STATEMENT

OF

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BEFORE THE

HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

CONCERNING

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

PRESENTED ON

JUNE 13, 2011

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

[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

[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

[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

[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).

Morton Rosenberg, a graduate of New York University (BA, 1957) and the Harvard Law School (L.L.B., 1960), was a Specialist in American Public Law with the American Law Division of the Congressional Research Service, Library of Congress (CRS) from December 1972 to August 2008. Mr. Rosenberg specialized in the areas of constitutional law, administrative law and process, congressional practice and procedure, and labor law, and in the problems raised by the interface of Congress and the Executive which involved the scope of the congressional oversight and investigative prerogatives, the validity of claims of executive and common law privileges before committees, and issues raised by the presidential exercise of temporary and recess appointment power. He is the author of a number of journal articles on separation of powers and administrative law issues including "Whatever Happened to Congressional Review of Agency Rulemaking?: A Review, Assessment, and Proposal for Reform," 51 Adm. L. Rev. 1051(1999); "Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," 57 Geo. Wash. L. Rev. 627 (1989); "The Airports Authority Case: Separation of Powers Revisited," CRS Review (September 1991)(with Johnny Killian); and "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order12,291," 80 Mich. L. Rev. 193 (1981). Mr. Rosenberg was named the recipient of the 2004-2005 Mary C. Lawton Award for Outstanding Public Service by the American Bar Association Section of Administrative Law and Regulatory Practice in November 2005.

Following his retirement from CRS he was engaged as a Fellow at the Constitution Project to research and write a monograph on congressional investigative oversight entitled "When Congress Comes Calling: A Primer on the Principles, Practices and Pragmatics of Legislative Inquiry" which was published in July 2009. He then served as a consultant to the general counsel of the Public Company Accounting Oversight Board PCAOB) and its private counsel in the preparation of briefs and for oral argument before the Supreme Court in December 2009 in Free Enterprise Fund v. PCAOB, a case challenging the constitutionality of the appointment and removal provisions of the Board's enabling legislation. He also has been engaged as a senior legal consultant to the Financial Crisis Inquiry Commission which investigated the causes of the 2008 financial meltdown, and as a litigation consultant with the firm of Waite, Schneider, Bayless & Chesley Co., L.P.A.