez
Counsel to the President
The White House
Washington, D.C. 20500

Dear Judge Gonzalez:

I write to apologize for my strident tone during our conversation on December 13, 2001. However, I spoke as I did because I believe passionately that Congress is a vital, co-equal branch of government. I am concerned that the policy that you and General Ashcroft articulated prior to the Committee's December 13, 2001, hearing – that henceforth Congress would never receive deliberative documents from a criminal investigation or prosecution – would make Congressional oversight, and therefore, its ability to legislate effectively, impossible in some cases. I believe passionately in the principles at stake, and I am concerned that the President is receiving bad advice. I am particularly disturbed by the advice to the President that he should claim executive privilege before the Justice Department or White House had a clear understanding of why Congress is seeking the information that we have subpoenaed. It would seem that, at a minimum, the President should be fully briefed as to why Congress had made its requests prior to a claim of executive privilege.

The Committee's December 13, 2001, hearing focused exclusively on whether the Justice Department would comply with a subpoena for documents pertaining to Justice Department misconduct in its handling of confidential informants in Boston. Of particular interest to the Committee is the case of Joseph Salvati, a man who spent thirty years in prison for a crime he did not commit. Tragically, Justice Department officials withheld exculpatory evidence and allowed prosecutors to seek the death penalty against Mr. Salvati. When we asked the Justice Department witness why the President had claimed executive privilege, he was unable to provide any rationale, apart from a very generalized explanation that would apply to any request by Congress for any deliberative documents. This was troubling at the time, and it is still troubling. Thus, we will continue to explore this subject during future hearings.

It is my sincere hope that Committee hearings to be held during the next several months will shed some light on the issues that now confront us. At the appropriate time, I will invite you to appear before the Committee, and it is my hope that you will do so voluntarily.

Sincerely,

Dan Burton

Dan Burton
Chairman

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 19, 2001

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing to follow up regarding the Committee's subpoenas seeking prosecutorial decisonmaking memoranda in connection with the Committee's investigations of campaign finance matters, alleged false statements by an individual (Ernest Howard) in a separate investigation, and the FBI's handling of informants in Boston. The Department stands ready to work with the Committee to seek to accommodate the legitimate needs that the Committee may have for information regarding these matters.

The Department has a strong confidentiality interest in the extremely sensitive prosecutorial decisionmaking documents called for by the subpoenas. The Attorney General and other Department decisionmakers must have the benefit of candid and confidential advice and recommendations in making investigative and prosecutorial decisions. Consistent with the longstanding position of the executive branch with respect to these kinds of highly sensitive memoranda, the President has therefore asserted executive privilege with respect to the subpoenaed documents. At the same time, he has requested that the Department remain willing to work with the Committee to provide such information as the Department can, consistent with his instructions and without violating the constitutional doctrine of separation of powers.

Pursuant to longstanding executive branch policy, in responding to congressional requests for confidential information, the Department seeks in all cases to engage in an accommodation process in an effort to satisfy legitimate congressional needs while protecting executive branch confidentiality interests. The Department has already accommodated the Committee's information needs with respect to the prosecutorial memoranda relating to campaign finance and the Howard matter. We have provided briefings on the reasons for the decisions to decline prosecutions for Ernest Howard and Mark Middleton, which your August 30, 2001, letter indicated were very helpful. With regard to the Conrad collection of memoranda, on August 23, 2000, then Attorney General Reno publicly stated the reasons for her decision not to appoint a Special Counsel and, on October 5, 2000, you questioned her about that decision in an interview

on the record. Prior to these explanations, the Department had provided the underlying factual records relating to each matter, to the extent permissible under the grand jury secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure. In the October 2000 meeting, some information also could not be provided because of its relevance to then pending investigations.

As to the Boston matter, we believe that the Department and the Committee can work together to provide the Committee additional information without compromising the principles maintained by the executive branch. We will be prepared to make a proposal as to how further to accommodate the Committee's needs as soon as you inform us in writing of the specific needs the Committee has for additional information. See United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc).

The Department has been providing an extensive body of other materials to the Committee since April 27, 2001, when we provided approximately 1178 pages in response to your request of March 30, 2001 for documents about the murder of Mr. Edward Deegan, for which Mr. Joseph Salvati and six others were convicted. Since the crime was not prosecuted federally, the FBI does not have a discrete file on the subject. Hence, the responsive documents were found in other files and some information was redacted because it pertained to other matters outside the scope of the Committee's request. In August 2001, Committee counsel reviewed unredacted copies of these documents and some pages were re-processed to restore information that was responsive to your June 5 request for documents on other Boston matters. More than 3800 pages have been produced in response to that request and the FBI is still processing responsive documents regarding the FBI's handling of informants in Boston. We expect to provide documents regarding the FBI's Top Hoodlum Program this week and to produce additional documents after the Holiday recess.

The document production process for the Boston matters has thus been proceeding since March of this year. We note, moreover, that the Committee's March and June requests did not indicate any interest in the prosecutorial decision-making memoranda and the Committee did not even request them until it subpoenaed them on September 6. The Committee then immediately scheduled for September 13 a hearing regarding its demand for these documents. When that hearing was postponed due to the events of September 11, the Department was advised that the matter would be deferred until a later time. We first learned that the Committee was renewing the matter during the week following Thanksgiving when the hearing was re-scheduled for December 6. It was postponed to December 13 at the Department's request so that Assistant Attorney General Michael Chertoff could testify, but his obligations relating to the September 11 investigation made that appearance impossible and the Chairman refused the Attorney General's request that the hearing be postponed to the week of December 17.

The Department fully respects the Committee's interest in reviewing allegations of misconduct by government employees, and we have provided, and will continue to provide, investigative records, judicial filings, and other records responsive to your requests, consistent with the accommodation process. Of course, we cannot provide grand jury information covered by Rule 6(e), electronic surveillance information subject to Title III, or information that would identify confidential informants.

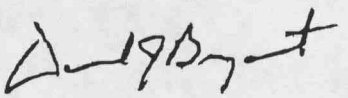
Finally, as the Committee is aware, the Department is fully committed to addressing corruption in the handling of informants by the FBI in Boston and has dedicated extensive resources to that purpose. In 1999, the Justice Task Force was established to investigate law enforcement corruption relating to Messrs. James Bulger and Stephen Flemmi. The Task Force has expanded the scope of the inquiry to include allegations that FBI agents and prosecutors allowed a witness to frame Mr. Salvati and others for the Deegan murder while permitting that witness to protect another individual, who was central to the murder conspiracy. It was the Task Force that located exculpatory documents, which led to the release of Peter Limone and the dismissal of charges against Mr. Salvati and Mr. Limone. The Task Force also has obtained the indictment of former FBI Special Agent John Connolly, which is expected to go to trial early in 2002. Additionally, the United States Attorney's Office in Boston obtained indictments against Messrs. Bulger and Flemmi in 1995 and in 2000, charging them with 19 and 10 murders, respectively. The ongoing work of the Task Force and the United States Attorney's Office is dedicated to investigating and prosecuting corruption by FBI agents and prosecutors relating to the handling of informants, as well as any underlying crimes that may have been committed by those individuals. As these efforts proceed, it will be important to ensure that they are based only on the evidence and the law, free from any political influence or coercion.

We have not objected to the Committee's undertaking its own investigation and we understand that Committee staff have conducted interviews and may have undertaken other investigative steps in Boston and elsewhere. We ask that the Committee provide us with information that it believes may be relevant to potential violations of federal criminal law. We understand the Committee's interest in not deferring its own inquiry while our criminal investigations continue, and we trust that the two can continue independently, as has often happened historically.

The Department looks forward to a continued dialogue with the Committee so we can accommodate your legitimate oversight needs for information in a manner that is consistent with

our law enforcement responsibilities. We would like to resume such a constructive conversation as soon as possible.

Sincerely,



Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

Members of Committee on Government Reform

Office of the Attorney General
Washington, D. C. 20530

Brett -
Your orig.
(left on
copy mach.)

December 10, 2001

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing to request that you assert executive privilege with respect to memoranda from the Chief of the Campaign Financing Task Force to former Attorney General Janet Reno recommending that a Special Counsel be appointed to investigate a matter under review by the Task Force, memoranda written in response to those memoranda, and deliberative memoranda from other investigations containing advice and recommendations concerning whether or not particular criminal prosecutions should be brought. The Committee on Government Reform of the House of Representatives has issued subpoenas to me demanding these documents.

The Department has gone to great lengths, consistent with the constitutional and statutory obligations of the Executive Branch, to accommodate the Committee's needs concerning the prosecutorial decisions that are the subject of these documents. The Department has provided briefings that included explanations of the reasons for the decisions, and we are willing to provide further briefings. The Committee has been unsatisfied with these accommodations, however, and has pressed for access to the documents themselves.

I strongly believe that releasing or otherwise making these extremely sensitive prosecutorial decisionmaking documents available to Congress would compromise the ability of the Department of Justice to assist you in discharging your constitutional law enforcement responsibilities. The authority to investigate and prosecute criminal suspects is one of the core executive powers vested in the President by the Executive Power and Take Care Clauses of Article II of the Constitution. In order to assist the President in fulfilling his constitutional duty, the Attorney General and other Department decisionmakers must have the benefit of candid and confidential advice and recommendations in making investigative and prosecutorial decisions.

The need for confidentiality is particularly compelling in regard to the highly sensitive prosecutorial decision of whether to bring criminal charges. The Department's attorneys are asked to render unbiased, professional advice about the merits of potential criminal cases. The formal mechanism by which this process occurs is the preparation of prosecution and declination memoranda. In short, these documents review the strength of the evidence, substantive legal

issues, policy considerations and overall likelihood of success if the case were to proceed. If these deliberative documents are subject to congressional scrutiny, we will face the grave danger that prosecutors will be chilled from providing the candid and independent analysis essential to the sound exercise of prosecutorial discretion and to the fairness and integrity of federal law enforcement. As the Supreme Court described its concern about a chilling effect: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). The Court observed that "the importance of this confidentiality is too plain to require further discussion." Id.

Just as troubling, the prospect of congressional review might force prosecutors to err on the side of investigation or prosecution simply to avoid public second-guessing. This would undermine public and judicial confidence in our law enforcement processes. It is for all of these reasons that the Supreme Court has unanimously recognized the "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." Id.

Disclosure of declination memoranda would also implicate significant individual privacy interests. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss.

The Department respects and cooperates with the legitimate exercise of Congress's oversight authority. Congressional committees need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary. We have significant concerns, however, about oversight requests for prosecution and declination memoranda. The nexus between such inquiries and the purpose of oversight is questionable, and this kind of demand threatens to politicize the criminal justice process. Legislative branch pressure on prosecutorial decisionmaking is inconsistent with the separation of powers and thereby threatens individual liberty.

The memoranda to former Attorney General Reno and the prosecutorial decisionmaking documents addressed to other Department officials clearly fall within the scope of executive privilege. The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations. Under controlling case law, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. See McGrain v. Daugherty, 273 U.S. 135, 160 (1927) (Congress has oversight authority to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

We believe that the Committee has failed to provide a sufficient reason to disclose these sensitive prosecutorial documents. Congress cannot justify a demand for a decisionmaking document based on its disagreement with a prosecutorial decision. See Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Re: Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (1986). In any event, even if the Committee has a legitimate oversight interest in these documents, its oversight needs cannot outweigh the Executive Branch's interest in the confidentiality of prosecutorial decisionmaking and our concerns about congressional influence on such decisionmaking in individual cases. I do not believe that access to these prosecutorial decisionmaking documents are "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee, 498 F.2d at 731.

It is my legal judgment that executive privilege may properly be asserted in these circumstances. I request and advise that you do so.

Sincerely,

John Ashcroft
Attorney General

DOCUMENTS SUBJECT TO EXECUTIVE PRIVILEGE CLAIM

1. Memorandum to James K. Robinson, Assistant Attorney General, Criminal Division, Michael Horowitz, Chief of Staff, Criminal Division, and Alan Gershel, Deputy Assistant Attorney General, Criminal Division, from Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, Re: Investigative Plan and Recommendation to Appoint a Special Counsel, May 1, 2000.

2. Memorandum to Alan Gershel, Deputy Assistant Attorney General, Criminal Division, Michael Horowitz, Chief of Staff, Criminal Division, and Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, from James K. Robinson, Assistant Attorney General, Criminal Division, Re: Investigative Plan and Recommendation to Appoint a Special Counsel, May 12, 2000.

3. Memorandum to James K. Robinson, Assistant Attorney General, Criminal Division, Alan Gershel, Deputy Assistant Attorney General, Criminal Division, and Michael Horowitz, Chief of Staff, Criminal Division, from Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, Re: Investigative Plan and Recommendation to Appoint a Special Counsel, May 18, 2000.

4. Memorandum to James K. Robinson, Assistant Attorney General, Criminal Division, from Alan Gershel, Deputy Assistant Attorney General, Criminal Division, Re: Investigative Plan, June 20, 2000.

5. Memorandum to the Attorney General from Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, Re: Recommendation to Appoint a Special Counsel, July 11, 2000.

6. Memorandum to James K. Robinson, Assistant Attorney General, Criminal Division, from Lee J. Radek, Chief, Public Integrity Section, Criminal Division, Re: Evaluation of Recommendation by Robert Conrad to Appoint a Special Counsel, July 18, 2000.

7. Memorandum to the Attorney General from James K. Robinson, Assistant Attorney General, Criminal Division, Re: Whether to Appoint a Special Counsel, July 28, 2000.

8. Memorandum to the Attorney General from Louis J. Freeh, Director, Federal Bureau of Investigation, Re: Whether to Appoint a Special Counsel, July 28, 2000.

9. Memorandum to Lee J. Radek, Chief, Public Integrity Section, Criminal Division, from Trial Attorney, Public Integrity Section, Criminal Division, Re: Whether to Prosecute Ernest Howard, Special Agent in Charge of Houston Field Division of the Drug Enforcement Administration, March 6, 2001.

10. Federal Bureau of Investigation Memorandum submitted to Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, Re: Whether to Prosecute Mark E. Middleton, Special Assistant to the White House Chief of Staff, August 22, 2000.

11. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Diane M. Kottmyer, Chief, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Eight Named Individuals, March 7, 1990.

12. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Diane M. Kottmyer, Chief, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Seven Named Individuals, September 18, 1989.

13. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Jeremiah T. O'Sullivan, Chief Attorney, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute the First National Bank of Boston, January 8, 1985.

14. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Jeremiah T. O'Sullivan, Chief Attorney, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute the First National Bank of Boston, December 20, 1984.

15. Memorandum to Marvin Loewy, Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, from Jeremiah T. O'Sullivan, Chief Attorney, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute the First National Bank of Boston and One Named Individual, December 11, 1984.

16. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Jeremiah T. O'Sullivan, Chief Attorney, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Seven Named Individuals, August 25, 1983.

17. Memorandum to Gerald T. McGuire, Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, from Gerald E. McDowell, Attorney in Charge, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Twenty-One Named Individuals, January 29, 1979.

18. Memorandum to Thomas Kennelly, Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, from Gerald E. McDowell, Attorney in Charge, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Seven Named Individuals, August 11, 1969.

19. Memorandum to Henry Peterson, Chief, Organized Crime and Racketeering Section, Criminal Division, from Walter T. Barnes, United States Attorney, District of Massachusetts, Re: Whether to Prosecute Three Named Individuals, June 6, 1967.

20. Memorandum to William G. Hundley, Chief, Organized Crime and Racketeering Section, Criminal Division, from Walter T. Barnes, United States Attorney, District of Massachusetts, Re: Whether to Prosecute One Named Individual, December 2, 1965.

Office of the Attorney General
Washington, D. C. 20530

December 10, 2001

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

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Disclosure of declination memoranda would also implicate significant individual privacy interests. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss.

The Department respects and cooperates with the legitimate exercise of Congress's oversight authority. Congressional committees need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary. We have significant concerns, however, about oversight requests for prosecution and declination memoranda. The nexus between such inquiries and the purpose of oversight is questionable, and this kind of demand threatens to politicize the criminal justice process. Legislative branch pressure on prosecutorial decisionmaking is inconsistent with the separation of powers and thereby threatens individual liberty.

The memoranda to former Attorney General Reno and the prosecutorial decisionmaking documents addressed to other Department officials clearly fall within the scope of executive privilege. The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations. Under controlling case law, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. See McGrain v. Daugherty, 273 U.S. 135, 160 (1927) (Congress has oversight authority to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

We believe that the Committee has failed to provide a sufficient reason to disclose these sensitive prosecutorial documents. Congress cannot justify a demand for a decisionmaking document based on its disagreement with a prosecutorial decision. See Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Re: Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (1986). In any event, even if the Committee has a legitimate oversight interest in these documents, its oversight needs cannot outweigh the Executive Branch's interest in the confidentiality of prosecutorial decisionmaking and our concerns about congressional influence on such decisionmaking in individual cases. I do not believe that access to these prosecutorial decisionmaking documents are "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee, 498 F.2d at 731.

It is my legal judgment that executive privilege may properly be asserted in these circumstances. I request and advise that you do so.

Sincerely,

John Ashcroft
Attorney General

DOCUMENTS SUBJECT TO EXECUTIVE PRIVILEGE CLAIM

1. Memorandum to James K. Robinson, Assistant Attorney General, Criminal Division, Michael Horowitz, Chief of Staff, Criminal Division, and Alan Gershel, Deputy Assistant Attorney General, Criminal Division, from Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, Re: Investigative Plan and Recommendation to Appoint a Special Counsel, May 1, 2000.

2. Memorandum to Alan Gershel, Deputy Assistant Attorney General, Criminal Division, Michael Horowitz, Chief of Staff, Criminal Division, and Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, from James K. Robinson, Assistant Attorney General, Criminal Division, Re: Investigative Plan and Recommendation to Appoint a Special Counsel, May 12, 2000.

3. Memorandum to James K. Robinson, Assistant Attorney General, Criminal Division, Alan Gershel, Deputy Assistant Attorney General, Criminal Division, and Michael Horowitz, Chief of Staff, Criminal Division, from Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, Re: Investigative Plan and Recommendation to Appoint a Special Counsel, May 18, 2000.

4. Memorandum to James K. Robinson, Assistant Attorney General, Criminal Division, from Alan Gershel, Deputy Assistant Attorney General, Criminal Division, Re: Investigative Plan, June 20, 2000.

5. Memorandum to the Attorney General from Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, Re: Recommendation to Appoint a Special Counsel, July 11, 2000.

6. Memorandum to James K. Robinson, Assistant Attorney General, Criminal Division, from Lee J. Radek, Chief, Public Integrity Section, Criminal Division, Re: Evaluation of Recommendation by Robert Conrad to Appoint a Special Counsel, July 18, 2000.

7. Memorandum to the Attorney General from James K. Robinson, Assistant Attorney General, Criminal Division, Re: Whether to Appoint a Special Counsel, July 28, 2000.

8. Memorandum to the Attorney General from Louis J. Freeh, Director, Federal Bureau of Investigation, Re: Whether to Appoint a Special Counsel, July 28, 2000.

9. Memorandum to Lee J. Radek, Chief, Public Integrity Section, Criminal Division, from Trial Attorney, Public Integrity Section, Criminal Division, Re: Whether to Prosecute Ernest Howard, Special Agent in Charge of Houston Field Division of the Drug Enforcement Administration, March 6, 2001.

10. Federal Bureau of Investigation Memorandum submitted to Robert J. Conrad, Jr., Chief, Campaign Financing Task Force, Re: Whether to Prosecute Mark E. Middleton, Special Assistant to the White House Chief of Staff, August 22, 2000.

11. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Diane M. Kottmyer, Chief, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Eight Named Individuals, March 7, 1990.

12. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Diane M. Kottmyer, Chief, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Seven Named Individuals, September 18, 1989.

13. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Jeremiah T. O'Sullivan, Chief Attorney, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute the First National Bank of Boston, January 8, 1985.

14. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Jeremiah T. O'Sullivan, Chief Attorney, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute the First National Bank of Boston, December 20, 1984.

15. Memorandum to Marvin Loewy, Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, from Jeremiah T. O'Sullivan, Chief Attorney, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute the First National Bank of Boston and One Named Individual, December 11, 1984.

16. Memorandum to David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, from Jeremiah T. O'Sullivan, Chief Attorney, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Seven Named Individuals, August 25, 1983.

17. Memorandum to Gerald T. McGuire, Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, from Gerald E. McDowell, Attorney in Charge, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Twenty-One Named Individuals, January 29, 1979.

18. Memorandum to Thomas Kennelly, Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, from Gerald E. McDowell, Attorney in Charge, Organized Crime Strike Force Division of the United States Attorney's Office for the District of Massachusetts, Re: Whether to Prosecute Seven Named Individuals, August 11, 1969.

19. Memorandum to Henry Peterson, Chief, Organized Crime and Racketeering Section, Criminal Division, from Walter T. Barnes, United States Attorney, District of Massachusetts, Re: Whether to Prosecute Three Named Individuals, June 6, 1967.

20. Memorandum to William G. Hundley, Chief, Organized Crime and Racketeering Section, Criminal Division, from Walter T. Barnes, United States Attorney, District of Massachusetts, Re: Whether to Prosecute One Named Individual, December 2, 1965.

Executive Privilege (January 4, 2002)

- The President has asserted executive privilege to protect the long-standing position of the Executive Branch that deliberative prosecutorial memoranda regarding whether to prosecute particular individuals or to appoint a special prosecutor must be kept confidential. This position is based on the principle that the Attorney General and other Justice Department decisionmakers must have the benefit of candid and confidential advice in making investigative and prosecutorial decisions.

- As has long been recognized, the need for confidentiality is particularly compelling with regard to the highly sensitive decision whether to seek criminal charges. The formal mechanisms by which such decisions occur are "prosecution memoranda" and "declination memoranda" prepared by line prosecutors. These documents discuss the strength of evidence and evaluate the overall likelihood of success; in addition, they often contain candid and unflattering personal information about witnesses and potential defendants.

    - Were these memoranda subject to congressional scrutiny, we would face the grave risk that prosecutors would be chilled from providing the candid and independent analysis essential to the sound exercise of prosecutorial judgment.

- Congressional demands for these highly sensitive documents threatens to politicize the prosecutorial decisionmaking process and thereby threaten individual liberty.

    - Although accommodations of congressional demands for such documents have been made on very rare and isolated occasions in the past, those were exceptions to the general principle, and the President and the Attorney General determined that the general principle governs this matter.

- In this matter, the Justice Department has provided briefings to the Committee that include explanations of the factors that go into such prosecutorial decisions, and the Department remains willing to accommodate the Committee's interests further.

Feb. 4 Draft

Precedents re Department decisions to disclose deliberative prosecutorial documents

1. 1980, Billy Carter

- In 1980, a special Senate Judiciary Subcommittee conducted an inquiry about the Department's investigation and conclusions regarding alleged violations of the Foreign Agents Registration Act by the President's brother, Billy Carter. It appears that, while the matter was pending, then Attorney General Civiletti discussed Mr. Carter's failure to register under the Act with the President, which underscored the Committee's interest in the Department's process leading up to the declination.

- We understand that the Subcommittee records indicate that deliberative prosecutorial memoranda, as well as factual investigative records, were disclosed. We have not located any information indicating that the Department expressed concerns about the disclosure of the deliberative prosecutorial documents or otherwise sought an accommodation, let alone any assertion of executive privilege.

2. 1982, ABSCAM

- In 1982, the Department provided a wide range of documents, including prosecutorial memoranda, regarding the ABSCAM undercover investigations to the Senate Select Committee to Study Law Enforcement Undercover Activities of the Components of the Department of Justice.

- The select committee was established in response to congressional concerns that the ABSCAM undercover investigations had targeted Members of Congress. The decision to make available prosecutorial decisionmaking documents from closed ABSCAM prosecutions should be understood against that background.

3. 1987, General Dynamics

- Our information regarding the General Dynamics matter, which was the subject of the Senate inquiry in 1984 that is referenced in item 5 of your September 7 letter, indicates that deliberative prosecutorial memoranda were provided to Congress.

- The circumstances and terms of this disclosure are unclear and I do not know whether the Department considered its implications as we have in the instant matter.

4. 1989-90, Rocky Flats Immunity

- The House Government Operations Subcommittee on Environment, Energy, and Natural Resources (Synar) investigated Rockwell's request for immunity, which the Department

declined. Factual records were produced and after negotiations over deliberative materials, only a few were not provided, although the Department offered access to the Chairman, the Ranking Member and designated staff. After their review, Chairman Synar reiterated his request and negotiations resumed.

- The Department was concerned about the chilling effect on the decision-making process and the Subcommittee's effort to inject itself into the deliberations by reviewing the operations and recommendations that were considered before the final decision. The Subcommittee was not alleging any misconduct by the Department.

- Once negotiations reached an impasse, the Department considered seeking an assertion of executive privilege although no subpoena had been issued for the documents but for reasons wholly unrelated to the dispute, the Attorney General decided not to seek the assertion and the documents were produced.

5. 1992, BNL (Banco Nacionale do Lavoro)

- The House Judiciary Committee requested deliberative documents regarding the prosecution of Christopher Drogoul, which was then a closed portion of the BNL investigation.

- Committee staff were permitted to review deliberative prosecutorial documents over a weekend prior to a Committee hearing to consider whether, pursuant to particular provisions of the Independent Counsel portion of the Ethics in Government Act, a majority of majority party members or a majority of all non-majority members of the Committee should formally request the Attorney General to seek such an appointment. (28 USC 592(g))

- In that instance, the Committee had a specific statutory role to play relative to the Attorney General's decision about whether to seek the appointment of the Independent Counsel and the deliberative documents were made available for review for that limited purpose, and not for an oversight inquiry.

6. 1992, Rocky Flats Plea Agreement

- In 1992, the House Science, Space, and Technology Subcommittee on Investigations and Oversight initiated an inquiry into the Department's plea agreement with Rockwell International Corporation, which related to criminal violations of environmental laws at the Rocky Flats nuclear weapons facility, outside of Denver. The Subcommittee wanted information about the Department's decision not to prosecute individuals and asked to interview the line prosecutors about those decisions.

- The Department made an exception to the established policy against making such individuals available to Congress with regard to two prosecutors who had answered

questions from the media at a press conference on the Rocky Flat settlement. Our position, however, remained that the prosecutors could not disclose information about internal deliberations leading up to the declination decisions. When other issues regarding the Subcommittee staff interviews could not be resolved, the attorneys were subpoenaed to testify before a closed Subcommittee hearing. They provided extensive testimony but declined to answer questions seeking deliberative information.

- Thereafter, Chairman Wolpe sent a letter to the President demanding that he either assert executive privilege regarding the deliberative process information or direct the Department to permit its witnesses to answer those outstanding hearing questions. When the Department did not agree to this ultimatum, the Chairman advised that he would defer contempt proceedings if the United States Attorney from Denver would testify before the Subcommittee on particular date, but the United States Attorney was not available on that date and the Chairman refused to reschedule.

- The parties eventually agreed to staff interviews of Department attorney witnesses pursuant to specified procedures whereby deliberative prosecutorial documents were made available only for use at the interviews and staff notes on those documents could not be publicly disclosed and the interview transcripts, including any deliberative information, could be used publicly only to refresh recollection or impeach the testimony of a witness.

7. <u>1992-93, Environmental Crimes</u>

- Beginning in 1991, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce investigated the environmental crimes enforcement program conducted by the Environmental Protection Agency and the Department , focusing on allegations that the Department had been disrupting and undermining the EPA's enforcement program. In 1992, the Subcommittee requested that a large number of Department prosecutors be made available for interviews with Subcommittee staff concerning the deliberations on specific closed environmental crimes cases where the Department had declined prosecution. The Department denied the request, citing our longstanding policy of generally not making line prosecutors available for congressional interviews because of the chilling effect of such interviews.

- The impasse over the requested interviews continued into 1993, when the Clinton Administration Department leadership agreed to let the prosecutors be interviewed After this decision was made, the Department decided that the declination memoranda and other deliberative and work product documents in the case files should also be released to the Subcommittee, because the prosecutor interviews would explore essentially identical information about the deliberations relating to the declinations.

8. <u>1995-96, White House Travel Office</u>

- In November1995, immediately after a jury acquitted Billy Dale (the former head of the

White House Travel Office) of embezzlement, the House Government Reform Committee requested the Department's files regarding that prosecution. The Department withheld the prosecution memorandum for Mr. Dale and two declination memoranda concerning decisions not to bring criminal charges against other individuals involved in the Travel Office matter.

- In February 1996, the Committee subpoenaed our Travel Office documents. The continued to refuse to produce the Billy Dale prosecution memorandum and the two declination memoranda. The Department negotiated with Committee staff about an accommodation and reached an agreement whereby the Chairman reviewed the documents, while reserving the right to ask for copies at a later date.

- There was no further contact on this issue until May 2nd, when Chairman Clinger wrote to the Attorney General, informing her that the Committee was not in receipt of all the subpoenaed documents and calling for the Department to deliver all documents responsive to the subpoena by May 8th. For any documents not produced, the Chairman demanded that the Department provide an executive privilege claim, signed by the President. The Chairman also informed the Attorney General that he had scheduled a Committee meeting to take place on May 9th, at which time the Committee would vote on whether to instigate contempt proceedings against the Attorney General. The Department produced the documents on May 8th.

9. <u>1997-2000, LaBella and Freeh Memoranda</u>

- In 1997-1998, the Department received subpoenas from the House Government Reform Committee for memoranda to the Attorney General recommending she seek appointment of an independent counsel to take over the Department's ongoing campaign finance criminal investigation -- the first written in November 1997 by FBI Director Louis Freeh, the second in July 1998 by Campaign Financing Task Force Chief Charles LaBella.

- The Department withheld the memoranda, citing both the Department's policy of declining to provide congressional committees access to confidential information concerning an ongoing criminal investigation and its concern that disclosure would discourage Department employees in future cases from candidly expressing their views and recommendations on controversial and sensitive matters. The Department's principal emphasis was on the open investigation policy, in particular the concern that disclosure would put members of Congress in a position to exert pressure or attempt to influence the prosecution of specific cases and that disclosure could provide a "road map" of our investigation, thus jeopardizing our work by tipping off potential targets of our approach and our analysis.

- The Department provided a briefing on the Freeh memorandum in January 1998 and offered the same for the LaBella memorandum in August 1998. The Committee rejected the offer and instead voted to hold the Attorney General in contempt. Efforts at reaching an accommodation continued, and responding to a suggestion by House Judiciary

Committee Chairman Henry Hyde, the Department permitted the Chairman and Ranking Minority Members of the House Government Reform Committee and the House and Senate Judiciary Committees to read the Freeh and LaBella memos. Subsequently, Government Reform Committee staff reviewed the memos (as redacted to remove open investigative and grand jury information), but the Department balked at permitting all 44 members of the Committee to read the memos, and there the impasse stayed for another year and a half.

- In March 2000, the Los Angeles Times ran an article quoting from the LaBella memorandum. Chairman Burton immediately requested copies of the Freeh and LaBella memoranda. The Department denied the request, referring to the two justifications the Department had previously provided for not releasing the documents, but placing considerably more emphasis on the second justification, that disclosure would chill future deliberations.

- In April, the Chairmen of the House and Senate Judiciary Committees requested copies of the memoranda, and the Senate Judiciary Committee authorized the issuance of subpoenas. In May, the House Judiciary Committee agreed to a protocol with the Department for obtaining the memoranda that precluded notes from leaving the Committee's offices and prohibited dissemination of the documents' content without Committee authorization. The documents or their content could be released by the Chairman, in consultation with the Ranking Minority Member, or by vote of a Judiciary Subcommittee, after notice to the Department. Later that month, the Senate Judiciary Committee and the Department agreed to a similar protocol. Finally, Chairman Burton wrote the Department to say that a protocol along the lines of the one reached with the Judiciary Committees was not necessary and that standard Committee arrangements for handling documents should suffice. However, the Department worked out additional arrangements with the Committee under which the Committee kept the documents in a secured facility but could, by Committee vote or by agreement of the Chairman and Ranking Minority Member, make the documents or their contents public after providing the Department reasonable notice.

Itinerary for Moot Hearing Preparation on February 4 and 5, 2002

Monday, February 4, 2002

3:00 - :45 PM	Introduction and Recap
	Discussion of Q&A responsibility between Dan and Mike
	Review/discussion of message – core principles/our theory of the case
	Read through/discussion of Dan's Draft Opening Statement
3:45 - 5:00 PM	Moot Q&A

Tuesday, February 5, 2002

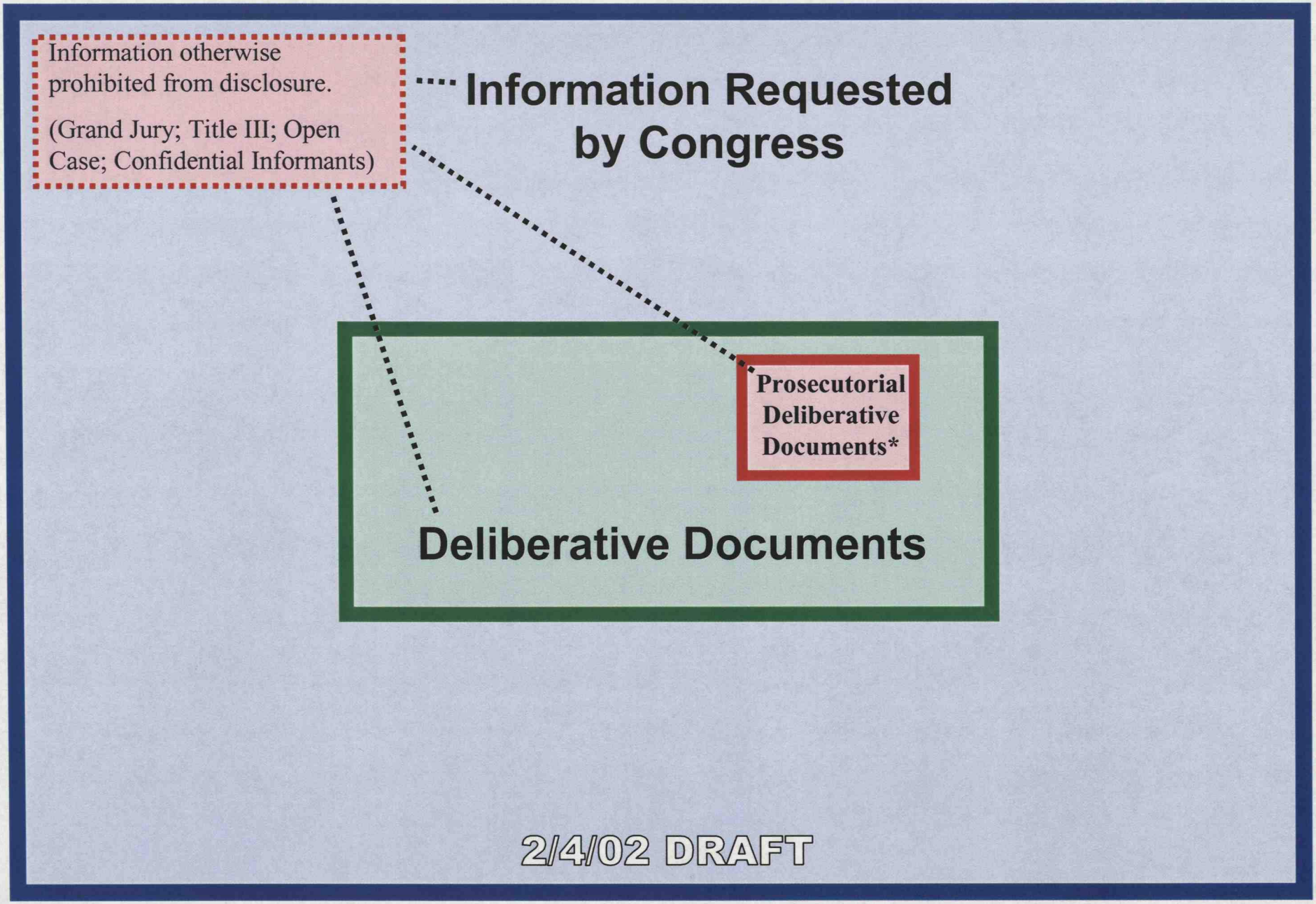
10:00 - :15 AM	Read through of Dan's final opening statement
10:15 - Noon	Moot Q & A/Discussion of outstanding issues

General Division of Responsibility for Moot Questions

History of Congressional Access to Deliberative Justice Department Documents
OLC and OLA staff

Executive Privilege
White House Counsel, OLC and OLA staff

Boston
CRM Div and OLA staff



* DOJ makes the decision-maker utilizing the documents available and provides briefings.

Timeline of Correspondence and Events

1.	3/30/01:	Chairman Burton letter to Attorney General Ashcroft requesting letters related to Salvati and Deegan.
	4/27/01:	AAAG Walter response to Chairman Burton's 3/30/01 letter.
2.	5/2/01:	AAAG Walter letter to Chairman Burton confirming DOJ request to Committee staff that the Committee not publicly disclose particular documents provided with 4/27/01 letter.
3.	5/10/01:	Chairman Burton letters to Attorney General Ashcroft and Massachusetts Parole Board Chairman Michael Pomarole requesting documents related to Salvati.(See response under #6)
4.	5/21/01:	Chairman Burton letter to Attorney General Ashcroft requesting documents related to Middleton.
5.	5/22/01:	Chairman Burton letter to Attorney General Ashcroft regarding an April 10, 2001 Committee Staff Report.
6.	5/23/01:	Chairman Burton letter to Attorney General Ashcroft requesting documents related to Limone, Tameleo and Grieco.
	6/12/01:	AAG Bryant response to Chairman Burton's 5/10/01 and 5/23/01 letters.
7.	6/5/01:	Chairman Burton letter to Attorney General Ashcroft requesting certain documents.
	8/31/01:	FBI Assistant Director Collingwood letter responding to 6/5/01 Chairman Burton letter.
	2/1/02:	AAG Bryant supplemental response to Chairman Burton's 6/5/01 letter.
8.	6/7/01:	FBI Assistant Director Collingwood letter to Chairman Burton responding to request for documents made to SAC Prouty (FBI-Boston) on 5/10/01.
9.	8/27/01:	Chairman Burton letter to Attorney General Ashcroft requesting certain documents.
	8/27/01:	DAAG O'Brien for AAG Bryant letter to Chairman Burton responding to 8/27/01 Chairman Burton letter.
10.	8/29/01:	Chairman Burton letter to Attorney General Ashcroft regarding Committee document requests.
11.	8/30/01:	Chairman Burton letter to Attorney General Ashcroft requesting documents for 9/6/01 hearing.
	9/6/01:	AAG Bryant letter to Chairman Burton responding to Chairman Burton's 8/30/01 letter.
12.	9/6/01:	Chairman Burton letter to Attorney General Ashcroft transmitting subpoena for documents, some of which were requested in Chairman Burton 8/29/01 letter.
	9/19/01:	AAG Bryant letter to Chairman Burton responding to Chairman Burton's 9/6/01 letter and subpoena.
13.	9/7/01:	Chairman Burton letter to Attorney General Ashcroft requesting historical precedents.
	9/12/01:	**Hearing scheduled for 9/13 postponed due to the events of September 11th via phone call from Jim Wilson to AAG Bryant.**
	9/13/01:	**Original Hearing Date.**
14.	12/10/01:	Attorney General Ashcroft letter to President Bush requesting that the President

assert Executive privilege.

12/12/01: President Bush memorandum to Attorney General Ashcroft asserting Executive privilege.

15. 12/12/01: Chairman Burton letter to Attorney General Ashcroft asking for a representative of the Department of Justice to appear at the Committee's 12/13/01 hearing.

16. 12/12/01: AAG Bryant letter to Chairman Burton advising of the Department's concerns about testimony at the Committee's 12/13/01 regarding litigation based upon the FBI's handling of informants in Boston.

12/13/01: Government Reform Committee Hearing "The FBI's Handling of Confidential Informants in Boston: Will the Justice Department Comply with Congressional Subpoenas?"; Michael Horowitz testifying.

17. 12/18/02: Chairman Burton letter to Attorney General Ashcroft requesting certain documents.

1/4/02: AAG Bryant letter to Chairman Burton responding to Chairman Burton 12/18/01 letter.

18. 12/19/01: AAG Bryant letter to Chairman Burton following up on items related to the Committee's 12/13/01 hearing.

1/3/02: Chairman Burton letter responding to AAG Bryant's 12/19/01 letter.

19. 12/21/01: FBI Assistant Director Collingwood responding to Chairman Burton 6/5/01 letter.

20. 1/3/02: Chairman Burton letter to Judge Gonzalez regarding President Bush's assertion of Executive privilege.

1/10/02: Judge Gonzalez letter responding on behalf of the Executive branch to Chairman Burton's 1/3/02 letters to Judge Gonzalez and Attorney General Ashcroft.

1/11/02: Chairman Burton letter responding to Judge Gonzalez's 1/10/02 letter.

1/10/02: Pursuant to 1/10/02 Gonzalez letter, Committee agrees to meet with AAG Chertoff. Shortly thereafter, Chairman Burton directs meeting be canceled.

21. 1/11/02: House Government Reform Committee Chief Counsel James Wilson letter to AAG Bryant requesting a copy of a transcript that he believes is in the possession of Special Attorney John Durham or his staff.

22. 1/18/02: AAG Bryant letter responding to Mr. Wilson's 1/11/02 letter.

23. 1/17/02: Chairman Burton letter to Attorney General Ashcroft inviting AAG Bryant to testify at the House Government Reform Committee hearing to be held on January 23, 2002.

24. 1/25/02: AAG Chertoff letter to Chairman Burton providing privilege log requested at 12/13/01 hearing.

25. 1/25/02: AAG Bryant letter to Chairman Burton regarding status of responses to requests for documents relating to the oversight of the FBI's handing of informants on Boston.

26. 1/29/02: Chairman Burton letter to AAG Bryant requesting that he testify at the House Government Reform Committee hearing to be held on February 6, 2002.

2/1/02: AAG Bryant letter responding to Chairman Burton's 1/29/02 and 9/7/01 letters.

BURTON: I asked the Justice Department a few months ago to provide me with a list of all the situations in the past where deliberative documents have been provided to Congress. The Justice Department has not provided that list. Tell me about what you've done to prepare a list like that. Can you tell me that? You're looking around, you don't know.

HOROWITZ: I do not know...

BURTON: You don't know.

HOROWITZ: ... what's been done to prepare the list.

BURTON: The guys behind you know anything about that?

HOROWITZ: We will do...

BURTON: You'll check into it.

HOROWITZ: We will get back to the committee with a list of what we've got and provide the committee with those materials.

BURTON: OK. Who in the case of Salvati has been interviewed by the Justice Department so we can end up with a complete list? Who's been interviewed? Can you give us any names that you've interviewed regarding this guy being in jail for 30 years for something he didn't do?

HOROWITZ: I'm not familiar with who..

BURTON: You don't know.

HOROWITZ: ... specifically was interviewed in connection with the investigation.

BURTON: And will you commit to providing the committee with a complete list?

HOROWITZ: I will certainly go back and discuss that, but not knowing who was discussed and given the status of the indicted case that's going to trial, or at least is scheduled for a trial, next month, it's a matter I would need to discuss with the prosecutors who are handling the matter.

BURTON: We're asking about other cases, not this case; other cases where you have provided deliberative documents. That's what we want to have.

HOROWITZ: I would need to go back and document by document review it and provide the committee with materials that don't involve these type of deliberative documents.

COUNSEL: OK. So in this case, the committee has subpoenaed documents, the Justice Department has located specific documents that are germane to that subpoena...

HOROWITZ: And I believe it's ongoing.

COUNSEL: Perhaps more, perhaps more. And you've made a determination that in this case, not in the hypothetical case, but in this particular case, this subpoena, the September 6 subpoena, in fact the president's made this decision that he will not permit the Justice Department to provide to Congress the documents that pertain to our Boston investigation. Is that correct?

HOROWITZ: That's correct. The president has made that determination, although he has not prohibited us from, again, discussing with the committee...

(CROSSTALK)

COUNSEL: Right, but we're not going to talk about discussions; we're talking about the documents. Because I'm going to ask you some questions about that in a minute. But the president has decided that the members of Congress will not be permitted to see specific documents. OK.

Feb. 4 DRAFT

Precedents in Support of the Department's Position in the Instant Matter

1. 1909, U.S. Steel

- President Roosevelt and his Attorney General declined to turn over deliberative prosecutorial documents regarding the Department's decision not to take legal action in connection with U.S. Steel's acquisition of the Tennessee Coal and Iron Co.

- The President's letter regarding the motive of U.S. Steel and the economic environment of the acquisition were shared, but not the Attorney General's opinions or rationale for the decision.

- The President explained: "... I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action."

2. 1957-58, AT & T

- The Department withheld deliberative documents relating to decisions about the case from a House Judiciary Antitrust Subcommittee.

- In declining to turn over the documents, Deputy Attorney General William Rogers quoted President Eisenhower's comments in invoking executive privilege in 1954 regarding deliberations relating to the McCarthy investigations, in noting that it is necessary "to maintain the proper separation of powers between the Executive and Legislative Branches of the Government in accordance with my responsibilities and duties under the Constitution."

- Deputy Attorney General Rogers also stated that "the essential process of full and flexible exchange might be seriously endangered were staff members hampered by the knowledge they might at some later date be forced to explain before Congress intermediate positions taken."

- Eventually, three Department representatives testified before the Subcommittee and they reaffirmed the Department's policy of withholding internal deliberative documents.



STATEMENT OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT REFORM

CONCERNING

THE HISTORY OF AND BASIS FOR CONGRESSIONAL ACCESS TO DELIBERATIVE JUSTICE DEPARTMENT DOCUMENTS

PRESENTED ON

FEBRUARY 6, 2002

Mr. Chairman and Members of the Committee

My name is Morton Rosenberg. I am a specialist in American Public Law in the American Law Division of the Congressional Research Service (CRS). Among my areas of professional concern at CRS are the problems raised by the interface of Congress and the Executive which involve the scope and application of congressional oversight and investigative prerogatives. Over the years I have been involved in advising Congress in a number of investigations, including Iran-Contra, Rocky Flats, Whitewater, Travelgate, Filegate, campaign fundraising during the 1996 election, and the Clinton impeachment inquiry, as well as other significant interbranch oversight involvement has been advising Members and staff, majority and minority, on such matters as organization of the probes, subpoena issuance and enforcement, the conduct of hearings, and contempt of Congress resolutions, and it has required my dealing with a wide variety of legal and practical issues.

You have asked me here today to provide historical and legal background to assist the Committee in assessing the substantiality of the President's December 12, 2001, assertion of executive privilege with respect to prosecutorial decision making documents the Committee has subpoenaed from the Department of Justice (DOJ). Three categories of documents are involved: (1) documents relating to law enforcement corruption dating from almost 30 years ago in the FBI's Boston office which allegedly allowed persons to be convicted of murder on the false testimony of two informants in order to protect the undercover operations of those informants; (2) a memorandum by the chief of the Campaign Financing Task Force to Attorney General Janet Reno recommending that she request the appointment of an independent counsel to investigate the fund raising activities of Vice President Gore (the Conrad memo) and related memoranda; and (3) memoranda describing reasons for declining to recommend prosecutions of former DEA Special Agent in Charge Ernest Howard and former Clinton White House aide Mark Middleton. The President founded his assertion of privilege on the need to protect "the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions" and the concern "that congressional access to prosecutorial decisionmaking of this kind threatens to politicize the criminal justice process."

My review of the historical experience and legal rulings pertinent to congressional access to information regarding the law enforcement activities of the Department of Justice indicates that the claim of constitutional privilege by the President is unprecedented and, under the most recent Supreme Court and appellate court rulings pertinent to the scope of the presidential communications privilege, would appear to be open to serious question as to whether it has been properly asserted in this matter. In the last 80 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice activities. It appears that the fact that an agency, such as the Justice Department, has determined for its own internal purposes that a particular item should not be disclosed, or that the information sought should come from one agency source rather than another, does not prevent either House of Congress, or its committees or subcommittees, from obtaining and publishing information it considers essential for the proper performance of its constitutional functions. We are aware of no court precedent that imposes a threshold burden on committees to demonstrate, for example, a "substantial reason to believe wrongdoing occurred" before they may seek disclosure with respect to the conduct of specific open and closed criminal and civil cases. Indeed, the case law is quite to the contrary. An inquiring

committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern.

Committees, however, normally have been restrained by prudential considerations that involve a pragmatic assessment that has been informed by weighing consideration 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 their jurisdiction, against the potential burdens and harms that may be imposed on an agency if deliberative process matter is publically disclosed. In particular, sensitive law enforcement concerns and duties of the Justice Department have been seen to merit that substantial weight be given the agency's deliberative processes in the absence of a reasonable belief of a jurisdictional committee that government misconduct has occurred. A careful review of the historical record indicates a generally faithful congressional adherence to these prudential considerations.

My discussion will proceed as follows. I will briefly review the legal basis for investigative oversight and then describe several prominent examples of congressional oversight of the DOJ that reflect significant milestones in the establishment of the congressional oversight prerogative vis-a-vis the Department. I will conclude with an assessment of the substantiality of the President's claim of executive privilege in this matter in the light of the long and consistent history of congressional oversight access to DOJ deliberative process information and the case law that has developed from it that presently informs the scope of Congress' power.

The Legal Basis for Oversight

Numerous Supreme Court precedents recognize a broad and encompassing power in Congress to engage in oversight and investigation that would reach all sources of information necessary for carrying out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees have plenary power to compel production of information needed to discharge their legislative functions from executive agencies, private persons, and organizations. Within certain constraints, the information so obtained may be made public.

Although there is no express provision of the Constitution that specifically authorizes Congress to conduct investigations and take testimony for the purposes of performing its legitimate functions, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress.[1] Thus, in *Eastland v. United States Servicemen's Fund*, the Court explained that "[t]he scope of its power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[2] In *Watkins v. United States,* the Court described the breadth of the power of inquiry: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of

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1 *McGrain v. Daugherty,* 272 U.S. 135 (1927).

2 421 U.S. at 504, n. 15 (quoting *Barenblatt v. United States*, 360 U.S. 109, 111).

existing laws as well as proposed or possibly needed statutes."[3] The Court went on to emphasize that Congress's investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[4] "[T]he first Congresses," it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"[5] and subsequently, in a series of decisions, "[t]he court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered."[6] Accordingly, the Court stated, it recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[7]

Illustrative Investigations and Case Law

Perhaps most instructive and illuminating for present purposes is a review of important precedents over the last 80 years regarding oversight of the Justice Department. Appended to this testimony are brief summaries of 18 selected congressional investigations from the Palmer Raids and Teapot Dome in the 1920's to Watergate and through Iran-Contra, Rocky Flats and the recent campaign finance inquiries. Those investigation demonstrate that DOJ has consistently been obligated to submit to congressional oversight, regardless of whether litigation is pending, so that Congress is not delayed unduly in investigating misfeasance and/or malfeasance in the Justice Department and elsewhere. A number of these investigations spawned seminal Supreme Court rulings that today provide the foundation for the broad congressional power of inquiry. All were contentious and involved Department claims that committee demands for agency documents and testimony were precluded either on the basis of constitutional or common law privilege or policy. In the majority of instances reviewed, the testimony of subordinate DOJ employees, such as line attorneys and FBI field agents, was taken formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. In all instances, investigating committees were provided with documents respecting open or closed cases that often included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases, confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrests of subjects, and documents, presented to grand juries nor protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, among other similar "sensitive" materials. The instances of DOJ oversight reviewed of course are not exhaustive of such inquiries. The consequences of these historic inquiries at times have been profound and farreaching, directly leading to important remedial legislation and resignations (Harry M. Daugherty, J. Howard McGrath) and convictions (Richard Kleidienst, John Mitchell) of four attorneys general.

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[3] 354 U.S. 178, 187 (1957).

[4] *Id.*

[5] *Id.* at 182.

[6] *Id.* at 194-195.

[7] *Id.* at 200 n. 33.

Three past DOJ investigations are worthy of highlight here. All three involved substantial disclosures of deliberative documents and the testimony of agency officials and live personnel; two involved landmark Supreme Court rulings buttressing congressional oversight authority.

The Teapot Dome scandal in the mid-1920's provided the model and indisputable authority for wideranging congressional inquiries. While the Senate Committee on Public Lands and Surveys focused on the actions of the Department of the Interior in leasing naval oil reserves, a Senate select committee was constituted to investigate "charges of misfeasance and nonfeasance in the Department of Justice"[8] in failing to prosecute the malefactors in the Department of the Interior, as well as other cases.[9] The select committee heard from scores of present and former attorneys and agents of the Department and its Bureau of Investigation, who offered detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. Not all of the cases upon which testimony was offered were closed, as one of the committee's goals in its questioning was to identify cases in which the statute of limitations had not run out and prosecution was still possible.[10]

The committee also obtained access to Department documentation, including prosecutorial memoranda on a wide range of matters. However, given the charges of widespread corruption in the Department and the imminent resignation of Attorney General Daugherty, it would appear that some of the documents furnished the committee early in the hearings may have been volunteered by the witnesses and not officially provided by the Department. Although Attorney General Daugherty had promised cooperation with the committee, and had agreed to provide access to at least the files of closed cases,[11] such cooperation apparently had not been forthcoming.[12]

In two instances immediately following Daugherty's resignation, the committee was refused access to confidential Bureau of Investigation investigative reports pending the appointment of a new Attorney General who could advise the President about such production,[13] though witnesses from the Department were permitted to testify about the investigations that were the subject of the investigative reports and even to read at the hearings from the investigative reports. With the appointment of the new Attorney General, Harlan F. Stone, the committee was granted broad access to Department files. Committee Chairman Smith Brookhard remarked that "[Stone] is furnishing us with all the files we want, whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked."[14] For example, with the authorization of the new Attorney General, an accountant with the Department who had led an investigation of fraudulent sales of property by the

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[8] *McGrain v. Daugherty,* 273 U.S. 135, 151 (1927).

[9] Investigation of Hon. Harry M. Daughtery, Formerly Attorney General of the United States: Hearings Before the Senate Select Committee on Investigation of the Attorney General, vols. 1-3, 68th Congress, 1st Session (1924).

[10] *See, e.g., id.* at 1495-1503, 1529-30,2295-96.

[11] *Id.* at 1120.

[12] *Id.* at 1078- 79.

[13] *Id.* at 1015-16 and 1159-60.

[14] *Id.* at 2389.

Alien Property Custodian's office appeared and produced his confidential reports to the Bureau of Investigation. The reports described the factual findings from his investigation and his recommendations for further action, and included the names of companies and individuals suspected of making false claims. The Department had not acted on those recommendations, though the cases had not been closed.[15] A similar investigative report, concerning an inquiry into the disappearance of large quantities of liquor under the control of the Department during the prior administration of President Harding, was also produced.[16]

As part of its investigation, the select committee issued a subpoena for the testimony of Mally S. Daugherty, the brother of the Attorney General. After Mally Daugherty failed to respond to the subpoena, the Senate sent its Deputy Sergeant at Arms to take him into custody and bring him before the Senate. Daugherty petitioned in federal court for a writ of *habeas corpus* arguing that the Senate in its investigation had exceeded its constitutional powers. The case ultimately reached the Supreme Court, where, in a landmark decision, *McGrain v. Daugherty,*[17] the Court upheld the Senate's authority to investigate these charges concerning the Department:

> [T]he subject to be investigated was the administration of the Department of Justice-- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers-- specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.[18]

The Court thus underlined that the Department of Justice, like all other executive departments and agencies, is a creature of the Congress and subject to its plenary legislative and oversight authority. There is no indication whatsoever that its prosecutorial functions are in any manner immune from legislative inquiry.

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[15] *Id.* at 1495-1547.

[16] *Id.* at 1790.

[17] 273 U.S. 135 (1927).

[18] 277 U.S. at 177-78.

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,*[19] a different witness at the Congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts... and shall respectfully decline to answer any questions propounded by your committee."[20] The Supreme Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness' contention that the pendency of lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws." *Id.* at 295. The Court further explained: "It may be conceded that Congress is without authority to compel disclosure for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[21]

The *Siclair* ruling also inferentially indicates that the Department's oft-proffered distinction between open and closed cases has littlel weight.

One of the most prominent Congressional investigations of the Department grew out of the highly charged confrontation at the end of the 97th Congress concerning the refusal of Environmental Protection Agency Administrator Ann Gorsuch Burford, under orders from the President, to comply with a House subcommittee subpoena requiring the production of documentation about EPA's enforcement of the hazardous waste cleanup legislation. This dispute culminated in the House of Representative's citation of Burford for contempt of Congress, the first head of an Executive Branch agency ever to have been so cited by a House of Congress. It also resulted in the filing of an unprecedented legal action by the Department, in the name of the United States, against the House of Representatives and a number of its officials to obtain a judicial declaration that Burford had acted lawfully in refusing to comply with the subpoena.

Ultimately, the lawsuit was dismissed,[22] the documents were provided to Congress, and the contempt citation was dropped. However, a number of questions about the role of the Department during the controversy remained: whether the Department, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the United States Attorney for the District of Columbia not to present the contempt certification of Burford to the grand jury for prosecution and had made the decision to sue the House; and, generally, whether there was a conflict of interest in the Department's simultaneously advising the President, representing Burford, investigating alleged Executive branch wrongdoing, and enforcing the congressional criminal contempt statute. These and related questions raised by the Department's actions were the subject of an investigation by

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[19] 279 U.S. 263 (1929).

[20] *Id.* at 290.

[21] *Id.* at 295.

[22] *U.S. v. House of Representatives,* 557 F. Supp. 150 (D.D.C. 1983).

the House Judiciary Committee beginning in early 1983. The committee issued a final report on its investigation in December 1985.[23]

Although the Judiciary Committee ultimately was able to obtain access to virtually all of the documentation and other information it sought from the Department, in many respects this investigation proved as contentious as the earlier EPA controversy from which it arose. In its final report, the committee concluded that:

> [T]he Department of Justice, through many of the same senior officials who were most involved in the EPA controversy, consciously prevented the Judiciary Committee from obtaining information in the Department's possession that was essential to the Committee's inquiry into the Department's role in that controversy. Most notably, the Department deliberately, and without advising the Committee, withheld a massive volume of vital handwritten notes and chronologies for over one year. These materials, which the Department knew came within the Committee's February 1983 document request, contained the bulk of the relevant documentary information about the Department's activities outlined in this report and provided a basis for many of the Committee's findings.[24]

Among the other abuses cited by the committee were the withholding of a number of other relevant documents until the committee had independently learned of their existence,[25] as well as materially "false and misleading" testimony before the committee by the head of the Department's Office of Legal Counsel.[26]

The committee's initial request for documentation was contained in a February 1983 letter from its chairman, Peter Rodino, to Attorney General William French Smith. The committee requested the Department to "supply all documents prepared by or in the possession of the Department in any way relating to the withholding of documents that Congressional committees have subpoenaed from the EPA."[27] The letter also specifically requested, among other things, a narrative description of the activities of each division or other unit of the Department relating to the withholding of the EPA materials, information about the Department's apparent conflict of interest in simultaneously advising the Executive Branch while being responsible for prosecuting the Burford contempt citation, and any instructions given by the Department to the United States Attorney for the District of Columbia not to present the Burford contempt to the grand jury.

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[23] See, Report of the House Comm. on the Judiciary on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-1983, H.R. Rep. No.99-435, 99th Cong., 1st Sess (1985) ("EPA Withholding Report").

[24] EPA Withholding Report at 1163; *see* also 1234-38.

[25] *Id.* at 1164.

[26] *Id.* at 1164- 65 & 1191-1231.

[27] *Id.* at 1167 & 1182-83.

At first the Department provided only publicly available documents in response to this and other document requests of the committee.[28] However, after a series of meetings between committee staff and senior Department officials, an agreement was reached whereby committee staff were permitted to review the materials responsive to these requests at the Department to determine which documents the committee would need for its inquiry.[29] Committee staff reviewed thousands of documents from the Land and Natural Resources Division, the Civil Division, the Office of Legal Counsel, the Office of Legislative Affairs, the Office of Public Affairs, and the offices of the Attorney General, the Deputy Attorney General, and the Solicitor General.[30]

In July 1983, the committee chairman wrote to the Attorney General requesting copies of 105 documents that committee staff had identified in its review as particularly important to the committee's inquiry.[31] By May 1984, only a few of those documents had been provided to the committee, and the chairman again wrote to the Attorney General requesting the Department's cooperation in the investigation. In that letter, the chairman advised the Attorney General that the committee's preliminary investigation had raised serious questions of misconduct, including potential criminal misconduct, in the actions of the Department in the withholding of the EPA documents.[32] The committee finally received all of the 105 documents in July 1984, a full year after it had initially requested access. The committee at that time also obtained the written notes and a number of other documents that had been earlier withheld.[33]

There was also disagreement about the access that would be provided to Department employees for interviews with committee staff. The Department demanded that it be permitted to have one or more Department attorneys present at each interview. The committee feared that the presence of Department representatives might intimidate the Department employees in their interviews and stated that it was willing to permit a Department representative to be present only if the representative was "walled-off' from Department officials involved with the controversy, if the substance of interviews was not revealed to subsequent interviewees, and if employees could be interviewed without a Department representative present if so requested. The Department ultimately agreed to permit the interviews to go forward without its attorneys present. If a Department employee requested representation, the Department employed private counsel for that purpose. In all, committee staff interviewed twenty-six current and former Department employees, including four Assistant Attorney Generals, under this agreement.[34]

Partly as a result of these interviews, as well as from information in the handwritten notes that had been initially withheld, the committee concluded that it also required access to Criminal Division documents concerning the origins of the criminal investigation of

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[28] *Id.* at 1184.

[29] *Id.* at 1168 & 1233.

[30] *Id.* at 1168.

[31] *Id.* at 1169.

[32] *Id.* at 1172.

[33] *Id.* at 1173.

[34] *Id.* at 1174-76.

former EPA Assistant Administrator Rita Lavelle in order to determine if the Department had considered instituting the investigation to obstruct the committee's inquiry. The committee also requested information about the Department's earlier withholding of the handwritten notes and other documents to determine whether Department officials had deliberately withheld the documents in an attempt to obstruct the committee's Investigation.[35] The Department at first refused to provide the committee with documents relating to its Lavelle investigation "[c]onsistent with the longstanding practice of the Department not to provide access to active criminal files."[36] The Department also refused to provide the committee with access to documentation related to the Department's handling of the committee's inquiry, objecting to the committee's "ever- broadening scope of ...inquiry."[37]

The committee chairman wrote the Attorney General and objected that the Department was denying the committee access even though no claim of executive privilege had been asserted.[38] The chairman also maintained that "[i]n this case, of course, no claim of executive privilege could lie because of the interest of the committee in determining whether the documents contain evidence of misconduct by executive branch officials."[39] With respect to the documents relating to the Department's handling of the committee inquiry, the chairman demanded that the Department prepare a detailed index of the withheld documents, including the title, date, and length of each document, its author and all who had seen it, a summary of its contents, an explanation of why it was being withheld, and a certification that the Department intended to recommend to the President the assertion of executive privilege as to each withheld document and that each document contained no evidence of misconduct.[40] With respect to the Lavelle documents, the chairman narrowed the committee's request to "predicate" documents relating to the opening of the investigation and prosecution of Lavelle, as opposed to FBI and other investigative reports reflecting actual investigative work conducted after the opening of the investigation.[41] In response, after a period of more than three months from the committee's initial request, the Department produced those two categories of materials.[42]

But this was not the last chapter of this affair. As has been the case in the present inquiry, in the past the Department has frequently made the broad claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is thereby limited. Prosecutorial discretion is said to be off limits to congressional inquiry and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor with respect to pursuing criminal cases. That argument was raised to a constitutional level in litigation that ensued after the Judiciary Committee filed its report and asked the Attorney General to appoint an independent counsel to pursue a criminal investigation of Department officials based on the Committee's findings.

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[35] *Id.* at 1176- 77 & 1263-64.

[36] *Id.* at 1265.

[37] *Id.* at 1265.

[38] *Id.* at 1266.

[39] *Id.*

[40] *Id.* at 1268-69.

[41] *Id.* at 1269-70.

[42] *Id.* at 1270.

The appointment was made and during the course of the investigation one of the subjects, Theodore Olson, who at the time of the Burford affair was the Assistant Attorney General for the Office of Legal Counsel, was served with a subpoena and refused to comply, claiming that the independent counsel statute was unconstitutional on a variety of constitutional grounds.

When the case reached the Supreme Court it rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. Rather, the Court noted in *Morrison v. Olson,* [43] sustaining the validity of the appointment and removal conditions for independent counsels under the Ethics in Government Act, that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by Executive Branch officials, but held that the exercise of prosecutorial discretion is in no way "central" to the functioning of the Executive Branch.[44] The Court therefore rejected a claim that insulating the independent counsel from at-will presidential removal interfered with the President's duty to "take care" that the laws be faithfully executed. Interestingly, the *Morrison* Court took the occasion to reiterate the fundamental nature of Congress' oversight function (" . . . receiving reports or other information and oversight of the independent counsel's activities . . . [are] functions that we have recognized as generally incidental to the legislative function of Congress," citing *McGrain v. Daugherty.*)[45]

The breadth of *Morrison's* ruling that the prosecutorial function is not an exclusive function of the Executive was made clear in a decision of the Ninth Circuit Court of Appeals in *United States ex rel Kelly* v. *The Boeing Co.*,[46] which upheld, against a broad based separation of powers attack, the constitutionality of the *qui tam* provisions of the False Claims Act vesting in private parties enforcement functions against agencies.[47] The

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[43] 487 U.S. 654 (1988).

[44] *Id.* at 691-92.

[45] *Id.* at 694.

[46] 9 F.3d 743 (9th Cir. 1993).

[47] Boeing argued, *inter alia*, that Congress could not vest enforcement functions outside the Executive Branch in private parties. Applying *Morrison* the appeals court emphatically rejected the contention.

> Before comparing the *qui tam* provisions of the FCA to the independent counsel provisions of the Ethics in Government Act, we must address Boeing's contention that only the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law. *It is clear to us that no such absolute rule exists. Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "it is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "there is no real dispute that the functions performed by the independent counsel are `executive' in the sense that they are law enforcement

(continued...)

implications of that ruling for the propriety of the President's claim privileges will be discussed in the concluding section of this testimony.

A final relevant case study involved a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology commenced a review of the plea bargain settlement by the Department of Justice of the government's investigation and prosecution of environmental crimes committed by Rockwell International Corporation in its capacity as manager and operating contractor at the Department of Energy's (DOE) Rocky Flats nuclear weapons facility.[48] The settlement was a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA's National Enforcement Investigation Centers, and the DOE Inspector General. The subcommittee was concerned with the size of the fine agreed to relative to the profits made by the contractor and the damage caused by inappropriate activities; the lack of personal indictments of either Rockwell or DOE personnel despite a DOJ finding that the crimes were "institutional crimes" that "were the result of a culture, substantially encouraged and nurtured by DOE, where environmental compliance was a much lower priority than the production and recovery of plutonium and the manufacture of nuclear 'triggers'"; and that reimbursements provided by the government to Rockwell for expenses in the cases and the contractual arrangements between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.

The subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the United States Attorney for the District of Colorado; an assistant U.S. Attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI

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[47] (...continued)

> functions that typically have been undertaken by officials within the Executive Branch." 487 U.S. at 692 (emphasis added). Use of the world "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not always be undertaken by Executive Branch officials. See Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent, 99 Yale L.J. 1069, 1070 (1990)(Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). *Thus, we reject Boeing's assertion that all prosecutorial power of any kind belongs to the Executive Branch.*

9 F.3d at 751 (emphasis supplied). The Supreme Court has recently sustained the constitutionality of the False Claims Act in *Vermont Agency of Natural Resources* v. *U.S. ex rel Stevens*, 120 S. Ct. 1858, 1863-65 (2000).

[48] See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Committee on Science, Space and Technology, 102d Cong., 2d Sess., Vols. I and II (1992) ("Rocky Flats Hearings"); Meetings: To Subpoena Appearance by Employees of the Department of Justice and the FBI and To Subpoena Production of Documents From Rockwell International Corporation, Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology, 102d Congress, 2d Sess., (1992)("Subpoena Meetings").

field agent; and received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e).[49]

At one point in the proceedings all the witnesses who were under subpoena, upon written instructions from the Acting Assistant Attorney General, Criminal Division, refused to answer questions concerning internal deliberations in which decisions were made about the investigation and prosecution of Rockwell, the DOE and their employees. Two of the witnesses advised that they had information and, but for the DOJ directive, would have answered the subcommittee's inquiries. The subcommittee members unanimously authorized the chairman to send a letter to President Bush requesting that he either personally assert executive privilege as the basis for directing the witnesses to withhold the information or direct DOJ to retract its instructions to the witnesses. The President took neither course and the DOJ subsequently reiterated its position that the matter sought would chill Department personnel. The subcommittee then moved to hold the U .S. Attorney in contempt of Congress.

A last minute agreement forestalled the contempt citation. Under the agreement (1) DOJ issued a new instruction to all personnel under subpoena to answer all questions put to them by the subcommittee, including those which related to internal deliberations with respect to the plea bargain. Those instructions were to apply as well to all Department witnesses, including FBI personnel, who might be called in the future. Those witnesses were to be advised to answer all questions fully and truthfully and specifically instructed that they were allowed to disclose internal advice, opinions, or recommendations connected to the matter. (2) Transcripts were to be made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing. (3) Witnesses were to be interviewed by staff under oath. (4) The subcommittee reserved the right to hold further hearings in the future at which time it could call other Department witnesses who would be instructed by the Department not to invoke the deliberative process privilege as a reason for not answering subcommittee questions.[50]

Assessment and Conclusions

The Department's initial position that its policy henceforth would be to deny congressional access to any deliberative documents and deliberative prosecutorial documents in particular is one that would be difficult to sustain in light of the overwhelming number and nature of successful oversight inquiries over the past 80 years and the supportive Supreme Court rulings rendered during that period. The most recent communication from the Department seems to have softened its position to some degree, at least with respect to its rhetoric. In his February 1, 2002, letter to the Chairman, the DOJ Assistant Attorney General for Legislative Affairs explains:

> Our particular concern in the current controversy pertains to the narrow and especially sensitive categories of advice memoranda to the Attorney General and the deliberative documents making

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[49] Rocky Flats Hearing, Vol. I, at 389-1009, 1111-1251; Vol. II.

[50] Rocky Flats Hearings, Vol. I at 9-10,25-31,1673-1737; Subpoena Hearings, at 1-3,82-86, 143-51.

> recommendations regarding whether or not to bring criminal charges against individuals. We believe that the public interest in avoiding the politicization of the criminal justice process required greater protection for those documents which, in turn, influences the accommodation process. This is not an "inflexible position," but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making.

It is difficult to view this as an accommodation, and the letter does not indicate a retreat from the presidential claim of privilege with respect to this "narrow" category of prosecutorial documents. Thus the threshold issue remains whether a claim of privilege is tenable in the present circumstances. A recent appeals court ruling from the District of Columbia Circuit raises serious doubt whether a presidential communications privilege reaches the prosecutorial documents here in issue.

In *In re Sealed Case (Espy),*[51] the appeals court addressed several important issues left unresolved by the Watergate cases: the precise parameters of the presidential executive privilege; how far down the chain of command the privilege reaches; whether the President has to have seen or had knowledge of the existence of the documents for which he claims privilege; and what showing is necessary to overcome a valid claim of privilege.

The case arose out of an Office of Independent Counsel (OIC) investigation of former Agriculture Secretary Mike Espy. When allegations of improprieties by Espy surfaced in March of 1994, President Clinton ordered the White House Counsel's Office to investigate and report to him so he could determine what action, if any, he should undertake. The White House Counsel's Office prepared a report for the President, which was publically released on October 11, 1994. The President never saw any of the underlying or supporting documents to the report. Espy had announced his resignation on October 3, to be effective on December 31. The Independent Counsel was appointed on September 9 and the grand jury issued a subpoena for all documents that were accumulated or used in preparation of the report on October 14, three days after the report's issuance. The President withheld 84 documents, claiming both the executive and deliberative process privileges for all documents. A motion to compel was resisted on the basis of the claimed privileges and after *in camera* review the district court quashed the subpoena, but in its written opinion did not discuss the documents in any detail and provided no analysis of the grand jury's need for the documents. The appeals court reversed.

At the outset, the court's opinion carefully distinguishes between the "presidential communications privilege" and the "deliberative process privilege". Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decisionmaking. But the deliberative process privilege applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and "disappears altogether when there is any reason to believe government misconduct has occurred."[52]

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[51] 121 F.3d 729 (D.C. Cir. 1997).

[52] 121 F.3d at 745, 746; see also *id.* at 737-738 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely

(continued...)

On the other hand, the court explained, the presidential communications privilege is rooted in "constitutional separation of powers principles and the President's unique constitutional role" and applies only to "direct decisionmaking by the President."[53] The privilege may be overcome only by a substantial showing that "the subpoenaed materials likely contain[] important evidence" and that "the evidence is not available with due diligence elsewhere."[54] The presidential privilege applies to all documents in their entirety[55] and covers final and post-decisional materials as well as pre-deliberative ones.[56]

Turning to the chain of command issue, the court held that the presidential communications privilege must cover communications made or received by presidential advisers in the course of preparing advice for the President even if those communications are not made directly to the President. The court rested its conclusion on "the President's dependence on presidential advisers and the inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight" and "the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources".[57] Thus the privilege will "apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff."[58]

The court, however, was acutely aware of the dangers to open government that a limitless extension of the privilege risks and carefully cabined its reach by explicitly confining it to White House staff, and not staff in the agencies, and then only to White House staff that has "operational proximity" to direct presidential decisionmaking.

> We are aware that such an extension, unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's

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[52] (...continued)
denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government'").

[53] Id. at 745, 752. See also *id.* at 753 ("...these communications nonetheless are ultimately connected with presidential decisionmaking".).

[54] Id. at 754. See also *id.* at 757.

[55] In contrast, the deliberative process privilege does not protect documents that simply state or explain a decision the government has already made or material that is purely factual, unless the material is inextricably intertwined with the deliberative portions of the materials so that disclosure would effectively reveal the deliberations. 121 F.3d at 737.

[56] Id. at 745.

[57] *Id.* at 752.

[58] Id.

> decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigation and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. *See* AAPS, 997 F.2d at 910 (it is "operational proximity" to the President that matters in determining whether "[t]he President's confidentiality interests" is implicated)(emphasis omitted).
>
> Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters. This restriction is particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President, and thus are subject to FOIA and other open government statutes. See *Armstrong v. Executive Office of the President,* 90 F.3d 553, 558 (D.C. Cir. 1996), *cert denied* -- U.S. ---, 1 17 S.Ct. 1842, 137 L. Ed.2d 1046 (1997). The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President. If the government seeks to assert the presidential communications privilege in regard to particular communications of these "dual hat" presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.[59]

The appeals court's limitation of the presidential communications privilege to "direct decisionmaking by the President" makes it imperative to identify the type of decisionmaking to which it refers. A close reading of the opinion makes it arguable that it is meant to encompass only those functions that form the core of presidential authority, involving what the court characterized as "quintessential and non-delegable Presidential power."[60] In the case before it the court was specifically referring to the President's Article 11 appointment

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[59] Id. (footnote omitted).

[60] Id. at 752.

and removal power which was the focal point of the advice he sought in the Espy matter. But it is clear from the context of the opinion that the description was meant to be in juxtaposition with the appointment and removal power and in contrast with "presidential powers and responsibilities" that "can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of authority or statutory framework."[61] The reference the court uses to illustrate the latter category is the President's Article II duty "to take care that the laws are faithfully executed," a constitutional direction that the courts have consistently held not to be a source of presidential power but rather an obligation on the President to see to it that the will of Congress is carried out by the executive bureaucracy.[62]

The appeals court, then, would appear to be confining the parameters of the newly formulated presidential communications privilege by tying it to those Article II functions that are identifiable as "quintessential and non-delegable," which would appear to include, in addition to the appointment and removal powers, the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, the power to negotiate treaties, and the power to grant pardons and reprieves. On the other hand, decisionmaking vested by law in agency heads such as prosecutorial decisionmaking, rulemaking, environmental policy, consumer protection, workplace safety and labor relations, among others, would not necessarily be covered. Of course, the President's role in supervising and coordinating (but not displacing) decisionmaking in the executive branch remains unimpeded. But his communications would
presumably not be cloaked by constitutional privilege.

Such a reading of this critical passage is consonant with the court's view of the source and purpose of the presidential communications privilege and its expressed need to confine it as narrowly as possible. Relying on *United States* v. *Nixon* ,[63] the In *re Sealed Case* court identifies "the President's Article II powers and responsibilities as the constitutional basis of the presidential communications privilege... Since the Constitution assigns these responsibilities to the President alone, arguably the privilege of confidentiality that derives from it also should be the President's alone."[64] Again relying on *Nixon* the court pinpoints the essential purpose of the privilege: "[Tlhe privilege is rooted in the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and knowledge. Confidentiality is what ensures the expression of 'candid, objective, and even blunt or harsh opinions' and the comprehensive exploration of all policy alternatives before a presidential course of action is selected."[65] The limiting safeguard is that the privilege will apply in those instances where the Constitution provides that the President alone must make a decision. "The presidential communications privilege should

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[61] Id. at 752-53.

[62] See, *e.g., Kendall ex rel. Stokes v. United States,* 37 U.S. (12 Pet.) 522, 612-613 (1838); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952); *Myers v. United States,* 272 U.S. 52, 177 (1926)(Holmes, J., dissenting); *National Treasury Employees Union v. Nixon,* 492 F.2d 587, 604 (D.C. Cir. 1974).

[63] 418 U.S. 683 (1974).

[64] Id. at 748.

[65] Id. at 750.

never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President."[66]

Espy, taken together with *Morrison* v. *Olson's* holding that prosecution is not a core or exclusive function of the Executive and *McGrain* v. *McDaugherty's* understanding that Congress' access to prosecutorial information is founded on its plenary authority to create, empower and fund the activities of the Department, raises serous doubts to the efficacy of the claim to a presidential communications privilege in this case. Rather, the withholding claim arguably must be tested as one of the common law privileges of agencies that may be overcome by a showing of need by an investigatory body and, as *Espy* noted, "disappears" upon a reasonable belief by such investigating body that government misconduct has occurred. Thus, a demonstration of need of a jurisdictional committee in most circumstances would appear to be sufficient, and a plausible showing of fraud, waste, abuse or maladministration would be likely conclusive.

Even before *Espy,* courts and committees have consistently countered such claims of agencies as attempts to establish a species of agency privilege designed to thwart congressional oversight efforts. Thus it has been pointed out that the claim that such internal communications need to be "frank" and "open" does not lend it any special support and that coupling that characterization with the notion that those communications were part of a "deliberative process" will not add any weight to the argument. In effect, such arguments have been seen as attempting to justify a withholding from Congress on the same grounds that an agency would use to withhold such documents from a citizen requester under Exemption 5 of the Freedom of Information Act (FOIA).[67]

Such a line of argument is likely to be found to be without substantial basis. As has been indicated above, Congress has vastly greater powers of investigation than that of citizen FOIA requesters. Moreover, in the FOIA itself, Congress carefully provided that the exemption section "is not authority to withhold information from Congress."[68] The D.C. Circuit in *Murphy v. Department of the Army*,[69] explained that FOIA exemptions were no basis for withholding from Congress because of:

> the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others . . . . Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively. If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private

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[66] Id. at 752.

[67] 5 U.S.C. 553 (b)(5)(1994).

[68] 5 U.S. C. 552 (d).

[69] 613 F. 2d 1151 (D.C. Cir. 1979).

> persons, that is but an incidental consequence of the need for informed and effective lawmakers.[70]

Further, it may be contended that the ability of an agency to assert the need for candor to ensure the efficacy of internal deliberations as a means of avoiding congressional information demands would severely undermine the oversight process. If that were sufficient, an agency would be encouraged to disclose only that which supports its positions, and withhold that with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering the whole evidence, and become little more than a set-piece of entertainment in which an agency decides what to present in a controlled "show and tell" performance.

Moreover, every federal official, including attorneys, could assert the imperative of timidity--that congressional oversight, by holding up to scrutiny the advice he gives, will frighten him away from giving frank opinions, or discourage others from asking him for them. This argument, not surprisingly, has failed over the years to persuade legislative bodies to cease oversight. Indeed, when the Supreme Court discussed the "secret law" doctrine in *NLRB v. Sears, Roebuck & Co.*[71] it addressed why federal officials--including those giving legal opinions--need not hide behind such fears:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if *adopted*, will become public is slight. First, when adopted, the reasoning becomes that of agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports . . .[disclosure].[72]

A "chilling" effect argument needs to be demonstrated concretely in particular cases or else it would overwhelm investigative prerogatives. In the present circumstances it would appear difficult to demonstrate. The Boston matter involves issues of fraud over two decades old. Certainly it would be difficult sustain a chilling of candor argument in such circumstances. Moreover, the recommendations of the Conrad memo would not appear to have been deterred by the public fight over and ultimate revelation of the Freeh and La Bella memos or the apparent negative effect t to the public sector career of Mr. La Bella as a result of the memo.

Finally, my review of the historical record of congressional inquiries, as well as my personal experiences with committee investigations of DOJ, indicate that committee, normally have been restrained by prudential considerations that involve a pragmatic assessment that has been informed by weighing considerations of legislative need, public

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[70] 613 F. 2d at 1155-56, 1158.

[71] 421 U.S. 132 (1975).

[72] 421 U.S. at 161 (emphasis in original).

APPENDIX

Selected Congressional Investigations Of The Department of Justice, 1920-2000

This appendix consists of brief summaries of 18 significant congressional investigations of the Department of Justice which involved either open or closed investigations in which the Department agreed to supply documents pertaining to those investigations, including prosecutorial decisionmaking memoranda and correspondence, and to provide line attorneys and investigative personnel for staff interviews and for testimony before committees.

Palmer Raids

In 1920 and 1921, investigations were held in the Senate and House into the so-called "Palmer raids" in which, under the direction of Attorney General A. Mitchell Palmer, thousands of suspected Communists and others allegedly advocating the overthrow of the government were arrested and deported. See Charges of Illegal Practices of the Department of Justice: Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 66th Congress, 3d Session (1921)(hereinafter "Senate Palmer Hearings"); Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F . Post and Others: Hearings Before the House Committee on Rules, 66th Congress, 2d Session (1920)(hereinafter "House Palmer Hearings"). Attorney General Palmer, accompanied by his Special Assistant, J. Edgar Hoover, during three days of testimony at the Senate hearings discussed the details of numerous deportation cases, including cases which were on appeal. Senate Palmer Hearings at 38-98,421-86,539-63. House Palmer Hearings at 3-209. In support of his testimony, Palmer provided the Subcommittee with various Department memoranda and correspondence, including Bureau of Investigation reports concerning the deportation cases. *E.g.,* Senate Palmer Hearings at 431-43, 458- 69,472-76. Among the materials provided were the Department's confidential instructions to the Bureau outlining the procedures to be followed in the surveillance and arrest of the suspected Communists, *id.* at 12-14, 18-19, and a lengthy "memorandum of comments and analysis" prepared by one of Palmer's special assistants, which responded to a District Court opinion, at the time under appeal, critical of the Department's actions in these deportation cases, *id.* at 484-538.

Teapot Dome

Several years later, the Senate conducted an investigation of the Teapot Dome scandal. While the Senate Committee on Public Lands and Surveys focused on the actions of the Department of the Interior in leasing naval oil reserves, a Senate select committee was constituted to investigate "charges of misfeasance and nonfeasance in the Department of Justice," *McGrain v. Daugherty,* 273 U.S. 135, 151 (1927), in failing to prosecute the malefactors in the Department of the Interior, as well as other cases. Investigation of Hon. Harry M. Daughtery, Formerly Attorney General of the United States: Hearings Before the Senate Select Committee on Investigation of the Attorney General, vols. 1-3, 68th Congress, 1st Session (1924). The select committee heard from scores of present and former attorneys and agents of the Department and its Bureau of Investigation, who offered detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. Not all of the cases upon which testimony was offered were closed, as one of the committee's goals in its questioning was to identify cases in which the statute of limitations had not run out and prosecution was still possible. *See, e.g., id.* at 1495-1503, 1529-30,2295-96.

The committee also obtained access to Department documentation, including prosecutorial memoranda, on a wide range of matters. However, given the charges of widespread corruption in the Department and the imminent resignation of Attorney General Daugherty, it would appear that some of the documents furnished the committee early in the hearings may have been volunteered by the witnesses and not officially provided by the Department. Although Attorney General Daugherty had promised cooperation with the committee, and had agreed to provide access to at least the files of closed cases, *id.* at 1120, such cooperation apparently had not been forthcoming, *id.* at 1078- 79.

In two instances immediately following Daugherty's resignation, the committee was refused access to confidential Bureau of Investigation investigative reports pending the appointment of a new Attorney General who could advise the President about such production, *id.* at 1015-16 and 1159-60, though witnesses from the Department were permitted to testify about the investigations that were the subject of the investigative reports and even to read at the hearings from the investigative reports. With the appointment of the new Attorney General, Harlan F. Stone, the committee was granted broad access to Department files. Committee Chairman Smith Brookhard remarked that "[Stone] is furnishing us with all the files we want, whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked." *Id.* at 2389. For example, with the authorization of the new Attorney General, an accountant with the Department who had led an investigation of fraudulent sales of property by the Alien Property Custodian's office appeared and produced his confidential reports to the Bureau of Investigation. The reports described the factual findings from his investigation and his recommendations for further action, and included the names of companies and individuals suspected of making false claims. The Department had not acted on those recommendations, though the cases had not been closed. *Id.* at 1495-1547. A similar investigative report, concerning an inquiry into the disappearance of large quantities of liquor under the control of the Department during the prior administration of President Harding, was also produced. *Id.* at 1790.

As part of its investigation, the select committee issued a subpoena for the testimony of Mally S. Daugherty, the brother of the Attorney General. After Mally Daugherty failed to respond to the subpoena, the Senate sent its Deputy Sergeant at Arms to take him into custody and bring him before the Senate. Daugherty petitioned in federal court for a writ of *habeas corpus* arguing that the Senate in its investigation had exceeded its constitutional powers. The case ultimately reached the Supreme Court, where, in a landmark decision, *McGrain v. Daugherty,* 273 U.S. 135 (1927), the Court upheld the Senate's authority to investigate these charges concerning the Department:

> [T]he subject to be investigated was the administration of the Department of Justice-- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers-- specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.

273 U.S. at 177.

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,* 279 U.S. 263 (1929), a different witness at the Congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts... and shall respectfully decline to answer any questions propounded by your committee." *Id.* at 290. The Supreme Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws." *Id.* at 295.

The Court further explained: "It may be conceded that Congress is without authority to compel disclosure for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." *Id.* at 295.

Investigations of DOJ During the 1950's

In 1952, a special House subcommittee was constituted to conduct an inquiry into the administration of the Department of Justice. The subcommittee conducted a lengthy investigation from 1952 to 1953, developing thousands of pages of testimony on a range of allegations of abuses and inefficiencies in the Department. Investigations of the Department of Justice: Hearings Before the Special Subcommittee to Investigate the Department of Justice of the House Committee on the Judiciary, parts 1 and 2, 82d Congress, 2d Session (1952), parts 1 and 2, 83d Congress, lst Session (l953)(hereafter "DOJ Investigation Hearings"). The subcommittee summarized its conclusions about its inquiries during the 82d Congress in Investigation of the Department of Justice, H.R. R No.1079, 83d Congress, 1st Session (1953)(hereinafter "DOJ Investigation Report"). Among the subjects of inquiry considered during these hearings were the following:

1. Grand Jury Curbing

Extensive testimony was heard about a charge that the Department had attempted improperly to curb a grand jury inquiry in St. Louis into the failure to enforce federal tax fraud laws. After taking testimony in executive session from one witness, the subcommittee suspended its hearings on this subject pending the discharge of the grand jury. DOJ Investigation Hearings at 753. The subcommittee resumed its hearings several months later, at which time testimony was taken from the former Attorney General, a former Assistant Attorney General, the Chief of the appellate section of the Tax Division, and an Assistant U .S. Attorney. Several members of the St. Louis grand jury also testified before the subcommittee. In addition to intradepartmental correspondence, *see id.* at 1256-57, 1270- 71, among the materials that the subcommittee reviewed and included in the public record were transcripts of telephone conversations between various Department attorneys concerning the grand jury investigation. *Id.* at 759-66.[1]

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[1] Other memoranda and documents from the Department were reviewed by the subcommittee and kept in its confidential files, for example, a letter of instruction from the Attorney

(continued...)

The subcommittee began its hearings on the handling of the St. Louis grand jury with a statement emphasizing that its interest "is merely to ascertain whether or not there was in fact any attempt by the Department of Justice to influence the grand jury in its investigation," *id.* at 754, and that "the members of the subcommittee and counsel are aware of the rule of strict secrecy surrounding the proceedings of any grand jury . Mindful of that, our questioning will not touch upon any specific case or evidence that may have been presented to the grand jury." *Id.* The subcommittee's questions to the grand jurors focused on efforts by Department attorneys to prevent them from conducting a thorough investigation and on whether the grand jury had been pressured by those attorneys to issue a report absolving the government of impropriety in its handling of tax fraud cases. *Id.* at 766-808. Similar questions were asked of the present and former Department attorneys who testified, *id.* at 808-894, 1064- 1117, 1256-1318, and at one point the subcommittee asked for, and an Assistant U .S. Attorney provided, the names of certain witnesses who had appeared before the grand jury. *Id.* at 811. Later that same year, the subcommittee examined similar charges of interference by the Department with another grand jury, which had been investigating Communist infiltration of the United Nations. The subcommittee received testimony from a number of grand jurors and Department attorneys, including then Criminal Division attorney Roy Cohn. *Id.* at 1653-1812. The subcommittee's chief counsel again cautioned that "[t]he sanctity of the grand jury as a process of American justice must be protected at all costs," and stated that the subcommittee was seeking information solely relating to attempts to delay or otherwise influence the grand jurors' deliberations, not which would reveal the actual testimony of witnesses appearing before them. *Id.* at 1579-80.

2. Prosecution of Routine Cases

Attorney General McGrath resigned in April 1952, in part in response to the evidence uncovered by the subcommittee of corruption in the Department, particularly in the Tax Division. As a result of the replacement of McGrath by James P. McGranery, and the Administration's concern about these reports of corruption, the subcommittee observed "a new and refreshing attitude of cooperation which soon appeared at all levels in the Department of Justice." DOJ Investigation Report at 69. The subcommittee declared that "its work has been limited only by the capacity of its staff to digest the sheer volume of available fact and documentary evidence relating to the Department's work. Everything that has been requested has been furnished, including file materials and administrative memoranda which had previously been withheld." *Id.*

For example, in investigating charges that the Department was often dilatory in its handling of routine cases, the subcommittee staff undertook a detailed analysis of a number of cases in which delay was alleged to have occurred. To demonstrate publicly the nature of this problem, the subcommittee chose a procurement fraud case that had been recently closed, and conducted a "public file review" of the case at a subcommittee hearing. Attorneys from the Department at the hearing went document by document through the Department's file in the case. DOJ Investigative Hearings (82d Congress) at 895-964. The subcommittee was granted access to all of the documentation

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[1] (. . . continued) General to the Department attorney that had been sent to St. Louis. *Id.* at 890. In addition, the district court judge that had convened the grand jury gave the subcommittee permission to use the notes of the U .S. Attorney in St. Louis and of one of the grand jurors, with all names deleted. *Id.* The judge also submitted a deposition to the subcommittee about the Department's interference with the grand jury. *Id.* at 891-93.

collected in the case, with the exception of confidential FBI reports which the subcommittee had agreed not to seek. However, certain communications from the FBI to the Department concerning the prosecution of the case were provided. *Id.* at 897.

3. New York City Police Brutality

During the 83d Congress, the subcommittee turned to allegations that the Criminal Division had entered into an agreement with the New York City Police Department not to prosecute instances of police brutality by New York police officers that might be violations of federal civil rights statutes. The subcommittee stated that its purpose was not to inquire into the merits of particular cases, only to ascertain whether such an arrangement had been entered into between the Justice Department and the New York City police. DOJ Investigation Hearings (83d Congress) at 26. Justice Department witnesses had also been instructed by the Attorney General not to discuss the merits of any pending cases. *Id.*

Department witnesses included a former Attorney General, several present and former Assistant Attorneys General, as well as other Department attorneys and FBI agents *Id.* at 25-294. The substance of earlier meetings between Department officials and the New York City Police Commissioner in which this arrangement was allegedly agreed to was probed in depth. Although questions concerning the merits of specific cases were avoided, the subcommittee obtained from these witnesses a chronology of the Department's actions in a number of cases. The subcommittee received Department memoranda and correspondence, as well as telephone transcripts of the intradepartmental conversations of a United States Attorney. *Id.* at 62-63,233-34,239-41,258-59,262,269-73.

Investigation of Consent Decree Program

In 1957 and 1958, the Antitrust Subcommittee of the House Judiciary Committee conducted an inquiry into the negotiation and enforcement of consent decrees by the Antitrust Division, and their competitive effect, with particular emphasis on consent decrees that had been recently entered into with the oil-pipeline industry and A T&T. See Consent Degree Program of the Department of Justice: Hearings before the Antitrust Subcomm. (Subcomm. No.5) of the House Comm. on the Judiciary, parts I & II, 85th Cong., 1st & 2d Sess. (1957-58)(hereafter "Consent Decree Hearings"); Antitrust Subcomm. (Subcomm. No.5), 86th Cong., 1st Sess., Report on Consent Decree Program of the Department of Justice (Comm. Print 1959)(hereafter "Consent Decree Report"). The subcommittee developed a 4492 page hearing record, holding seventeen days of hearings on the A T&T consent decree and four days of hearings on the oil pipeline consent decree.

The subcommittee experienced what it viewed as a lack of cooperation from the Department throughout its investigation, stating that "[t]he extent to which the Department of Justice went to withhold information from the committee in this investigation is unparalleled in the committee's experience." Consent Decree Report at xiii. With respect to the A T&T consent decree, DOJ unconditionally refused to make available to the subcommittee information from its files of that case. The subcommittee's chairman initially had written the Attorney General, requesting that he make available "all files in the Department of Justice relating to the negotiations for, and signing of, a consent decree in this case." Consent Decree Hearings at 1674.

Deputy Attorney General William P. Rogers asserted two grounds to support the Department's refusal to provide the subcommittee with such access. First, that the files contained information

voluntarily submitted by AT&T in the course of consent decree negotiations. Rogers wrote the subcommittee chairman that "[w]ere [the files] made available to your subcommittee, this Department would violate the confidential nature of settlement negotiations and, in the process, discourage defendants, present and future, from entering into such negotiations." *Id.* at 1674-75. In a later letter, the head of the Antitrust Division, Victor Hansen, added that "[t]hose considerations which require that the Department treat on a confidential basis communications with a defendant during consent decree negotiations also apply to the enforcement of a decree." *Id.* at 3706.

The second reason given by Rogers for the Department's refusal to provide the subcommittee access to the AT&T files was that they contained memoranda and recommendations prepared by staff of the Antitrust Division, and the "essential process of full and flexible exchange might be seriously endangered were staff members hampered by the knowledge they might at some later date be forced to explain before Congress intermediate positions taken." *Id.* at 1675. Rogers stated that this action was being taken in accordance with an earlier directive from the President to the Department to that effect, which provided:

> Because it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before [congressional] committees not to testify to any such conversations or communications or to produce any such document or reproductions. This principle must be maintained regardless of who would be benefitted by such disclosures.

Id.

The subcommittee in its final report asserted that initially the "Attorney General refused access to the files of the Department of Justice primarily in order to prevent disclosure of facts that might prove embarrassing to the Department." Consent Decree Report at 42. The subcommittee further concluded that such withholding had "materially hampered the committee's investigation." However, it may be noted that the subcommittee was ultimately able to obtain much of the material concerning the A T&T consent decree that DOJ refused to provide directly from AT&T itself. *Id.*

The Department was, however, somewhat more forthcoming in permitting testimony of its attorneys about the AT&T consent decree. For example, the head of the Antitrust Division instructed two Division attorneys who had dissented from the decision to enter into the AT&T consent decree and had been called to testify before the subcommittee that "we do not at the present time think it appropriate...to...assert any privilege on behalf of the Department with regard to any information within [your] knowledge which is relevant to the negotiations of the decree in the Western Electric case." Consent Decree Hearings at 3647. These two attorneys later testified about those negotiations, including their reasons for differing with the Department's decision to enter into the consent decree. *Id.* at 3711-44.

Cointelpro and Related Investigations of FBI-DOJ Misconduct

Over the period 1974-1978, Senate and House committees examined the intelligence operations of a number of federal agencies, including the domestic intelligence operations of the FBI and various units of the Justice Department such as the Interdivision Information Unit. See S. Rep.

No.755, Books 1-3, 94th Cong., 2d Sess. (1976)(hereafter "Senate Intelligence Report"); Intelligence Activities, Senate Resolution 21: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, vols. 1-6, 94th Cong., 1st Sess. (1975)(hereafter "Senate Intelligence Hearings"); FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. of the Judiciary, parts 1-3, 94th Cong., 1st & 2d Sess. (1975-1976), par1;s 1-2, 95th Cong., 1st & 2d Sess. (1978)(hereafter "House FBI Hearings"). A select Senate committee examined 800 witnesses: 50 in public session, 250 in executive sessions and the balance in interviews. Senate Intelligence Report, Book II, at ix n.7. A number of those providing public testimony were present and former officials of the FBI and the Department of Justice.

The Select Committee estimated that in the course of its investigation it had obtained from these intelligence agencies and other sources approximately 110,000 pages of documents (still more were preliminarily reviewed at the agencies). *Id.* Hundreds of FBI documents were reprinted as hearing exhibits, though "[u]nder criteria determined by the Committee, in consultation with the Federal Bureau of Investigation, certain materials have been deleted from these exhibits to maintain the integrity of the internal operating procedures of the FBI. Further deletions were made with respect to protecting the privacy of certain individuals and groups. These deletions do not change the material content of these exhibits." Senate Intelligence Hearings at iv n.1. The select committee concluded in its final report that the "most important lesson" learned from its investigation was that "effective oversight is impossible without regular access to the underlying working documents of the intelligence community. Top level briefings do not adequately describe the realities. For that the documents are a necessary supplement and at times the only source." Senate Intelligence Report, Book II, ix n. 7.

Hearings on FBI domestic intelligence operations also were held before the House Judiciary Subcommittee on Civil and Constitutional Rights beginning in 1975. A number of Department of Justice and FBI officials testified, including Attorneys General Levi and Bell and FBI Director Kelly. At the request of the Chairman of the Judiciary Committee, the General Accounting Office in 1974 began a review of FBI operations in this area. FBI Oversight Hearings (94th Congress), part 2, at 1-2. In an attempt to analyze current FBI practices, the GAO chose ten FBI offices involved in varying levels of domestic intelligence activity, and randomly selected for review 899 cases (ultimately reduced to 797) in those offices that were acted on that year. *Id.* at 3.

The FBI agreed to GAO's proposal to have FBI agents prepare a summary of the information contained in the files of each of the selected cases. These summaries described the information that led to opening the investigation, methods and sources of collecting of information for the case, instructions from FBI Headquarters, and a brief summary of each document in the file. After reviewing the summaries, GAO staff held interviews with the FBI agents involved with the cases, as well as the agents who prepared the summaries. *Id.* at 3-4.

These hearings were continued in 1977 to hear the results of a similar GAO review of the FBI's domestic intelligence operations under new domestic security guidelines established by the Attorney General in 1976. In its follow-up investigation, GAO reviewed 319 additional randomly selected cases. As in its earlier review, GAO utilized FBI case summaries followed by agent interviews. This time, however, the Department also granted GAO access to copies of selected documents for verification purposes, with the names of informers and other sensitive data excised. House FBI Oversight Hearings (95th Congress), part 1, at 103.

White Collar Crime in the Oil Industry

In 1979, joint hearings were held by the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Crime of the House Judiciary Committee to conduct an inquiry into allegations of fraudulent pricing of fuel in the oil industry and the failure of the Department of Energy and DOJ to effectively investigate and prosecute alleged criminality. See, White Collar Crime in the Oil Industry: Joint Hearings before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Crime of the House Commerce on the Judiciary, 96th Cong., Ist Sess. (1979)(hereinafter "White Collar Crime Hearings). During the course of the hearing, testimony and evidence were received in closed session regarding open cases in which indictments were pending and criminal proceedings were in progressing. The Chairman of the Subcommittee on Energy and Power remarked: "We know indictments are outstanding. We do not wish to interfere with rights of any parties to a fair trial. To this end we have scrupulously avoided any actions that might have affected the indictment of any party. In these hearings we will restrict our questions to the process and the general schemes to defraud and the failure of the Government to pursue these cases. Evidence and comments on specific cases must be left to the prosecutors in the cases they bring to trial." White Collar Crime Hearings at 2. DOJ's Deputy Attorney General, Criminal Division, praised the Chairmen and committee members for their discreet conduct of the hearings: "I would like to commend Chairman Conyers, Chairman Dingell, and all other members of the committee and staff for the sensitivity which they have shown during the course of these hearings to the fact that we have ongoing criminal investigations and proceedings, and the appropriate handling of the question in order not to interfere with those investigations and criminal trials." *Id.* at 134.

The committees requested access to declination memoranda and the Justice Department stated that it had no objection, except to request that the information not be made public unless the committees had a compelling need. During the course of the hearing a DOJ staff attorney testified in open session as to the reason for not going forward with a particular criminal prosecution. Although a civil prosecution of the same matter was then pending, DOJ agreed to supply the committees with documents leading to the decision not to prosecute. *Id.* at 156-57.

Billy Carter/Libya Investigation

A special subcommittee of the Senate Committee on the Judiciary was constituted in 1980 to investigate the activities of individuals representing the interests of foreign governments. Due to the short time frame which it was given to report its conclusions to the Senate, the subcommittee narrowed the focus of its inquiry to the activities of the President's brother, Billy Carter, on behalf of the Libyan government. See Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the Senate Comm. on the Judiciary, vols. 1-111, 96th Cong., 2d Sess. (1980)(hereafter "Billy Carter Hearings"); Inquiry into the Matter of Billy Carter and Libya, S. Rep. No. 1015, 96th Cong., 2d Sess. (1980)(hereafter "Billy Carter Report"). A significant portion of this inquiry concerned the Department's handling of its investigation of the Billy Carter matter, in particular whether Attorney General Benjamin R. Civiletti had acted improperly in withholding certain intelligence information about Billy Carter's contacts with Libya from the attorneys in the Criminal Division responsible for the investigation, or had otherwise sought to influence the disposition of the case.

Although there was early disagreement as to the extent of the subcommittee's access to certain information from the White House, there was no attempt by the Department to limit access to its attorneys involved with the Billy Carter case. The subcommittee heard testimony from several representatives of the Department, including Attorney General Civiletti, the Assistant Attorney General in charge of the Criminal Division, Philip B. Heymann, and three of his assistants. These witnesses testified about the general structure of decisionmaking in the Department, the nature of the investigation of Billy Carter's Libyan ties, the Attorney General's failure to immediately communicate intelligence information concerning Billy Carter to the Criminal Division attorneys conducting the investigation, the decision to proceed civilly and not criminally against Carter, and the effect of various actions of the Attorney General and the White House on that prosecutorial decision. Billy Carter Hearings at 116-30, 683-1153. The subcommittee also took depositions from some of these witnesses. Pursuant to a Senate Resolution providing it with such power, subcommittee staff took 35 depositions, totaling 2,646 pages. *Id.* at 1741-42.

The subcommittee also was given access to documents from the Department's files on the Billy Carter case. The materials obtained included prosecutorial memoranda, correspondence between the Department and Billy Carter, the handwritten notes of the attorney in charge of the foreign agents registration unit of the Criminal Division, and FBI investigative reports and summaries of interviews with Billy Carter and his associates. *Id.* at 755-978. Not included in the public record were a number of classified documents, which were forwarded to and kept in the files of the Senate Intelligence Committee. These classified documents were available for examination by designated staff members of the subcommittee and the Intelligence Committee, and some of the documents were later used by the subcommittee in executive session.

Undercover Law Enforcement Activities (ABSCAM)

In 1982, the Senate established a select committee to study the law enforcement undercover activities of the FBI and other components of the Department of Justice. See Law Enforcement Undercover Activities: Hearings Before the Senate Select Comm. to Study Law Enforcement Undercover Activities of Components of the Department of Justice, 97th Cong., 2d Sess. (1982)(hereafter "Abscam Hearings"); Final Report of the Senate Select Comm. to Study Undercover Activities of Components of the Department of Justice, S. Rep. No.682, 97th Cong., 2d Sess. (1982). Representatives from the Department, including FBI Director William Webster, testified generally about the history of undercover operations engaged in by the Department, their benefits and costs, and the policies governing the institution and supervision of such operations, including several sets of guidelines promulgated by the Attorney General. These witnesses also testified about Abscam and several other specific undercover operations conducted by the FBI and other units of the Department. Abscam Hearings at 10-85, 153-226,255-559,895-924, 1031-70.

In addition to the witnesses from the Department providing public testimony, committee staff conducted interviews with a number of present and former Department attorneys and FBI agents. Abscam Report at 8-10. Among those testifying or interviewed were several present and former members of the Department's Brooklyn Organized Crime Strike Force. The Department wrote the committee that it "does not normally permit Strike Force attorneys to testify before congressional committees [and] have traditionally resisted questioning of this kind because it tends to inhibit prosecutors from proceeding through their normal tasks free from the fear that they may be second-guessed, with the benefit of hindsight, long after they take actions and make difficult judgements in the course of their duties." *Id.* at 486. The Department, nevertheless, agreed to this testimony, "because of their value to you as fact witnesses and because you have assured us that they will be

asked to testify solely as to matters of fact within their personal knowledge and not conclusions or matters of policy ." *Id.*

The most extensive focus of the committee's inquiry was on the FBI's Abscam operation, which lasted from early 1978 through January 1980, and resulted in the criminal conviction of one Senator, six Members of the House of Representatives, several local officials, and others. As part of this review, the subcommittee was "given access to almost all of the confidential documents generated during the covert stage of the undercover operation known as Abscam." *Id.* at; v. In all, the committee reviewed more than 20,000 pages of Abscam documents, as well as video and audio tapes and tape transcripts, *id.* at 9, provided under the terms of an elaborate access agreement negotiated with the Department.

Pursuant to the agreement, the subcommittee was provided copies of confidential Abscam materials other than grand jury materials barred from disclosure under Rule 6(e) of the Federal of Criminal Procedure without a court order and certain prosecutorial memoranda from the Abscam cases. Under the agreement, the Department was also permitted to withhold from the committee documents that might compromise ongoing investigations or reveal sensitive sources or investigative techniques, though the Department was required to describe each such document withheld, explain the basis of the denial, and give the committee an opportunity to propose conditions under which the documents might be provided. The committee further agreed to a "pledge of confidentiality" under which it was permitted to use and publicly disclose information derived from the confidential documents and to state that the information came from Department files, but was prohibited from publicly identifying the specific documents from which the information was obtained. All confidential documents were kept in a secure room, with access limited to the committee's members, its two counsel, and several designed document custodians. See generally, *id.* at v, 472-84. Later, DOJ agreed to permit access to those materials by other committee attorneys as well.

In addition to the documents to which it was given direct access, the committee received extensive oral briefings, including direct quotations, on basic factual material from the prosecutorial memoranda that were withheld, as well as from documents prepared or compiled by the Department's Office of Professional Responsibility as part of an internal investigation of possible misconduct in the Abscam operations and prosecutions. *Id.* at v.

Under the general framework established by this agreement, there was considerable give and take between the committee and the Department as to the degree of access that would be provided to specific documents. For example, the committee's counsel had sought access to a report prepared in the Criminal Division on FBI undercover operations. Abscam Hearings at 514. The committee's chairman had also written the Attorney General requesting access to that report. Abscam Report at 485. An agreement was reached whereby the report could be examined by committee members or counsel at the Department and notes taken on its contents, but it could neither be copied or removed from the Department. *Id.* at 494. Committee counsel utilized this procedure, but the committee determined that such limited access made it impractical for its members to personally review the report, and the committee's chairman again wrote the Attorney General asking for release of a copy. *Id.* at 498. The Department ultimately agreed to provide a copy of the report to each member of the committee, with the understanding that the report would not be disseminated beyond the members of the committee and its counsel, no additional copies would be made, and the copies provided by the Department would be returned at the conclusion of the committee's work. *Id.* at 501.

Finally, the committee retained the right under the access agreement to seek unrestricted access to documents if it determined that the limited access set forth in the agreement was insufficient to permit it to effectively conduct its investigation. *Id.* at v.

A similar investigation was conducted by the House Judiciary Subcommittee on Civil and Constitutional Rights, which held a total of twenty-one hearings over a period of four years. See FBI Undercover Activities, Authorization; and H.R. 3232: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong., 1st Sess. (1983); FBI Undercover Operations: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981); FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st & 2d Sess. (1979-80). The subcommittee examined in detail the FBI's Operation Corkscrew undercover operation, an investigation of alleged corruption in the Cleveland Municipal Court, with access to confidential Department documents provided to it under an agreement patterned after the access agreement negotiated by the Senate select committee. Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, FBI Undercover Operations, 98th Cong., 2d Sess. 91-93 (Comm. Print 1984).

Investigation of Withholding of EPA Documents

One of the most prominent Congressional investigations of the Department grew out of the highly charged confrontation at the end of the 97th Congress concerning the refusal of Environmental Protection Agency Administrator Ann Gorsuch Burford, under orders from the President, to comply with a House subcommittee subpoena requiring the production of documentation about EPA's enforcement of the hazardous waste cleanup legislation. This dispute culminated in the House of Representative's citation of Burford for contempt of Congress, the first head of an Executive Branch agency ever to have been so cited by a House of Congress. It also resulted in the filing of an unprecedented legal action by the Department, in the name of the United States, against the House of Representatives and a number of its officials to obtain a judicial declaration that Burford had acted lawfully in refusing to comply with the subpoena.

Ultimately, the lawsuit was dismissed, *U.S. v. House of Representatives,* 557 F. Supp. 150 (D.D.C. 1983), the documents were provided to Congress, and the contempt citation was dropped. However, a number of questions about the role of the Department during the controversy remained: whether the Department, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the United States Attorney for the District of Columbia not to present the contempt certification of Burford to the grand jury for prosecution and had made the decision to sue the House; and, generally, whether there was a conflict of interest in the Department's simultaneously advising the President, representing Burford, investigating alleged Executive branch wrongdoing, and enforcing the Congressional criminal contempt statute. These and related questions raised by the Department's actions were the subject of an investigation by the House Judiciary Committee beginning in early 1983. The committee issued a final report on its investigation in December 1985. See Report of the House Comm. on the Judiciary on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-1983, H.R. Rep. No.99-435, 99th Cong., 1st Sess (1985) ("EPA Withholding Report").

Although the Judiciary Committee ultimately was able to obtain access to virtually all of the documentation and other information it sought from the Department, in many respects this investigation proved as contentious as the earlier EPA controversy from which it arose. In its final report, the committee concluded that:

> [T]he Department of Justice, through many of the same senior officials who were most involved in the EPA controversy, consciously prevented the Judiciary Committee from obtaining information in the Department's possession that was essential to the Committee's inquiry into the Department's role in that controversy. Most notably, the Department deliberately, and without advising the Committee, withheld a massive volume of vital handwritten notes and chronologies for over one year. These materials, which the Department knew came within the Committee's February 1983 document request, contained the bulk of the relevant documentary information about the Department's activities outlined in this report and provided a basis for many of the Committee's findings.

EPA Withholding Report at 1163; *see* also 1234-38. Among the other abuses cited by the committee were the withholding of a number of other relevant documents until the committee had independently learned of their existence, *id.* at 1164, as well as materially "false and misleading" testimony before the committee by the head of the Department's Office of Legal Counsel, *id.* at 1164- 65 & 1191-1231.

The committee's initial request for documentation was contained in a February 1983 letter from its chairman, Peter Rodino, to Attorney General William French Smith. The committee requested the Department to "supply all documents prepared by or in the possession of the Department in any way relating to the withholding of documents that Congressional committees have subpoenaed from the EPA." *Id.* at 1167 & 1182-83. The letter also specifically requested, among other things, a narrative description of the activities of each division or other unit of the Department relating to the withholding of the EPA materials, information about the Department's apparent conflict of interest in simultaneously advising the Executive Branch while being responsible for prosecuting the Burford contempt citation, and any instructions given by the Department to the United States Attorney for the District of Columbia not to present the Burford contempt to the grand jury.

At first the Department provided only publicly available documents in response to this and other document requests of the committee. *Id.* at 1184. However, after a series of meetings between committee staff and senior Department officials, an agreement was reached whereby committee staff were permitted to review the materials responsive to these requests at the Department to determine which documents the committee would need for its inquiry. *Id.* at 1168 & 1233. Committee staff reviewed thousands of documents from the Land and Natural Resources Division, the Civil Division, the Office of Legal Counsel, the Office of Legislative Affairs, the Office of Public Affairs, and the offices of the Attorney General, the Deputy Attorney General, and the Solicitor General. *Id.* at 1168.

In July 1983, the committee chairman wrote to the Attorney General requesting copies of 105 documents that committee staff had identified in its review as particularly important to the committee's inquiry. *Id.* at 1169. By May 1984, only a few of those documents had been provided to the committee, and the chairman again wrote to the Attorney General requesting the Department's cooperation in the investigation. In that letter, the chairman advised the Attorney General that the committee's preliminary investigation had raised serious questions of misconduct, including potential

criminal misconduct, in the actions of the Department in the withholding of the EPA documents. *Id.* at 1172. The committee finally received all of the 105 documents in July 1984, a full year after it had initially requested access. The committee at that time also obtained the written notes and a number of other documents that had been earlier withheld. *Id.* at 1173.

There was also disagreement about the access that would be provided to Department employees for interviews with committee staff. The Department demanded that it be permitted to have one or more Department attorneys present at each interview. The committee feared that the presence of Department representatives might intimidate the Department employees in their interviews and stated that it was willing to permit a Department representative to be present only if the representative was "walled-off' from Department officials involved with the controversy, if the substance of interviews was not revealed to subsequent interviewees, and if employees could be interviewed without a Department representative present if so requested. The Department ultimately agreed to permit the interviews to go forward without its attorneys present. If a Department employee requested representation, the Department employed private counsel for that purpose. In all, committee staff interviewed twenty-six current and former Department employees, including four Assistant Attorney Generals, under this agreement. *Id.* at 1174-76.

Partly as a result of these interviews, as well as from information in the handwritten notes that had been initially withheld, the committee concluded that it also required access to Criminal Division documents concerning the origins of the criminal investigation of former EPA Assistant Administrator Rita Lavelle in order to determine if the Department had considered instituting the investigation to obstruct the committee's inquiry. The committee also requested information about the Department's earlier withholding of the handwritten notes and other documents to determine whether Department officials had deliberately withheld the documents in an attempt to obstruct the committee's Investigation. *Id.* at 1176- 77 & 1263-64. The Department at first refused to provide the committee with documents relating to its Lavelle investigation "[c]onsistent with the longstanding practice of the Department not to provide access to active criminal files." *Id.* at 1265. The Department also refused to provide the committee with access to documentation related to the Department's handling of the committee's inquiry, objecting to the committee's "ever- broadening scope of ...inquiry." *Id.* at 1265.

The committee chairman wrote the Attorney General and objected that the Department was denying the committee access even though no claim of executive privilege had been asserted. *Id.* at 1266. The chairman also maintained that "[i]n this case, of course, no claim of executive privilege could lie because of the interest of the committee in determining whether the documents contain evidence of misconduct by executive branch officials." *Id.* With respect to the documents relating to the Department's handling of the committee inquiry, the chairman demanded that the Department prepare a detailed index of the withheld documents, including the title, date, and length of each document, its author and all who had seen it, a summary of its contents, an explanation of why it was being withheld, and a certification that the Department intended to recommend to the President the assertion of executive privilege as to each withheld document and that each document contained no evidence of misconduct. *Id.* at 1268-69. With respect to the Lavelle documents, the chairman narrowed the committee's request to "predicate" documents relating to the opening of the investigation and prosecution of Lavelle, as opposed to FBI and other investigative reports reflecting actual investigative work conducted after the opening of the investigation. *Id.* at 1269- 70. In response, after a period of more than three months from the committee's initial request, the Department produced those two categories of materials. *Id.* at 1270.

E.F. Hutton Investigation

In 1985 and 1986, the Crime Subcommittee of the House Judiciary Committee conducted an investigation to determine why no individuals were charged in connection with an investigation of E.F. Hutton in which the company pled guilty to 2000 felony counts. See, E.F. Hutton Mail and Wire Fraud, Report of the House Subcommittee on Crime, Committee on the Judiciary, 99th Cong. 2d Sess. (Committee Print, Serial No. 13, December 1986) (Hutton Report). As part of this investigation, the subcommittee sought letters to Hutton employees promising not to prosecute, draft indictments, and internal DOJ communications regarding proposals by or within the Justice Department regarding the disposition of charges against Hutton employees. Hutton Report at 1119. Assistant Attorney General Trott responded to the request by stating:

> We understand this to be a request for prosecutive memoranda . . . It now appears that there is one document prepared early in the investigation that may fall within your request. We will produce that for the Subcommittee after appropriate redactions have been made. We believe that the necessary redactions are those principally set out in *In re Grand Jury Investigation(Lance)*, 610 F. 2d 202, 216-17 (5th Cir. 1080) (opinions or statement based on knowledge of grand jury proceedings may be disclosed "provided, of course, the statement does not reveal the grand jury information on which it is based.") Thus, such information as the identity of witnesses who testified before the grand jury and the substance of their testimony and the identity of documents which were subpoenaed by the grand jury must be redacted." Hutton Report at 1217.

The Justice Department also recommended that the subcommittee go to court to obtain access to all of the information, including that covered by Rule 6(e). Hutton Report at 1218. The Justice Department went to court to seek guidance regarding the applicability of Rule 6(e) to the documents sought by the subcommittee. In court, the Justice Department argued only on 6(e) grounds, and never claimed that any documents should be withheld on deliberative process grounds. The court dismissed the case because it presented no case or controversy. However, the court expressed "serious doubt" as to the applicability of Rule 6(e) to the documents sought by the subcommittee.

The Subcommittee report includes as exhibits a number of deliberative prosecutorial documents. One 21-page memorandum contains a detailed discussion of Hutton's money management practices, and concludes "these money management techniques violated numerous federal criminal statutes and, therefore, prosecution is appropriate and recommended." (See Hutton Report at 1328.) The committee was also provided with a series of memoranda prepared by a line attorney which analyzed the defenses which could be offered by Hutton officers, and the DOJ's responses to those defenses. These memoranda are among many examples of deliberative prosecutorial memoranda provided by DOJ. *See* Hutton Report 1329-35.

Iran-Contra

In the late 1980s, an intense Congressional investigation focused, in part, on Attorney General Meese's conduct during the Iran-Contra scandal. The House and Senate created their Iran-Contra committees in January, 1987. The Iran-Contra committees demanded the production of the Justice Department's files, to which Assistant Attorney General John Bolton responded, on behalf of Attorney General Meese, by attempting to withhold the documents on the claim that providing them

would prejudice the pending or anticipated litigation by the Independent Counsel. The Iran-Contra committees disputed that contention, required the furnishing of all Justice Department documents, and questioned all knowledgeable Justice Department officers up to, and including, Attorney General Meese.

One major aspect of the Iran-Contra Committees' investigation focused on the inadequacies of the so-called "Meese Inquiry," the team led by Attorney General Meese which looked into the National Security Council (NSC) staff in late November, 1987. The Iran-Contra committees concluded, that this inquiry had the effect of forwarning the NSC staff to shred their records and fix upon an agreed false story, and by the Meese team's methods the last vital opportunity to uncover the obscured aspects of the scandal was foreclosed. The Congressional investigation provided documentary evidence regarding incompetence, at best, by the Attorney General's inquiry team during the Meese Inquiry. The Congressional report summed up such matters as the Attorney General's taking no notes and remembering no details of his crucial interviews of CIA Director Casey and others, the Justice Department inquiry's not taking any steps to secure the remaining unshredded documents, and the Justice Department team's allowing the shredding to occur while the team was in the room; the inquiry team excluded the Criminal Division and the FBI from the case until it was too late. According to the Congressional report the Attorney General gave his press conference of November 25, 1986, with an account that in key respects misstated and concealed embarrassing information which had been furnished to him. See, Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No.433 and S. Rep. No.216, 100th Cong., 1st Sess. 310, 317, 314, 317-18, 647 (1987).

Rocky Flats Environmental Crimes Plea Bargain

In June 1992 the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology commenced a review of the plea bargain settlement by the Department of Justice of the government's investigation and prosecution of environmental crimes committed by Rockwell International Corporation in its capacity as manager and operating contractor at the Department of Energy's (DOE) Rocky Flats nuclear weapons facility. See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Committee on Science, Space and Technology, 102d Cong., 2d Sess., Vols. I and II (1992) ("Rocky Flats Hearings"); Meetings: To Subpoena Appearance by Employees of the Department of Justice and the FBI and To Subpoena Production of Documents From Rockwell International Corporation, Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology, 102d Congress, 2d Sess., (1992)("Subpoena Meetings").

The settlement was a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA's National Enforcement Investigation Centers, and the DOE Inspector General. The subcommittee was concerned with the size of the fine agreed to relative to the profits made by the contractor and the damage caused by inappropriate activities; the lack of personal indictments of either Rockwell or DOE personnel despite a DOJ finding that the crimes were "institutional crimes" that "were the result of a culture, substantially encouraged and nurtured by DOE, where environmental compliance was a much lower priority than the production and recovery of plutonium and the manufacture of nuclear 'triggers'"; and that reimbursements provided by the government to Rockwell for expenses in the cases and the contractual arrangements

between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.

The subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the United States Attorney for the District of Colorado; an assistant U .S. Attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI field agent; and received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e). Rocky Flats Hearing, Vol. I, at 389-1009, 1111-1251; Vol. II.

At one point in the proceedings all the witnesses who were under subpoena, upon written instructions from the Acting Assistant Attorney General, Criminal Division, refused to answer questions concerning internal deliberations in which decisions were made about the investigation and prosecution of Rockwell, the DOE and their employees. Two of the witnesses advised that they had information and, but for the DOJ directive, would have answered the subcommittee's inquiries. The subcommittee members unanimously authorized the chairman to send a letter to President G. W. Bush requesting that he either personally assert executive privilege as the basis for directing the witnesses to withhold the information or direct DOJ to retract its instructions to the witnesses. The President took neither course and the DOJ subsequently reiterated its position that the matter sought would chill Department personnel. The subcommittee then moved to hold the U .S. Attorney in contempt of Congress.

A last minute agreement forestalled the contempt citation. Under the agreement (1) DOJ issued a new instruction to all personnel under subpoena to answer all questions put to them by the subcommittee, including those which related to internal deliberations with respect to the plea bargain. Those instructions were to apply as well to all Department witnesses, including FBI personnel, who might be called in the future. (2) Transcripts were to be made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing. (3) Witnesses were to be interviewed by staff under oath. (4) The subcommittee reserved the right to hold further hearings in the future at which time it could call other Department witnesses who would be instructed not to invoke the deliberative process privilege as a reason for not answering subcommittee questions. Rocky Flats Hearings, Vol. I at 9-10,25-31,1673-1737; Subpoena Hearings, at 1-3,82-86, 143-51.

Investigation of the Justice Department's Environmental Crimes Section

From 1992 to 1994, the House Commerce Committee's Subcommittee on Oversight and Investigations conducted an extensive investigation into the impact of the Department of Justice (DOJ) on the effectiveness of the Environmental Protection Agency's (EPA) criminal enforcement program. The probe involved two public hearings, nearly three years of staff work, intensive review of documents (many of which were obtained only though subpoenas), and the effort to overcome persistent Department resistence. The investigation focused on allegations of mismanagement of the Environmental Crimes Section (ECS), the DOJ Headquarters component charged with environmental prosecution responsibilities; and the effect on the relationship between U.S. Attorneys' offices and the ECS as a consequence of Main Justice's decision to centralize control of environmental prosecution in Washington, D.C. at the very same time that all other areas of prosecution control were being decentralized.

The Subcommittee's investigation was delayed for months by DOJ refusals of requests to interview DOJ line attorneys and the denial of access to numerous primary decisionmaking documents as well as documents prepared in response to the Subcommittee's investigation. The initial phase of the investigation required overcoming refusals to produce internal EPA documents bearing on 17 closed criminal environmental cases. The documents ultimately produced by EPA included Reports of Investigation, case agent notes, internal reports and memoranda, communications with private parties, and correspondence with DOJ. The next phase concentrated on attempts to obtain staff interviews with DOJ line attorneys with first hand information on whether various closed cases had been mishandled, including three Assistant United States Attorneys. DOJ officials initially refused on the ground of the chilling effect such access would have and the historic reluctance of the Department to allow such access, offering instead to provide access to the head of ECS instead. The Subcommittee responded that it was premature to interview the ECS head without interviewing line attorneys who had first hand knowledge of the facts in question. The change of administration in 1993 did not result in an easing of DOJ's resistant posture and in May 1993 the Subcommittee voted to issue 26 subpoenas to present and former DOJ attorneys. In June 1993 DOJ acquiesced to staff interviews of the subpoenaed attorneys pursuant to a negotiated agreement. Document subpoenas were also authorized but not issued. However, continued refusal to voluntarily produce the documents resulted in their issuance and service in March 1994 on the Attorney General and the Acting Assistant Attorney General for the Environment and Natural Resources Division. Some of these documents involved closed cases, but DOJ claimed they were "deliberative" in nature and that only limited access could be allowed for them. Other documents withheld involved internal DOJ communications respecting responses to the Subcommittee's investigation after the six cases were closed. At the time the subpoenas were served, the Acting Assistant Attorney General's nomination for the position was before the Senate Judiciary Committee. The Chairman of the Subcommittee advised the Judiciary Committee of the withholding and a hold was put on her nomination. In late March, DOJ agreed to comply with the subpoena and the documents were provided over a period of months. Coincidentally the Senate hold was lifted.

The major results of the investigation and its revelations were the reversal of the policy of centralization of control of environmental prosecutions in Washington, D.C., and the return of such control to the U.S. Attorney's offices; and the replacement of the top management of the ECS. See "Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program," 103d Cong., 2d Sess. 1-4, 10-40 (1994)(Comm. Print #103-T).

Campaign Finance Investigations

Allegations of violations of campaign finance laws and regulations surfaced during the latter stages of the 1996 presidential election campaign and became objects of investigations by committees in both Houses between 1996 and 2000. Several of the committee inquiries focused on the nature and propriety of DOJ actions and non-actions during the course of investigations undertaken by the Department. Two are illustrative.

In 1997, the Senate Governmental Affairs Committee began an investigation into allegations of improprieties with respect to the flow of money into the campaigns, particularly into the Republican and Democratic National Committees, and especially with respect to money from foreign sources. After the first round of hearings, the Committee became concerned with the quality of DOJ's prosecution efforts as well as with evidence of a lack of cooperation and coordination between Main Justice and the FBI. In 1999 the Committee held hearings on DOJ's handling of the investigation of Yah Lin "Charlie" Trie, a person from Arkansas with a long time friendly

relationship with President Clinton, who had frequent access to the White House and was alleged to have funneled $220,000 from foreign sources to the Domestic National Committee. Mr. Trie also provided the President's Legal Expense Trust (PLET) with $789,000 in sequentially numbered money orders. During the course of the DOJ investigation, Mr. Trie fled the country, leaving an agent in control of his business. In April 1997, the Committee subpoenaed business documents relating to its campaign finance investigation and documents relating to the PLET. At the same time the DOJ's Campaign Finance Task Force was engaged in a parallel investigation. As early as June 1997 FBI Agents in Little Rock became convinced that Trie's agent was destroying subpoenaed documents, a process that continued until October 1997. During that period the FBI attempted to obtain a search warrant to prevent further document destruction. DOJ Task Force supervisory attorneys declined to grant permission to seek a search warrant on the ground there was insufficient probable cause. The committee subpoenaed four FBI special agents who testified to their efforts to procure a search warrant, as well as the Task Force supervisory attorney who refused its issuance and the Chief of the Public Integrity Section of DOJ. The Committee also obtained from DOJ the investigatory notes of the special agents, the draft affidavit in support of the warrant requests, the notes of the Task Force supervisor, and a memo from one of the special agents to FBI Director Freeh expressing concern over DOJ handling of the investigation. See, Hearing, The Justice Department's Handling of the Yah Lin "Charlie" Trie Case, before the Senate Committee on Governmental Affairs, 106th Cong., 1st Sess. 3-4, 14-63, 105-133 (1999).

In December 1997, press reports indicated that FBI Director Freeh had sent a memorandum to Attorney General Reno suggesting that she seek appointment of an independent counsel to conduct the campaign finance investigation in order to avoid an appearance of a political conflict of interest. The House Committee on Government Reform and Oversight scheduled a hearing and requested that Freeh appear and produce the memo. The Attorney General intervened and explained that she would not comply on the grounds of the longstanding DOJ policy prohibiting sharing of deliberative material in open criminal cases with the Congress, and to prevent the chilling effect such disclosures would have on Department personnel in future investigations. The Committee issued subpoenas on December 5, 1997 and both Reno and Freeh refused to comply. At no time did the Attorney General make a claim of executive privilege. In July 1998 the Committee learned that the head of DOJ's Campaign Finance Task Force, Charles La Bella, had prepared a lengthy memorandum for the Attorney General which concluded that the Attorney General was required by both the mandatory and discretionary provisions of the independent counsel law to appoint an independent counsel. On July 24, 1998, the Committee issued a subpoena for both the Freeh and La Bella memos. The Attorney General refused compliance again and on August 6, 1998, the Committee voted to hold the Attorney General in contempt of Congress. See Contempt of Congress, Report of the Committee on Government Reform and Oversight on the Refusal of Attorney General Janet Reno to Produce Documents Subpoenaed by the Government Reform and Oversight Committee, H. Rept. No. 105-728, 105th Cong., 2d Sess. (1998). However, the contempt report was not taken up on the House floor prior to the end of the 105th Congress.

On March 10, 2000, following press reports indicating that the La Bella memo had been leaked in its entirety to a newspaper, the Committee again subpoenaed the memos. The Attorney General still refused to release the memos but offered to allow Committee staff unredacted review but without any note taking. Negotiations continued but the Committee began review under the DOJ conditions. Ultimately, an accommodation was reached in which all memoranda subject to subpoena were to be produced to the Committee. The documents would be kept in a secure facility with access restricted to a limited number staff. The Committee agreed to give DOJ notice in advance of its intent to release the documents and to allow DOJ the opportunity to explain why they should not be

disclosed. The Committee notified the Attorney General of its intent to release the documents at a June 6 hearing. The memos were released to the public on that date by unanimous consent.

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Statement of Rep. Henry Waxman
Hearing on History of Congressional Access to Deliberative Documents

February 6, 2002

Mr. Chairman, I welcome this hearing today, which emphasizes the importance of openness and transparency in our system of government. Hopefully those of use who serve in government -- both in the Congress and the Executive Branch -- understand that we serve by the consent of the people. We are accountable to the people. But there can be no accountability when the government chooses to operate in secrecy, outside the view of the public and its elected representatives in Congress.

We are here today because the Bush Administration continues, with almost every passing day, to value the interests of secrecy over transparency. Some of this is due to the events of September 11. The Justice Department, for example, has refused to release the names of immigrants who have been detained because they might have information relevant to the war on terrorism. But this Administration's effort to operate in secret goes far beyond national security or any other important national interest. There are many examples, but I'll take a brief moment to lay out three.

Energy Task Force. Ten months ago, Congressman John Dingell and I tried to obtain the most basic information about the energy task force chaired by Vice President Cheney. We also asked the General Accounting Office to conduct an independent, nonpartisan review of the task force's operations and funding. Our initial interest in the workings of the task force began with news reports that the task force had met privately with major campaign contributors, such as Kenneth Lay, the former CEO of Enron, but had denied similar access to environmental and consumer groups. My staff later examined the plan that emerged from this process and found at least 17 policies that were advocated by Enron or that benefitted Enron. I have taken great pains not to accuse anyone in the Administration of misconduct. But these facts raise questions that deserve straight answers. The Bush Administration has unfortunately responded with secrecy. Left with no alternative, the Comptroller General has been forced to take legal action to compel disclosure of information that should be in the public light.

Census Data. Nine months ago, I and other members of this Committee requested adjusted census data collected as part of the 2000 Census. This was not top secret information. It was information that the Census Bureau had already collected which included corrections for errors using modern statistical techniques. We did this because the raw data released by the Commerce Department missed over six million Americans and could affect, among other things,

the allocation of more than $185 billion in federal grants. The Bush Administration again responded with secrecy and refused to release the adjusted data. The Administration took this position even though federal courts had ordered similar data released after the last census. Left with no alternative, I and 15 other members filed a lawsuit to force disclosure of this important information. Last month, a federal district judge ordered the Commerce Secretary to turn over this information, which should have been released from the very outset.

Presidential Records Act. In November of last year, President Bush issued an executive order which significantly curtails public access to Presidential records under the Presidential Records Act. Using his authority under this order, President Bush is blocking access to 60,000 pages of records from the Reagan Administration. On December 19, Chairman Burton and I, along with 34 other members of this Committee and the Judiciary Committee, wrote to President Bush asking that he reconsider this latest limitation on the public's right to know, as well as his decision limiting this Committee's access to documents important to its investigation of the Boston office of the FBI.

I have with me an article written by David Rosenbaum, which appeared this past Sunday in the New York Times. I ask unanimous consent that it be included in the record. Mr. Rosenbaum writes that "[m]ore than any of its recent predecessors, this administration has a penchant for secrecy." In the same article, Thomas Blanton, the director of the National Security Archive at George Washington University, says, "This administration has a knee-jerk response -- reflexive secrecy."

Today's hearing focuses on President Bush's assertion of executive privilege over Justice Department records that relate to the infamous 1968 Salvati case. This is, unfortunately, another example of reflexive secrecy. This Committee has issued a subpoena for information bearing on allegations of the most serious misconduct in the Boston office of the FBI. These are not speculative allegations. A grand jury has returned an indictment for a former FBI agent who worked out of that office, and the Justice Department has a special task force conducting an extensive criminal investigation. In a letter last month to Chairman Burton, the Counsel to the President himself acknowledges that this is a case "where the Executive Branch has filed criminal charges alleging corruption in the FBI investigative process."

There are no compelling reasons for keeping these documents from the Committee. This does not appear to be a case where disclosure of the relevant documents will undermine an open criminal investigation. That would be an important consideration that I -- and I'm sure other members -- would take into account in pressing a demand for these prosecution memos. To date, however, the Justice Department has given absolutely no indication that these documents requested by the Committee relate to open cases.

Americans want an open government, not an imperial presidency. Openness has its costs. In some case, such as the records of the energy task force, disclosure may be embarrassing. But ultimately, trust in government depends upon openness and accountability.

I look forward to hearing the testimony of our witnesses today.

"Congressional Access to Department
of Justice Deliberative Documents"

Mark J. Rozell
Professor of Politics
The Catholic University of America

Congressional Testimony before the
House Committee on Government Reform
February 6, 2002

Thank you Mr. Chairman for the invitation to address the committee. I am the author of a book on executive privilege – one that I am presently updating – and therefore have a strong interest in following cases of legislative-executive disputes over access to executive branch information. The current case has received enormous attention for many good reasons, but I would like to focus my comments on the question of Congress's right of access to deliberative documents within the Department of Justice.

The administration's claim to secrecy in the current case does not meet the traditional standards for a valid assertion of executive privilege. The history of the use of executive privilege clearly demonstrates that this is a legitimate presidential power, but one that operates within the limits of a system of separated powers. Presidents and their staff often have legitimate needs of confidentiality and members of Congress have needs of access to information to conduct investigations. When these needs collide, a balancing test is in order. Just as the congressional power of inquiry is not absolute, neither is the presidential power of executive privilege. Merely uttering the words "national security" or "prosecutorial" does not automatically settle an interbranch dispute in the administration's favor.

Executive privilege should never be used as an opening or early bid in a dispute with a congressional committee, only to be negotiated away as Congress asserts its prerogatives. It is a power that should be used rarely and only in the most compelling circumstances. Traditionally claims of executive privilege have been valid in cases of protecting (1) certain national security needs; (2) confidential deliberations where it can clearly be demonstrated that disclosure would harm the national interest; (3) protecting the integrity of ongoing investigations when any form of disclosure would clearly undermine the pursuit of justice.

There is no compelling national interest being protected by withholding information regarding closed investigations. In circumstances involving allegations of governmental corruption, Congress's power of investigation is especially weighty when balanced against an administration's claim of secrecy.

Congressional Access to Deliberative Documents

There is substantial precedent for Congress to receive access to deliberative documents from the Department of Justice. I will briefly describe three previous examples to make the case.

First, during the William Rehnquist confirmation hearings in 1986, members of the Senate Judiciary Committee requested access to Department of Justice memoranda that Rehnquist had earlier written while he was the head of the Nixon administration Office of Legal Counsel (OLC). Rehnquist had no objection to his earlier memoranda being made available to the committee. Nonetheless, the Reagan administration Justice Department initially refused to turn over the memoranda and the president invoked executive privilege. The administration's

position was that Congress should not have access to documents that contain confidential legal advice.

Republicans controlled the committee and these Senators both supported their president and the Rehnquist selection to be chief justice. Yet there was bipartisan agreement that a congressional prerogative was at stake and to allow the Justice Department to automatically withhold deliberative documents from a past administration would establish a terrible precedent. The committee had the votes necessary to subpoena the documents and to delay the confirmation proceedings. The president withdrew his claim of executive privilege. The Justice Department and the Judiciary Committee then reached an accommodation in which Senators and certain staff would receive access to many of the disputed documents.

The mistake that the administration made in this case was to use executive privilege as an opening bid in a dispute with Congress over access to information rather than first try to work with Congress on some accommodation that would satisfy the needs of both branches. The administration further erred when it claimed that as a matter of principle Congress should not have access to Department of Justice deliberative documents, even in the case of documents from an earlier administration. That the Reagan administration allowed access to some, but not all the requested documents, makes it clear that the principle of denying Congress access to such materials is far from absolute.

A second example was a controversy during the George H.W. Bush administration over an Office of Legal Counsel opinion memorandum that said the FBI may legally apprehend fugitives abroad without the permission of the host country. Members of Congress raised critical questions whether this new policy – which overturned an earlier OLC memorandum forbidding such a practice - lacked statutory authority and conflicted with international law. The House Judiciary Committee requested access to the memorandum and the Department of Justice refused on the principle that to do so would violate its "secret opinions policy". No one had ever heard of a secret opinions policy before, but the Department apparently had adopted one to deny Congress access to all OLC decision memoranda. The Department also claimed that releasing the memorandum would violate the attorney-client privilege because to do so would make federal agencies in the future reluctant to rely on Justice for confidential legal advice.

The Judiciary Committee voted to subpoena the memorandum. Once again, Congress and the administration reached an accommodation. The Department of Justice and the Committee agreed to an arrangement whereby committee members could review, but not copy, department documents pertaining to the memorandum as well as the memorandum itself. Someone in the Bush administration then leaked the full memorandum to the Washington Post. The Supreme Court ultimately upheld the practice of apprehending fugitives abroad, but this decision had no bearing on the issue of the committee's right to obtain access to OLC decision memoranda.

A third example was a congressional investigation into allegations that Reagan administration Department of Justice officials had conspired to force the INSLAW computer company into bankruptcy and to then have INSLAW's leading software product bought by another company. In 1991, when a subcommittee of the House Committee on the Judiciary sought access to Department of Justice documents regarding INSLAW, the Bush administration refused and claimed attorney-client privilege. In this case, the administration claimed that the need for secrecy was especially compelling because the requested documents concerned an ongoing investigation by the Department of Justice.

The subcommittee voted to subpoena the documents and the full committee followed and did the same. Again, the two sides reached an accommodation, though it was not entirely satisfactory to Congress. The Department of Justice agreed to turn over to the committee the vast majority of the requested materials, yet it refused to make a complete showing of all disputed documents. What is most significant about this case is that Congress received access to Department of Justice documents regarding an ongoing investigation. All of the current cases under investigation by the Committee are closed and therefore constitute an even stronger claim to disclosure than the INSLAW investigation.

Conclusion

The above cases make it clear that there is ample precedent for Congress to receive access to Department of Justice deliberative documents. There are many other cases of Congress receiving such materials in one way or another. The history of information disputes between the branches is mostly one of both sides working out reasonable accommodations. In so doing, the branches respect one another's legitimate needs and constitutional powers.

In our system of separated powers, it is not credible to argue that in cases of information disputes one branch has absolute power. There are limits to the exercise of executive privilege and to the congressional power of inquiry. Nonetheless, the legislative power of inquiry is very broad and in a democratic system the presumption must be in favor of openness. The burden is on an administration to prove that it has the right to secrecy and not on Congress to prove that it has the right to investigate.

In the case of a long closed investigation and allegations of serious Department of Justice wrongdoing, the argument for congressional access to documents is especially strong. To allow the current claim of executive privilege to stand would enable the administration in the future to withhold from Congress any information that it wants to as long as someone says the words "prosecutorial materials". That would be a terrible precedent to establish.

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Statement of Rep. Christopher Shays
February 6, 2002

While we are engaged in a very real war against terrorism, the administration has chosen to invoke the Constitution in defense of an abstraction: candor in secret executive decision-making.

Candidly, I believe invoking executive privilege to protect thirty year-old memos relevant to our investigation of Justice Department corruption was premature and heavy-handed, bordering on arrogance. When President and Attorney General have asked for, and received, extraordinary powers in the fight against terrorism – powers that risk infringement of our constitutional liberties – the Executive Branch should expect, if not demand, increased congressional scrutiny of their use of those powers, even if that oversight risks infringement of their constitutional prerogatives. It's a fair and necessary trade under these extraordinary circumstances. This is no time for some legalistic *jihad* to regain the halcyon, largely mythical, days of unfettered executive powers.

There can be no question there is an administration-wide effort to "push back" against what is seen as an erosion of executive prerogatives to conduct public business in secret. We are confronted with an inflexible policy barring congressional access to very broad, but still only vaguely defined, classes of executive branch documents often, if not routinely, made available by previous administrations.

The White House concedes that in "unusual circumstances like those present here, where the Executive Branch has filed criminal charges alleging corruption in the FBI investigative process, even the core principle of confidentiality applicable to prosecution and declination memoranda may appropriately give way, to the extent permitted by law, if Congress demonstrates a compelling a specific need for the memoranda."

What could be more compelling than the need to right the wrong done to Joseph Salvati, an innocent man imprisoned for thirty years based on the machinations of corrupt state and federal prosecutorial processes? With regard to the documents the Committee has subpoenaed, the Department of Justice should conclude our review of thirty year-old deliberative documents under these extraordinary circumstances threatens no one's candor, and that our reading of long-closed case files in this instance will bring needed light to a dark chapter in our legal history.

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

February 22, 2002

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This confirms the agreement reached by Committee staff with Department representatives today concerning the use of a particular document in the deposition of former FBI agent Dennis Condon today.

The document, which has been redacted in accordance with Fed. R. Crim. P. 6(e), is a memorandum, dated June 6, 1967, by Walter T. Barnes and Assistant United States Attorney Edward Harrington, regarding a prosecution of Raymond Patriarca and others. As part of the accommodation process, Committee staff previously reviewed the document on a confidential basis in light of your particularized need in advance of your February 14, 2002 hearing, at which Judge Harrington testified.

In furtherance of that accommodation process, we have agreed that the redacted document may again be reviewed by the Committee staff for the limited purpose of Mr. Condon's deposition and pursuant to your agreement that it will not be publicly disclosed, no copies will be made, and it will be returned to the Department at the end of the deposition. At the deposition, it also may be shown to Mr. Condon and his counsel. This agreement is based, again, on our efforts to accommodate the Committee's particularized need for access to the document in the deposition and should not be considered as a precedent regarding other Boston documents.

I hope that this further accommodation is helpful to the Committee. We look forward to conferring with Committee staff on February 25, 2002 to discuss other Boston documents.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

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