OBSTRUCTION OF JUSTICE: DOES THE JUSTICE DEPARTMENT HAVE TO RESPOND TO A LAWFULLY ISSUED AND VALID CONGRESSIONAL SUBPOENA?

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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OBSTRUCTION OF JUSTICE: DOES THE JUSTICE DEPARTMENT HAVE TO RESPOND TO A LAWFULLY ISSUED AND VALID CONGRESSIONAL SUBPOENA?

MONDAY, JUNE 13, 2011

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 1 p.m., in room 2154, Rayburn House Office Building, Hon. Darrell E. Issa (chairman of the committee) presiding.

Present: Representatives Issa, Chaffetz, Lankford, Amash, Buerkle, Cummings, and Connolly.

Staff present: Michael R. Bebeau, assistant clerk; Richard A. Beutel, senior counsel; Robert Borden, general counsel; Molly Boyl, parliamentarian; Lawrence J. Brady, staff director; Steve Castor, chief counsel, investigations; John Cuaderes, deputy staff director; Carlton Davis, Jean Humbrecht, Jessica L. Laux, and Jonathan J. Skladany, counsels; Adam P. Fromm, director of Member services and committee operations; Justin LoFranco, deputy director of digital strategy; Mark D. Marin, senior professional staff member; Ashok M. Pinto, deputy chief counsel, investigations; Laura L. Rush, deputy chief clerk; Rebecca Watkins, press secretary; Ashley Etienne, minority director of communications; Jennifer Hoffman, minority press secretary; Carla Hultberg, minority chief clerk; Justin Kim, Donald Sherman, and Carlos Uriarte, minority counsels; Chris Knauer, minority senior investigator; Lucinda Lessley, minority policy director; Leah Perry, minority chief oversight counsel; Dave Rapallo, minority staff director; and Susanne Sachsman Grooms, minority chief counsel.

Chairman ISSA. The committee will come to order.

Today's hearing is on, "Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?"

The Oversight Committee mission statement is: We exist to secure two fundamental principles. First, Americans have a right to know that the money Washington takes from them is well-spent. And, second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers, because taxpayers have a right to know what they get from their government. We will work tirelessly, in partnership with citizen watchdogs, to

deliver the facts to the American people and bring genuine reform to the bureaucracy.

Today's hearing, in specific, is on the question of the powers and execution between the co-equal branches of government and the constitutional role of Congress to maintain a check on the executive branch.

As the principal investigative committee of the U.S. House of Representatives, this committee serves to protect the right of the American people to know what their government is doing. The compulsory authority of this committee is an essential tool of transparency and accountability of the Federal bureaucracy. Without it, the executive branch would be free from any oversight, shielded from the vigilant eye of the American people and their elected representatives, and prone to more waste, more fraud, and more abuse than the Nation has ever seen.

No administration, not the last one I served under nor this one, likes congressional oversight. And we often are accused of doing it for partisan reasons or because of a particular administration. For the most part, we do it because administrations come and go but the bureaucracy goes on and outlasts any President and any Cabinet officer.

Every administration needs oversight. This administration has had more money and more challenges to deal with that are fiscal in nature than most. However, the checks and balances on the Constitution are, to a great extent, what we are dealing with here today.

The administration has not yet come to recognize the role that this committee plays in preserving the rule of law, eliminating waste and fraud and abuse in the Federal Government. The U.S. Supreme Court has long held that the power of the Congress to conduct the investigations is inherent in the legislative process. Moreover, the Court has recognized that this power is broad.

Since first learning of the controversial program Operation Fast and Furious, I have worked closely with Senator Chuck Grassley to get to the bottom of the strategy by the Federal Bureau of Alcohol, Tobacco, and Firearms to allow heavy-duty arms to traffic into the hands of Mexican drug cartels. ATF field agents opposed this reckless program, which has been responsible for the deaths of innocent civilians in Mexico and even responsible for the death of a 40-year-old Border Patrol agent named Brian Terry.

Together with Senator Grassley, I have sent 16 letters to Department of Justice and ATF requesting information on this program. After giving the administration enough time to respond to a formal request, it has become clear that the compulsory process was needed. On March 31st, I authorized a subpoena for material documents needed to conduct thorough investigations into this matter. To date, the administration has provided only a handful of documents, all of which—I repeat, all of which—were already publicly available on the Internet, while withholding those that provide real answers.

Our committee was asked whether we would come for an in-camera interview—or, in-camera observation of additional documents. We went, only to find out that those documents were so redacted as to be useless, even for in-camera review.

Since that time, as many as 31 Democratic Members of Congress have expressed their serious concerns about the administration's response to this committee's investigation. These Members noted that "the American people deserve prompt and complete answers to the questions surrounding this operation." Moreover, these Democratic Members do not believe that the DOJ investigation should "curtail the ability of Congress to fulfill its oversight duties."

Today's hearing is not—I repeat, not—about the facts of the Fast and Furious program. On Wednesday, the committee will have ample opportunity to hear about the program and how it has affected the lives of people living on both sides of our shared Mexican border. Rather, today's hearing is about a constitutional question: It is about whether the administration is legally bound to respond to a lawfully issued and valid congressional subpoena.

To obstruct a congressional investigation in this way is a serious matter. This is not the first administration to flirt with this breach of the public trust, and it will probably not be the last. But on our watch—and this is our watch—this Congress will not shrink from its constitutional responsibility and this committee will leverage every power at its disposal to enforce the rule of law.

Today's witnesses will help the committee as we wade through the constitutional waters, and I look forward to a vigorous debate among our Members.

I might note that this hearing is one of the most important because it may in fact be the one that sets the course for whether we work together on a bipartisan fashion to do our constitutional obligations of oversight.

With that, I recognize the ranking member for his opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

And I welcome our panel of distinguished witnesses.

And we have a valuable opportunity today to examine not only Congress' authority to conduct investigations but also the historical precedent of committees in exercising that authority.

Today's hearing is being held in the broader context of investigations currently being conducted by two different branches of government. On one hand, the Department of Justice is prosecuting dozens of individuals in Federal court, including defendants accused of murdering Border Patrol Agent Brian Terry in Arizona on December the 14th, as well as 20 other defendants indicted for firearms trafficking and other crimes involving international drug cartels. On the other hand, in March, this committee launched an investigation into allegations that mismanagement and abuse in ATF gun-trafficking investigations may have enabled some of the same crimes.

The allegations made to date are very troubling, and new information we obtained raises additional concerns about the role of various actors involved in these incidents. I believe that the executive branch and Congress can and must achieve both of these objectives. The Department's interest in prosecuting these crimes and the committee's interest in investigating the management of ATF programs are not—and I repeat, are not—mutually exclusively.

I am particularly mindful that Agent Terry's family has lost someone they held very dear. They deserve not only for the killers

and gun traffickers to be brought to justice after the fact, but they also deserve direct and straightforward answers from their government about whether more could have been done to prevent his murder.

To answer the question posed by the title of today's hearing, yes—and I repeat, yes—I do believe the Department must respond to the committee's subpoena, even though it was issued unilaterally without committee debate only 15 days after the chairman's original request for documents. I believe this committee has both the authority and the ability to play a constructive role in investigating these matters.

But there is a second question the hearing title should have posed: Does the committee have an obligation—and I want the witnesses to listen to me carefully—to proceed responsibly to avoid irreparable damage to ongoing prosecutions? Again, I believe the answer to that question is "yes."

Historically, Congress has taken great care to ensure that its investigations do not harm ongoing criminal cases. In most instances, committees have tailored the scope of their inquiries to avoid impairing open cases. Committees have been meticulous in providing the Department with opportunities to warn them if information they obtain is under seal, relates to grand-jury information, identifies cooperating witnesses, may endanger someone's safety, or would impair ongoing criminal investigations if released publicly. And I hope the witnesses will address that question also.

No member of this committee wants to risk compromising criminal prosecutions involving alleged murderers and gun traffickers for international drug cartels. That is why these types of reasonable accommodations protect not only the integrity of the criminal investigation but the integrity of the committee. Reckless disclosures could complicate a trial and cast a cloud over the committee's current and future investigations. I believe that both the executive branch and Congress have an obligation to help the other achieve their constitutional responsibilities rather than manufacturing unnecessary conflict.

For the benefit of our witnesses, let me note that the Department has now asserted executive privilege—has not asserted executive privilege to withhold documents to date. It has produced or made available for review more than 1,300 pages, some public and some not.

The Department and the committee have agreed on search terms for electronic searches of responsive e-mails, which are now being conducted for 19 officials approved by our committee staff. Last week, the committee conducted a 6-hour interview of the special agent in charge of ATF's Phoenix office, and we have scheduled an interview of his supervisor, the ATF deputy assistant director. These actions demonstrate good faith.

At the same time, the Department has expressed serious and legitimate concerns about the scope of the documents encompassed by Chairman Issa's subpoena, including records that identify individuals who are assisting in the investigation, that identify sources and investigative techniques, that present risks to individuals' safety, and that prematurely inform subjects and targets about our in-

vestigation in a matter that permits them to evade and obstruct our prosecutorial efforts.

Finally, it is in this area that the committee stands to benefit most from the expertise of our witnesses. I look forward to hearing about the ways other committees have conducted their investigations to obtain the information they needed while accommodating the Department's legitimate interests.

And I trust that our panelists will not only address the first question but address the second question, too, that I just posed. Thank you.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Elijah E. Cummings follows:]

Opening Statement
Rep. Elijah E. Cummings, Ranking Member

Hearing on "Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?

June 13, 2011

Thank you, and welcome to our panel of distinguished witnesses. We have a valuable opportunity today to examine not only Congress' authority to conduct investigations, but also the historical precedent of committees in exercising that authority.

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On the other hand, in March this Committee launched an investigation into allegations that mismanagement and abuse in ATF gun trafficking investigations may have enabled some of the same crimes. The allegations made to date are very troubling, and new information we have obtained raises additional concerns about the role of various actors involved in these incidents.

I believe the Executive Branch and Congress can and must achieve both of these objectives. The Department's interest in prosecuting these crimes, and the Committee's interest in investigating the management of ATF programs, are not mutually exclusive.

I am particularly mindful that Agent Terry's family has lost someone they held very dear. They deserve not only for the killers and gun traffickers to be brought to justice after the fact. They also deserve direct and straightforward answers from their government about whether more could have been done to prevent his murder.

To answer the question posed by the title of today's hearing, yes, I believe the Department must respond to the Committee's subpoena, even though it was issued unilaterally without Committee debate only 15 days after the Chairman's original request for documents. I believe this Committee has both the authority and the ability to play a constructive role in investigating these matters.

But there is a second question the hearing title also should have posed: Does this Committee have an obligation to proceed responsibly to avoid irreparable damage to the ongoing prosecutions? Again, I believe the answer is yes.

Historically, Congress has taken great care to ensure that its investigations do not harm ongoing criminal cases. In most instances, committees have tailored the scope of their inquiries to avoid impairing open cases. Committees have been meticulous in providing the Department with opportunities to warn them if information they obtain is under seal, relates to grand jury information, identifies cooperating witnesses, may endanger someone's safety, or could impair ongoing criminal investigations if released publicly.

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These actions demonstrate good faith. At the same time, the Department has expressed serious and legitimate concerns about the scope of documents encompassed by Chairman Issa's subpoena, including records that "identify individuals who are assisting in the investigation," that "identify sources and investigative techniques," that "present risks to individual safety," and that "prematurely inform subjects and targets about our investigation in a manner that permits them to evade and obstruct our prosecutorial efforts."

It is in this area that the Committee stands to benefit most from the expertise of our witnesses. I look forward to hearing about ways other committees have conducted their investigations to obtain the information they needed while accommodating the Department's legitimate interests.

Chairman ISSA. I thank the ranking member.

All Members will have 7 days to submit opening statements and extraneous material for the record.

We now recognize our panel of witnesses.

Mr. Morton Rosenberg is a fellow at The Constitution Project here in Washington, DC.

Mr. Todd Tatelman is a legislative attorney in the Congressional Research Service American Law Division. He is certainly someone we rely on constantly.

Mr. Louis Fisher is a specialist in constitutional law at the Law Library of the Library of Congress.

I am sorry. Mr. Fisher, did I get something wrong?

Mr. FISHER. Yeah, I retired about a year ago. I am with The Constitution Project also.

Chairman ISSA. OK, you are with The Constitution Project. But your tenure at the Library of Congress is also appreciated, even if slightly in the rearview mirror.

And Professor Charles Tiefer is a Commissioner serving on the Commission on Wartime Contracting, along with our former member, Mr. Shays, I gather.

Gentlemen, you will all have 5 minutes each, plus or minus, and then we will have a round of questioning.

Pursuant to the committee rules, all witnesses here are to be sworn. Would you please rise to take the oath and raise your right hands?

[Witnesses sworn.]

Mr. ISSA. Let the record reflect that all witnesses answered in the affirmative.

Again, we don't have an extremely busy dais here, although we may have many more Members flying in in the next few minutes. So try to summarize your written statements in 5 minutes. Understand that your entire written statement will be put into the record.

We first recognize Mr. Rosenberg for 5 minutes.

STATEMENTS OF MORTON ROSENBERG, FELLOW, THE CONSTITUTION PROJECT; TODD B. TATELMAN, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE; LOUIS FISHER, SCHOLAR IN RESIDENCE, THE CONSTITUTION PROJECT; AND CHARLES TIEFER, COMMISSIONER, COMMISSION ON WARTIME CONTRACTING

STATEMENT OF MORTON ROSENBERG

Mr. ROSENBERG. Mr. Chairman, members of the committee, I want to thank you for affording me the opportunity of appearing here today to talk about these important and interesting issues.

A little over 9 years ago, I appeared here with my friend and fellow panelist, Charles Tiefer, when this committee was successfully investigating the bizarre cover-up of over 20 murders by informants with the knowledge of their FBI handlers and the likely acquiescence of their FBI and Department of Justice superiors. That case, to get into Mr. Cummings' question, involved open investigations that were going on at that particular time.

Charles remarked to me before today's hearing that the committee could have saved a lot of time and effort by playing a video of the 2002 hearing. But, as I will briefly detail, though our conclusions with respect to what we found in 2002 are the same—that law and history require the Justice Department to comply with your lawfully issued and valid subpoenas—there are differences here that need to be thought about and perhaps addressed.

I have a sense that is expressed by—I am sorry—that was expressed by Conan Doyle's Sherlock Holmes in "The Hound of the Baskervilles" that there is a dog here that has not yet barked.

When I first began working in this area in the mid-1970's, the mere threat of a subpoena was usually sufficient to get compliance. The only exception was when the target was a Cabinet-level official, and that tended to require a subpoena followed by a threat of a contempt citation and, sometimes, a subcommittee vote on contempt.

When the executive pushback began in the early 1970's, the investigative world changed. A subpoena became virtually always necessary, and threats and actual votes of subpoenas were frequent and were countered by direct executive claims of Presidential privilege. By 2008, there had been 12 votes of contempt against Cabinet-level officials, 3 by votes in the full House.

All ultimately resulted in substantial and complete compliance with congressional informational demands, and all relied on the established caselaw on investigative authority, starting with *McGrain* v. *Daugherty,* which dealt with the Justice Department, and *Sinclair* v. *The United States,* which also dealt with the important question—and settled the important question, I think—that an ongoing Department of Justice trial doesn't stop Congress from getting witnesses to talk.

But the true key to those successes was evidenced in the will of those investigating committees—an aspect of inquiry that may be severely tested in this and in future investigations. One of the differences that I have alluded to is that, in 2002, the President expressly asserted executive privilege. But the rationale given for invoking the privilege then was exactly the same as is now being urged by DOJ: the longstanding policy of the Department that it never shares information with congressional committees about open or closed, criminal or civil litigation or investigations because either it would undermine the independence and effectiveness of its law enforcement mission; damage by pre-trial publicity; reveal identities of informants; disclosing government strategies, methods, and operational weaknesses; chilling the exercise of prosecutorial discretion by DOJ attorneys; and, most important, interfering with the President's constitutional duty to faithfully execute the laws.

To me, that is the same dress with a different coat. They are setting up a possible claim that is very interesting. But I will get to that. That is the dog.

A second difference is that the law respecting executive privilege, and more particularly the Presidential communications privilege, has dramatically changed over the last 15 or 20 years. As I indicated in my written testimony, the Supreme Court's 1988 ruling in *Morrison* v. *Olson* cast a significant doubt as to whether prosecu-

torial discretion was a core Presidential power over which executive privilege may be asserted.

And that doubt was magnified by two D.C. Court of Appeals opinions dealing with Espy and Judicial Watch in 1997 and 2004. Taken together with previous High Court decisions, it is now the law of the circuit most likely to rule on privilege disputes that an assertion of Presidential communications privilege will be held to be limited to the quintessential power and nondelegation of Presidential power, and those are the core functions in the Constitution. And one of the core functions is not prosecutorial discretion.

The third difference emanates from the important 2008 District Court ruling in *House Judiciary Committee* v. *Miers.* That case arose out of the removal and replacement of nine U.S. attorneys in 2006. White House Counsel Harriet Miers and Chief of Staff Josh Bolton were subpoenaed by the committee for testimony and documents, but, at the direction of the President, they refused to comply and were ordered not to even appear on the return date, on the ground that the claim of privilege by the President gave them absolute immunity from committee process.

Both were held in contempt of Congress, but the Attorney General ordered the U.S. attorney not to present the citation to a grand jury, as is required by the congressional contempt statute. By resolution of this House, the committee filed a civil enforcement action. The Department of Justice contested the validity of the authorizing resolution and defended the notion of absolute immunity. The court upheld the validity of the authorizing resolution, finding that the longstanding Supreme Court recognition of implied power to investigate and to compel production of information included an implied cause of action to redress the institutional injury caused by the depravation of the information that was being sought. It also rejected out of hand the absolute immunity claim of the President.

The Miers case, I believe, is the dog that hasn't barked. It is a two-edged sword. While it recognizes the House's right to seek judicial assistance to vindicate its constitutionally based institutional right to secure information from the Executive and refutes the notion that the President can cloak a subordinate official with absolute immunity from the compulsory process, it leaves open the door for Executive judicialization of the congressional subpoena enforcement power.

Current DOJ dogma is that it is unconstitutional for either house of Congress to use the criminal contempt statute or the inherent contempt power to punish Presidential appointees for following Presidential orders to withhold information from Congress.

DOJ currently has the potential power to string out your investigation, to refuse to obey it, and then, when the time for contempt comes, can say, "No, you can't go to court for criminal contempt; you can't use inherent contempt power. All you can do is to bring a civil action." And a civil action will extend and delay your constitutional ability to enforce what the caselaw and what the many examples that we have shown, you know, in our papers about your powers.

[The prepared statement of Mr. Rosenberg follows:]

Mr. Chairman and Members of the Committee

My name is Morton Rosenberg. For over 35 years I was a Specialist in American Public Law with the American Law Division of the Congressional Research Service (CRS). Among my areas of professional concern at CRS were the problems raised by the interface of Congress and the Executive which involved the scope and application of congressional oversight and investigative prerogatives. Over the years I was called on by committees to advise and assist on a number of significant inquiries, including Watergate, Iran-Contra, Rocky Flats, the organizational breakdown of the Justice Department's Environmental Crimes Program, Whitewater, Travelgate, Filegate, campaign fund raising during the 1996 election, the Clinton impeachment proceeding in the House, corruption in the FBI's Boston Regional Office, and the removal and replacement of nine United States Attorneys in 2006. I also assisted committee Members and staff, majority and minority, on such matters as organization of probes, subpoena issuance and enforcement, the conduct of hearings, and contempt of Congress resolutions. Since my retirement I have written a handbook on investigative oversight entitled "When Congress Comes calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry," which was funded and published in 2009 by the Constitution Project.

You have asked me here today to provide historical and legal background to assist the Committee in assessing the substantiality of the Justice Department's DOJ) refusal to allow the Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Kenneth E. Melson, to comply with a March 31, 2011 Committee subpoena for documents, as well as Committee requests to make available for interviews ATF officials, line employees or other persons with knowledge of the structure and conduct of Project Gunrunner and Operation Fast and Furious. DOJ also objects to a subpoena for documents and testimony to a "cooperating witness" in a criminal trial 20 defendants indicted for gun trafficking violations uncovered by Operation Fast and Furious.[1] The grounds for DOJ's

[1] Project Gunrunner is a broad initiative run by ATF designed to disrupt the illegal flow of guns from the United States to Mexico along the Southwest Border, which has received increasing funding since FY2006. See, "The Bureau of Alcohol, Tobacco Firearms and Explosives (ATF) Budget and Operations for FY2011," CRS Report R41206, Jan. 6, 2011, by William J. Crouse. Operation Fast and Furious is part of the broader Gunrunner project and is described by DOJ as "a criminal investigation of an extensive gun trafficking enterprise. The purpose of the investigation is to dismantle a transnational organization believed to be responsible for trafficking weapons into Mexico, in part by prosecuting its leadership." It is a joint effort of local U.S. Attorney Office prosecutors and ATF

objections rest solely on its "long-standing policy regarding the confidentially of ongoing criminal investigations" that prohibits the sharing of such information with congressional committees. The assertion rests on no constitutional privilege or case law authority but rather on past opinions of Attorneys General and the DOJ Office of Legal Counsel (OLC) [2] The policy is said to be based on DOJ's "strong need to protect the independence and effectiveness of our law enforcement efforts" which may be compromised by prejudicial pre-trial publicity; or by the revelation of the identity of confidential informants; or the disclosure of the government's strategy in anticipated or pending investigations or judicial proceedings; or by the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys; or by incurring interference with the President's constitutional duty to faithfully execute the laws.

My review of the historical experience and the legal rulings pertinent to congressional access to information regarding the law enforcement activities of the Justice Department indicates that its asserted policy has been consistently overridden in the face of legitimate exercises of a committee's constitutionally based investigatory prerogatives. The law is clear: 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 in order to present an enforceable information demand. Nor are we aware of any 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 or closed criminal or civil cases.

In the last 90 years Congress has consistently sought and obtained a wide variety of purportedly sensitive enforcement and management information, including deliberative prosecutorial memoranda; FBI investigative reports and summaries of FBI interviews; memoranda and correspondence prepared while cases were pending; confidential instructions outlining the procedures and guidelines to be followed for undercover operations and the surveillance and arrest of subjects; documents that were presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal procedure; the

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agents. See letter to Chairman Issa from Assistant Attorney General for Legislative Affairs Ronald Weich, dated April 8 2011.

[2] See id., attaching a May 17, 2000 opinion letter to Senator Orrin Hatch detailing policy objections that have been raised against congressional information requests in the past.

testimony of line attorneys and other subordinate agency employees regarding the conduct of open or closed cases or investigations; and detailed testimony about specific instances of DOJ's failure to prosecute cases that allegedly merited prosecution. These investigations have encompassed virtually every component of DOJ, including its sensitive Public integrity Section and its Office of Professional Responsibility. They also covered all levels of DOJ officials and employees, from the Attorney General down to subordinate line personnel. Further, they have delved into virtually every area of the Department's operations, including its conduct of domestic intelligence operations. The consequences of these historic inquiries at times have been profound and far reaching, directly leading to important remedial legislation and resignations (Harry M. Daugherty, J. Howard McGrath, Alberto R. Gonzales) and convictions (Richard Kleindienst, John Mitchell) of five attorneys general.

There have been only three formal presidential assertions that executive privilege required withholding internal DOJ documents sought by a congressional subpoena. Two such claims were ultimately abandoned by the President and a third was not pursued.[3] There is no such claim here and under circumstances of the present situation it would be unlikely to succeed in light of the most recent District of Columbia Circuit court rulings, which will be briefly discussed below.

In sum, then, it appears that the fact that an agency, such as DOJ, has determined for its own internal purposes that a particular informational item should not be disclosed, or 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 responsible performance of its constitutional functions.

I would hasten to add that it has also been my experience that committees have normally been restrained by prudential considerations that have involved a pragmatic assessment that has been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of the laws that fall within their jurisdiction, against the potential burdens and harms that may be imposed on an agency if internal deliberative

[3] See, Morton Rosenberg, When Congress Comes Calling: A Primer on Principles, Practices, and Pragamatics of Legislative inquiry, 46 and n. 283 (Constitution Project 2009) Investigation Primer).

process matter is publically exposed. In particular, sensitive law enforcement concerns of DOJ 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, scope and reach of the congressional investigative oversight power, and then describe several historical examples inquiries into questionable DOJ practices that may seen as particularly pertinent to the situation at hand. I will conclude with an assessment of the substantiality of DOJ's policy claims for its withholdings.

The Legal Basis for Oversight

Although there is no express provision of the Constitution that specifically authorizes the Congress to conduct investigations and take testimony for 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.

Indeed, the breadth of a jurisdictional committee's investigative authority was established in two seminal Supreme Court decisions emanating from the Teapot Dome inquiries of the mid-1920's, both of which involved, directly or indirectly, the Department of Justice. As part of its investigation , a Senate select committee issued a subpoena for the testimony of the brother of Attorney General Harry Daugherty. After Daugherty failed to respond to the subpoena the Senate sent its Deputy Sergeant at Arms to arrest him and bring him before the Senate. This action was challenged as beyond the Senate's constitutional authority. The case reached the Supreme Court where, in a landmark ruling, McGrain v. Daugherty[4], upheld the Senate's authority to investigate charges concerning the propriety of the Department's administration of its statutory mission. The Court first emphasized that the power of inquiry, with the accompanying process to enforce it, is "an essential and appropriate auxiliary to the legislative function, " and that Congress must have access to the information

[4] 273 U.S. 135 (1927).

"respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which is infrequently so – recourse must be had to others who do possess it. Experience has taught that the mere requests for such information often are unavailing, and also that the information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."[5] The Court also made it clear that the target of the Senate investigation, the Department of Justice, like all other departments and agencies, is a creation of the Congress and subject to its plenary legislative and oversight authority in order to determine whether and how it is carrying out its mission:

> [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.[6]

In another Teapot Dome case that reached the High Court, Sinclair v. United States[7], a different witness at the congressional hearings refused to provide answers and was prosecuted for contempt of Congress. Based upon a separate lawsuit brought by the government against the witnesses company, the witness had 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

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[5] Id., at 174-75.
[6] Id., at 177-78.
[7] 279 U.S. 263 (1929).

your committee." The Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness' contention that the pending 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 to further investigate the actual administration of the law."[8] The Court further explained: "It may be conceded that Congress is without authority to compel disclosures 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."[9] The Sinclair ruling strongly infers that the Department's distinction between open and closed cases has little weight.

Subsequent Court rulings have amplified the breadth and scope of the investigative power. In Eastland v. U.S. Servicemen's Fund it explained the "the scope of the power of inquiry ...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[10] In Watkins v. United States , the Court stated the broad power of inquiry "encompasses inquiries concerning the administration of existing laws as well as proposed statutes"[11] and that its power is at its peak when the subject is waste, fraud, abuse, or maladministration within a government department.[12]

Illustrative instances of Congressional Committees Obtaining DOJ Prosecutorial Deliberative Materials and the Testimony of Officials and Line Personnel[13]

1. Teapot Dome

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[8] Id., at 295.

[9] Id. See also, Hutcheson v. United states, 369 U.S. 599,617 (1962)(a committee's investigation "need not grnd to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding...or when crime or wrongdoing is disclosed.")

[10] 421 U.S.491, 504, n. 15 (!975).

[11] 354 U.S. 178, 187 (1957).

[12] Id., at 182, 194-95, 200 n.33.

[13] The following case studies were selected because the fact situations and issues raised are particularly pertinent to that presented in this hearing. A fuller exposition of the issues raised by committee inquiries and many more case studies may be found Morton Rosenberg, Congressional Investigations of the Department of Justice, 1920-2007: History, Law and Practice, CRS Report No. RL34197, August 20, 2008.

The Teapot Dome scandal provided not only the indisputable authority for wide ranging congressional inquiries, but also a model for obtaining purported sensitive information from DOJ. As indicated in the McGrain opinion, a Senate select committee was constituted to investigate charges of misfeasance and nonfeasance in DOJ by its failure to prosecute the malefactors in the Interior Department and elsewhere. The select committee heard from scores of present and former attorneys and agents of DOJ and its Bureau of Investigation (the forerunner of the FBI) who offered detailed testimony about specific instances concerning 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 was to identify cases in which the statute of limitations had not run out and prosecution was still possible.[14]

The committee also gained 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 Daugherty, it would appear that some of the documents furnished may have been volunteered by the witnesses and not officially provided by the Department. Although the Attorney General had promised cooperation with the committee and had agreed to provide access to at least the files of closed cases,[15] such cooperation apparently had not been forthcoming. [16]

In two instances 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,[17] though witnesses from the Department were permitted to testify about investigations that were the subject of investigative reports and even to read at the hearings from those reports. With the appointment of the new Attorney General, Harlan Fisk 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."[18] For

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[14] Investigation of Hon Harry M. Daugherty, Formerly attorney General of the United State, Hearings Before the Senate select Committee on Investigation of the Attorney general, vols. 1-3, 68th Cong, 1st Sess.1495-1503, 1529-30, 2295-96 (1924).
[15] Id. at 1120.
[16] Id., at 1078-79.
[17] Id., at 1015-16, 1159-60..
[18] Id., at 2389.

example, with the authorization of Stone, 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.[19] 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.[20]

2. The Investigation of the Claim of Presidential Privilege

One of the most prominent and contentious congressional investigations of DOJ grew out of the highly charged confrontation at the end of the 97th Congress concerning the refusal of the Environmental Protection Agency (EPA) 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 (Superfund). The 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. It also resulted in the filing of an unprecedented legal action by DOJ against the House to obtain a judicial declaration that Burford had acted lawfully in refusing to comply with the subpoena at the direction of the President.

Ultimately the lawsuit was dismissed, the documents were provided to the committee, and the contempt citation was dropped. However, a number of questions about he role of the Justice Department during the controversy remained: whether DOJ, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the U.S. Attorney for the District of Columbia not to present the contempt citation to the grand jury for prosecution and made the decision to sue the House; and , generally, whether there was conflict of interest in the Department's simultaneously advising the President, representing Burford, investigating alleged Executive Branch wrongdoing, and not enforcing the congressional contempt

[19] Id., at 1495-1547.
[20] Id., at 1790.

statute. These and other related questions raised by DOJ's actions became the subject of an investigation by the House Judiciary Committee beginning in early 1983. The Committee issued a final report in December 1985.[21]

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

> [T]he Department of Justice, through many of the same senior officials who were 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 the basis for many of the Committee's findings.[22]

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,[23] as well as "false and misleading" testimony before the Committee by the head of the Department's Office of Legal Counsel.[24]

In addition to delays in receiving documentary materials, there was disagreement about the access that would be provided for Committee staff interviews. DOJ demanded that any such interviewees be accompanied by DOJ lawyers. Ultimately DOJ agreed to permit interviews to go forward without its attorneys present, and if an employee requested representation, DOJ paid for a

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[21] See, Report of the House Comm. on the Judiciary on Investigation of the Role of he Department of Justice in the Withholding of EPA Documents from Congress in 1982-1983, H. Rept. No. 99-435, 99th Cong. 1st Sess. (1985)(EPA Withholding Report).
[22] EPA Witholding Report at 1163; see also 1234-38.
[23] Id., at 1164.
[24] Id., at ii64-65, 1191—1231.

private attorney. In all, Committee staff interviewed 26 current and former Department employees, including four Assistant Attorney Generals.[25]

Partly as a result of these interviews, as well as from handwritten notes initially withheld, the Committee determined it needed access to Criminal Division documents respecting the origins of a criminal investigation of former EPA Assistant Administrator Rita Lavelle in order to determine if the Department had considered instituting the investigation to obstruct the committees inquiry. The Committee also requested information about the Department's earlier witholdng of handwritten notes to determine whether Department officials had deliberately withheld the documents in an attempt to obstruct the Committee's investigation. The Department first refused to provide the documents relating to the Lavelle investigation "[c]onsistent with the longstanding practice of the department not to provide access to active criminal files."[26] The Department also refused to provide the committee with access to documentation related to the Department's handling of its inquiry, objecting on the ground of the Committee's "ever-broadening scope of...inquiry."[27] After a delay of almost three months the Department produced both categories of documents.[28]

The Committee's final report asked for the Attorney General to appoint an independent counsel pursuant to the Ethics in Government Act to investigate its allegations of obstruction of congressional proceedings. Attorney General Meese agreed and the target of the Committee's inquiry, former Assistant Attorney General Ted Olson, precipitated a constitutional challenge to the Act by refusing comply with a subpoena. The case reached the Supreme Court and dealt with the government's broad claim, among others, that prosecution an inherently or core executive function and that congressional access related to that function is thereby limited. The Court rejected that notion in Morrison v. Olson, which sustained the validity of the appointment and removal conditions for independent counsels under the Act. [29] The Court noted 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

[25] Id., at1174-76.
[26] Id., at 1265.
[27] Id., at 1266.
[28] Id., at 1270.
[29] 487 U.S. 654 (1988).

Branch.[30] 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 incident to the legislative function of Congress, " citing McGrain v. Daugherty.).[31]

3. Rocky Flats

A subsequent relevant case study involved a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space and Technology which conducted a review of a plea bargain settlement by the Justice Department 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 Energy Department's (DOE) Rocky Flats nuclear weapons facility.[32] 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, DOJ, EPA, 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 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 for expenses in the cases and contractual arrangements between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.

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[30] Id., at 691-92.

[31] Id., at 694.

[32] 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., @d Sess., vols I and II (1992)(Rocky Flats Hearings); Meetings: To Subpoena the 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, House Comm. on Science, Space and Technology, 102d Cong. 2d Sess. (1992)(Subpoena Meetings).

The Subcommittee held 10 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).

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 the chair that they had information and, but for the DOJ directive, would have answered the questions. The Subcommittee members unanimously authorized the chair to send a letter to President Bush requesting that he either claim executive privilege as the basis for directing the witness' silence or to direct DOJ to retract its instructions. The President took neither course and 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) the DOJ issued a new instruction to all personnel under subpoenas 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 all DOJ 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 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 DOJ not to invoke the deliberative process privilege as a reason for not answering Subcommittee questions.[33]

4. Corruption in the FBI's Boston Regional Office

In December 2001 the House Government Reform Committee issued a subpoena for DOJ documents relating to alleged law enforcement corruption in the FBI's Boston Regional Office that had occurred over a period of almost 30 years. During that time, FBI officials allegedly knowingly allowed innocent persons to be convicted of murder on the false testimony of two informants in order to protect the undercover activities of those informants who were part of organized crime gangs in New England; then knowingly permitted the two informants to commit some 21 additional murders during the period they acted as informants; and finally, the handlers gave the informants warning of an impending grand jury indictment which gave them an opportunity to flee. One is still at large. The President asserted executive privilege and ordered the Attorney General not to release the documents because disclosure "would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions," and that Committee access to the documents "threatens to politicize the criminal justice process" and to undermine the fundamental purpose of the separation of powers doctrine, "which was to protect individual liberty." In defending the assertion of privilege the Justice Department claimed a historical policy of withholding deliberative prosecutorial documents from Congress in both open and closed civil and criminal cases.[34]

Initial congressional hearings after the privilege claim was made demonstrated the rigidity of the Department's position. The Department later agreed that there might be some area for compromise, and on January 10, 2002, White House Counsel Alberto Gonzales wrote to Chairman Burton conceding that it was a "misimpression" that congressional committees could never have access to deliberative documents from a criminal investigation or prosecution. But, he continued, since the documents "sought a very narrow and particularly sensitive category of deliberative matters" and "absent unusual circumstances, the executive Branch has traditionally protected these highly sensitive deliberative

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[33] Rocky Flats Hearings, Vol. I at 9-10, 25-31, 1673-1737; Subpoena Hearings at 1-3, 82-86, 143-51.
[34] Louis Fisher, "The Politics of Executive Privilege," 108 (Carolina Pres, 2004) (Fisher).

against public or congressional disclosure" unless a committee showed a "compelling or specific need" for the documents.[35]

The documents continued to be withheld until a further hearing, held on February 6, 2002, when the Committee heard expert testimony describing over 30 specific instances since 1920 of DOJ giving committee access to prosecutorial memoranda for both open and closed cases and providing testimony of subordinate department employees , such as line attorneys, FBI field agents and U.S, Attorneys , and included detailed testimony about specific instances DOJ's failure to prosecute meritorious cases. In all instances, investigating committees were provide with documents respecting open and closed cases that often included prosecutorial memoranda, FBI investigative reports and correspondence prepared during undercover operations and documents presented to grand juries not protected by Section 6 (e), among other similar "sensitive materials." Within weeks of the hearing the privilege claim was abandoned and the disputed documents were provided.[36]

Concluding Observations

Congress has an established right and judicially recognized prerogative, pursuant to its constitutional authority to legislate and appropriate, to receive from officers and employees of the executive departments and agencies accurate and truthful information regarding federal programs and policies administered by such officers and agencies. As stated by the Supreme Court, "[a] legislative body cannot legislate wisely or effectively in the absence of information regarding conditions which the legislation is intended to change or effect."[37] The courts have recognized no countervailing right or interest for a federal official in a department or agency to intentionally withhold, conceal or prevent the disclosure of truthful policy information to the Congress concerning legislation affecting programs and policies administered by such agencies when requested by a jurisdictional committee. This understanding applies with equal force to the law enforcement activities of the Department of Justice.

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[35] Fisher, Id.

[36] "Everything Secret Degenerates: The FBI's Use of Murderers As Informants," House Report No. 108-414, 108th Cong., 2d sess. 121-134 (20040; Hearings, "Investigation Into Allegations of Justice department Misconduct in New England-Vol. I," House Comm. on Government Reform, 107th Cong., !st and @d Sess's, 520-556, 562-604 (May 3, December 13, 2001, February 6, 2002)(Hearings).

[37] McGrain v. Daugherty, supra, 272 U.S. at 175.

As detailed in this paper, as a matter of law, buttressed by90 years of history and practice, congressional committees with jurisdiction and authority that have exercised the full panoply oversight and investigative tools available to them, have consistently gained access to needed information from the department in the form of documents or testimony from any component of the agency, regardless of the subject matter involved and irrespective of the grade level of officer or employee with information or required knowledge.

The policy arguments presented by DOJ have either been rejected by the courts of or on their face unacceptable. The courts have held that Congress must be given access to agency documents or witnesses even in situations where the inquiry may result in pre-trial publicity or the exposure of criminal corruption or maladministration. The Supreme Court has noted that a committee's investigation "need not grind to a halt whenever responses to its inquiries might be potentially harmful to a witness in some distinct proceeding...or when crime or wrongdoing is disclosed."[38] Despite the existence of pending litigation, Congress may investigate facts that have a bearing on that litigation where the information sought is needed to determine what, if any, legislation should be enacted to prevent further ills. [39]

Although several lower courts have recognized that congressional hearings may have the result of generating pre-trial publicity, they have not suggested that there are any constitutional or legal limitations on Congress' right to conduct an investigation while a court case is pending. Instead the courts have granted additional time or changed the location of a trial to deal with the problem. In one the leading cases, Delaney v. United States, the court entertained "no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it."[40] The courts have recognized that in such cases congressionally generated publicity may result in harming prosecutorial efforts of the Executive, but that this remains a choice that is solely within Congress' discretionto make, irrespective of the consequences. As the Iran-Contra independent Counsel succinctly observed: "The legislative branch has the power to decide whether it is more important perhaps to destroy a prosecution than to hold back testimony

[38] Hutcheson v. United states, 369 U.S.,599, 617 (1962).
[39] Sinclair v, United States, 279 U.S. 263, 294 (1929).
[40] 199 F. 2d 107, 114 (1st Cr. 1952).

they need. They make that decision. It is not a judicial decision, or a legal decision, but a political decision of the highest importance."[41]

The further policy argument that there is a serious concern over the revelation government strategies, methods or operational weaknesses is simply ludicrous. This very investigation is about whether ATF's strategy of using straws to follow where the guns went awry and allowed not only more guns to go to the cartels but also caused collateral damage of many more deaths including that of U.s. law enforcement officers. If this concern were to be permitted to block congressional inquiries, it would prevent Congress from performing a major portion of its constitutionally mandated oversight. For Congress to forego such inquiries would be an abandonment of its oversight duties. Surely, the best way to correct either bad law or bad administration is to closely examine the methods and strategies that led to the mistakes.

Finally, although the Executive has not asserted constitutional privilege in this exercise, as it did in 2002, it is appropriate to briefly note that is likely unavailable in this instance. As indicated above, the Supreme Court's ruling in Morrison v. Olson has cast significant doubt whether prosecutorial discretion is a core presidential power over whether executive privilege may be asserted, a doubt that has been magnified by two District of Columbia Circuit court rulings in In re sealed Case (Espy)[42] and Judicial Watch, Inc. v. Department of Justice.[43] In those decisions, assertion of the presidential communications privilege was held to be limited to "quintessential and nondelegable presidential power" and is confined to communications to advisors in "operational proximity" with the president. Those decisions indicate that "core powers do not include prosecutorial decision making. Espy strongly hinted, and Judicial watch made clear, that the protection of the presidential communications privilege extends only to the boundaries of the White House and the executive Office of the President and not to the departments and agencies, even if the actionswere related to a core power, unless they "solicited and received" by a close White House advisor or the President himself. Judicial watch, which dealt with pardon documents at DOJ that had not been "solicited and received" by a close White House advisor, determined that "the need for the presidential privilege becomes

[41] Lawrence E. Walsh, "The Independent Counsel and the Separation of Powrers," 25 Hous. L. Rev. 1, 9 (1988).
[42] 121 F. 3d. 729 (D.C. Cir. (1997).
[43] 365 F. 3d 1108 (D.C. Cir. 2004).

more attenuated the further away the advisors are from the President [which] affects the extent to which the contents of the President's communications can be inferred from pre-decisional communication."[44]

This is not to gainsay or dismiss out of hand the potential weight and applicability of the DOJ policy arguments in particular situations and circumstances. Rather, what I have addressed here is the oft-repeated rhetorical notion that the Department has never allowed congressional access to open or closed litigation files or other "sensitive" internal deliberative process matter and examined the legal weight to be accorded such assertions to withhold I the face of well established congressional investigative authority.

[44] An extended discussion of these developments may found in Morton Rosenberg, "When congress Comes Calling", 25-30 (Constitution Project, 2009).

Chairman ISSA. Thank you.
Mr. Tatelman.

STATEMENT OF TODD B. TATELMAN

Mr. TATELMAN. Thank you, Mr. Chairman and Ranking Member Cummings. I appreciate the opportunity for CRS to be invited here to testify. And, on behalf of that institution, we thank you for all of the work that you do for us, and we hope that we can continue to be of service to the committee as we move forward.

Like my colleague, or former colleague, Mort Rosenberg, I want to focus a little bit more on sort of the traditional history and sort of lay the groundwork for the congressional prerogative here and the constitutional basis for the power that the committee is asserting to exercise.

It is important to note—and I think that all of our written testimonies do so note—that there is a long and consistent practice of legislative oversight of the other branches of government, be they either executive branches or, in some cases, judicial branch in oversight of the courts. That history goes all the way back to the British Parliament and rights of the Parliament against the Crown. It was confirmed and further practiced by the various colonial legislatures in the pre-constitutional era. The early Congresses made absolutely no hesitation—and I will go through an example here in a moment—about their ability to conduct extensive inquiry and oversight into actions of the executive branch.

State courts and, ultimately, the U.S. Supreme Court have consistently and overwhelmingly affirmed Congress' constitutional authority to conduct almost exclusive oversight of the executive branch, broad oversight of private persons and parties, and investigations into any and all areas in which Congress feels there is a legitimate legislative purpose.

Probably the best and most persuasive example that I can find for you is, in fact, Congress' own actions early on during the constitutional era. Back in 1792, the Second Congress instituted an investigation and started an inquiry to determine the cause of more than a thousand American casualties in the Ohio Valley at the hand of some Indian tribes, involving the actions of Major General Arthur St. Clair and his military exploits in that era.

Initially after Congress found out about the issue, there was a motion on the floor of the House of Representatives to pass a resolution calling for the President or the executive branch to conduct the inquiry into St. Clair's defeat all on its own. This was completely rejected by a floor vote on the House of 35 to 21.

A second motion was subsequently filed to create a select committee of Members of the House of Representatives and to vest that committee with the power to call for all persons, papers, and records as may be necessary to assist the committee in its inquiries. This resolution passed 44 to 10, with luminaries such as James Madison both voting against the Presidential investigation and for the formation of a congressional select committee.

What is even more interesting, however, and more of note and relevant here is the response that they got from the executive branch, which also included many Framers and Founders who had been present at the Constitutional Convention, including President

Washington and then-Secretary of the Treasury Alexander Hamilton. According to notes from Thomas Jefferson, after the committee was formed and sent its inquiry to Secretary of War Henry Knox asking for the Presidential papers related to St. Clair's expedition, the Cabinet met in President Washington's study and agreed that the House had a legitimate right and interest in both conducting the inquiry and in requesting the papers and documents.

They also agreed that the information should be given over to the Congress unless there would be injury to the public, and absent a showing of that injury to the public, the documents were to be disclosed. And, in fact, several days later, Mr. Knox made the documents available to the committee.

I think what is most relevant and important about this early example is not only the participation of those who helped draft the founding documents that attorneys and specialists in the Constitution like this panel are currently interpreting today, but also the consistency with which all of the people, whether they be in the Congress or in the executive branch, viewed the House's prerogative to both create the committee of inquiry, demand the papers, and receive them from the executive branch, who obviously had a vested interest in performing its own investigation of the events that had occurred.

I want to briefly jump forward about 200 years, or a little less than 200 years, to *McGrain* v. *Daugherty,* which is, as Mort mentioned, the seminal case that sets forth the Supreme Court's opinion of Congress' oversight and investigatory power. Now, as most of you probably are aware, *McGrain* v. *Daugherty* was ultimately a spinoff of what was then the Teapot Dome investigation into the oil leases that the executive branch was engaged in. Specifically, it was an investigation into then-Attorney General Daugherty's failure to prosecute and bring certain causes of action against various people who had participated in that scandal.

There was a committee subpoena to one Mally Daugherty, who was the Attorney General's brother. He was located in Ohio as president of a bank out there. He ultimately was subpoenaed both to appear before the Senate and testify as well as to provide records and papers. He refused and remained in Ohio. The Congress passed a resolution issuing a warrant for his arrest and that he be brought before the bar of the Senate for an inherent contempt trial.

When he was arrested in Ohio, he immediately applied for a writ of habeas corpus from a district court in Cincinnati. That writ was granted and subsequently appealed by the U.S. Government to the Supreme Court. The Supreme Court reversed unanimously and described, as Chairman Issa quoted, the power of inquiry of Congress as, "an essential and appropriate auxiliary to the legislative function."

McGrain's rationale and theory has been picked up and cited extensively by Supreme Courts since then. Courts such as the Supreme Court in *Watkins* v. *The United States* said, "The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning

the administration of existing laws as well as proposed or possibly needed statutes."

Moreover, in 1975, the Supreme Court in a case called *Eastland* v. *United States Servicemen's Fund,* again relying on the precedent set by McGrain and ultimately Sinclair and Watkins, said, "The scope of Congress' power of inquiry is as penetrating, as far-reaching as the power to enact and appropriate funds under the Constitution."

In sum, Mr. Chairman and Mr. Ranking Member, there is very little question that Congress' constitutional authority vested under Article I is sufficiently broad to encompass the inquiry that the committee is trying to seek. That is not to say, however, that Congress' power is unlimited or not subject to certain constraints. The question really is whether or not any of those constraints are legally based or politically based.

Legally based constraints would include, say, for example, the power not to conduct unlawful searches and seizures, or require that people at the direction of this House, such as the Capitol Police or the Sergeant at Arms, engage in violations of the Fourth Amendment. Another example would be compelling witness testimony when it might be contrary to their Fifth Amendment rights against self-incrimination. And yet a third legal possibility would be a legitimate and valid claim of Executive privilege, or Presidential communications privilege, which the *Court in United States* v. *Nixon* in 1973 recognized as constitutionally based.

On the other side of that coin are the concerns Ranking Member Cummings raised, which I term as "political," which is not to say they are illegitimate, but meaning they are not legally or constitutionally based, which gets into questions such as whether or not this is a responsible course of action or whether or not the committee has any sort of an interest in seeing the prosecution successfully completed or not interfering with the Justice Department's internal investigations or processes.

Those are completely legitimate questions for this committee to consider, but they are ultimately for this committee to determine whether or not they are proper or proper exercises of this committee's power. The Constitution makes no such limitations or restrictions and places no such limitations or requirements that Congress overcome those. Merely, those are left for the political branches to negotiate and work out amongst themselves.

And, with that, I will turn it over to my panelists.

[The prepared statement of Mr. Tatelman follows:]

Statement of Todd B. Tatelman
Legislative Attorney
Congressional Research Service

Before

The Committee on Oversight and Government Reform
United State House of Representatives

June 13, 2011

On

Obstruction of Justice: Does the Justice Department Have to Respond to Lawfully Issued and Valid Congressional Subpoena?

Chairman Issa, Ranking Member Cummings, and Members of the Committee:

My name is Todd B. Tatelman, I am a Legislative Attorney in the American Law Division of the Congressional Research Service at the Library of Congress. I thank you for inviting CRS to testify today regarding Obstruction of Justice: Does the Justice Department Have to Respond to Lawfully Issued and Valid Congressional Subpoena? Specifically, the Committee has asked for a discussion of the constitutional authority given to Congress to conduct oversight of the Executive Branch.

Congress's power to conduct oversight and investigations, including oversight and investigations of the other branches of government, is extremely broad. Although there is no express language in the Constitution or a specific statute authorizing the conduct of congressional investigations, precedents from the British Parliament, the practices of colonial assemblies, state legislatures, and the early Congresses, as well as the opinions in several state court and U.S. Supreme Court decisions, have firmly established that such a power is essential to the legislative function and is properly implied from the vesting of all legislative powers in Congress.[1]

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[1] *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 435 (1977); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Barnblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also* James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159-164 (1926); C.S. Potts, *Power of Legislative Bodies to Punish for* Contempt, 74 U. PA. L. REV. 695 (1926); Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189, 193-94 (1967).

In addition to a textual basis, congressional oversight has been argued to be a central function of representative government. According to Senators William S. Cohen and George J. Mitchell, oversight of the executive is designed "to allow a free people to drag realities out into the sunlight and demand a full accounting from those who are permitted to hold and exercise power."[2] Dragging "realities out" is how Congress shines the spotlight of public attention on many significant issues, allowing lawmakers and the American people to make informed judgments about executive activities and actions. As Woodrow Wilson articulated in *Congressional Government*, Congress's informing function "should be preferred even to its legislative [lawmaking] function." Wilson went on to explain:

> Unless Congress has and uses every means of acquainting itself with the acts and dispositions of the administrative agents of government, the country must be helpless to learn how it is being served; and unless Congress both scrutinizes these things and sifts them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important it should understand and direct.[3]

Early Congressional Precedent

Largely because its membership included many of the delegates who participated both at the Constitutional Convention in Philadelphia and at the various state ratifying conventions, the early Congresses arguably provide the best example of the institution's view of its own prerogatives. This is especially true with regard to Congress's ability to obtain information directly from the Executive Branch. In fact, the early Congresses did not hesitate to assert their prerogatives with respect to conducting oversight and investigations of the Executive. In 1792, the House of Representatives of the Second Congress initially considered a resolution calling for the President to conduct an inquiry into the causes of the military losses of Major General Arthur St. Clair.[4] The House rejected a purely presidential inquiry and instead adopted a resolution creating a select committee to investigate the incident.[5] The resolution adopted by the House authorized the committee to "call for such persons, papers, and records, as may be necessary to assist its inquiries."[6] Acting on its delegated authority, the select committee promptly called for documents from the Secretary of War.

The response of the Executive, specifically President Washington and his cabinet, which also contained a number of delegates to the Constitutional Convention and subsequent state ratifying conventions, is illustrative as well. Upon receipt of the select committee's request, President Washington convened his cabinet of advisors – Secretary of State Thomas Jefferson, Secretary of Treasury Alexander Hamilton, Secretary of War Henry Knox, and Attorney General Edmund Randolph – to determine what response, if any, was warranted. According to notes taken by Thomas Jefferson, Washington's cabinet was in agreement on the following principles:

> First that the House was an inquest, and therefore might institute inquires. Second, that they might call for papers generally. Third, that the Executive ought to communicate such papers as the public

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[2] SENATORS WILLIAM S. COHEN AND GEORGE J. MITCHELL, MEN OF ZEAL, A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS, 305 (1988).

[3] WOODROW WILSON, CONGRESSIONAL GOVERNMENT, 303 (1885).

[4] 3 ANNALS OF CONG. 490 (1792).

[5] *Id.* at 494.

[6] *Id.*

> good would permit and ought to refuse those that the disclosure of which would injure the public: consequently were to exercise discretion. Fourth, that neither the committee nor the House had a right to call on the head of a department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President. ... It was agreed in this case that there was not a paper, which might not be properly produced.[7]

As a result of these deliberations, Secretary of War Knox was instructed to and delivered copies of the requested papers to the House.[8]

The St. Clair example establishes a strong precedent for congressional access to executive materials. Based on its actions, Congress clearly did not believe that its power of inquiry stopped at the President's door. Similarly, the President accepted Congress's legitimate authority to call for papers. The St. Clair precedent also establishes that, while there exists some discretion on the part of the President, the ability to withhold extends only to those documents that "would injure the public." Thus, as at least one separation of powers scholar has noted, "Presidents were not entitled to withhold information simply because it might embarrass the administration or reveal illegal or improper activities."[9]

State Legislature Precedent

Further support for the power of legislatures, specifically Congress, to conduct oversight and investigations can be derived from the practices of both the colonial assemblies, which were well known to the drafters of the Constitution, as well as the oversight activities of various state legislatures after ratification.

According to one scholar, the early colonial assemblies "very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention."[10] For example, in 1722, the Massachusetts legislature asserted the right to summon the heads of colonial forces to determine their responsibility for the failure to carry out operations ordered during a previous session of the legislature.[11] Another example occurred in Pennsylvania, in 1770, when a standing committee of the Pennsylvania Assembly – charged with auditing and settling the accounts of the treasury and collectors of public revenues, and imbued with the "full Power and Authority to send for Persons, Papers, and Records ... " – ordered that the assessors and collectors of Lancaster County appear before them and bring their books and papers for the preceding 10 years.[12]

In addition to state legislative precedent, state court decisions have on several occasions directly addressed the question of the power of legislative bodies to receive evidence, call witnesses, and generally acquire knowledge and information from the sources of its choosing.[13] Two prominent

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[7] THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON, VOL. 1, 304 (Albert Ellery Bergh eds) (1903).

[8] *See* CONGRESS INVESTIGATES: A DOCUMENTARY HISTORY 1792-1974, VOL. 1, 10 (Arthur M. Schlesinger, Jr. & Roger Burns eds. 1975).

[9] LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE, 11 (2004).

[10] C.S. Potts, *Power of Legislative Bodies to Punish for* Contempt, 74 U. PA. L. REV. 695, 708 (1926).

[11] *See id.* (citing VOTES OF THE ASSEMBLY, VOL. III, 498-503).

[12] *See id.* at 709. (citing VOTES OF THE ASSEMBLY, VOL. VI, 66-102, 199, 224).

[13] *See, e.g., Sullivan v. Hill*, 73 W.Va. 49, 53 (1913); *State v. Frear*, 138 Wis. 173 (1909); *Ex parte Parker*, 74 S.C. 466, 470 (continued...)

examples are worth specific mention. First, in 1859, the Supreme Judicial Court of Massachusetts decided *Burnham v. Morrissey*,[14] in which the court held that the Massachusetts House of Representatives has the power to compel witnesses to testify before the House or one of its committees and that the refusal of a witness, duly summoned to appear, to attend or testify is in contempt of that authority and may be arrested and brought before the House. The court specifically stated that:

> [t]he house of representatives has many duties to perform, which necessarily require it to receive evidence, and examine witnesses. ... It has often occasion to acquire a certain knowledge of facts, in order to the proper performance of the legislative duties. We therefore think it clear that it has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and to testify. This power to summon and examine witnesses it may exercise by means of committees.[15]

In 1885, the Court of Appeals for the State of New York decided *Keeler v. McDonald*,[16] in which the court reversed a lower court decision granting a writ of *habeas corpus* to William McDonald. Mr. McDonald had been found in contempt by the New York State Senate and was being held in the Albany County jail.[17] In reversing the lower court's granting of the writ, the Court of Appeals directly addressed the legislature's right to obtain information, holding that:

> [t]he power of obtaining information for the purpose of framing laws to meet supposed or apprehended evils is one which has, from time immemorial, been deemed necessary, and has been exercised by legislative bodies. ...
>
> It is difficult to conceive of any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and to summon witnesses. In many cases it may be indispensible to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation, and the remedy required; ...."[18]

Supreme Court Precedent

In addition to the strong precedents established by the early Congresses and various state legislatures, the Supreme Court has firmly established Congress's investigative and oversight prerogatives. The broad legislative authority to seek and enforce informational demands was unequivocally established in two Supreme Court rulings arising out of the 1920's Teapot Dome scandal.

The seminal case establishing Congress's power of inquiry is *McGrain v. Daugherty*,[19] which arose out of the exercise of the Senate's inherent contempt power. The Senate had authorized a select committee to investigate the alleged failure of the Attorney General, Harry M. Daugherty, to prosecute violations of the

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(...continued)

(1906); *Lowe v. Summers*, 69 Mo. App. 637, 649-50 (1897); *Keeler v. McDonald*, 99 N.Y. 463 (1885); *Burnham v. Morrissey*, 80 Mass. 226 (1859); *Falvey v. Massing*, 7 Wis. 630, 635-38 (1858).

[14] 80 Mass. 226 (1859).

[15] *Id.* at 239.

[16] 99 N.Y. 463 (1885).

[17] *Id.* at 472.

[18] *Id.* at 481-82.

[19] 273 U.S. 135, 174-75 (1927).

Sherman Antitrust Act and the Clayton Act against various monopolies.[20] During the course of the select committee's investigation, who issued a subpoena to Mally S. Daugherty, brother of the Attorney General and president of Midland National Bank of Washington Court House, Ohio, directing him to appear and testify before the committee as well as to bring specifically requested documents for the committee's review.[21] Mr. Daugherty refused to appear and produce the subpoenaed materials. As a result, a warrant was issued directing the Sergeant-at-Arms that Mr. Daugherty be arrested and brought before the bar of the Senate.[22] Upon his arrest in Cincinnati, Mr. Daugherty sought and obtained a writ of *habeas corpus* from the district court directing his release.[23] On appeal, the Supreme Court, in reversing the district court and quashing the writ, described Congress's power of inquiry, with the accompanying process to enforce it, as "an essential and appropriate auxiliary to the legislative function." The Court explained:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information–which not infrequently is true–recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain that which is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry–with enforcing process–was regarded and employed as a necessary and appropriate attribute of the power to legislate–indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.[24]

Two years later, in *Sinclair v. United States,*[25] a different witness at the congressional hearings investigating Teapot Dome refused to provide answers to committee questions, and was prosecuted for contempt of Congress. The witness, Harry F. Sinclair, 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."[26] The Supreme Court upheld the witness's 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."[27] The Court further explained that:

> [i]t 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

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[20] *Id.* at 151.

[21] *Id.* at 152.

[22] *Id.* at 153-54.

[23] *Id.* at 154.

[24] *Id.* at 174-75.

[25] 279 U.S. 263 (1929).

[26] *Id.* at 290.

[27] *Id.* at 295.

> 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.[28]

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress's investigative authority. For example, the Court, in *Watkins v. United States*, described the breadth of the power of inquiry. According to the Court, Congress's power "to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[29] The Court did not limit the power of congressional inquiry to cases of "wrongdoing." It emphasized, however, 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, the Court stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[30] "[T]he first Congresses," held "inquiries dealing with suspected corruption or mismanagement by government officials"[31] 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."[32] Accordingly, the Court now clearly recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[33] Additionally, in *Eastland v. United States Servicemen's Fund*,[34] the Court explained that "[t]he scope of [Congress's] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[35]

Other Judicial Precedent

While it is true that each of the above referenced Supreme Court cases involved actions against non-executive branch officials, the Supreme Court has never made a distinction between Congress's power to investigate the Executive and Congress's authority with respect to private citizens. Largely due to the political nature of congressional investigations of the Executive Branch and the reluctance of the judiciary to interfere in political questions, the case law involving executive branch officials is limited and has not reached the Supreme Court. That said, the judicial precedent that does exist is arguably favorable to congressional prerogatives.

A prominent example occurred in June of 1976, during a Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce investigation into allegations of improper domestic intelligence gathering, foreign intelligence gathering, and the wiretapping of telephone

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[28] *Id.*

[29] 354 U.S. 178, 187 (1957).

[30] *Id.*

[31] *Id.* at 182.

[32] *Id.* at 194-95

[33] *Id.* at 200 n. 33; *see also Morrison v. Olson*, 487 U.S. 654, 694 (1988) (noting that Congress's role under the Independent Counsel Act "of receiving reports or other information and oversight of the independent counsel's activities ... [are] functions we have recognized as being incidental to the legislative function of Congress") (citing *McGrain v. Daugherty*, 273 U.S. 135 (1927)).

[34] 421 U.S. 491 (1975).

[35] *Id.* at 504, n. 15 (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1960)).

communications without a warrant. Pursuant to its authority under the House Rules, subpoenas were issued to the American Telephone and Telegraph Company (AT&T) by the subcommittee seeking copies of "all national security request letters sent to AT&T and its subsidiaries by the [Federal Bureau of Investigation] FBI as well as records of such taps prior to the time when the practice of sending such letters was initiated."[36] Before AT&T could comply with the request, the Department of Justice (DOJ) and the subcommittee's Chairman, Representative John Moss, entered into negotiations seeking to reach an alternative agreement which would prevent AT&T from having to turn over all of its records.[37] When these negotiations broke down, the DOJ sought an injunction prohibiting AT&T from complying with the subcommittee's subpoenas. According to the court, the DOJ based its claim on the "the damage to the national interest from the centralization and possible disclosure outside of Congress, of information identifying the targets of all foreign intelligence surveillance since 1969."[38] The District Court for the District of Columbia applied a balancing test between the competing Executive and Legislative Branch authorities with respect to the issues presented. That court concluded that the alternative offered by the President met most of the subcommittee's needs. The court, however, deferred to the "final determination" of the President that execution of the subpoena "would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States" and issued the injunction.[39]

On appeal, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) first dismissed several prudential concerns. Specifically, the court considered the doctrines of mootness, political question, and standing, determining that none of them prevented the court from reaching the merits of the injunction.[40] Next, the court very carefully addressed the claims of absolute rights asserted by both the Congress and the Executive Branch. Relying on both *Eastland v. United States Servicemen's Fund*,[41] as well as *McGrain v. Daugherty*,[42] the court stated that the "Congressional power to investigate and acquire information by subpoena is on a firm constitutional basis."[43] Moreover, the court concluded that while generally congressional subpoena power cannot be interfered with by the courts, the "*Eastland* immunity is not absolute in the context of a conflicting constitutional interest asserted by a coordinate branch of government."[44] Turning to the Executive Branch's claims of absolute control over national security information, the court noted that Supreme Court precedent does "not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers."[45] Given the sensitivity of the constitutional balancing that the court was faced with, combined with the fact that the parties had nearly reached an out-of-court settlement, the court expressly declined to rule on the merits of the injunction. Rather, it remanded the case to the district court to modify the injunction to exclude information for which no claim

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[36] *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976) [hereinafter AT&T I].

[37] *Id.* at 386. The precise details of the delicate negotiations between the DOJ and the Subcommittee are explained by the court, and, therefore, will not be recounted here. *See id.* at 386-88.

[38] *Id.* at 388.

[39] *United States v. AT&T & Moss*, 419 F.Supp. 454, 458-461 (D.D.C.1976).

[40] *See AT&T I*, 551 F.2d at 390-91.

[41] 421 U.S. 491 (1975).

[42] 273 U.S. 135 (1927).

[43] *AT&T I*, 551 F.2d at 393.

[44] *Id.* at 392 (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974)).

[45] *Id.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) & *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948)).

of national security had been made.[46] Moreover, the court directed the parties to continue negotiations and report to the district court on their progress.[47]

After continued negotiations, which focused primarily on access to un-redacted DOJ memoranda, the parties reached an impasse and found themselves back before the D.C. Circuit.[48] Like its previous decision, the court, rather than ruling on the merits of the constitutional conflict, attempted to fashion a compromise resolution that would force the parties back to the negotiating table, or at least allow the district court to play a role in mediating the dispute. It allowed the DOJ to limit the sample size of the unedited memoranda and prohibited the committee staff from removing its notes from the FBI's possession.[49] In a situation where inaccuracy or deception was alleged by the subcommittee, the materials were to be forwarded to the district court for *in camera* review and any remedial action the court found necessary.[50] In addition, while the Attorney General was afforded the right to employ a substitution procedure for the most sensitive documents, the substitutions would have to be approved by the district court based on a showing of "the accuracy and fairness of the edited memorandum, and the extraordinary sensitivity of the contents of the original memorandum to the national security."[51]

In the end, the court in *AT&T* never ruled on the merits of the dispute and never resolved the constitutional conflict between the branches. At most, *AT&T* stands for the proposition that neither claims of executive control over national security documents, nor congressional assertions of access are absolute. Instead, both claims are qualified and, therefore, subject to potential judicial review, but only after every attempt to resolve the differences between the branches themselves has been exhausted. In addition, *AT&T* provides support for the proposition that third-party subpoenas – such as ones to telecommunications companies – can be challenged in federal court and are not subject to the constitutional protection provided by the Speech or Debate Clause.

In the most recent conflict between the Congress and Executive Branch to make its way before the courts, *Committee on the Judiciary, U.S. House of Representatives v. Miers*,[52] the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law ("the Committee") filed a civil lawsuit against the White House in an attempt to enforce its prerogatives. After an extensive investigation into the resignations of nine United States Attorneys involving numerous witness interviews and several congressional hearings, the Committee ultimately sought information relating to the resignations directly from the White House.[53] After several attempts to obtain the information informally, the Committee issued and served subpoenas on Ms. Harriet Miers, the former White House Counsel and Mr. Joshua

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[46] *Id.* at 395 (stating that "[w]e direct the District Court to modify the injunction to exclude request letters pertaining to taps classified by the FBI as domestic, since there was no contention by the Executive, nor finding by the District Court, of undue risk to the national security from transmission of these letters to the Subcommittee.").

[47] *Id.*

[48] *See United States v. AT&T*, 567 F.2d 121, 124-25 (D.C. Cir. 1977) (detailing the extensive negotiations between the DOJ and the Subcommittee since the court last heard from the parties).

[49] *Id.* at 131-32.

[50] *Id.*

[51] *Id.* at 132.

[52] 558 F.Supp.2d 53 (D.D.C. 2008).

[53] *See generally*, H.Rept. 110-423 (2007), *available at*, http://judiciary.house.gov/Media/PDFS/ContemptReport071105.pdf; *see also* H. Jud. Comm. Mot. Summ. J. at 11 (copy on file with authors).

Bolten, the White House Chief of Staff and custodian of White House records.[54] Ms. Miers's subpoena was for both documents and testimony about her role, if any, in the resignations; while Mr. Bolten's subpoena was only for White House records and documents related to the resignations. When the information was not provided to the Committee by the White House, the Committee sought a declaratory judgment in federal district court.

In holding that the Congress has standing to bring a civil suit for the purpose of enforcing its subpoenas, the District Court for the District of Columbia affirmed Congress's power of inquiry and its ability to issue subpoenas. Specifically, the court stated that "'[j]ust as the power to issue subpoenas is a necessary part of the Executive Branch's authority to execute federal laws' so too is Congress's need to enforce its subpoenas a necessary part of its power of inquiry."[55] The court went on to state that "there can be no question that Congress has a right – derived from its Article I legislative function – to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas."[56]

As discussed above, the cases involving disputes between Congress and the Executive rely heavily on the rationale articulated by the Supreme Court in *McGrain*, *Sinclair*, *Watkins*, and *Eastland*. More importantly, the courts have not distinguished Congress's power of inquiry based on the target. Phrased another way, those courts that have reviewed Congress's power of inquiry against the Executive have found it to be equally as plenary and powerful as when it is used against private persons or entities.

Authority of Congressional Committees

Oversight and investigative authority is implied from Article I of the Constitution and lies with the House of Representatives and Senate. The House and Senate in turn have delegated this authority to various entities, the most relevant of which are the standing committees of each chamber Committees of Congress have only the power to inquire into matters within the scope of the authority delegated to it by its parent body. Once having established its jurisdiction, authority, and the pertinence of the matter under inquiry to its area of authority, however, a committee's investigative purview is substantial and wide-ranging.

Committee Jurisdiction

Establishing committee jurisdiction is the foundation for any attempt to obtain information and documents from the Executive Branch. A claim of lawful jurisdiction, however, does not automatically entitle the committee to access whatever documents and information it may seek. Rather, an appropriate claim of jurisdiction authorizes the committee to inquire and request information. The specifics of such access may still be subject to prudential, political, and constitutionally based privileges asserted by the targets of the inquiry.

A congressional committee is a creation of its parent house and, therefore, has only the power to inquire into matters within the scope of the authority that has been delegated to it by that body.[57] Thus, the

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[54] H. Jud. Comm. Mot. Summ. J. at 12.

[55] *Miers*, 558 F.Supp.2d at 75 (internal citation omitted).

[56] *Id.* at 84.

[57] *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); *see also Watkins v. United States*, 354 U.S. at 198.

enabling chamber rule or resolution that gives the committee life is also the charter that defines the grant and limitations of the committee's power. In construing the scope of a committee's authorizing charter, courts will look to the words of the rule or resolution itself, and then, if necessary, to the usual sources of legislative history such as floor debate, legislative reports, and prior committee practice and interpretation.

Rule X of the House Rules and Rule XXV of the Senate Rules deal respectively with the organization of the standing committees and establish their jurisdiction.[58] Jurisdictional authority for "special" investigations may be given to a standing committee, a joint committee of both houses, or a special subcommittee of a standing committee, among other vehicles. Given the specificity with which the House and Senate rules now confer jurisdiction on their standing committees, as well as the care with which most authorizing resolutions for special and/or select committees have been drafted in recent years, sufficient models exist to avoid a successful judicial challenge by a witness that his noncompliance was justified by a committee's overstepping its delegated scope of authority.

Legislative Purpose

While the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only "in aid of the legislative function"[59] and cannot be used to expose for the sake of exposure alone. The Supreme Court in *Watkins* underlined these limitations stating that:

> There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.[60]

A committee's inquiry must have a legislative purpose or be conducted pursuant to some other constitutional power of the Congress, such as the authority of each House to discipline its own Members, judge the returns of the their elections, and to conduct impeachment proceedings.[61] Although the 1927 Supreme Court decision in *Kilbourn v. Thompson*[62] held that the investigation in that case was an improper probe into the private affairs of individuals, the courts today generally will presume that there is a legislative purpose for an investigation, and the House or Senate rule or resolution authorizing the investigation does not have to specifically state the committee's legislative purpose.[63] In *In re Chapman*,[64]

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[58] *See* RULES OF THE HOUSE OF REPRESENTATIVES FOR THE 112TH CONGRESS, Rule X, *available at*, http://rules.house.gov/Media/file/PDF_112_1/legislativetext/112th%20Rules%20Pamphlet.pdf (2011); *see also* S. Doc. 107-1, *Senate Manual*, Rule XXV, 107th Cong. (2002).

[59] *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

[60] *Watkins v. United States*, 354 U.S. at 187.

[61] *See, e.g., McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also In Re Chapman*, 166 U.S. 661 (1897).

[62] 103 U.S. 168 (1881).

[63] *McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938); LEADING CASES ON CONGRESSIONAL INVESTIGATORY POWER, 7 (Comm. Print 1976). For a different assessment of recent case law concerning the requirement of a legislative purpose, *See* Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189, 232 (1967).

[64] 166 U.S. 661, 669 (1897).

the Court upheld the validity of a resolution authorizing an inquiry into charges of corruption against certain Senators despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated:

> The questions were undoubtedly pertinent to the subject matter of the inquiry. The resolutions directed the committee to inquire "whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." What the Senate might or might not do upon the facts when ascertained, we cannot say nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.
>
> Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.
>
> We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.[65]

In *McGrain v. Daugherty*,[66] the original resolution that authorized the Senate investigation into the Teapot Dome Affair made no mention of a legislative purpose. A subsequent resolution for the attachment of a contumacious witness declared that his testimony was sought for the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." The Court found that the investigation was ordered for a legitimate object. It wrote:

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

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[65] *In re Chapman*, 166 U.S. at 699.

[66] 273 U.S. 135 (1927).

> resolution and is rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.[67]

Moreover, when the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of the Congress exceeds its power when it seeks information in such areas.[68] In the past, the types of legislative activity which have justified the exercise of the power to investigate have included the primary functions of legislating and appropriating;[69] the function of deciding whether or not legislation is appropriate;[70] oversight of the administration of the laws by the executive branch;[71] and the essential congressional function of informing itself in matters of national concern.[72] In addition, Congress's power to investigate such diverse matters as foreign and domestic subversive activities,[73] labor union corruption,[74] and organizations that violate the civil rights of others[75] have all been upheld by the Supreme Court.

Despite the Court's broad interpretation of legislative purpose, Congress's authority is not unlimited. Courts have held that a committee lacks legislative purpose if it appears to be conducting a legislative trial rather than an investigation to assist in performing its legislative function.[76] Furthermore, although "there is no congressional power to expose for the sake of exposure,"[77] "so long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."[78]

Conclusion

As demonstrated, there exists ample precedent, both legislative and judicial, for the assertion that Congress has the constitutional authority to conduct oversight of the Executive and enforce its demands for information. Specific investigations, however, may give rise to political and/or prudential concerns raised by the Executive, which Congress may find persuasive. In addition, there may be constitutionally based privileges, such as the privilege against self-incrimination or the presidential communications privilege, to which Congress must adhere, or overcome via a granting of immunity[79] or by a showing of

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[67] *Id.* at 179-180.

[68] *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

[69] *Barenblatt v. United States*, 360 U.S. 109 (1959).

[70] *Quinn v. United States*, 349 U.S. 155, 161 (1955).

[71] *McGrain*, 273 U.S. at 295.

[72] *United States v. Rumely*, 345 U.S. 4, 43-45 (1953); *see also Watkins*, 354 U.S. at 200 n. 3.

[73] *See, e.g., Barrenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McPhaul v. United States*, 364 U.S. 372 (1960).

[74] *Hutcheson v. United States*, 369 U.S. 599 (1962).

[75] *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

[76] *See United States v. Cross*, 170 F. Supp. 303 (D.D.C. 1959); *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956).

[77] *Watkins v. United States*, 354 U.S. 178, 200 (1957). However, Chief Justice Warren, writing for the majority, made it clear that he was not referring to the "power of the Congress to inquire into and publicize corruption, mal-administration or inefficiency in agencies of the Government." *Id.*

[78] *Barenblatt*, 360 U.S. at 132.

[79] *See* 18 U.S.C. §§ 6002, 6005 (2006).

need and unavailability of the information elsewhere by an appropriate investigating authority.[80] The potential availability of these arguments, however, has no impact on the underlying constitutional authority vested in the Congress to conduct oversight and require that information, whether in the form of testimony, documents, or both.

[80] *See In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997); *see also Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

Chairman ISSA. Thank you.
Mr. Fisher.

STATEMENT OF LOUIS FISHER

Mr. FISHER. Thank you very much. It is a very important hearing to explore this.

When committees ask for documents from the administration, they are typically told initially that you can't have them; it is part of the "deliberative process," it is part of the "active litigation file," it has do with either pending or ongoing investigations. That is just the opening statement by the administration. And, as you know, at that time it all falls back to the committee as to how determined you are of your understanding of your constitutional duties.

I refer in my statement to a study in 1949 by an attorney who worked at the Justice Department who said that when Congress and the administration collide, the administration prevails every time. Of course, that wasn't true in 1949 or before or after. It is much more complicated, and you have to have each branch understand its limits and each understand its duties.

I think a much better explanation of what Congress can get through its constitutional duties comes from another attorney who worked at the Justice Department, and his name, Antonin Scalia. And he testified in 1975 before a Senate committee, and at that time he was the head of the Office of Legal Counsel. And he said—and I think his words are quite good—that when there is an impasse between the two branches—his language—the answer is likely to lie in the hurly burly, the give and take of the political process between the legislative and executive. Then he said, when it comes to an impasse, the Congress has the means at its disposal to have its will prevail.

Now, on these clashes, it may be tempting to think that there is a winner and a loser. I think when Congress does not push its constitutional powers and gets the document it needs for a thorough investigation that there is a loser, and the loser is the public, its constitutional government, and the system of checks and balances.

In 1982, President Reagan, I think, set a good framework for these document fights. He said, "Historically, good-faith negotiations between Congress and the executive branch have minimized the need for invoking executive privilege. And this tradition of accommodation should continue as the primary means of resolving conflicts between the branches."

At present time, you have a subpoena, and, as you said in your opening statement, a subpoena is not satisfied when you have to have committee staff travel to the Justice Department to sit in camera and look at documents that are heavily redacted. There is no way the committee can satisfy its constitutional duties.

In 1981, Attorney General William French Smith said that, when Congress is going after documents, it has a better chance of getting it when it is pursuant to legislation rather than pursuant to oversight. I don't think there is anything to that distinction at all. You have as much right to oversee the laws as you do to enact them. And if there is anything to that distinction, every time you do an oversight hearing you could just introduce legislation. So it doesn't make any sense to me.

As far as getting access to documents in cases of ongoing criminal investigations, Mort talked about the FBI corruption case that was on that. My statement goes into a good deal of detail into the Inslaw matter—again, active criminal investigations, and Congress got the documents it needed.

Finally, your success in getting documents I think depends a lot on bipartisan support. A committee acting in a bipartisan manner is much stronger. In this case, I think it is even stronger when the two chambers of Congress are after the same documents.

If you do not get the documents you want, there is always the next step, after subpoena is not satisfied, to go toward contempt. And my statement gives a lot of examples where that has come about in the past. And through the contempt procedure, Congress can get the information it needs to satisfy its constitutional duties.

Thank you very much.

[The prepared statement of Mr. Fisher follows:]

Statement by Louis Fisher,
The Constitution Project,
Before the
House Committee on Oversight and Government Reform,
"Obstruction of Justice: Does the Justice Department Have to Respond to Lawfully Issued and Valid Congressional Subpoenas?"
June 13, 2011

Mr. Chairman, thank you for the invitation to testify on congressional access to executive branch documents, sought in this case through the subpoena process. Presidents and their advisers often claim that information requested by Congress is covered by the doctrine of executive privilege and other principles, including the protection of the "deliberative process" and "active litigation files." Those are opening, not closing, arguments. In a system of separated powers, one branch does not have any necessary superiority over the other. Various precedents and judicial rulings are interesting but hardly dispositive. What usually breaks the deadlock is a series of political decisions: the determination of lawmakers to use the coercive tools available to them, and calculations by the executive branch whether a continued standoff carries heavy and intolerable losses for the administration.

By and large, the two branches will generally fashion a compromise that promotes their interests – sometimes antagonistic, sometimes not. Political understandings and settlements can keep executive-legislative conflicts over information to a manageable level. Legal and constitutional principles serve as guides, but no more than that. Attempts to announce precise boundaries on what Congress may and may not have are not realistic or even desirable. Disputes over information invariably come with their own unique qualities, characteristics, and histories, both legal and political, and not likely to be governed solely by past practices.

Congress has the theoretical advantage because of the abundant tools at its disposal. To convert that theoretical edge to actual success requires from lawmakers an intense motivation, the staying power to cope with a long and frustrating battle, and an abiding commitment to honor their constitutional purpose. Antonin Scalia, while serving as head of the Office of Legal Counsel, put the matter well during a congressional hearing in 1975. When congressional and presidential interests collide, the answer is likely to lie in the "hurly-burly, the give-and-take of the political process between the legislative and the executive. . . . [W]hen it comes to an impasse the Congress has the means at its disposal to have its will prevail."[1]

[1] "Executive Privilege – Secrecy in Government," hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess. 87 (1975).

Constitutional Principles

In their struggles over information, Congress and the executive branch rely not on clearly enumerated powers but on implied powers: the implied power of Congress to investigate in order to legislate in an informed manner, and the implied power of the President to withhold certain documents to protect executive interests. It is tempting to see executive-legislative clashes only as a confrontation between two branches, yielding a loser and a winner. It is more than that. Congressional access represents part of the framers' belief in representative government. When lawmakers are unable (or unwilling) to obtain executive branch information needed for congressional deliberations, the loss extends to the public, democracy, and constitutional government.

No constitutional language authorizes the President to withhold documents from Congress, nor does any provision empower Congress to demand and receive information from the executive branch. Although the Supreme Court frequently claims that the Constitution "creates a Federal Government of enumerated powers,"[2] the government is not confined solely to express and enumerated powers. The Supreme Court has recognized the constitutional power of Congress to investigate and the President's power to withhold information.[3] Those powers would exist with or without judicial rulings. How do we resolve a collision between these two implied powers?

A lengthy study by Herman Wolkinson in 1949, expressing the executive branch position, asserted that federal courts "have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest, and they will not interfere with the exercise of that discretion."[4] That statement, incorrect when written, is even less true today as a result of litigation and political precedent established over the past half century. Similarly inaccurate is his claim that "in every instance where a President has backed the refusal of a head of a department to divulge confidential information to either of the Houses of Congress, or their committees, the papers and the information were not furnished."[5] Through the

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[2] United States v. Lopez, 514 U.S. 549, 552 (1995). See also Boerne v. Flores, 521 U.S. 507, 516 (1997) ("Under our Constitution, the Federal Government is one of enumerated powers.")

[3] McGrain v. Daugherty, 273 U.S. 135, 175 (1927) ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to effect or change."); United States v. Nixon, 418 U.S. 683, 711 (1974) ("To the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.").

[4] Herman Wolkinson, "Demands of Congressional Committees for Executive Papers" (Part I), 10 Fed'l Bar. J. 103, 103 (1949). At the time he wrote this article, Mr. Wolkinson served as an attorney with the U.S. Department of Justice.

[5] Id. at 104.

appropriations power, impeachment, the appointment process, subpoenas, and the contempt power, Congress has prevailed in many instances.[6]

When executive-legislative clashes occur, they are seldom resolved judicially. Accommodations are usually entered into without the need for litigation. In 1982, President Ronald Reagan set forth the governing procedure for responding to congressional requests for information: "Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches."[7]

On those rare occasions where executive-legislative disputes enter the courts, judges typically reject sweeping claims of privilege by elected officials while encouraging the two branches to find a satisfactory compromise. The model for this process is illustrated by the efforts of Judge Harold Levinson in the AT&T cases of the 1970s.[8] The outcome is more likely decided by the persistence of Congress and its determination to sanction executive noncompliance. Congress can win most of the time if it has the will to do so.

Long before there were any judicial precedents to guide interbranch struggles over information, Congress and the executive branch began to develop some understandings and accommodations: the House inquiry during the First Congress on the conduct of Robert Morris as Superintendent of Finance during the Continental Congress, a 1790 congressional investigation into an annuity for Baron von Steuben, and of course the House inquiry into the heavy losses military losses suffered by the troops of Maj. Gen. Arthur St. Clair to Indian tribes.[9] The first use of the contempt power came in 1795, when the House found it necessary to investigate an effort by private parties to corrupt the integrity of lawmakers. The Senate in 1800 conducted similar investigations to protect the dignity and reputation of its institution.[10]

Congressional Subpoenas

The Supreme Court has described the congressional power of inquiry as "an essential and appropriate auxiliary to the legislative function."[11] The issuance of a subpoena pursuant to

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[6] Louis Fisher, The Politics of Executive Privilege 27-134 (2004).

[7] Memorandum from President Reagan to the Heads of the Executive Department and Agencies, "Procedures Governing Responses to Congressional Requests for Information," November 4, 1982, paragraph 1.

[8] United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977); United States v. American Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976).

[9] Fisher, The Politics of Executive Privilege, at 6-10.

[10] Id. at 14-17.

[11] McGrain v. Daugherty, 272 U.S. 135, 174 (1927).

an authorized investigation is "an indispensable ingredient of lawmaking."[12] To be legitimate, a congressional inquiry need not produce a bill or legislative measures. "The very nature of the investigative function – like any research – is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."[13]

Lawmakers and their committees usually obtain the information they need for legislation or oversight without threats of subpoenas. They understand that committee investigations have to satisfy certain standards. Legislative inquires must be authorized by Congress, pursue a valid legislative purpose, raise questions relevant to the issue being investigated, and inform witnesses why questions put to them are pertinent.[14] Congressional inquiries may not interfere with the independence of decisionmakers in adjudicatory proceedings before a department or agency.[15]

Federal courts give great deference to congressional subpoenas. If the investigative effort falls within the "legitimate legislative sphere," the congressional activity – including subpoenas – is protected by the absolute prohibition of the Speech or Debate Clause, which prevents members of Congress from being "questioned in any other place. In a 1975 case, the Supreme Court ruled that such investigative activities are immune from judicial interference.[16]

As a tool of legislative inquiries, both houses of Congress authorize their committees and subcommittees to issue subpoenas to require the production of documents and the attendance of witnesses regarding matters within the committee's jurisdiction. Committee subpoenas "have the same authority as if they were issued by the entire House of Congress from which the committee is drawn."[17] If a witness refuses to testify or produce papers in response to a committee subpoena, and the full committee votes to report a resolution of contempt to the floor, the full House or Senate may vote in support of the contempt citation.

Committees and subcommittees are authorized to request, by subpoena, the attendance and testimony of witnesses and the production of books, records, correspondence, and other documents as it considers necessary. A congressional subpoena identifies the name of the committee or the subcommittee; the date, time, and place of the hearing a witness is to attend; and the particular kind of document sought. A subpoena

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[12] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975).
[13] Id. at 509.
[14] Wilkinson v. United States, 365 U.S. 399, 408-09 (1961); Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 305 (D.D.C. 1976).
[15] Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966).
[16] Eastland v. United States Servicemen's Fund, 421 U.S. at 501.
[17] Id. at 515.

may state that if the documents are delivered by a particular date, the person who has custody over documents need not appear. It is rare for an executive official to wholly sidestep a congressional subpoena. In 1989, a House subcommittee issued a subpoena to former Housing and Urban Development Secretary Samuel Pierce. He appeared but invoked his constitutional right not to incriminate himself. He became the first former or current Cabinet official to invoke the Fifth Amendment since the Teapot Dome scandal of 1923.[18] In 1991, Secretary of Commerce Robert Mosbacher became the first sitting Cabinet officer to refuse to appear before a congressional committee to explain why he would not comply with a subpoena.[19]

In 1981, Attorney General William French Smith issued an opinion that analyzed how the administration should respond to a congressional subpoena. He concluded that when Congress issues a subpoena as part of a "legislative oversight inquiry," access by Congress has less justification than when it seeks information for legislative purposes."[20] He acknowledged that Congress "does have a legitimate interest in obtaining information to assist it in enacting, amending, or repealing legislation." Yet "the interest of Congress in obtaining information for oversight purposes is, I believe, considerable weaker than its interest when specific legislative proposals are in question."[21] This distinction between legislation and oversight is strained and unconvincing. Congress has as much right to oversee the execution of laws as it does to pass them. Moreover, even if such an artificial distinction could be drawn, Congress could easily erase it by introducing a bill to "justify" every oversight proceeding. There is no reason for Congress to act in that manner.

The Inslaw Affair

In 1990, the House and the Justice Department engaged in a showdown over access to documents concerning the Inslaw Affair. On December 5, Chairman Jacks Brooks of the Judiciary Committee convened a hearing to review the refusal of Attorney General Richard Thornburgh to provide the committee with access to all documents regarding a civil dispute brought by Inslaw, Inc., a computer company. Inslaw charged that high-level officials in the Justice Department conspired to force Inslaw into bankruptcy and have its computer software program, called PROMIS, transferred or bought by a rival company to help the company keep track of civil and criminal cases. Federal Bankruptcy Judge

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[18] Valerie Richardson and Jerry Seper, "House Committee Subpoenas Pierce," Washington Times, September 21, 1989, at A5; Gwen Ifill, "Pierce Invokes Fifth Amendment," Washington Post, September 27, 1989, at A1; Haynes Johnson, "Teapot Dome of the '80s," Washington Post, September 29, 1989, at A2.
[19] Susan B. Glasser, "Secretary Spurns Census Subpoena," Roll Call, December 12, 1991, at 1.
[20] 5 Op. O.L.C. 27, 29-30 (1981).
[21] Id. at 30.

George Bason had already ruled that the Justice Department "took, converted, and stole" Inslaw's proprietary software, using "trickery, fraud, and deceit."[22]

The Justice Department denied those charges, claiming that what was at stake was a contract dispute. Chairman Brooks said that the controversy reached the highest levels of the department, including at least two Assistant Attorneys General, a Deputy Attorney General, and Attorney General Edwin Meese. Because House and Senate investigating committees had been denied access to documents needed to establish the department's guilt or innocence, Brooks concluded that he was "even more convinced that the allegations concerning INSLAW must be fully and independently investigated by the committee."[23]

The ranking member of the committee, Hamilton Fish (R-N.Y.), pointed out that the department had given considerable assistance to the legislative investigation, arranging for over 50 interviews with departmental employees, handing over "voluminous written materials," and providing space for congressional staff.[24] In a letter to Rep. Fish, Assistant Attorney General W. Lee Rawls noted that in an accommodation with House Judiciary, "the Department did not insist on its usual practice of having a Department representative at these interviews."[25] Committee staff also had access, pursuant to a confidentiality agreement, "to the files reflecting investigations by the Office of Professional Responsibility, and we have provided documents generated during investigations by the Criminal Division into allegations of wrongdoing relating to Inslaw."[26] Committee staff were allowed to depose departmental employees "without the presence of Department counsel," and were given access to the Civil Division's files on the Inslaw litigation. Out of tens of thousands of documents, the department "withheld only a minute fraction, which are privileged attorney work product that would not be available to a party in litigation with the United States."[27]

At the hearing, the committee heard testimony from Steven R. Ross, House General Counsel, who analyzed the Attorney General's decision to withhold documents because of pending civil litigation and the need for the department to protect litigation strategy and agency work products.[28] Ross took exception to the position advanced by Rawls in his letter to Rep. Fish that congressional investigations "are justifiable only as a means of facilitating the task of passing legislation." Such a standard, Ross said, would "eradicate

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[22] "The Attorney General's Refusal to Provide Congressional Access to 'Privileged' Inslaw Documents," hearing before a subcommittee of the House Committee on the Judiciary, 101st Cong., 2d Sess. 1 (1990).
[23] Id. at 2.
[24] Id. at 3.
[25] Id. at 163.
[26] Id. at 164.
[27] Id
[28] Id. at 77.

the time-honored role of Congress of providing oversight, which is a means that has been upheld by the Supreme Court on a number of occasions, by which the Congress can assure itself that previously passed laws are being properly implemented."[29] Fish interrupted at that point to agree that the sentence by Rawls was "not a technically correct statement of the power of the Congress" and was "far too narrow."[30]

Ross also challenged the claim by the Justice Department that it could deny Congress documents to protect pending litigation. Ross reviewed previous decisions by the Supreme Court to demonstrate that information could not be withheld from Congress simply because of "the pendency of lawsuits."[31] The congressional investigation of Anne Gorsuch, EPA Administrator, was cited by Ross as another example of the Justice Department labeling documents as "enforcement sensitive" or "litigation sensitive" to keep materials from Congress.[32]

On July 25, 1991, a subcommittee of House Judiciary issued a subpoena to Attorney General Thornburgh. A newspaper story said that the night before the subcommittee was scheduled to vote on the subpoena, the Justice Department indicated that it was willing to turn over the Inslaw documents. Chairman Brooks, given recent departmental promises, said he was too skeptical to accept the offer.[33] He wanted access to the documents to decide whether the department had acted illegally by engaging in criminal conspiracy. When the committee failed to receive the materials, Brooks said that the committee would consider contempt of Congress proceedings against the department.[34]

At that point, several hundred documents were delivered to the committee, which later released a formal investigative report on the Inslaw Affair.[35] The committee gained access to sensitive files of the Office of Professional Responsibility and received more than 400 documents that the department had described as related to "ongoing litigation and other highly sensitive matters and 'protected' under the claims of attorney-client and attorney work product privileges."[36]

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[29] Id. at 78.
[30] Id.
[31] Id. at 79.
[32] Id. at 80-81. For details on the Gorsuch investigation by Congress, see Fisher, The Politics of Executive Privilege, at 126-30.
[33] Joan Biskupic, "Panel Challenges Thornburgh Over Right to Documents," CQ Weekly Report, July 27, 1991, at 2080. See also David Johnston, "Administration to Fight House Panel's Subpoena," New York Times, July 30, 1991, at A12.
[34] Susan B. Glasser, "Deadline Passes, But Justice Dept. Still Hasn't Given Papers to Brooks," Roll Call, September 19, 1991, at 12.
[35] H. Rept. No. 857, 102d Cong., 2d Sess. (1992).
[36] Id. at 92-93.

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FBI Corruption in Boston

Toward the end of 2001, President George W. Bush invoked executive privilege for the first time. He acted in response to subpoenas issued by the House Government Reform Committee covering two issues: campaign finance and FBI corruption in Boston. He advised Attorney General John Ashcroft not to release the documents to the committee because disclosure "would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions." He argued that giving the committee access to the documents "threatens to politicize the criminal justice process" and undermine the fundamental purpose of the separation of powers doctrine, which "was to protect individual liberty."[37]

This kind of sweeping language, grounded in fundamental constitutional principles, appeared to shut the door in the face of the committee. In fact, Bush's statement made it clear he was ready to negotiate. He advised the Justice Department to "remain willing to work informally with the Committee to provide such information as it can, consistent with these instructions and without violating the constitutional doctrine of separation of powers."[38] In the end, Bush succeeded in withholding the campaign finance documents but folded on the Boston materials.

There could hardly be a subject area less attractive for Bush's first use of executive privilege than FBI's conduct in Boston. During hearings on May 3, 2001, the House Government Reform Committee laid out the basic facts. It wanted documents concerning the FBI's role in a 30-year-old scandal in Boston that sent innocent people to prison for decades and allowed mobsters to commit murder. The FBI tolerated this injustice because it wanted to preserve access to informers, while at the same time knowing that the individuals imprisoned were innocent of the charges. During this crime spree, some FBI agents took cash from the mobsters.[39] This sordid record promoted the committee investigation, and it was on such a dispute that President decided to invoke executive privilege.

On December 13, 2001, the day following Bush's decision to assert executive privilege, the committee held further hearings on the Boston matter. Michael Horowitz, appearing on behalf of the Justice Department, defended the use of executive privilege to keep from the committee documents regarding the department's decision to prosecute or decline to prosecute. The reason for withholding these pre-decisional documents was "to

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[37] 37 Weekly Comp. Pres. Doc. 1783 (2001).
[38] Id.
[39] "Investigation Into Allegations of Justice Department Misconduct in New England – Volume 1," hearings before the House Committee on Government Reform, 107th Cong,, 1st-2d Sess. 1-4 (2001-02).

protect the integrity of Federal prosecutive decisions" and to make sure that such decisions are based on "evidence and the law, free from political and other improper influences."[40] Releasing such documents to the committee, he said, "would undermine the integrity of the core executive branch decisionmaking function."[41]

This testimony was far too abstract and rigid to survive as departmental doctrine. Six days after the hearings, the department wrote a much more conciliatory letter to the committee chairman. It now stated "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."[42]

On January 10, 2002, White House Counsel Alberto R. Gonzales wrote to the committee, noting that it was a "misimpression" that congressional committees could never receive deliberative documents from a criminal investigation. "There is no such bright-line policy, nor did we intend to articulate any such policy." Instead, the department would treat such documents "through a process of appropriate accommodation and negotiation to preserve the respective constitutional roles of the two Branches." The committee's subpoenas "sought a very narrow and particularly sensitive category of deliberative matters – prosecution and declination memoranda – as well as the closely related category of memoranda to the Attorney General regarding the appointment of a special prosecutor" for the campaign finance investigation. Yet Gonzales signaled that such materials, under certain conditions, might be shared with the committee: "Absent unusual circumstances, the Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure."[43]

The dispute had clearly moved away from fixed departmental principles to the specific question of whether "unusual circumstances" were absent or present. Clearly it was the latter. Gonzales said that the administration "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 principles 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."[44] The White House was now "prepared to accommodate the Committee's interest in a manner that should both satisfy the

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[40] Id. at 379.
[41] Id. at 380.
[42] Letter from Assistant Attorney General Daniel J. Bryant to Rep. Dan Burton, chairman of the House Committee on Government Reform, December 19, 2001, at 2.
[43] Letter from Alberto R. Gonzales, Counsel to the President, to Rep. Dan Burton, January 10, 2002, at 1.
[44] Id. at 2.

Committee's legitimate needs and protect the principles of prosecutorial candor and confidentiality."[45]

The committee held hearings a third time, on February 6, 2002, to hear testimony from experts who cited specific instances of the executive branch giving congressional committees access to prosecutorial memoranda for both open and closed investigations.[46] Under these multiple pressures, the Bush administration agreed to give the Government Reform Committee prosecutorial memos on FBI conduct in Boston. Some of the documents were released within one hour of the committee's decision to hold President Bush in contempt.[47]

Conclusions

Congressional subpoenas represent the first volley from a committee that has decided that executive branch documents are necessary to fulfill legislative responsibilities, and that informal negotiations between the two branches have failed. Issuance of a subpoena is usually successful in dislodging the documents, particularly when the committee request enjoys broad bipartisan support, as was the case with the probe into FBI operations in Boston. If that step is ineffective, the committee can deliberate on the necessity of going the next step by holding an executive official in contempt. The decision to invoke the contempt power has been generally effective in compelling executive agencies to cooperate and release documents to investigative committees.[48]

In its April 8, 2011 letter to Chairman Issa, the Justice Department stated that many of the committee's requests for records relate to ongoing criminal investigations: "Based upon the Department's long-standing policy regarding the confidentiality of ongoing criminal investigations, we are not in a position to disclose such documents, nor can we confirm or deny the existence of records in our ongoing investigative files."[49] That claim sweeps too broadly. As indicated in my statement, Congress has often obtained records related to ongoing criminal investigations.

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[45] Id. at 3.

[46] "Investigation Into Allegations of Justice Department Misconduct in New England – Volume 1," at 520-604 (testimony by Morton Rosenberg and Charles Tiefer).

[47] Vanessa Blum, "White House Caves on Privilege Claim," Legal Times, March 18, 2002, at 1. See Charles Tiefer, "President Bush's First Executive Privilege Claim: The FBI/Boston Investigation," 33 Pres. Stud. Q. 201 (2003).

[48] For specific examples of the contempt power being invoked from 1975 to the present, see Fisher, The Politics of Executive Privilege, at 112-33.

[49] Letter from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, U.S Department of Justice,to Chairman Darrell Issa, House Committee on Oversight and Government Reform, April 8, 2011, at 1.

Chairman ISSA. Thank you.
Professor Tiefer.

STATEMENT OF CHARLES TIEFER

Mr. TIEFER. Thank you, Mr. Chairman and ranking minority member.

For 15 years, I was counsel to Congress—4 years as assistant Senate legal counsel and 11 years as deputy general counsel and general counsel in the House of Representatives. During that time, I worked on a very large number of investigations like this of the Justice Department or of enforcement agencies, and I reviewed the extensive history that my colleagues at the panel have talked about. I want to briefly point out the similarities of those instances before focusing on today.

In 2002, as Mort Rosenberg has described, I gave full-length written and oral testimony to this committee about a similar issue during the Bush administration involving an FBI informant program. And, as was laid out in my full-length memo at that time, which I am including as an appendix to my testimony today, this showed that this particular committee has the full right to obtain the documents it needs for oversight over enforcement programs, then FBI, today ATF.

In 1992, I worked with a House subcommittee investigating the Rocky Flats matter. That was a grand-jury matter. And the same extreme arguments made by the Justice Department, that Congress can't go anywhere near grand-jury investigations, were raised then, and the committee succeeded, nevertheless, in getting the evidence that it sought.

In 1987, I was special deputy chief counsel on the House Iran-Contra Committee. And I want to point out some similarities of the arguments raised today and then, points that were correctly raised by Mr. Cummings—and I will talk about the two sides, both that these are not arguments that disable the committee from going ahead, merely that call for it to follow an orderly process, as it is following today and as it should follow down the road.

Were there cooperating witnesses at that time who were called before congressional committees after deliberation? Yes. Robert McFarlane, former national security advisor, a co-conspirator of Oliver North and John Poindexter, who were the key defendants, was called and questioned, even with the risk that would create lines of his testimony that could be used to say, "Look, he is saying one thing in one place and a different things another place."

Was there a possibility that the congressional investigation could endanger ongoing investigations or could complicate the trial? Absolutely. Oliver North was called as a witness. John Poindexter was called as a witness. They were shown the documents that would be used against them. They were shown the most persuasive arguments and most persuasive questions, the most persuasive things that could be used to show that they had engaged in illegal conspiracy. And, in a way, they got a preliminary view of what the trial would consist for them.

I would say that doesn't mean one drives roughshod over the Justice Department. One starts, as this committee is doing today and as its predecessors have done, as I have testified—and, for that

matter, 30 years ago when I was just starting in this business, I came to a House subcommittee and heard people who are the age that I am now talk about Watergate and the struggles they had had during Watergate with getting evidence. So it is a live progression. It is not just in books up on the shelf with dust on them. It is live committee chairmen dealing with real issues like the ones you have today.

What is the way the Justice Department should make its points? Well, first of all, it should provide most of the important documents. It doesn't start by withholding; it starts by providing.

Second, for anything that it doesn't deliver right off the bat, it should issue an invitation for them to be viewed by Members and staff. I heard the chairman describe that an inadequate invitation had been made, heavily redacted documents under circumstances that couldn't be viewed. That is not the right way to proceed.

And, finally, if they do say, "We are going to withhold some documents because they are highly prejudicial in a concrete way to an open case," then they have to provide a privilege log so that the committee, itself, can decide what should be withheld. I might say that, during the recent litigation over the U.S. attorneys' terminations in the previous administration, one of the arguments that prevailed in court on behalf of the congressional inquiry was that the administration had not provided that privilege log. A document-withholding claim is not valid unless a privilege log is provided.

And I thank the committee.

[The prepared statement of Mr. Tiefer follows:]

UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer
Professor of Law

HOUSE COMMITTEE ON GOVERNMENT REFORM
HEARING ON THE HISTORY OF CONGRESSIONAL ACCESS
TO DELIBERATIVE JUSTICE DEPARTMENT DOCUMENTS
Executive Privilege Overclaiming

at the Justice Department

by Professor Charles Tiefer

Mr. Chairman and Members of the Committee, I appreciate the opportunity to testify on the important subject of today's hearing.

This testimony can be summarized as a survey showing that in the years **from the 1920s through 1992, Congressional oversight committees were, indeed, provided with access to Justice Department deliberative documents - contrary to the Department's current executive privilege claim.** The Department's contention that such access did not precede, or was a peculiar feature of, the Clinton Administration that can now, therefore, stop, is without grounding in the facts. I say this based both on historical research that I, and the Congressional Research Service, conducted and published in Congressional hearings in 1990-1992 and have now supplemented, and my own personal experience with Congressional oversight of the Justice Department from 1979 to 1995.

Currently, I am professor at the University of Baltimore Law School, where I have been since leaving the Congress in 1995. Before that, in 1984-95 I was Solicitor and Deputy General Counsel of the House of Representatives, and in 1979-84 I was Assistant Senate Legal Counsel, two positions with similar responsibilities. For over fifteen years, my responsibilities included frequent testimony and advice in Congressional investigations,[1] and briefs or argument in related judicial proceedings.[2] Additionally, I have published a 1994 book and a number of major law review articles concerning Congressional investigation issues.[3] Since 1995 I have testified before

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[1] Testimony by Charles Tiefer, "The Attorney General's Withholding of Documents from the Judiciary Committee" in Department of Justice Authorization for Appropriations, Fiscal Year 1992: Hearings Before the House Comm. on the Judiciary, 102nd Cong., 1st Sess. (July 11, 1991), at 76-125; Testimony by Charles Tiefer, "Withholding of Documents from the Judiciary Committee," in The Attorney General's Refusal to Provide Congressional Access to "Privileged" Inslaw Documents: Hearings Before a Subcomm. of the House Comm. on the Judiciary, 101st Cong,. 2d Sess. (Dec. 5, 1990), at 83-104; Testimony by Charles Tiefer, "Invalidity of the Defense Department's Claim of Executive Privilege," in Our Nation's Nuclear Warning System: Will It Work If We Need It?: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. (Sept. 26, 1985), at 89-102.

[2] My work in those offices is analyzed in Charles Tiefer, The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client, 61 Law & Contemp. Probs. 47 (1998).

[3] Charles Tiefer, The Semi-Sovereign Presidency: The Bush Administration's Strategy for Governing Without Congress (Westview Press 1994)(hardcover and paperback); Charles Tiefer, The Senate Trial of President Clinton, 28 Hofstra L. Rev. 407 (1999); Charles Tiefer, The Controversial Transition Between Investigating the President and Impeaching Him, 14 St. Johns J. Leg. Comment. 111 (1999); Charles Tiefer, The Specially Investigated President, 5 Univ. of Chic. Roundtable 143-204 (1998);

Congressional committees on,[4] and discussed publicly, these issues. Last week, for example, when the Washington Post published an article by Charles Lane, *A Washington Battle Once Fought Before: Familiar Issues Underlie GAO-White House Dispute*, Jan. 30, 2002, at A6, it interviewed and quoted me on the history of Congressional oversight and current overclaiming of deliberative process privilege. For more than twenty years, thus, my research, experience and conclusions with Congressional oversight of the Justice Department, and claiming of executive privilege, have been spread at some length on the public record.

To summarize briefly the background, the Committee's oversight of the Justice Department has focused on the matter of the Boston FBI, and, in particular, to obtaining several subpoenaed Justice Department memoranda, averaging 22 years old, that are the primary evidence from the regular channels of the Justice Department about the role that knowledge (or ignorance) about such abuse played in its decisions and activities.[5] The Committee expects these memoranda to shed light on the Justice Department□s relationship to FBI problems and abuses in handling and protection of an organized crime informant. On December 12, 2001, the President formally invoked executive privilege - an action the press is reporting as marking a new crusade against Congressional oversight - and the issues in dispute were explored initially at a hearing before this Committee on December 13, 2001, which today's hearing are following up.

Naturally, the Justice Department witnesses seek to portray the President's claim of executive privilege as something other than an unprecedented secrecy barrier to proper oversight, but this portrayal is not easy when blocking an inquiry about FBI abuses several decades ago. Moreover, the Justice Department had been repeatedly reminded by the Committee that the Justice Department provided the Committee with access to a number of well-known deliberative documents for closed criminal cases during the Clinton Administration in 1993-2000.[6] The Justice Department witnesses at the December 13, 2001 hearing did not effectively dispute that the Clinton Administration did provide access to deliberative process memoranda in closed cases during 1993-2000.[7] How could they tell this Committee otherwise? This Committee had direct experience with this - as did the Attorney General, Senator Ashcroft, then a strong proponent of Congress receiving access to Justice Department records for oversight.

So, the Justice Department witnesses at the December 13, 2001 hearing justified its executive privilege invocation on the ground that its current denial of access accords with precedents from before 1993-2000. Before then, the Department claims, Congress was not provided, even in closed cases, with access to deliberative

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Charles Tiefer, Congressional Oversight of the Clinton Administration, and Congressional Procedure, 50 Admin. L. Rev. 199 (1998); Charles Tiefer, The Fight□s the Thing: Why Congress and Clinton Rush to Battle with Subpoena and Executive Privilege, Legal Times, Oct. 14, 1996, at 25; Charles Tiefer, Contempt of Congress: Turf Battle Ahead, Legal Times, May 27, 1996, at 26. Charles Tiefer, Privilege Pushover: Senate Whitewater Committee, Legal Times, Jan. 1, 1996, at 24; Charles Tiefer, The Constitutionality of Independent Officers as Checks on Executive Abuse, 63 Boston U. L. Rev. 59-103 (1983).

[4] Charles Tiefer, Testimony, Rights of Involuntary Witnesses Not to be Broadcast, in Hearings Before the House Committee on Rules, 105th Cong., 1st Sess. (Nov. 5, 1997); Communications and Miscommunications At the CIA, in Final Report of the House Select Subcommittee to Investigate the United States Role in Iranian Arms Transfers to Croatia and Bosnia, 104th Cong., 2d Sess. (1996)(Bosniagate Report; chapter of Minority Views, for staff on which I served as counsel); Charles Tiefer, Testimony, Re: False Statements Restoration Act, in False Statements After Hubbard: Hearings Before the Senate Committee on the Judiciary, 104th Cong., 2d Sess. (May 15, 1996).

[5] A log provided by the Department lists ten prosecution or declination memoranda dated 1965, 1967, 1969, 1979, 1983, 1984, 1984, 1985, 1989, and 1990.

[6] The Clinton Administration ultimately provided this Committee with access to the Freeh and LaBella memoranda relating to the 1996 campaign finance matter - once the subject of those memoranda was effectively closed - and, in 1993-94, providing the Energy and Commerce Committee with access to the memoranda regarding allegedly flawed efforts by the Environmental Crimes section. Damaging Disarray: Organizational Breakdown and Reform in the Justice Department□s Environmental Crimes Program, Staff Report, Subcomm. On Oversight and Investigations of the House Comm. On Energy and Commerce, 103d Cong., 2d Sess. (Dec. 1994)(Comm. Print 103-T)(□*Damaging Disarray*□).

[7] The DOJ letter of Feb. 1, 2002, references an OLA letter of Jan. 27, 2000 restating the Department's position on privilege claims. It emphasizes the issue of □Open Matters, letter at 3-5, more than the deliberative issues for closed ones, letter at 5-6. For closed matters, unlike open matters, there is mention of accommodations with Congressional committees that satisfy their needs for information that may be contained in deliberative material . . . . Page 5.

documents. It admits certain exceptions, notably Teapot Dome or Watergate, but tries to put them in a separate category which involved corruption by the then Attorney General and the then Department officials who were deciding these issues. (Testimony of Michael E. Horowitz, Chief of Staff, Criminal Division, on Dec. 13, 2001, Tr. at 185). Apart from those exceptions, the Department places total reliance upon the repeatedly-referenced opinions of the Office of Legal Counsel in 1982-83,[8] supplemented with a letter of February 1, 2001, which maintains the Department□s position even though the letter itself acknowledges many precedents to the contrary.

As in the section entitled Defying Burton in this week's *Legal Times* article on this issue,[9] the press has already seen through the transparent cover, over what the Justice Department is actually doing by its contentions about the history before 1993. Those contentions are without merit. An actual recounting of key precedents in that history will be found in an Memorandum (by the Congressional Research Service) entitled *Selected Congressional Investigations of the Department of Justice, 1920-1992 (1920-1992 Congressional DOJ Oversight)*[10] and other sources cited herein. My testimony today will divide the time periods into (I) the period from Teapot Dome to Watergate, (II) from Watergate to the 1983 OLC opinion, and then, (III) 1983-1992.

Before beginning the recounting, it may help to understand the points being advanced that deal with the Justice Department's position as to its claiming of executive privilege in this matter. The first and principal point is that Congressional investigations did, in fact, obtain access to deliberative Justice Department documents and their equivalent before 1993. In my own experience since starting in Congress in 1979, as well as my studies of the prior history, I saw the same pattern before as after 1993. Namely, the Department makes arguments to fend off proper oversight by Congress, but before (as after) 1993, Congressional committees which had a sufficient need, and which persevered, succeeded in obtaining access to deliberative documents and their equivalent for closed cases during my twenty-plus years of such oversight, and, before as well.[11]

Second, Congressional committees obtain access to Justice Department deliberative documents for several reasons, not just one. While the Justice Department conceded at the December 13 hearing one such reason - namely, its explanations of Teapot Dome and Watergate that they involved departmental corruption at the top[12] -

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[8] These may be found at *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751 (Dec. 14, 1982)(Part I: Presidential invocations)(□OLC 1982 Opinion□), and *id.* at 782, 785 (Jan. 27, 1983)(Part II: Invocations by Executive Officials, especially the first section, regarding Attorney General and Department of Justice Refusals)(OLC 1983 Opinion)

[9] Section entitled Defying Burton, in Vanessa Blum, Why Bush Won't Let Go: To the White House, the Paper Fight with Congress is Part of a Bigger Plan to Restore Presidential Power, Legal Times, Feb. 4, 2002, at 1, 12 (Their aim: to roll back 30 or 35 years of compromise by presidents of both parties and restore a power to the executive branch not seen since the Supreme Court forced President Richard Nixon to turn over tapes . . . .). This Committee's Chief Counsel, James Wilson, articulates ably in this article the merit of the Committee's position.

[10] From *Damaging Disarray, supra*, at 333-50. *1920-1992 Congressional DOJ Oversight* is a CRS product that followed up earlier research of my own, presented as testimony in the previous decade at hearings on such issues. *See, e.g.* my testimony, *Statement by General Counsel to the Clerk of the House of Representatives Regarding the Attorney General's Withholding of Documents from the Judiciary Committee*, reprinted in *The Attorney Genera'ls Refusal to Provide Congressional Access to Privileged INSLAW Documents: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 83 (1990)(*Attorney General's Unsuccessful Withholding*□).

[11] For some of the fine scholarly commentary on this kind of dispute, *see, e.g.*, Peter M. Shane, Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information, 44 Admin. L. Rev. 197 (1992); Neal Devins, Congressional-Executive Information Access Disputes: A Modest Proposal--Do Nothing, 48 Admin. L. Rev. 109 (1996); Stanley M. Brand & Sean Connelly, Constitutional Confrontation: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials, 36 Cath. U.L. Rev. 71 (1986).

[12] Even if this were the only reason, the Committee staff has argued that this reason appears to be applicable to the Boston FBI matter. While I am not personally in a position to evaluate what level in the Justice Department had awareness of the Boston FBI matter, I do take issue with a suggestion that Teapot Dome, Watergate, or other instances in which access was granted can be distinguished from the Boston FBI matter because those involved allegations against the sitting or current Attorney General or Assistant Attorney General while the Boston FBI matter predates the current ones. The Teapot Dome investigations focused on the Harding Administration and Attorney General Daugherty but continued in the Coolidge Administration and the term of Attorney General Harlan Fiske Stone. The Watergate investigations started as to Attorney General John Mitchell and were

there are other reasons as well. And, there is no better such reason than the subject of today□s hearing: an allegation that the Department has let the (Boston) FBI abuse its potent tools, such as its management of informants, to invade civil liberties. There is a powerful tradition in Congressional oversight to dig out the records needed to investigate the apparent tolerance of abuse of FBI powers. Yet, when this Committee reminded the current Justice Department that it had overseen the alleged abuse of access to FBI files about public officials in the □Filegate□ scandal, apparently the answer from the current Justice Department was that such oversight only occurred after 1993, and not before. Congressional investigations of abuses in relation to FBI management of informants obtained the access to documents in the 1975-76 Congressional investigations of the FBI as to COINTELPRO, the 1982 Congressional investigation of the FBI as to ABSCAM, and the late 1980s Congressional investigations of the FBI as to CISPES. American prize their civil liberties, and yet there is no one else, except Congress, with the power to probe Justice Department toleration or complicity in abuses involving FBI management of informants - including the power to obtain access to the key documents for proper oversight, be they deliberative or otherwise.

Third, the Justice Department employs certain characteristic but losing arguments before 1993 as now. I call the main argument the argument to □ignore the past or respect the □new sheriff in town.[13] When it is seen how often this argument has been made without success, it becomes apparent that the argument to ignore the past or to respect the new sheriff in town has no legal merit. Rather, it is a transparent cover for the actual underlying argument which is implicit and which is spelled out in private: that the new administration should get a pass, not from having an actual legal argument to ignore the precedents, not from being any more a □new sheriff than every previous administration that tried out such a theme, but, simply, because the Administration wants it.

I describe how the ignore the past or new sheriff in town notion historically was tried unsuccessfully by the Justice Department. Having been personally involved in proper Justice Department oversight for more than the last two decades, I know versions of the □ignore the past or new sheriff in town argument not only from its use by Republican Administrations - Reagan, Bush I, and now this administration - but also from its use by Democratic Administrations - Carter and Clinton. Almost every new Administration makes this argument. It fails, and, then, in the next administration, it is usually tried again. And, it usually fails again. When the Justice Department testimony on December 13 put total reliance upon its 1983 OLC Opinion, it simply repeated that cycle, as the 1983 Opinion was a prime example of the attempt, which was discredited and which failed, at this same new sheriff in town argument.

The methodology in this survey is quite simple. To show Congressional access to Justice Department deliberative documents, it traces, with supplementation, the accounts in the CRS 1993 memo, *1920-1992 Congressional DOJ Oversight*, and in my own 1991 memo, *Attorney Generals Unsuccessful Withholding*. Since the Justice Department testimony on December 13 put total reliance upon its 1983 OLC Opinion, this is simultaneously traced as well. Retracing the 1983 Opinion shows both that it actually records much Justice Department providing to Congress of access to such documents, and, that it skips over events like Teapot Dome, Watergate, and the then-recent investigations of the Nixon, Ford, and Carter administration Justice Departments and FBI.

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resisted by Attorney General Kleindienst - himself later convicted of lying to Congress - and continued through the term of Attorney General Richardson to the term of Attorney General Saxbe. Moreover, the probes of FBI abuses - such as those of the Church Committee, Senate Abscam Committee, and House Judiciary/Intelligence/GAO investigation as to CISPES, all discussed below - all occurred, successfully, under Presidents and Attorneys General who came after the alleged abuses. The Justice Department theory that Congressional investigations of the Justice Department or the FBI are denied access because of turnover at the top is simply more of the ignore the past or new sheriff in town argument discussed below.

[13] A new administration comes to office as a change of party in power, and urges Congress to ignore the record of the recent past in which the predecessor Justice Department was subject to Congressional oversight. It argues that abuses such as occurred in the past will not recur on its watch. Also, it urges Congress to forget the precedent of its predecessors providing access to Congressional committees, suggesting this was a temporary aberration from a somehow completely different golden age of the past in which it exercised power without oversight.

I. The Period from Teapot Dome to Watergate[14]

The Committee may not need to focus upon the pre-Watergate precedents. This testimony addresses them mostly to dispel the argument by the Justice Department, both now and in the 1983 OLC opinion, that before Watergate the Justice Department existed in some kind of oversight-free status, and that it had successfully drawn the line it now wishes to restore. It creates that argument only by a selective and incomplete recounting of the actual history. The reality was otherwise. It was the Watergate era of executive privilege claims by the Nixon Administration which was the historic aberration: from Teapot Dome to Watergate, Congressional investigations which could show a sufficient need, and which persevered in their quest to obtain what they needed, were provided with deliberative Justice Department documents in closed cases.

From the 1920s to the 1940s: The OLC Opinion of 1983 on this subject is conspicuous in its not addressing the most important examples of this period.[15] From 1915 to 1941, the OLC opinion mentions only one single example - one obscure matter about a merger case.[16] It completely overlooks the two leading examples of Justice Department abuses and Congressional investigations. In 1920-21, Congressional investigations looked into the so-called □Palmer raids, in which, under the direction of Attorney General A. Mitchell Palmer, thousands of suspects were arrested and deported, often in violation of basic liberties.[17] For three days of Senate hearings, Palmer, accompanied by his Special Assistant J. Edgar Hoover, was grilled. Palmer provided the Congressional investigators with various Department memoranda, including confidential instructions to the Bureau of Investigation, Bureau of Investigation reports, and a □memorandum of comments and analysis about the key case that had been in court. The OLC opinion conspicuously omits mention of the Palmer raids. A fair conclusion is that what had occurred so discredited the Bureau of Investigation that it spent ensuing decades rebuilding its shattered stature - - not asserting privilege.

The 1983 OLC opinion conspicuously omits to mention Teapot Dome, too. Coupled with its mentioning only one matter from the 1920s through 1941, the obvious explanation is that the clarity and force of the Supreme Court□s Teapot Dome opinions disabled any effort to shield the Justice Department from proper oversight for the ensuing decades, much as the Supreme Courts decision in Watergate did subsequently.[18]

Starting in 1941, the OLC opinion does mention one area of refusals to provide Congressional access: loyalty or domestic intelligence investigations, with several examples from 1941 to the 1954 Eisenhower directive that raised up executive privilege to prominence. However, this was not a matter of protecting the deliberative process, for in the disputes over those providing those files, the names and the file evidence themselves (because of

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[14] The Justice Department has made a point of commenting in its 2/1/2002 letter about President Theodore Roosevelt□s response to 1909 Senate questions about the 1907 acquisition of Tennessee Coal and Iron by U.S. Steel. This is truly grasping at old straws. Moreover, that particular transaction is historically famous: Roosevelt had let J.P. Morgan have such a deal as a way of calming the Panic of 1907, and the 1909 Senate questions were simply an attempt to embarrass him. The 1909 Senate questions were a political statement, as was Roosevelt□s response, neither of them being respectively either a probe or a withholding of evidence about past abuses, and, hardly represent a precedent for resisting a probe of abuses.

[15] My memorandum focuses on the OLC Opinion of 1983, which addresses itself to □Attorney General and Justice Department refusals, rather than to the OLC Opinion of 1982, which addresses itself to refusals all over the government approved by presidents; to debate non-Justice-Department examples would be to chase rabbits hither and yon.

[16] OLC opinion, *supra*, at 788.

[17] This account is from *1920-1992 Congressional DOJ Oversight*, at 1, in *Damaging Disarray*, at 333; and, my own testimony in *Attorney General□s Refusal* at 87 n.2.

[18] After all, the Supreme Court could not have said any more plainly that Congress had the right to evidence about decisions not to prosecution. As the Supreme Court specifically held about the investigation of the Attorney General's failure to prosecute in the Teapot Dome matter: "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." McGrain v. Daugherty, 273 U.S. 135, 177 (1927). Oversight was "plainly" legitimate when "the 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 . . . ." Id., 273 U.S. at 177 (emphasis added).

the effect on the civil liberties of those named), not deliberative material, were the focus of contention.[19] By and large, the privilege assertions do not concern prosecutorial documents, but rather, FBI domestic intelligence files and the like; proper oversight in these contexts was restored by the Church Committee, Abscam, and CISPES Congressional investigations. Apart from loyalty or domestic intelligence matters, during the Truman Administration, the Congressional scandal-probing investigations of the Justice Department - notably, the investigation of Truman Administration fixing of criminal tax cases, also called the Grand Jury Curbing Investigation - succeeded in obtaining the deliberative memoranda they needed, which eventually led to an Assistant Attorney General going to jail.[20]

The 1950s and 1960s: There was certainly sparring, temporarily, in the late 1950s between the Eisenhower Administration and Congressional investigations following Eisenhowers 1954 directive.[21] However, the OLC opinion is misleading in giving the impression that this sparring consistently denied Congressional access to deliberative documents. The OLC opinion cites the Dixon-Yates scandal as an example of withholding of deliberative documents, but Attorney General Brownells advice, quoted by OLC, is actually to provide deliberative documents in closed cases - not to withhold them.[22] So while the Eisenhower Administration toyed with an ignore the history argument to alter the rules established by Teapot Dome, it did not do what the current Justice Department is attempting.

The other main DOJ example cited by the OLC opinion - and raised again in the DOJ letter of February 1, 2002 - consists of the DOJ resistance to proper oversight about the much-criticized consent decree by which DOJ settled the Truman Administrations suit against AT&Ts Western Electric monopoly. OLC 1983 Opinion, at 798-99. What followed was a historic investigation by a House Judiciary Subcommittee chaired by Rep. Emanuel Cellar. The OLC opinion and the DOJ 2/1/2001 letter both cite the Department s resistance to providing evidence about that consent decree. There was no Presidential claim of executive privilege in that matter, an important point.[23] However, as the OLC Opinion admits, the House Subcommittee obtained, by a different route, the memoranda it needed - - of the repeated private meetings between Attorney General Brownell, and the head of AT&T, where the former gave the latter a famous friendly little tip that settled the case on terms of giveaway to the phone monopoly.[24]

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[19] Hoovers FBI simply provided the McCarthy Era inquiries with FBI files unofficially - by leaks to sympathetic Members of Congress. Senator McCarran stated that For years as chairman of the Judiciary Committee, I had the FBI files handed to me. . . . Raoul Berger, Executive Privilege: A Historical Myth 212 (1974)(quoting Sen. McCarrans speech in the Congressional Record). The FBIs preference for distributing these files itself, rather than having them formally subpoenaed or requested, served its own interests, but not those of civil liberties.

[20] *1920-1992 Congressional DOJ Oversight*, at 3-5, in *Damaging Disarray*, at 335-37; Berger, at 214 & n.27; Arthur M. Schlesinger, Jr., The Imperial Presidency 156 & n.59 (1974)(paperback edition).

[21] Arthur M. Schlesinger, Jr., The Imperial Presidency 159 (1974)(The Eisenhower directive ushered in the greatest orgy of executive denial in American history).

[22] Once the proceeding is no longer pending. . . such information should, upon request, be made available by the Commission to an appropriate congressional committee. OLC 1983 Opinion, at 797-98. As to the key transaction of the Dixon-Yates scandal, The Kefauver Senate Committee undertook an investigation of this transaction, whereupon President Eisenhower declared that it was open to the public . . . [T]he President had waived his directive in this case so that every pertinent paper or document could be made available to the Committee. Berger, *supra*, at 238.

[23] The late-1950s pattern of claims of privilege without formal Presidential authorization led to the famous Moss letters to Presidents Kennedy, Johnson, and Nixon, in which they pledged the contrary. Ultimately, this led to the Reagan memo of 1982 formalizing that pledge, which has remained in effect. It is under that memo that the current claim, as to the Boston FBI matter, was made.

[24] The friendly little tip memorandum obtained by the Cellar Subcommittee is described in Joseph Goulden, Monopoly (1968) and Mark J. Green, The Closed Enterprise System 39 (1972). Both cite the Cellar Subcommittee hearings (Consent Decree Program of the Department of Justice: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 85th Cong., 1st & 2d Sess., pts. I & II (1957-58)) and report, which are also cited in 1983 OLC Opinion at 799. This is an example that discredited, not supported, the Department s claim that it makes privilege assertions to protect line attorneys from political interference. The opposite was the case; privilege assertions were its unsuccessful attempt to cover up its own political interference with the enforcement work of line attorneys.

The 1960s: In any event, when President Eisenhower was succeeded by Presidents Kennedy and Johnson, the brief late-1950s flurry of invocations of executive privilege ended. The 1983 OLC opinion does not cite a single example of withholding from Congress by the Justice Department during those eight years. 1983 OLC Opinion, 800-801 (skipping from Eisenhower to Nixon administrations).[25] In fact, President Kennedy ordered the release of documents the Eisenhower Administration had been withholding. Berger, *supra*, at 239-40 (Kennedy sharply limited resort to executive privilege, an example followed by President Johnson).[26]

To sum up: there had been a fairly consistent pattern from the 1920s through the 1960s, from Teapot Dome to the end of the Johnson Administration, that Congressional committees with a sufficient need, and which persevered, could have access to DOJ deliberative documents. The relatively limited exceptions had been as to domestic intelligence or loyalty files, an issue of civil liberties more than deliberative process; apart from that, Teapot Dome had established legal principles of proper Congressional oversight access to closed cases which were followed largely even during the intensified sparring of the late 1950s and restored after that brief period.[27]

Of course, there was a historically famous shift during the Nixon Administration, which made new intense efforts to withhold documents.[28] But, the Nixon Administration Justice Departments experiment with ignore the past or □new sheriff in town document-withholding was disastrous after the absence of such claims during the prior Kennedy-Johnson administrations. The 1983 OLC Opinion again is conspicuously silent about this: it skips from 1970 to 1975, as though the Justice Department problems during Watergate had not existed, preferring not to dwell upon examples from the Nixon Administration discredited by Watergate. 1983 OLC Opinion at 801.[29] Minor examples cited in the other OLC opinion actually confirm what is discussed here.[30]

The main story of the Justice Department in Watergate is too well known to require retelling: how it provided back-channel information, during the cover-up, to the White House, and how successive investigations by the Senate Watergate Committee, the special prosecutor, and the House impeachment inquiry, had to strip off the secrecy to trace this. Ultimately, the House impeachment inquiry was not denied documents on deliberative process grounds, even obtaining the President□s tapes.

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[25] The 1982 OLC opinion, which deals with privilege claims throughout the government approved by presidents, does have a couple of Kennedy and Johnson examples, at 776-78, but they have nothing to do with the Justice Department, but with national security and White House assistants.

[26] One way of reading the history is that Presidents Kennedy and Johnson, having just come from the Senate of the 1950s, and knowing how angry the Senate had gotten over the preceding claims of executive privilege, let committees have access to documents. Schlesinger, *supra*, at 170-72. In 1965, when the Senate launched an investigation of government invasions of privacy - at a time when the FBI was without statutory authority for domestic wiretapping, since Title III was not enacted until 1968 - President Johnson issued an executive order forbidding such wiretapping except for national security. Richard Ged Powers, Secrecy and Power: The Life of J. Edgar Hoover 402 (1987).

[27] The virtual absence of examples in the 1983 OLC Opinion from 1915 to 1941, from the 1940s (except for loyalty and national security files), and from the period of the Kennedy and Johnson administrations, means that even the OLC Opinion upon which the Justice Department places total reliance does not effectively dispute this.

[28] These were collected in Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary, Refusals by the Executive Branch to Provide Information to the Congress 1964-1973 (Comm. Print 1975)(despite the title, almost all instances are 1969-73).

[29] Again, the 1982 OLC opinion, which deals with privilege claims throughout the government approved by presidents, does have a Watergate paragraph, but it deals tersely with President Nixon□s tapes, not the Justice Department, at 779. Still, it is striking that the opinion tells the story about how President Nixon asserted executive privilege in the text, and how he withheld the tapes from the Senate Watergate Committee, as though it were as good an assertion of executive privilege as any other. As for how the refusal to provide those tapes produced the Supreme Court ruling against executive privilege and, incidentally, the Presidents resignation in disgrace, that is deemed beyond the scope of this memorandum. *Id.* at 779.

[30] As a 1969 example, the Justice Department explained, in response to a premature request by the House Armed Service Committee investigation into the My Lai massacre. . . . a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigative files. 1983 OLC Opinion at 801 (underlining added). In fact, Congress persevered after the open case was closed (i.e., after the court-martial of Lt. Calley), and then did receive the files.

But, that was not the only Watergate story at the Justice Department, by a long stretch. Even before the main story broke open, Congressional investigations studied in depth the efforts of International Telephone and Telegraph (ITT) to obtain favorable settlement of cases - that is, to fix cases - by bringing outside pressure through the White House and the Attorney General.[31] When the privilege claims broke down, the probe of how ITT had endeavored to fix cases in the Justice Department□s Antitrust Division figured significantly in the House Impeachment investigation.[32] And, the famous cases of the Watergate era - symbolized by Watergate itself, with its attempt to plant an illegal bug - led to a breaking down of the effort to keep FBI domestic intelligence abuses shielded from proper Congressional oversight.

Apart from one misleading anecdote,[33] the OLC Opinion of 1983, which purports to discuss Congressional demands for DOJ and FBI evidence, simply omits what may well be the most thorough and important Congressional investigation of FBI abuses in history. In 1975-76, following an initial spate of inquiries by House committees - - including the Committee on Government Operations - - the Senate Select Committee on Intelligence, chaired by Frank Church, investigated abuses at the FBI and at other agencies.[34] The overriding theme was the use that the Nixon administration had made of the FBI and other intelligence agencies to discredit its political enemies and spy on hundreds of American writers, politics and civil rights leaders. Jim McGee & Brian Duffy, *Main Justice* 508-509 (1996).[35] That FBI operation, known as COINTELPRO, used a number of techniques, and these included working with informants whose management involved the kinds of issues of today□s hearing about the (Boston) FBI. While the Church Committee met with various forms of resistance, the FBI simply could not withhold memoranda on grounds of deliberative document privilege.

Moreover, in response to the Church Committee probe, the Attorney General, Ed Levi, ordered OLC to draft guidelines for the FBI that would cover the bureau□s most sensitive investigations--pursuing organized crime groups, conducting undercover operations including what this Committee is overseeing in Boston, the FBIs pursuit of organized crime groups by use of informants and carrying out domestic security and counterintelligence investigations. *Id.* at 311. These rules became known as the Levi Guidelines and they have shaped the operations of the FBI to this day. *Id.*[36] In a very real sense, all this Committee seeks to do by todays hearing, is investigate some apparent abuses of FBI authority in connection with informants that started even before the Church Committee but failed to come to light for decades thereafter, exercising the authority and looking at the kinds of FBI problems

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[31] The OLC Opinion of 1983 recounts in some detail how, in 1972, Chairman Bill Casey of the SEC held off Senate investigations of the ITT scandal, as though this were the whole story and as though this represented a good precedent. OLC Opinion of 1983, at 811-813.

[32] Impeachment of Richard M. Nixon: Report of the House Comm. on the Judiciary, H. Rep. No. 1305, 93d Cong., 2d Sess. 174-76 (1974)(ITT investigation).

[33] It recounts the withholding from a subcommittee of the House Committee on Government Operations of FBI □open files□ of domestic intelligence records. OLC Opinion of 1983, at 802. Not only were these open files, not closed ones, but, the FBI□s resistance on oversight of this subject folded just a year later when the Church Committee took up the matter.

[34] See U.S. Intelligence Agencies and Activities: Domestic Intelligence Programs: Hearings of the House Select Comm. on Intelligence, 94th Cong., 1st Sess. (1975); Federal Bureau of Investigation: Hearings of the Sen. Sel. Comm. on Intelligence, 94th Cong., 1st Sess. (1975); F. Smist, Congress Oversees the United States Intelligence Community 1947-1989 197-99 (1990); D.J. Garrow, The FBI and Martin Luther King, Jr.: From "Solo" to Memphis (1981). The House Government Operations Committee hearing and its effect is described in Sanford J. Ungar, *FBI* 565-72 (1975).

[35] Among COINTELPRO's (literally, Counter Intelligence Program) operations was COINTELPRO-New Left, which was directed against college campus groups and opponents of America's involvement in the Vietnam conflict. The operation was so vaguely defined that it resulted in the targeting of legitimate, non-violent anti-war groups. Another aspect was COINTELPRO-Black Nationalist, which targeted Black civil rights groups, including ones involved exclusively in non-violent political expression. See generally Select Comm. To Study Governmental Operations with Respect to Intelligence Activities, Final Report, Book II: Intelligence Activities and the Rights of Americans, and Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, S. Rep. No. 755, 94th Cong., 2d Sess. 163 (1976).

[36] They were updated in 1983 by Attorney General William French Smith (the Smith guidelines) and the House held oversight hearings over the updated guidelines. See FBI Domestic Security Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 60-66 (Levi guidelines), 67-85 (Smith guidelines) (1983). They were later updated in 1989.

looked at by the original Church Committee.[37] That did not run afoul of privilege then, and, does not now.

Because I started as Assistant Senate Legal Counsel in 1979, at this point my discussion becomes based in part on first-person experience rather than historic review. Of what little the OLC Opinion of 1983 has to say about this period, its main example, about Senator Baucus□s Senate Judiciary subcommittee in 1979 (with which I worked), confirms the previous analysis. It quotes the official, express Justice Department policy to provide access to deliberative documents for closed cases.[38]

It is striking that the OLC opinion, having omitted meaningful discussion of Teapot Dome or Watergate, now omits the major Congressional investigation of the Carter Justice Department. In other words, it systematically omits examples of successful proper Congressional oversight of the Justice Department, forcing it unpersuasively to attempt ad hoc exceptions and explanations when reminded of these. In 1980, a Congressional investigation probed in detail the exchanges within the Carter Administration's Justice Department following the declination by the Criminal Division of criminal prosecution of Billy Carter in favor of a civil settlement. The President's brother had taken $220,000 from Libya, and there were again allegations of pressure upon, or monitoring of, the Criminal Division through the White House and the Attorney General. Then-Assistant Attorney General Philip Heymann had initially protested the oversight on the argument there had been no wrongdoing within his Division, but recognizing the necessity of oversight, eventually cooperated fully in the inquiry.[39] This is an instance referenced in the Justice Department letter of 2/1/2002; apparently, the Department now acknowledges that deliberative prosecutorial memoranda, as well as factual investigative records, were disclosed.[40]

- I served as the head of that Congressional investigations Justice Department task force. I personally questioned officials at three levels in the Criminal Division, the Deputy Attorney

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[37] The Church Committee looked at domestic intelligence, rather than organized crime, FBI activity. While there are structural and substantive distinctions between domestic intelligence and organized crime work, both require proper oversight of alleged FBI abuses - and alleged Justice Department tolerance or complicity in such abuses.

[38] This is the investigation of GSA sales of titanium and lithium. □The Department has agreed to give the Subcommittee staff limited access to these internal memoranda [2 closed files . . . .] Our policy with regard to providing Congressional Committees with analytical, strategy or deliberative portions of memorandum[s] related to these investigations is to make them available at the Department for review and analysis, including notetaking.□ OLC Opinion, at 803 (quoting DOJ letter).

Two other matters at the time involved the Senate Judiciary Committee□s review of the DOJ investigation of price-fixing in the uranium industry, and a Senate Judiciary Subcommittee□s review of the Public Integrity Section (also known as the □Vesco Investigation□ because of its principal focus). When DOJ sought court rulings, the courts allowed the release of the documents sought. In Re Grand Jury Impanelled October 2, 1978, 510 F.Supp. 112 (D.D.C.1981); *In re Grand Jury Investigation of the Uranium Industry*, 1979 WL 1661 at *1 (D.D.C. 1979). The OLC Opinion of 1983 did not address these, probably because the focus of dispute at the time was the (unsuccessful) DOJ effort to apply Rule 6(e) to documents presented to the grand jury, rather than on what deliberative characteristics were involved in the DOJ memoranda.

[39] Inquiry Into the Matter of Billy Carter and Libya: Report of a Subcomm. of the Sen. Comm. of the Judiciary, S. Rep. No. 1015, 96th Cong., 2d Sess. 45-58 (1980).

[40] The DOJ letter seems to be arguing some point in stating that in the 1980 Billy Carter instance there was not □any assertion of executive privilege,□ but it does not spell out what point it is trying to make. There were no formal assertions of executive privilege by President Carter in 1980, but, for that matter, there were none at all in his entire administration, and, the same could be said of President Reagan□s administration in 1983-88. The Justice Department did have its positions as to oversight both in 1977-80 and in 1983-88, they resulted at times in disputes - without Presidential privilege assertions - and the Congressional committees with a need for documents, deliberative or otherwise, that persevered, were provided with access. What the record from 1977-80 and 1983-88 serves to underscore is the extraordinary nature of the period of 1981-82 when President Reagan did assert executive privilege formally twice, and, the significant that at both times in 1981-82, the House Committees went on to obtain access anyway.

> General, and Attorney General Civiletti, precisely about the deliberative processes by which they had declined criminal prosecution of the Presidents brother. . With me in these interviews was Senator Strom Thurmonds counsel, Dennis Shedd, now a United States District Judge for the District of South Carolina. They answered all our questions and provided the documents; in this instance, the answers to questions were of much more interest than the documents. Thereafter, those we interviewed, from Joel Lisker to Civiletti, testified at televised hearings before the Committee on these same points.

In the Carter Administration, there had been the usual □ignore the past□ or □new sheriff in town□ arguments - explicitly that the abuses of the prior administrations would not recur and that their executive privilege claiming mistakes should be overlooked, and implicitly that Congressional committees should not continue such active oversight in the changed situation. This Committee will recognize the themes. Those arguments did not deter proper oversight at that time, including oversight of Justice Department deliberations regarding declinations to prosecute.

With the transition to the Reagan Administration came, in the first year, the first Reagan Administration claim of executive privilege, which concerned an obscure matter of mineral lease decisions by Interior Secretary James Watt.[41] Just as many cannot understand why the current Administration has drawn the executive privilege line on the Boston FBI matter, which seems so inappropriate a subject to claim privilege, many could not understand in 1981 why the line was drawn as to that obscure mineral lease matter. However, I recall well the □new sheriff in town□ theme being sounded - that the new (Reagan) Administration would not be giving in on deliberative documents the way its (Carter) predecessor had, and would show this by staking out its privilege claim early by a formal Presidential claim. It has been tried before. It lacked merit and it failed. It is being tried again.

I personally recall the 1981 day that the House Committee on Energy and Commerce held a hearing about the history of executive privilege, just like today□s hearing, with the primary testimony coming to Chairman Dingell from the leading historian of executive privilege, Raoul Berger; on another day, it received testimony from the famed oversight chair, Rep. John Moss; and, it released a strong opinion from the first modern General Counsel of the House, Stan Brand.[42] Faced with the bipartisan determination of the House Commerce Committee, led by Rep. John Dingell and Rep. James Broyhill, to see the documents, and the patient but persistent preparations they made, the administration conceded. As the House contempt report concludes, □[f]ollowing that vote [to hold Secretary Watt in contempt], negotiations with the White House continued and on March 18, 1982, the previously withheld documents were made available to the Subcommittee for review.□[43] It had taken a full year. Since □the deliberative process had concluded,□ the Counsel to the President surrendered that □all of the disputed documents were made available for one day at Congress . . . . [with limited] notetaking . . . .□ 1982 OLC Opinion at 780-81. Once again, it is quite hard to read even the Justice Department□s own OLC Opinion without noticing the providing of access to deliberative documents in closed cases. This was one of the only two instances in eight years, both failures, in which President Reagan formally claimed executive privilege.

Another Congressional oversight investigation of the early 1980s warrants attention. The Justice Department□s ABSCAM operation, in which an undercover sting operation run by the Department was used to offer bribes to Senators and Representatives, had raised serious questions regarding the Department□s use of its powerful tools, including its management of informants. A Senate Select Committee investigated ABSCAM. Once the cases were closed, the committee obtained access to all the documents it needed, including the Criminal Division prosecutorial memoranda.[44]

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[41] Assertion of Executive Privilege in Respose to a Congressional Subpoena, 5 Op. O.L.C. 27 (1981).

[42] Contempt of Congress: Hearings Before the Subcomm. On Oversight and Investigations of the House Comm. On Energy and Commerce, 97th Cong., 1st Sess. (1981).

[43] Contempt of Congress: Report of House Comm. On Energy and Commerce, H.R. Rept. No. 97-898 (1982), at page □III□ (the chairman□s introductory letter of transmittal).

[44] *1920-1992 Congressional DOJ Oversight* at 11. I was Assistant Senate Legal Counsel at the time. My colleague in that

Mort Rosenberg can describe the executive privilege claim in the Superfund investigation that was the genesis of the 1983 OLC opinion, and how the executive privilege exercise was discredited by the surrounding and subsequent events in court (as litigated by House General Counsel Stan Brand and Deputy Counsel Steven R. Ross), in Congress in the subsequent investigation of the DOJ role in withholding documents from Congress, and within the Administration.[45]

To sum up: from Watergate to the 1983 OLC Opinion, Congressional committees with a sufficient need, and which persevered, were provided access to DOJ deliberative documents. While the Justice Department acknowledges Watergate, it glosses over the Church Committee investigation of the FBI, and the Billy Carter Subcommittee and Abscam Committee investigations of the Criminal Division, not to mention the other examples. These show why Congressional oversight was needed for closed cases, and why the asserted privilege simply does not warrant denying access to the documents needed for proper oversight, whether deliberative or otherwise. And, they show that the current cycle of □ignore the past□ or □new sheriff in town□ argument repeats past failures in the claiming of privilege.

III. From the OLC Opinions of 1983 to the Clinton Administration

I had personal experience with much of the House oversight of the Justice Department during 1983-92, taking part in, or testifying during, a number of the investigations. Ticking them off in summary fashion may help, since the Justice Department witnesses at the December 2001 hearing did not express an awareness of them, and since even the 2/1/2001 letter still reflects only a limited awareness of them. In a word, the collapse of the 1982 Superfund executive privilege claim meant the discrediting of the 1982-83 OLC opinions, and this ushered in an era of seriously-negotiated but productive Congressional oversight of the Justice Department and the FBI.

1983: An investigation was conducted by the Senate Labor and Human Resources Committee, concerning the FBI's withholding of information during the confirmation hearings for Secretary of Labor Raymond J. Donovan. The FBI documents needed by the Committee for the probe were provided, not withheld.[46]

1984: Senator Grassley□s committee conducted an investigation of General Dynamics contract fraud. The Justice Department initially resisted by seeking a 6(e) ruling, and lost in court.[47] The Senate obtained the documents needed.

1985-86: The Criminal Division was investigated by a House Judiciary Committee subcommittee, regarding its decision to accept a corporate plea, without individual charges, from E.F. Hutton (which was caught in an extraordinary pattern of 2000 instances of check-kiting fraud). Initially, the Criminal Division resisted questioning of its line attorneys and the providing of their deliberative documents about its declination of charges against the corporate officials. The Criminal Division based its position on an interpretation of Rule 6(e), so it filed a case seeking a court order to block the oversight. I litigated the case and won.[48] The Assistant Attorney General for the Criminal Division then dropped his objection to a House Judiciary subcommittee hearing in which the line attorney in the matter answered in depth about the deliberations surrounding the declination of charges, and the Subcommittee

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office served on that oversight investigation.

[45] Investigation of the Role of the Dept. of Justice in the Withholding of EPA Documents from Congress in 1982-83: Rept. of the House Comm. on the Judiciary, H. Rept. No. 435, 99th Cong., 1st Sess. (1985).

[46] The report prepared for the committee concluded: "In short, the FBI supplied information that was inaccurate, unclear and too late. Worse, while the FBI told the Committee that there was nothing else to know, it withheld 'pertinent,' 'significant,' and 'important' information." The Timeliness and Completeness of the Federal Bureau of Investigations's Disclosures to the United States Senate in the Confirmation of Labor Secretary Raymond J. Donovan: S. Prt. No. 26, 98th Cong., 1st Sess. 46 (1983).

[47] *In Re Grand Jury Proceedings, Newport News Drydock & Shipbuilding Co.*, (E.D.Va., Oct. 17, 1984). The litigation in the matter was by the Senate Legal Counsels office, after my departure for the House.

[48] In re Harrisburg Grand Jury, 638 F. Supp. 43 (M.D. Pa. 1986).

obtained deliberative documents on the controversial aspects of the declination deliberations.[49]

1987: House and Senate special committees investigated the Iran-contra scandal. Of particular interest was the investigation of the so-called □fact-finding inquiry by Attorney General Meese along with three Justice Department aides. No claim of executive privilege could be made in the climate of the times; all the Justice Department attorneys involved were questioned in depth; all their documents were examined, whether deliberative or otherwise. After all, the case ultimately proved in the Iran-contra hearings and in court against the White House national security staff was of how they had obstructed both the House Intelligence Committee, and the FBI, by shredding documents in November 1986 while Justice Department attorneys were questioning them - literally, while the questioning was going on. The committee also thoroughly probed the ways that the White House national security staff had attempted to make improper use of the FBI and the Criminal Division to shield their □enterprise,□ again obtaining all the documents needed for this probe, whether deliberative or otherwise.[50]

1987-89: A House Judiciary Subcommittee tasked the GAO to probe allegations about the FBI investigation of law-abiding, legal opposition to United States intervention in Central America, particularly by CISPES. The FBI under Director William Webster cooperated in the Congressional probe, which developed a full picture of what many considered an abuse of FBI powers. The FBI could not, and did not, withhold the documents needed for this inquiry, whether deliberative or otherwise.[51] It is surprising, hence, that the Department would withhold the documents needed for the (Boston) FBI inquiry now.

1988: Attorney General Meese had refused to appoint an independent counsel to investigate allegations about Faith Ryan Whittlesey, the well-connected Ambassador to Switzerland. The explanations for that refusal figured prominently in the 1987 amendments to the independent counsel statute, but those explanations were contained in deliberative memoranda reflecting a debate between the Public Integrity Section, which favored an independent counsel, and others upon whom General Meese placed more reliance. In 1988, with the matter closed, Senators Kennedy and Metzenbaum overcame Justice Department resistance to review those memoranda.[52]

1989: The House Intelligence Committee similarly investigated the FBIs CISPES matter, and was not denied the documents needed.[53]

1990: A House Judiciary subcommittee probed allegations of an improper fix regarding an important Justice Department case, INSLAW. The Attorney General initially refused to provide documents, asserting privilege: the case was civil, but, he relied upon the argument that it was still open. Ultimately the subcommittee subpoenaed the documents and the probe was successfully completed.[54]

1989-91: A House Judiciary subcommittee dealt with Attorney General Thornburgh□s refusal to provide a then-secret Justice Department opinion about kidnaping suspects overseas for trial in the United States. That opinion was written simultaneously with a general memorandum, □Congressional Requests for Confidential Executive Branch Information,□ referenced in the Justice Department letter of 2/1/2002. [55] What the 1989 opinion on

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[49] E.F. Hutton Mail and Wire Fraud, Subcomm. On Crime of the House Comm. On the Judiciary, 99th Cong., 2d Sess. (1986).

[50] Specifically, the probes followed up contacts by Oliver North with the FBI and the Justice Department intended to protect his associates. Report of the Congressional Committees Investigating the Iran-Contra Affair, H. Rept. No. 433, 100th Cong., 1st Sess. 105-116 (1987)(Chapter 5, "NSC Staff Involvement in Criminal Investigations and Prosecutions"). I was Special Deputy Chief Counsel to the House Iran-Contra Committee.

[51] A good account is an article by the Subcommittee Chair, himself well-known as a former FBI agent. Don Edwards, Reordering the Priorities of the FBI in Light of the End of the Cold War, 65 St. John□s L. Rev. 59 (1991).

[52] 1987 Congressional Quarterly Almanac 365; Ruth Marcus, Impasse Over Documents Ends, Wash. Post, March 25, 1988, at A23.

[53] Report of the House Permanent Select Comm. on Intelligence, 100th Cong., 2d Sess. (1988).

[54] I testified against the claim of privilege. The Attorney General's Refusal to Provide Congressional Access to "Privileged" Inslaw Documents: Hearings Before a Subcomm. of the House Comm. on the Judiciary, 101st Cong,. 2d Sess. (Dec. 5, 1990).

[55] The Barr kidnapping opinion is dated June 21, the 1989 Barr opinion on withholding from Congress is dated June 19, and

withholding from Congress does not discuss is that, after two years of oversight effort, the House Judiciary subcommittee subpoenaed the document it sought. Although informally the President approved an assertion of executive privilege on the matter, in 1991, faced with a subpoena both for the INSLAW material and this opinion, the Department conceded on the claim of privilege in that 1989 pronouncement and agreed to Congressional access to the extraterritorial kidnapping opinion.[56] Only a few days after it received the subpoenas, on July 30, 1991, the Justice Department announced that it would release the documents requested by the House Judiciary Committee relating to both the INSLAW controversy and the legality of seizing suspects of U.S. crimes in foreign countries.[57]

1992: A House Science subcommittee investigated the plea bargain settlement of the Department□s case regarding the Rocky Flats facility. This is an instance referenced in the Justice Department letter of 2/1/2002.[58] It is worth noting, simply, that even the DOJ letter of 2/1/2002 admits that □[t]he deliberative prosecutorial documents were made available for use at the interviews [and] staff could take notes on the documents . . . .[59]

1992-94: The oversight subcommittee of the House Energy and Commerce Committee conducted its investigation of the Justice Department□s Environmental Crimes section. Ultimately, the subcommittee overcame initial resistance to obtain access to the documents about prosecution decisions in closed cases.[60]

This is only a partial list,[61] with few of the examples of Senate oversight, meant to draw primarily on my own personal experience. Taking the list as a whole, it establishes several points. First, in the years after the famous investigations such as Watergate and Iran-contra, it is just not the case that oversight ceased or the Justice Department could withhold documents or testimony about its deliberations. After President Reagan□s initial experience with unsuccessful Presidential executive privilege claims in 1981 and 1982, he simply refrained from making formal claims in 1983-88, and Presidential claims continued to be rare in the Bush Administration of 1989-

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they were published together later, in 1993, in 13 Op. O.L.C. 185, 195 (1989).

[56] I testified against the claim of privilege. Testimony by Charles Tiefer, □The Attorney General's Withholding of Documents from the Judiciary Committee" in Department of Justice Authorization for Appropriations, Fiscal Year 1992: Hearings Before the House Comm. on the Judiciary, 102nd Cong., 1st Sess. (July 11, 1991), at 76-125. I may note that this was a mere ten days after the letter of July 1, 1991, by OLA to Senator Metzenbaum, referenced in the DOJ letter of 2/1/2002. The thrust of the inquiry of June 6, 1991, by Senator Metzenbaum, had been to seek where then-Assistant Attorney General Luttig, having been nominated as appellate judge, had been standing on deliberative process privilege claims. It is not coincidental that when the House Judiciary Committee pressed the point regarding Inslaw and the extraterritorial kidnapping opinion soon thereafter, the documents were provided. The House and Senate Judiciary Committees are often in communication on such matters, and I specifically recall the effect when the pendency of AAG Luttig□s judicial nomination was alluded to at the July 1, 1991 hearing. The July 1, 1991 letter represents another of the attempted official DOJ privilege positions pre-1993 that were abandoned, disproving the notion that Congressional access after 1993 was somehow peculiar.

[57] Joel D. Bush, Congressional-Executive Access Disputes: Legal Standards and Political Settlements, 9 J.L. & Pol. 719, 742 (1993). The INSLAW documents were slow in coming, whereupon the □Committee Chairman then announced that contempt of Congress proceedings against the Justice Department were being considered, and several hundred documents were soon produced . . . .□ *Id.* (footnotes omitted).

[58] *1920-1992 Congressional DOJ Oversight* at 17.

[59] The real resistance line of the Justice Department up to that time was over questioning of line attorneys and FBI agents, much more than over documents. Once □President Bush had declined to invoke executive privilege . . . [that] led the Department of Justice to change its position and allow career staff to participate in the congressional inquiry.□ Joel Bush, *supra*, 9 J.L. & Pol. at 743.

[60] *Damaging Disarray*, *supra*. An account of the successful oversight effort is in Devins, *supra*, 48 Admin. L. Rev. at 122-24.

[61] I apologize in advance to those who labored successfully to obtain Justice Department documentation on a number of other oversight efforts that are not being listed here. I mean no disrespect to their efforts and plead the pressures of time as my excuse. For example, the House Government Operations Committee subcommittee on the Justice Department, under Chairman Mike Synar and Staff Director Sandy Harris; the House Government Operations Committee subcommittee that did general oversight, under Chairman Jack Brooks and Chief Investigator James Lewin; the House Judiciary Subcommittee on Civil and Constitutional Rights, under Chairman Don Edwards and Chief Counsel James X. Dempsey; and the House Commerce Committee, under Chairman John Dingell and Chief Counsels Michael Barrett and Reed Stuntz, conducted a number of successful efforts to obtain Justice Department documentation, beyond the few being listed here.

93.[62] On the contrary, with the lessons of those famous investigations reverberating, the Justice Department must provide access to documents, including deliberative documents. Its attempts not to provide this, although made, were unsuccessful. Those who now maintain that the providing of access by the Clinton Administration was something strange or novel are simply unaware that, after the debacle of the 1982 Superfund claim, the Reagan and Bush Justice Departments could not ultimately succeed in fending off oversight.

Second, the needs shown by Congressional committees are quite diverse, and not just limited to corruption by the Attorney General himself. The notion that there should only be oversight in a Teapot Dome or Watergate situation is without merit. Civil liberties concerns about undercover FBI operations, which figure in today□s hearing, figured in the CISPES investigations by the House Intelligence and House Judiciary committees, as they had figured in the Church Committee investigation in 1975-76 and in the Abscam oversight investigation of 1982.

Third, the supposed dangers that oversight of closed cases will politicize Justice Department decisions did not materialize. Other factors, such as the quality of leadership by the politically appointed officials in the Justice Department, appears to affect the risks of politics in the Justice Department□s decisions much, much more. Proper oversight serves a salutary purpose in counterbalancing those much greater risks.

Conclusion

All three periods - - from Teapot Dome to Watergate, Watergate to the 1983 OLC Opinion, and from the 1983 OLC Opinion to the Clinton Administration - - were periods when Congressional committees obtained access to the Justice Department documents in closed cases, whether deliberative or otherwise, needed for proper oversight of the Department and the FBI. The Department□s contention now that such access began during, or was a peculiar feature of, the Clinton Administration that ought now, therefore, stop, is without grounding in the facts.

[62] A formal Presidential privilege claim was made in a Defense Department matter (the A-12 contract), and an informal claim of privilege was prepared in the instance of the (initially) secret opinion about extraterritorial kidnapping. However, as discussed above, in the latter instance, Attorney General Barr relented on the claim and provided access to the Judiciary Committee and Subcommittee chairs, and the opinion was subsequently released to the public.

YEAR	INVESTIGATION of DOJ and FBI	CONGRESSIONAL ACCESS OBTAINED
1973-74	Senate Watergate, House Judiciary - as to Watergate and ITT	Full details re: Criminal and Antitrust Divisions (despite Presidential privilege claims)
1975-76	Church Committee, House Gov□t Ops - FBI abuses (COINTELPRO).	Full internal details of FBI undercover activity
1979	Senate Judiciary - contract cases	Memoranda of decisions
1980	Senate □Billy Carter□ Committee	Prosecutorial memoranda, as to declination re: President□s brother
1982-85	House Committees: EPA/Lands Division Withholding (Gorsuch)	Deliberative memoranda (despite Presidential executive privilege claim & 1983 OLC memo)
1982	Senate □Abscam□ Committee - FBI undercover sting	Prosecutorial memoranda; full details of FBI undercover activity
1984	Senator Grassley□s inquiry about General Dynamics charges	Documents as to criminal case
1986	House Judiciary - E.F. Hutton charges	Deliberative documents as to declination of corporate prosecution
1987	Senate, House Iran-contra as toAttorney General Meese and other DOJ/FBI	Questioning and documents as to DOJ role in cover-up
1987-89	House Intelligence and Judiciary/GAO as to FBI abuses (CISPES)	Full internal details of FBI activity
1988	Senate Judiciary, as to Whittlesey independent counsel declination	Access to decisional memoranda
1990	House Judiciary - Inslaw case	Questioning, memos
1991	House Judiciary as to OLC secret □extraterritorial kidnapping□ opinion	Access to secret opinion (despite informal executive privilege claim & 1989 Barr memo)
1992	House Science - Rocky Flats	Questioning as to corporate plea deal deliberations, and documents
1992-94	House Commerce - Environmental Crimes section	Prosecutorial memoranda

Chairman ISSA. Thank you.

And I recognize myself for 5 minutes to get started here.

Professor Tiefer, you mentioned Ollie North and Iran-Contra. In Iran-Contra, Ollie North was a participant in the Iran-Contra and ultimately was charged, convicted, and then overturned, to a certain extent because of congressional activity, meaning we, the Congress, granted some partial immunity; that immunity led to a decision that the inevitable discovery wasn't met, that discovery was based on, if you will, his testimony.

Is that roughly your understanding?

Mr. TIEFER. That is well-stated, Mr. Chairman.

Chairman ISSA. So this would be a classic example of what we have to avoid. We must avoid providing immunity to somebody that we believe is guilty of a crime unless we understand right off the bat that immunity is essential to further discovery and that this individual is, by definition, not the perpetrator. The worst thing to do is to get the kingpin and let them off. And I am not trying to disparage Colonel North, but it does appear as though he was, to a great extent, at the center, ultimately the target, and he got off.

Well, to that extent, let's get to the current case, even though all of you were talking in great terms of Watergate and Teapot Dome and all of which I have reviewed in preparation for today. In this case, if I understand correctly, Fast and Furious starts off with charges against a murderer who shot and killed Brian Terry and the people involved.

The weapons happened to have been weapons that were allowed to walk under Fast and Furious, is there any conceivable way, if we are not talking to the murder suspects or people involved, that we are touching that investigation? Do you believe that we are, by not looking at that at all but rather looking at the actions of high-ranking Federal officials, mostly here in Washington at ATF and Justice, that we in any way are close to allowing a murderer of a law enforcement agent to walk?

If you see—and I am not asking you to see something that isn't there. But do you see any way that we are—or any line that we shouldn't cross in relation to that, since we don't intend to?

Mr. Fisher.

Mr. FISHER. Yeah, I think you can conduct your investigation without going across that line.

I just wanted to add on Iran-Contra, Charles and I were on the House Iran-Contra Committee. And the independent counsel at the time met with us, and he certainly—going through the prosecution, and he said that Congress, as a co-equal body, has a right to conduct an investigation even if it complicated his prosecution. So that is the constitutional judgment by the prosecutor at that time.

Chairman ISSA. OK. Well, one thing that I can assure the Members on the dais is, I want the people involved in killing Brian Terry to be tried and convicted. I do not want to in any way come anywhere close to that. And that is something I will be communicating steadily to Justice.

On the other hand, what I would like the questions answered here, it has become this committee's view that the decision process leading to many of the actions taken under Fast and Furious well above the level of the Phoenix district office or the U.S. attorney

there is, in fact, what we believe is flawed, ill-conceived, and potentially covered up. And that is what we are investigating.

That would seem to be the question for all of you, and I want to get your answer. They have asserted that, you know, we are in the way of some meth addicts who got $200 a gun who are being charged and a murderer, and they are saying that our investigation of their decision process in Fast and Furious—we are talking about officials here in Washington involved—that the two are connected.

Do you see any connection, Mr. Rosenberg?

Mr. ROSENBERG. No. I think that what you are doing is looking at their strategies, their methods, their operational weaknesses. And this is well within the investigative authority of committees. That is what they are supposed to do. You fund these programs, empower them to do those sorts of things. And what you are looking at now is right in the wheelhouse of McGrain. Look at how they defined, you know, what it was that was being looked at and what was appropriate: how they were operating, what decisions they made, were the decisions good or bad. And, at that particular point, there is nothing that would exculpate or, you know, taint those—what went on.

It is very much like what you looked at in 2002—Mr. Burton looked at in 2002. We were trying to find out who knew what, how high it went, and how we can change it.

Another, you know, investigation that I helped out on was John Dingell's investigation of the environmental crimes section of DOJ between 1992 and 1994. They involved a centralization of environmental crimes prosecution decisions in main Justice when, at the same time, they were decentralizing almost all other criminal investigations at that time. And the committee looked at that, was strenuously opposed by not only the Justice Department but groups outside, former attorneys general. But zeroing in on what was going on, what was the effect of those kinds of decisions, organizational decisions, ultimately won the day. The policy was reversed. Many of the people in the environmental crimes section had to resign or were fired, and everything was put right.

Chairman ISSA. Thank you.

Mr. Cummings.

Mr. CUMMINGS. I want to thank all of you. As a lawyer, I tell you, this is a very interesting discussion.

And as an officer of a court, I wholeheartedly agree with the chairman that I, too, and I think everybody on this side of the aisle wants to make sure that anyone who is responsible for Brian Kelly's death to be prosecuted. I think it would be a sin and a shame if that did not happen. And it is in that vein that I am posing these questions.

Now, Professor Tiefer, I have contended that both the executive branch and Congress have legitimate interests. The Justice Department is trying to prosecute alleged murderers and gun traffickers. As a matter of fact, come June 17th, someone will be on trial with regard to the murder of Brian Kelly—Terry. I am sorry. And we are trying to investigate allegations of abuse and mismanagement within the same agencies.

I think we should be able to achieve both goals. And I think that is—you talked about negotiations, and I just think we have an in-

terest in achieving both. I agree that Congress has the authority to investigate. We can issue subpoenas, we can demand documents, and we can conduct depositions. But we have to exercise that authority responsibly, especially when these are—and there are open criminal cases ongoing.

I would like to ask you about some steps other committees have taken in the past to avoid compromising ongoing prosecutions.

First, the Department has raised serious questions with some of the documents covered by the committee's subpoena. According to the Department, they may include records that—and this is the Department now—they say that may identify individuals who are assisting in the investigation, that identify sources and investigative techniques, that present risks to individuals' safety, and that prematurely inform subjects and targets about their investigation in a manner that permits them to evade and obstruct our prosecutorial efforts.

My question is not whether we have a right to these documents. We already have some of them. My question is whether we should entertain a request from the Department to talk to them before we release them publicly, assuming they have not been released already publicly.

Mr. TIEFER. Thank you for your questions, Mr. Cummings.

By the way, a slight detour. I mentioned mostly chairs when I talked about these past investigations. The House Iran-Contra ranking minority member was Dick Cheney. I don't know if you quite see him as your sort of model, but I will say that——

Chairman ISSA. I do.

Mr. CUMMINGS. I will remain silent on that one.

Mr. TIEFER. Anyway.

I gave the Iran-Contra Committee as an example of a congressional committee going full speed ahead. At the other end, I cited the Abscam Committee in my memo, and that was a committee which said, "We need to be extremely cautious. We don't want to get in the way. We are going to be asking for nerve-center testimony at the heart of the"—and so they held off. They had the discussions you are talking about, and they decided, with the Justice Department behaving properly and respectfully toward the committee, telling it what there was, they decided that they would wait until the trials were over.

I mention that because that was an FBI informant investigation because of the way Abscam had been done, and just like the ATF investigation, it was something important for Congress to do.

I have said that I think the Justice Department should be starting by providing more documents, allowing better in-camera examination and privilege logs. And I think then the discussion that you are saying is very important before things are released would be on a basis that the committee should pursue—should pursue.

Mr. CUMMINGS. Let me ask you this, because I only have a limited amount of time. Again, assuming that the decisions are released, these documents ultimately rest with the committee, do you think it would be prudent to give the Department an opportunity to warn us if a public release could put people in danger or impair their investigation?

Let me make it clear, and I made a mistake earlier and said "Brian Kelly" and I meant "Brian Terry."

But go ahead.

Mr. TIEFER. I will be brief, given the time limit.

Yes, it is prudent in an open criminal case situation for the committee to hear from the Justice Department before making things public.

Mr. CUMMINGS. You know, as I listen to you, it seems like—I am always reminded of this book, "The Speed of Trust." And it talks about how important it is—by Covey. And he talks about how important it is to establish a trusting relationship.

And I take—it is sounds like what you are saying is you almost have to have some trust going on here to get to the point of negotiations—that is, between the committee and the Justice Department. Is that a reasonable conclusion?

Mr. TIEFER. I certainly think the Justice Department should try harder to earn the committee's trust. But, yes, it has to be a relationship of trust.

Mr. CUMMINGS. And just one more question, Mr. Chairman.

I just don't see any harm in taking the step—we retain the authority to make the final decision, but our decision is better informed. In the past, have other committees consulted with the Department before releasing documents publicly?

Mr. TIEFER. Very much so.

Mr. CUMMINGS. I am sorry, I didn't hear you.

Mr. TIEFER. Yes, before releasing documents publicly, if there is a stated Justice Department concern, there has been this consultation about how the committee, which has the authority to decide, should exercise that authority, yes.

Mr. CUMMINGS. I see my time has expired. Thank you.

Chairman ISSA. No problem.

The gentleman from Utah, Mr. Chaffetz, is recognized for 5 minutes.

Mr. CHAFFETZ. Thank you, Mr. Chairman.

And thank you all for being here.

If a President and/or an Attorney General states that mistakes were potentially made, that something went awry, does that give the committee an added need or imperative to pursue these documents? Does that add weight to the idea that they should be producing these documents?

Yes, Mr. Fisher?

Mr. FISHER. I think when you look at the departments of government—Interior, all the other—Commerce—departments can be looked at by the Justice Department. Who looks after the Justice Department? I think, when you have reason to believe there is mismanagement inside the Justice Department, to leave that to the Justice Department is not acceptable to me.

So I think that has been the concern. If there is one—there is one department where you do not want mismanagement and abuse, it is the Justice Department. And I think your committee has every right to find out exactly what the conditions are.

Mr. CHAFFETZ. But is that heightened from the fact that if the Attorney General and/or the President were to state that, yes,

something went awry there, does that give us more imperative to pursue those documents and comply with——

Mr. FISHER. I think it does better justify your inquiry, yes.

Mr. CHAFFETZ. Yes, Mr. Tatelman?

Mr. TATELMAN. Congressman, not to completely disagree with Mr. Fisher, but I think the concern that at least one could envision in a situation like that—and the way I would answer your question is, no, I don't think it changes the calculus one iota in either direction, which is to say you do not want to find the committee's position where they start to set a standard where you begin to suggest that only in circumstances where there has been an admission does Congress' right kick in or only—and one I hear very commonly in my work at CRS is, isn't it true that Congress can only investigate waste, fraud, and abuse? No, you are not limited under those circumstances in that way, at least not from a legal perspective.

I can understand the question from perhaps a political one, which is you might have an easier time selling the committee's actions publicly or justifying the committee's time in a public setting under those circumstances. But I would caution against anybody thinking that it changes your legal rights or authorities in any direction.

Mr. CHAFFETZ. So that doesn't diminish them at all——

Mr. TATELMAN. Absolutely not.

Mr. CHAFFETZ. OK. What is the remedy? I mean, if Department of Justice just says, "No, we are not going to do this," what is the remedy? What is the next step?

Mr. Fisher? Go ahead, Mr. Fisher.

Mr. FISHER. That they are not going to turn over documents?

Mr. CHAFFETZ. Yeah. If they just decide, "No, we are not going to do this," they continue to refuse to comply with a subpoena, what is the remedy?

Mr. FISHER. The next step—and it is taken many times—of course, is the contempt citation. And it has to go to the floor of either chamber. And not to many people like to be held in contempt of Congress. And that is—the administration should do everything it can to avoid that step. But already, because of your experience with your subpoena, you are thinking in that direction. But that is the last step.

Mr. CHAFFETZ. Anybody else care to comment on that?

Mr. TATELMAN. Well, I think it is exactly that, the other remedy is further negotiations or, you know, further——

Mr. CHAFFETZ. Well, why should a committee have to negotiate? What is the——

Mr. TATELMAN. I think contempt is a big escalation and a big step forward, both politically and I think definitely legally. I mean, it involves, as Lou mentioned——

Mr. CHAFFETZ. You just argued that we didn't have a diminished right. So, I mean, the right in your——

Mr. TATELMAN. Agreed, Congressman; it is not a rights question. But escalating it to the level of holding an executive branch official in contempt, which in this case I think would be the acting director of ATF who is officially the person under subpoena, if I understood the chairman's documents, that has only happened 12 times in the history of this country, and only 3 times has it gone to the full floor

of the House of Representatives. The other 9 have only been committee or subcommittee votes.

That is a pretty big escalation by the House against an executive branch official. It is certainly a justifiable one, but it is a big one.

Mr. ROSENBERG. Let me give an example that may help you in your question.

In one of the iterations of Whitewater, this committee, once again—I think the chairman was Mr. Clinger—went after the White House counsel, Jack Quinn, who was the holder of the—was the custodian of the documents that the committee was going after. And the President never claimed executive privilege but alluded to it and kept putting it off and, at one point, made a conditional claim of executive privilege depending on X, Y, and Z.

Well, the committee and Clinger got fed up, and what they did was schedule a contempt vote for 2 weeks hence—no, actually, they had already contempted Quinn, but scheduled a vote on the floor of the House for 2 weeks hence. And within that 2-week period, the documents were all turned over.

So that kind of an opportunity, it is what we call a staged process, which I believe that investigative oversight is. You go from one point of persuasion to the next, to the next, to the next. And what has happened over the last 15, 20 years is, we have skipped threats of, you know, of a subpoena and then subpoenaing and we are up to threats of contempt and then holding contempt over somebody's head. Well, Jack Quinn did not want to be held in contempt. That is what I understand.

Mr. CHAFFETZ. And, Mr. Chairman, my time has expired, but let me just—from my vantage point, nobody wants to have to go to this step. But here you have, in this particular case, a President and an Attorney General who are both claiming to be oblivious to what was going on, which I think weighs in on the issue of executive privilege. But both have also——

Mr. ROSENBERG. That is what the recent caselaw says, that——

Mr. CHAFFETZ [continuing]. But have also——

Chairman ISSA. And the gentleman's time has expired.

Mr. CHAFFETZ. Then I will yield back.

Chairman ISSA. I thank the gentleman.

The gentleman from Virginia, Mr. Connolly.

There will be a second round for those who can stay.

Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman. And thank you for having this hearing. It really is actually an intellectual feast. Because this is where the tectonic plates between the two branches come together, and we either collide or we gently subside. So it is a fascinating topic.

Let me ask, Mr. Tatelman, is it your view that Congress has an unfettered right to access to information it requires, or believes it requires, irrespective of the judicial consequences? If something is under adjudication, litigation, or a criminal trial, that is all fascinating but that has nothing to do with the exercise of Congress' absolute right to access information it seeks. Is that your position?

Mr. TATELMAN. Absent some countervailing constitutionally based claim, yes.

Mr. CONNOLLY. An absolute right.

Mr. TATELMAN. Yes.

Mr. CONNOLLY. Is that your position, Professor Tiefer?

Mr. TIEFER. I find in the Supreme Court opinions that what the persuasive opinion of Justice Brennan in *Hutcheson* v. *United States* said was that if there was an immediate, pending trial, that he would hope that there would be something other than an interference with that trial by the congressional committee.

So, in other words, the judicial position is that there should be some—I am hesitant to use the word "accommodation" because—but there should be other than the congressional committee proceeding full speed ahead without thinking about the consequences.

Mr. CONNOLLY. But, to his credit, Mr.—"Tatelman?"

Mr. TATELMAN. Tatelman.

Mr. CONNOLLY. Tatelman, excuse me.

Mr. Tatelman does not quibble it is an absolute right, as he reads the Constitution. While the late Supreme Court Justice Brennan may wish for consideration on our part, the Constitution doesn't mandate it. As a matter of fact, Mr. Tatelman's reading of the Constitution is, that is all in the fine print, but we can, if we wish, choose to ignore the consequences, even if it is pending litigation or criminal trial.

Is that your reading, as well? Or do you believe that ruling or that opinion by Mr. Brennan puts some check and balance on the otherwise unfettered right of Congress to seek information from the executive branch?

Mr. TIEFER. I think what is being said is that the Court would do what it wants within its power if the Congress ran roughshod over the—in the case of an immediately—that is the phrase in the case—immediately pending trial.

Mr. CONNOLLY. Well, let me—thank you.

Let me ask, let's deal with a hypothetical here. Well, let's actually not deal with a hypothetical; let's deal with the example the chairman gave you about Oliver North. Now, refresh my memory, but if the sequence is right, Oliver North was indicted and convicted in a court of law of a crime.

Mr. TIEFER. Correct.

Mr. CONNOLLY. And that conviction he appealed, and, subsequently, the appeal was successful in part because of what was perceived to be compromised testimony here in the Congress. Is that correct?

Mr. TIEFER. Well, I would more narrowly—and I think the statement by the chairman was correct on this point. On the issue of immunity, the obtaining of a court immunity order, that was the basis on which the appeal was successful.

Mr. CONNOLLY. OK. Fair enough. But here's my hypothetical. What if somebody in Congress, or a whole bunch of people in Congress, at that time decided willfully to taint his testimony in order to ensure subsequently that he could not be found guilty or that an appeal would be successful, that was a deliberate strategy here in the Congress? If Mr. Tatelman is correct on his interpretation of the Constitution, even though you and I might agree that would be wrong morally, it is nonetheless the right of Congress to do that. Is that your opinion?

Mr. ROSENBERG. Not to do that. I don't think—well, I won't talk for Mr. Tatelman.

Mr. CONNOLLY. Well, I am just following the logic here. If Congress——

Mr. ROSENBERG. There is law out there that——

Mr. CONNOLLY. Excuse me. This is my time, sir.

If we have, as Mr. Tatelman says, an unfettered, absolute right to information from the executive branch irrespective of the consequences, what is to stop an unbridled Congress, not like this one but one that might be more politically motivated, to deliberately taint the outcome of a pending criminal trial?

You look like you are ready to answer, Mr. Fisher.

Mr. FISHER. I would say, on the absolute right, I think there are—you have to establish in a committee that you have legitimate inquiry, and I think you do. There are some inquiries which I don't think would be legitimate, perhaps going into some individual's, an employee in the executive branch, private file and so forth. So you have to a establish some legitimate business here.

Mr. CONNOLLY. Mr. Chairman, I know that I am going to have another chance, and thank you.

I would simply say to you, though, the Constitution does not say that. It doesn't talk about "legitimate" and "illegitimate." We will come back to it in my next round.

Thank you.

Chairman ISSA. I look forward to it.

The gentlelady from New York.

Ms. BUERKLE. Thank you, Mr. Chairman. And thank you for calling this hearing.

Thank you this afternoon to our panelists for being here. Congress and the American people have the right to know how their money is being spent. And one of the panelists mentioned that the American people lose when we don't get the information that we are seeking, so this is a very important inquiry.

I just have one question, and then I am going to yield my time back to the chairman for any further questions he might have. I would like to ask each one of the panelists, if you look at the circumstances in this case, is there any reason why the Department of Justice should not comply with our request?

I will start with Mr. Rosenberg, and we can go right down. And I think that is just a "yes" or "no" answer.

Mr. ROSENBERG. From all that I know, what is in the papers that I received and looking at it, there is nothing yet that would dissuade me from saying that they should comply.

Ms. BUERKLE. Thank you.

Mr. Tatelman.

Mr. TATELMAN. I would be even more cautious than that. I think when you phrase the question as you have, Congresswoman, it is complicated. I think there may be some—in other words, we don't know enough, as members of the public or based on what we have seen thus far, I mean, I wouldn't feel comfortable answering that question either way. I simply don't have enough information to know for sure whether there is something lurking out there that might give them a more legitimate reason.

Based on what they have asserted thus far, it is arguable. But there may be things out there and maybe other information that we are just simply not aware of yet.

Ms. BUERKLE. Thank you.

Dr. Fisher.

Mr. FISHER. Yeah, you are just getting into some documents, some access, so you don't have a full picture, but you have enough of a picture, I believe, that there is at least concern about mismanagement and possible abuse. And I think that the Department of Justice would be very wise to work with your committee. Otherwise, it could be easily interpreted as some kind of an obstruction to make sure that embarrassing information does not come to light.

Ms. BUERKLE. Thank you, Dr. Fisher.

Professor.

Mr. TIEFER. As things stand now, they owe you the documents. It is their job to make a record that would support keeping anything back. And so far, they haven't set out to make such a case.

Ms. BUERKLE. Thank you.

And I yield my time back to the chairman.

Chairman ISSA. Thank you.

Professor Tiefer, you sort of gave the answer I was hoping to have my followup on. What you said earlier and I think what you repeated here I want to you elaborate on. When we ask a question, we can, in fact, be unreasonable in our broadness. It can happen, because we don't know what we don't know. Ultimately, the negotiation that I think we were talking about earlier is about telling us why our discovery is overly broad, making the case for what we don't need or we may consider narrowing, and then, as I think you are saying, make the case for what is not being delivered for some specific reason, either it is imprudent, which is our decision, or it is constitutionally protected, which is their decision and their responsibility to assert.

Would that sort of summarize your position?

Mr. TIEFER. Yes, Mr. Chairman.

Chairman ISSA. Well, I want to go quickly to Mr. Connolly's statement, though, which I think, Mr. Tatelman, you got the bullet on. The 27th Amendment exists because, at the founding of our country, they were very afraid that Congress would raid the Treasury. Isn't that true, that is why we are not allowed to raise our own pay arbitrarily during a term?

Mr. TATELMAN. In part, yes, absolutely.

Chairman ISSA. Now, the reason it got passed 200 years later was that the American people objected to a pay raise that Congress gave itself enough to put it over the top, after having sort of lingered out there for all those years. Isn't that your recollection?

Mr. TATELMAN. Yeah, I believe it was the State of Michigan that finally came around and provided the necessary last votes, yes.

Chairman ISSA. And, by the way, I approve of that amendment, albeit the last.

But let's go back to Mr. Connolly's statement. If, in fact, we were arbitrary or capricious, let's just say that we were trying to cover up Joe Smith, a Congressman's wrongdoing by interfering with the actual prosecution, defend our Speaker, John Smith. Wouldn't the court reasonably take an objection from the administration, from

the Attorney General, and consider it as its obligation to balance us every bit as much as it would balance the executive branch wrongful assertions? Isn't that the role of the court?

Mr. TATELMAN. Yes, Mr. Chairman. But also, more so, it is the role of all of your respective constituents. If they believe that the Congress has gone far beyond what is reasonable or what is prudent, as you put it, the remedy——

Chairman ISSA. Right, but that relief would only be granted every 2 years.

Mr. TATELMAN. Correct. But in the particular case at hand, yes, in part it is the court's duty and balance, but in part it is also, you know, Congress and the executive, all three branches, in some sense, working together.

I think the question that I was responding to was narrowly phrased with respect to Congress' right, which I think is——

Chairman ISSA. Right. And I agree.

Mr. Fisher, if you could respond, and then our time is up.

Mr. FISHER. Yeah, you mentioned on how a court would decide. I think it is in the interest of your committee and Congress and the administration not to go in that direction because no one knows what a court will do. You don't know who is going to be selected; you don't know what the result is. So I think both branches should figure out politically what accommodation meets your mutual interest.

Chairman ISSA. I agree with you that it is better to rely on caselaw than to try to make it.

With that, we recognize the gentleman from Oklahoma for 5 minutes.

Mr. LANKFORD. Thank you very much.

And thanks for being here to be able to have this testimony. It is very important to us.

Operation Fast and Furious utilized a lot of components of DOJ, including its domestic intelligence operations, Public Integrity Section, and its Office of Personnel Responsibility. Historically, congressional investigations have covered all levels of DOJ officials and employees, from the Attorney General down to subordinate line personnel.

What has been the scope of past congressional inquiries into the DOJ? Can you just define out, when we have done—are we within the scope at all to be able to ask questions of DOJ? And is there a legitimate reason for DOJ to withhold documents and information from this information, in your own personal perspective?

And anyone can answer that. I will let you just jump in as you choose to.

Mr. TIEFER. Well, if we could point to even one single House investigation, it was called the Superfund investigation, 1982–1983, in which the House did overcome a claim of executive privilege for an investigation of the Justice Department.

And there was a followup House Judiciary Committee investigation. It looked at the Criminal Division, it looked at the Civil Division, and it looked at the Lands Division. I don't think that there is an office—this committee held the Attorney General herself, Janet Reno, in contempt.

Nothing is off-limits.

Mr. LANKFORD. OK. Thank you.

Mr. FISHER. Yeah, I would agree that the Justice Department is not immune from these investigations at all. I think all of us have given examples, and our statements are fairly detailed on that.

Mr. LANKFORD. Thank you. On a separate issue——

Mr. ROSENBERG. Look at——

Mr. LANKFORD. Go ahead.

Mr. ROSENBERG [continuing]. Ruby Ridge, which dealt with the killings that were investigated and the investigations of four or five different agencies, including Justice Department, with regard to whether there was inappropriate, you know, activity with respect to the rules of engagement, etc. And a Senate committee got all those documents and exposed them. And this is the most sensitive part of the DOJ, you know, the Office of Professional——

Mr. LANKFORD. Yeah, we understand all these things are very sensitive and, obviously, very delicate. But there is a reasonable role for oversight in this committee, to be able to engage in the oversight.

Let me ask in a separate way, under the Privacy Act exception for congressional committees, do you know of any reason that DOJ can't voluntarily produce documents to a congressional committee if they chose to?

So, not necessarily from a subpoena or us to push them, but just to be able to say—can they voluntarily disclose these things and say, you know, "There is a letter that has been given; I want to engage in this to be able to help in every way that I can." Do you know of any reason they couldn't just voluntarily do this?

Mr. ROSENBERG. The Privacy Act says that documents—that the privacy-covered documents shall be available to all joint committees, committees, and subcommittees. I don't see why giving it to a joint committee, committee, or a subcommittee can't be done voluntarily.

Mr. LANKFORD. Thank you.

Anyone else want to make a comment on that?

Mr. TIEFER. Yes. There are some narrowly limited grounds in which the Justice Department can't, on its own, provide documents: grand-jury documents that you have to have a court order for; income tax returns, there are some very narrow specifications about what can be provided. Outside of those narrow grounds, the answer is, they can provide it voluntarily.

Mr. LANKFORD. OK.

All right. With that, I would yield back to the chairman.

Chairman ISSA. Thank you.

You know, earlier, there was a discussion about the U.S. attorneys case, the firing of the U.S. attorneys. I sat on Judiciary and here, so I remember it very well. I want to get into that for just a moment.

The administration claimed that it had an absolute right to hire and fire U.S. attorneys. And that was, in fact, confirmed. And yet, we went forward with the investigation because we were trying to get to the bottom of whether or not one or more of those individuals was fired for reasons related to the performance of their doing—in other words, to thwart prosecutions, to protect political friends of the administration, and so on.

Wouldn't that be the best example of legitimate overseeing, not just of the U.S. attorneys and the Attorney General but even of the administration? Because they questioned the President as to whether or not he had the authority to fire without a review of whether that firing was for some other reason other than his constitutional right.

Yes, Mr. Fisher?

Mr. FISHER. Yeah, I think that was a very powerful case because I can't imagine anything more dangerous than for the Justice Department to use U.S. attorneys in a partisan way, and that was the issue. So that was a terrifying moment, and Congress had every right to find out.

I don't think Congress ever got as much information as is needed to understand what actually went on. And there was no accountability, from the President to the AG on down. No one seemed to know exactly who did what.

Chairman ISSA. Professor Tiefer, did you have anything else on that?

Mr. TIEFER. That was, indeed, a very strong, strong reason to do that oversight.

Chairman ISSA. OK.

And, with that, I think we are ready for a second round. Since I just talked, I will hold mine for a moment and go to the ranking member.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

I would like to ask the witnesses about the status of the committee's investigation to see how it compares to other historical precedents.

On March 16, 2011, Chairman Issa initiated this committee's investigation by writing to ATF to request a wide range of documents. He certainly had the right to do so. These included memoranda, reports, emails, and other communications relating to the death of Agent Terry, Operation Fast and Furious, and other related topics.

The letter requested that all documents be produced in just 2 weeks, by March 30, 2011. When we did not receive the documents, the chairman issued a unilateral subpoena for these documents the next day, on March 31, 2011. There was no committee business meeting or debate or vote on the subpoena.

Professor Tiefer, before today were you aware that Chairman Issa's subpoena came only 15 days after his original request for documents? Were you aware of that?

Mr. TIEFER. The answer is, no, I hadn't gotten details.

Mr. CUMMINGS. And the majority staff memo for this hearing states that, after the subpoena was issued, "DOJ subsequently refused to produce documents responsive to the subpoena." But the Department, in fact, had produced to the committee or made available to the committee staff for review approximately 1,336 pages of subpoenaed documents to date.

Professor Tiefer, were you aware of that fact?

Mr. TIEFER. My sense is that, to say they produced documents responsive is implying to say they didn't produce other documents responsive, and that was my sense, yes. It was a mixture of—including the withholding of important documents.

Mr. CUMMINGS. And so, Professor Tiefer, your testimony seems to assume that the Department has asserted executive privilege to withhold documents. Before today, you were aware that the Department has not asserted any kind of executive privilege to withhold any documents from the committee. Is that right?

Mr. TIEFER. That is correct, and I would expand on that. I believe in as much interplay, not just negotiating but, frankly, fighting, between the committee and the Justice Department before taking the ultimate step.

Mr. CUMMINGS. All right.

Mr. TIEFER. One of the steps is to force—and this has worked in the past, and the people at this table have been with me in this—force the executive branch to say, "We are going to claim executive privilege," or, "We are not going to claim executive privilege." And, at this point, they haven't been put to that.

Mr. CUMMINGS. Now, if they are still—let's say we have a situation where Justice is trying to gather the documents, you know, gather responsive documents based on search protocols agreed to by the committee, but have not completed that process, and is acting in good faith. A little earlier, you talked about a privilege log. At what point does that log come up? I mean, if they are still trying to get the documents, at one point does the log come up? Is that a little premature?

Because it seems to me, you got to figure out what you have in response to the subpoena, and then it seems to me that then you have to make a list of documents that, you know, you don't think should be submitted and tell why. And that is basically what the log is all about, right?

Mr. TIEFER. On the one hand, that has certainly been the way the Justice Department has done it in the past, and our efforts to wean it off of that process haven't succeeded. I have often wished that, instead, they would turn over the things that aren't privileged as they come across them and only log the things that they are withholding.

But you are right, the usual process has been the way you are saying. They want to have them all before they decide what they are going to claim privilege on.

Mr. CUMMINGS. So let me make sure I understand this. Are you saying that you think they should just turn over all the documents and then say, "Look, don't give us back these?" That is not what you are saying, is it? The ones that we think are privileged? Is that what you are saying?

Mr. TIEFER. Well, let me put it to you this way, because I was at both ends of this process. I represented the House of Representatives when we had incoming subpoenas from them. And they weren't willing to sit there and wait while we went through all the documents. They wanted right away the important ones that we couldn't claim privilege on.

But when the shoe is on their foot, then they want to count all the documents before they decide which to claim privilege on. And that has been the traditional way through all administrations.

Mr. CUMMINGS. So, right now, I guess you are aware the Department is now conducting these searches for 19 officials approved by the committee staff. You were aware of that, right?

Mr. TIEFER. I believe it. They would be—having gotten a subpoena, they would be in big trouble if they weren't.

Mr. CUMMINGS. But you said something very interesting. You said that you believe there has to be a fight. Is that what you said? You don't usually hear that word in this committee.

Mr. TIEFER. Yes. Yes. There has to be a fight. Yes. This is not a lovemaking process.

Chairman ISSA. Well, we are doing really well there, Elijah. Finally, I found out that we are doing our job just right up here.

Mr. CUMMINGS. Thank you, Mr. Chairman.

Chairman ISSA. Thank you.

Mr. Lankford.

Mr. LANKFORD. Thank you.

I have one quick statement, and I would like to be able to yield some time to the chairman after that.

But my statement would be, Justice Department informed our committee on May the 2nd that they would make 400 pages of documents available. When the staff went to go view those documents, they were heavily redacted.

Is it appropriate—and I am going to ask this of Dr. Fisher—is it appropriate for DOJ to redact documents, sometimes heavily, page after page after page, in response to a subpoena?

Mr. FISHER. I don't think it is appropriate, and I think it sends the wrong signal, that it looks like there are some things they don't want you to see. So if they are trying to establish their bona fides, that is not a good way to do it.

Mr. LANKFORD. Right. Hundreds of pages of documents don't help to be able to count that they have turned over hundreds of pages when they are all heavily redacted at that point.

With that, I would yield back to the chairman.

Chairman ISSA. Thank you.

I am going to followup on that good line of questioning. You know, as all of you I think know, the only discovery that has been literally handed over to us was all 100 percent available on the Internet. So it was public record. And I know sometimes even public record can be sensitive, but not in this case.

However, the question, I think for everyone's edification up here, in-camera review is historically, in most criminal cases and civil cases, so that people can see with no redaction. Of course, they don't get to take it with them.

Is that your understanding of what is normally appropriate when you don't deliver something and yet you bring them in for a briefing and an in-camera review so you can then decide how to, Solomonesque, split the baby in half?

Mr. FISHER. Yeah, I think it is inconsistent. If it is in-camera, you should be able to see the documents.

Chairman ISSA. I guess I am getting pretty much yeses from everyone.

Professor Tiefer, you talk about the long history you have of knowing how Justice does business, both sides. I certainly remember when they raided William Jefferson's office without notice and took, at gunpoint, everything they wanted. That certainly was not showing any deference or negotiation with the Speaker or with our constitutional separation.

Are we doing something similar here, from what you can see?

Mr. TIEFER. I think there was no deference whatsoever in that process, that it was a serious affront to the separation of powers, and that one can argue at the margins here about whether the proper process could be stretched out a little more or not. But there is no comparison; you are respecting the separation of powers much more than they did in the Jefferson raid.

Chairman ISSA. Now, for the record, I would like to mention that Ranking Member Grassley, Senator Grassley, had been requesting these documents, and we had in our possession a letter saying that they wouldn't give it to him because he wasn't a chairman. And he had been requesting them since January or even before, but, certainly, formally, since January.

So I just want to be on the record that, yes, we did, Mr. Cummings, we did only allow 2 weeks, but we allowed 2 weeks because they basically said, we have the documents, we just won't give them to you because you are not entitled; Chairman Leahy would have had to request them. And so I figured, well, Chairman Issa, Chairman Leahy, we are somewhat similar, and I had an expectation that we would get something.

Professor Tiefer, I wanted to followup on something, though. You talked in terms of the history of AG and their operations, Justice. Rolling discovery, isn't that the norm in most other discovery that this committee does, where people say it is voluminous, and they start giving you them as they get to them, if you are working with Department of Interior, most of the other areas, from your knowledge?

Mr. TIEFER. Yes. It does vary from office to office. I think they have a problem here because some of the best evidence is emails, and it is not so easy to do rolling discovery of emails. But as far as documents and categories of documents, yes, that would be the normal practice.

Chairman ISSA. Mr. Tatelman, the same thing, that you are used to seeing information come out in dribs and drabs, even when we are asking for legislative language or research, we ask you for something, and then you get additional? And just for the record, that is my experience with everybody else, is you get what is easy and then you end up with what is very hard at the end.

I do want to set the record straight on one thing. I was off last week in my district, and so I was not aware DOJ has produced 80 pages of non-public documents as of last Friday. And I look forward to reading those.

And, with that, I recognize the gentleman from Virginia for 5 minutes.

Mr. CONNOLLY. Thank you again, Mr. Chairman.

And, Mr. Rosenberg, I want to give you—I know you were champing at the bit, and I didn't mean to cut you off, but I was running out of time.

Where we left, Mr. Tatelman, was you agreed with the assertion that Congress, as you read the Constitution, has an unfettered, absolute right to seek information, irrespective of the judicial consequences from the executive branch. Subsequently to the chairman's question, I think you indicated that but, of course, a court

ultimately adjudicates the dispute, should there be a dispute, between the two branches. Am I reading you correctly?

Mr. TATELMAN. Your question, Congressman, was whether or not Congress has the right to access the information. And the answer to that question—I will stand by my original answer—was they have absolutely a right, subject to countervailing constitutional privileges being asserted, but that there may be reasons, either political or otherwise, why Congress may choose not to assert that.

Mr. CONNOLLY. Yes, yes. No, I heard that. I was just trying to establish what your view was. But you would agree that, in the event of a dispute, the ultimate arbiter of a dispute is a court of law?

Mr. TATELMAN. Not necessarily in a dispute between the legislative and executive branches. Chairman Issa's hypothetical involved a criminal trial with which there is a judicial role to play there. But if you eliminate that part of the situation, no, not necessarily. I think Congress and the executive branch can and often do resolve these disputes over their rights and privileges and prerogatives without involving courts of law quite frequently.

Mr. CONNOLLY. But what if they don't? What if they can't?

Mr. TATELMAN. Well, there are certainly precedents to establish the fact that the courts are routinely cautious and very hesitant to get involved. You have the two AT&T cases in the late 1970's where the court, the D.C. Circuit Court, on two occasions refused to rule on the merits.

Mr. CONNOLLY. Well——

Mr. TATELMAN. Even the Miers situation, Congressman, the court doesn't rule on the merits of that dispute. It ruled Congress had a right to bring the case, it had standing to pursue it, it had a right to the information, but it didn't rule on the merit.

Mr. CONNOLLY. Mr. Tatelman, I have a limited amount of time. I get your point. Thank you.

But let me pose this question. Does the executive branch have a legitimate right to be concerned about the protection of FBI informants?

Mr. TATELMAN. Yes.

Mr. CONNOLLY. And if Congress were seeking even in-camera unredacted documents that would reveal the identity of those informants, might the FBI, and the executive branch by extension, have legitimate reason nonetheless to fear, wittingly or unwittingly, the revelation of such information?

Mr. TATELMAN. They have a legitimate reason to fear that, not a legal reason to withhold it.

Mr. CONNOLLY. No legal reason to withhold it.

Mr. TATELMAN. None that I am aware of.

Mr. CONNOLLY. All of you agree with that?

Mr. Fisher.

Mr. FISHER. I wouldn't put it that way. I think you raise a nice question because both sides have to make judgments about whether their course of action is not only legitimate but plays well in the public. So any effort by Congress to say, we want the names of some informants or we want the name of the chief of staff at some CIA—you don't do that. You are going to get injured. And I think

the executive branch has to worry that it doesn't injure itself also. So everyone makes, on both sides, some judgments.

Mr. CONNOLLY. Would you—well, Mr. Rosenberg, I want to give you a chance because I, sadly, had to cut you off. But you were reacting to the discussion about, well, what if we had a Congress that deliberately, as a strategy, sought this information in fact to negatively influence the outcome of a pending trial?

Mr. ROSENBERG. I think a question would be raised at that point.

Mr. CONNOLLY. I am sorry?

Mr. ROSENBERG. Congress' powers to upset and to, you know, screw up a particular trial is certainly there. But there is a particular line that I think I am aware of in the caselaw, that if there is an attempt to interfere with or to help convict someone, that would raise serious due-process questions.

Mr. CONNOLLY. OK. So there are inherently some limits on Congress' otherwise unfettered right to seek access to information from the executive branch; this might be one of those cases?

Mr. ROSENBERG. Very rare.

Mr. CONNOLLY. Very rare. But is it not also relatively infrequent that Congress seeks this kind of information when there, in fact, is a pending investigation or a criminal trial? Is it frequent that Congress brushes that aside and seeks to subpoena information nonetheless?

Mr. Fisher.

Mr. FISHER. The question again, please?

Mr. CONNOLLY. Well, how frequent is it that Congress chooses, even when there is a pending investigation, ongoing criminal open investigation, nonetheless to subpoena documents that may be related to that investigation?

I am under the impression Congress has always shown—I am sorry—has mostly shown, historically, some restraint under those circumstances.

Mr. FISHER. Well, it can show restraint. But if what you are just saying has to be done to fulfill a legislative purpose, then I think you have to go ahead.

Mr. CONNOLLY. That is a different question. My question, Mr. Fisher, was, how frequent is it that Congress brushes aside those concerns and pursues the subpoena nonetheless?

Mr. FISHER. I don't think Congress brushes aside, but it is frequent that Congress does go after the kind of information you are asking. It is frequent.

Mr. CONNOLLY. When there is an open criminal investigation?

Mr. FISHER. Yes.

Mr. CONNOLLY. Professor Tiefer, is that your understanding?

Chairman ISSA. I would ask the gentleman have an additional 30 seconds.

Mr. CONNOLLY. Oh, I thank the chair. I am sorry. I was unmindful of time.

Chairman ISSA. No, no, you are doing fine. Another 30 seconds.

Mr. TIEFER. If we broaden it because the same argument is made for open cases of other kinds—environmental, enforcement, and so forth—our memos show a number of times, a number of times. And for criminal ones, the most famous instances in history, like Teapot

Dome but especially Watergate and Iran-Contra, are criminal cases. Does it happen often? No. Does it happen? Yes.

Mr. ROSENBERG. But it is enough so that we can take it that it is a prerogative of Congress to do it.

Mr. CONNOLLY. I would just remind Professor Tiefer that, in the case of the investigations here in Congress, the Watergate hearings, they proceeded before criminal investigations were under way. The Erwin hearings proceeded a full year before those criminal investigations.

I yield back.

Chairman ISSA. Thank you. And I guess the professor stands corrected here.

I would ask unanimous consent that the statement delivered to us by the Department of Justice on today's hearing be entered into the record.

Without objection, so ordered.

[The information referred to follows:]

STATEMENT FOR THE RECORD OF
THE U.S. DEPARTMENT OF JUSTICE
BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES
AT A HEARING ENTITLED
"OBSTRUCTION OF JUSTICE: DOES THE JUSTICE DEPARTMENT HAVE TO RESPOND TO A LAWFULLY ISSUED AND VALID CONGRESSIONAL SUBPOENA?"
PRESENTED
JUNE 13, 2011

The Department of Justice is fully committed to working in good faith with the Committee to accommodate the Committee's legitimate oversight interests in this matter. The Department has already accommodated some requests for information - including providing documents, briefing committee staff, and facilitating interviews with Department employees - and will continue to do so with regard to this matter, though much of it relates to ongoing criminal investigations of drugs and weapons traffickers, as well as the murder of a federal law enforcement officer. The Department has to ensure it preserves the independence and integrity of its law enforcement efforts and its ability to hold criminals accountable.

The Constitution envisions, as the United States Court of Appeals for the District of Columbia Circuit has recognized in the seminal oversight case of *United States v. AT&T Co.*, 567 F.2d 121 (D.C. Cir. 1977), that the Legislative and Executive Branches will engage in a process of accommodation whereby each branch makes a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch. It is the policy of the Executive Branch to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. Going back to the beginning of the 20th century - under both Democratic and Republican administrations - the Department's policy has been to protect non-public and sensitive information regarding ongoing criminal investigations from release to preserve fairness and impartiality in the criminal justice process. As the Department's Office of Legal Counsel under President Reagan explained in 1986, "the policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances." *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 76 (1986). This policy is essential to fulfilling the Department's constitutional and statutory obligations to preserve the independence, integrity, and effectiveness of open law enforcement investigations and the criminal justice process more generally. Attached to this statement is a letter from Attorney General Reno to Senator Hatch, then-Chairman of the Senate Judiciary Committee, which provides a fuller statement of the rationale for our policy, as well as its lengthy and non-partisan history.

The Department anticipates that the witnesses at today's hearing will testify that Congress has a legitimate oversight interest over the Department, including its ongoing investigations, and that the Department has on certain occasions provided Congress with law enforcement materials.

Although the Department acknowledges as a general matter that Congress's oversight authority with respect to the Department extends to open matters, exercises of that oversight authority must also account for -- and in some cases yield to -- the legitimate confidentiality interests of the Department and the criminal justice system, especially in circumstances in which oversight is sought of open criminal investigations. As for the historical precedents, we do not believe they have ever involved a similar effort by Congress to review an active, ongoing criminal investigation in the manner sought by the Committee's subpoena. *See generally* Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 Notre Dame L. Rev. 1373, 1388-1410 (2002) (discussing the limited utility of the precedents relied upon by in Congressional Research Service reports).

The Department recognizes the legitimate oversight responsibility of Congress and will continue to work in good faith with the Committee on its requests for information while balancing the need to protect the integrity and effectiveness of the criminal investigations, ensure the safety of cooperating witnesses and law enforcement officers, preserve the Department's ability to hold criminals accountable, and keep investigations and law enforcement efforts free from undue political interference, perceived or otherwise.

Chairman ISSA. I am going to followup on that line of questioning.

Mr. Rosenberg, in the Bulger case, weren't we dealing with informants? Wasn't the whole case about informants who were committing crimes under the protection of Department of Justice?

Mr. ROSENBERG. Absolutely.

Chairman ISSA. And didn't—I think this would have been Clinger and then Burton. Didn't they basically, you know, pursue that in spite of initial pushback by DOJ?

Mr. ROSENBERG. There were claims that there were ongoing investigations, that there was ongoing litigation. Part of one of the litigations was members of the families of some of the 20 or 25 victims who were bringing tort claim suits, and——

Chairman ISSA. So, just following up on that line from the gentleman from Virginia, it is for us to decide whether or not it is appropriate to hold back, that ultimately has to be something in which we see enough to know that it may be prudent to delay or in some other way explore; it can't be unilateral by the executive branch. Isn't that what caselaw shows?

Mr. ROSENBERG. Yes.

Chairman ISSA. And do some of you remember a Congressman who now works down the hall, Mr. Waxman? Weren't there criminal cases and civil cases going in the Fallujah Four and in the Pat Tillman case? Weren't both of those, when the chairman of this committee brought both of those before the Congress, including testimony, weren't those—didn't they both have other activities going on?

Anyone remember? I mean, I do, but I want to make sure that I am remembering correctly.

Mr. FISHER. I think for Pat Tillman, I remember that, yes.

Chairman ISSA. OK. So it seems like we do have a strong issue.

I think, Mr. Fisher, at one point, you had talked in terms of the political—and I think Mr. Tatelman did, too—political versus legal and political versus constitutional. Our investigation about whether the policy, including a 20-year-old policy, or 22-year-old policy, at ATF that has been asserted to say that it is OK for guns to walk, it is OK for deadly weapons to get in the hands of people who then could kill a Federal agent or some other innocent bystander, that questioning that policy, which is at the heart of this investigation, should we wait while that ATF rule is still in place, while there still may, in fact, be guns or explosives or drugs walking?

That is the real question here, is, is the balance of prosecutions versus the balance of this policy, is that a legitimate question for this committee to explore sooner rather than later?

Mr. Rosenberg.

Mr. ROSENBERG. Absolutely, that you are right to do it. And, as I mentioned, the Dingell investigation of the environmental crimes unit was exactly that. A policy of centralizing the prosecutorial decisions in Washington as opposed to any other kinds of prosecutorial decisions was one that was ongoing. And the point of the ongoingness was disturbing, in that it made for perhaps discriminatory kinds of decisions being made not on the ground, not by the people who were investigating them, but from Washington itself.

And it took 2½ years and there was a voluntary recision of that particular policy.

But to wait around until they, you know, talked about it and discussed it would seem to Mr. Dingell at the time to be, you know, unquestionable, that they had to go after it.

Chairman ISSA. Well, you are in rarefied and good company if your investigation is compared even in a small way to Chairman Dingell's.

Mr. Fisher.

Mr. FISHER. I would use the two words "political" and "legal." I think the way you described it, the two words come together, because you have a political concern about this ATF policy in place for a long time and you have legitimate legal concerns, that this is something that you have to investigate to make sure it doesn't continue.

Chairman ISSA. Well, with that, I am going to do something unusual. I am going to yield back my own time, and thank all four of our panelists for probably the most—I hope if C–SPAN watchers are watching this, that they appreciate that, except for possibly with Thomas Jefferson alone in his study, we haven't brought this much intellectual capital to a hearing in a very, very long time.

I thank you for your testimonies.

And we stand adjourned.

[Whereupon, at 2:45 p.m., the committee was adjourned.]

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