CLASSIFICATIONS AND REDACTIONS IN FBI'S INVESTIGATIVE FILE

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

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CLASSIFICATIONS AND REDACTIONS IN FBI'S INVESTIGATIVE FILE

Monday, September 12, 2016

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

The committee met, pursuant to call, at 5:00 p.m., in Room 2154, Rayburn House Office Building, Hon. Jason Chaffetz [chairman of the committee] presiding.

Present: Representatives Chaffetz, Mica, Turner, Duncan, Jordan, Walberg, Amash, Gosar, Gowdy, Farenthold, Lummis, Massie, Meadows, DeSantis, Mulvaney, Buck, Blum, Hice, Russell, Carter, Grothman, Hurd, Palmer, Cummings, Maloney, Clay, Lynch, Connolly, Cartwright, Kelly, Lieu, Watson Coleman, DeSaulnier, and Welch.

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will come to order. We have an important hearing today. I appreciate all being here. I got to tell you, though, I wish I didn't have to compel you all to be here. We asked you as legislative liaisons to come participate with us and which you refused.

So the Committee on Oversight will come to order. Without objection, the chair is authorized to declare a recess at any time.

We have a couple of goals for the hearing and our investigation, and I need to do our constitutional duty. One, the FBI needs to produce its full investigative file to the United States Congress. And I mean the full file, not just the parts the FBI deemed relevant. Right now, we only have the 302s handpicked by the FBI. We decide what's relevant, not the Department of Justice, not the FBI. We're entitled to the full file.

Two, all unclassified portions of the file should be released to the public as quickly as possible. It has been more than 20 days since, I'm sure, the very first FOIA request was put out there and, by law, that should be out there. I want to commend the FBI for already releasing its investigative summary report and Secretary Clinton's 302 interview summary to the public. We do appreciate that, and it's duly noted. But there are still a number of 302s left for the FBI to release. We were surprised to learn that the 302s, the so-called investigative files provided to the United States Congress, at least to the security officer, were only a portion of them, not all of them.

And three, all Members of Congress should be able to review the entire file right now, unless you're part of the Intel Committee, Oversight Committee, the Judiciary Committee, and the Appropriations Committee, these are—if you're a member, you have to be on

those committees in order to view what is currently in the SCIF. It's unclear to me how the FBI can prevent a Member of Congress from seeing what we're already allowed to see by law, yet here they have done so. Even the unclassified information. That's what's mystifying to me. Even unclassified information you're preventing Members of Congress from seeing.

But we do believe we should be able to see the file and the whole file, and it's disappointing that we are here today. We have a number of questions about the redactions, the classifications. I thought a number of those things would just be entered in a briefing. You know, Elijah Cummings, my—the ranking member here, has made a point on several occasions that rather than just going right into a hearing, let's go to a briefing.

We had legitimate questions. We did have this planned for last week. We did have more than 12 Members of the Congress show up to have that briefing, and none of you showed up. That's inexcusable. You're the congressional affairs officers. It's your job to talk to Congress. And for some of you, I had to threaten to send a subpoena just to get you to appear today.

We did some—did some math. We've got seven of you sitting here. Between your compensation and your benefits package, you make more than $1 million from taxpayers. The taxpayers are paying you seven more than $1 million, and you won't even come talk to Congress. What do you do all day if you don't talk to Congress? That's your job.

So we're going to do that today. And the irony here is we're trying to protect the classified information. I didn't create this mess. Hillary Clinton created this mess. There are years of Federal records. Some of it so classified, none of us in this room should probably see them. Most of it's unclassified. But we have a duty and an obligation to protect that information.

I believe that's probably the same goal that you have, but we're going to have to have a reality check here. She's the one that took the records from the State Department, gave access to people who don't have security clearances. The case is closed. There's no consequences, nobody being held accountable. But we also had an FBI director come and testify that he never looked at her testimony under oath, and somehow we have a classified system and we have a nonclassified system, and somehow information was going from the classified system into a nonclassified system.

So it's ironic that you don't want to appear before this committee out of a concern for protecting classified information when Hillary Clinton walked around with a Blackberry full of classified information and gave access to sensitive Federal records to folks without security clearances at all.

I want to understand from each of you what it is you think that Congress should not see. See, I believe passionately in the role of Congress. I believe passionately in the Oversight and Government Reform Committee. We were founded in 1814. Every expenditure, everything we do in this Congress—or everything we do in this Nation is supposed to be overseen by us. We can investigate anything at any time. That's what's different about the United States of America. We're different because we are self-critical, we do go look under the hood, we do hold people accountable. That's why when

Abraham Lincoln joined the United States Congress, he was on this committee, and he peppered the President because he didn't believe that the Mexican-American War started as the President said it was. And there has been a rich history of that throughout generations.

We can't do that when each of the agencies that you all represent decide that, well, we're just going to show you the relevant information. We're not even going to answer your questions. You can't see those documents. That's the way a banana republic acts. It's not the way the United States of America acts. So we expect better and we expect you to be responsive, and I don't expect to have to issue a subpoena to see unclassified information.

While we can't be certain what is under each of the redactions within the documents, as far as we can tell, the redactions are covering information commonly given to Congress, such as names of key fact witnesses, titles and positions of government employees at the State Department, and Gmail accounts. There's nothing classified about that information.

While I understand there's an argument to withhold information under the Privacy Act or the Freedom of Information Act, neither of those apply to Congress or any other committees. As I understand it, the FBI is not withholding any information based on the Privacy Act. Instead, they just don't want to give us the information. So there's really no legal basis for these redactions.

The FBI also chose to redact any information in the report classified above secret. This also makes no sense. As a Member of Congress, we routinely receive documents and briefings from the intelligence community at the highest levels of classification, with the exception of sources, methods, with the exception of the SAP material. So any redactions have to be based on classification, have to be removed. We have to be able to see that information.

We also have questions on what the FBI file contains. Oddly enough, the copies of the file provided to us by the FBI are different. We are very grateful that they provided the first set on a Tuesday. I believe it was August 16th. The next day we got a second set. The problem is the second set had 27 emails more than the other one, which we are grateful for. It was an improving file. Only to have the FBI try to come back and recover those, not because it was SAP material, because it's embarrassing. That's why. It was embarrassing. But we should have had it in the first round. We should have had it at the very beginning.

I also want to put this request in context because it's far from the first time Congress or even this committee has requested an investigative file from the FBI or the Department of Justice. Congressional committees are routinely provided investigative materials by the Department of Justice and the FBI.

I ask unanimous consent to enter into the record the 2007 CRS report.

Chairman CHAFFETZ. This was done when things were going on with the dismissal of the U.S. attorneys. I'm going to read, it's a little bit long, but this is as good a summary as to why Congress should be able to see this as anything, and I have got to read a few sentences here.

From the CRS. A review of the historical experience and legal rulings pertinent to congressional access to information regarding the law enforcement activities of the Department of Justice indicates in the last 85 years, Congress has consistently sought and obtained deliberative prosecutorial memoranda and the testimony of line attorneys, FBI field agents, and other subordinate agency employees regarding the conduct of open and closed cases in the course of enumerable investigations of the Department of Justice activities.

These investigations have encompassed virtually every component of the Department of Justice and its officials, employees, from the Attorney General down to the subordinate level personnel. It appears that the fact that an agency, such as the Justice Department, has determined for its own internal purposes that a particular item should not be disclosed or that the information sought should come from one of the committees or subcommittees or does not prevent either the House of Congress or its committees or subcommittees from obtaining or publishing information it considers essential for the proper performance of its constitutional functions.

There appears to be no court precedent that impresses the threshold burden on committees to demonstrate, for example, quote, "a substantial reason to believe wrongdoing occurred," end quote, before a jurisdictional committee may seek disclosure with respect to the conduct of specific open and closed criminal and civil cases.

Indeed, the case law is quite the contrary. An inquiring committee need only show that the information sought is within the broad spectrum of the matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern.

And it goes on for page after page after page of precedent here. Basically, there is no legal reason why you should withhold any of this information from the United States Congress. This goes back from the Teapot Dome bribery scandal, to Valerie Plame, to what was done by Chairman Waxman when he requested the FBI 302s for President Bush, Vice President Cheney, Karl Rove, and several other senior advisors.

I have two other things that I'd like to enter into the record. I ask unanimous consent to enter into this—to enter the CRS report as well as the December 3, 2007, letter from Chairman Waxman to Attorney General Mukasey in the record.

Without objection, so ordered.

Chairman CHAFFETZ. I'd also ask unanimous consent to enter the September 10, 2007, letter from Chairman Conyers to Attorney General Gonzales into the record.

Without objection, so ordered.

Chairman CHAFFETZ. And finally, I want to commend the FBI for making its summary report and 302 of Secretary Clinton public. I do appreciate that. It's a good start. It's a good start. But it's time we be candid and honest with the American people, you allow Congress to do its job. I didn't pick this timeline. Hillary Clinton picked this timeline.

I don't care about the election, what time it is, we're going to keep going at this full speed ahead. It is far, far too important.

With that, I will now recognize the ranking member, Mr. Cummings, for 5 minutes.

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

To the witnesses, I hope that as you listened to the chairman, if you think that the cases that he has cited, previous cases involving, for example, the U.S. attorneys are distinguishable from what's happening here today, I'd just like to know. I think he makes a very good point. Other than the fact that in, I guess in some of those cases, at least, the Justice Department was accused of doing something wrong, but I would like to know exactly where you all stand on that, because I think he makes a very good point.

Well, here we are again, another day in the Oversight Committee, another emergency hearing about Hillary Clinton. Today is the second hearing about Secretary Clinton we have held in three business days, and tomorrow we will have a third.

For the record, Mr. Chairman, I want to thank you. And I want the American public to know that you have agreed to schedule a hearing on EpiPen, which affects so many of our constituents because that too is an emergency situation for the constituents of every member who sits here in this chamber right now.

As far as I can tell, the only emergency is that the election is less than 2 months away. The real reason for today's hearing is that FBI Director James Comey refused to be summoned before this committee yet again. He refused. Director Comey has already bent over backwards, departed from longstanding law enforcement precedent, and provided our committee with an unmatched level of transparency about his internal decisionmaking regarding this investigation.

First, he announced the results of his investigation publicly. Normally, the FBI does not discuss its internal decisionmaking, but Director Comey did so in this case.

Second, he agreed to testify in an emergency hearing before our committee 48 hours after his announcement. This is the FBI director. He sat right there in the witness chair and he testified about the evidence they obtained, the law they applied, and the decisionmaking process they employed. He described how, quote, "an all-star team," unquote, of career FBI investigators came to the unanimous conclusion and how it wasn't even close.

But the Republicans did not like the answers Director Comey gave, so they demanded copies of the FBI's internal investigative files. Again, in sharp break from past precedent, the FBI director agreed to share documents from the investigation in an effort to put this question to rest.

But again, that was not enough for the Republicans, so they demanded the public release of these documents. Yet again, Director Comey broke from precedent. He released the FBI's internal investigative memo and the notes from their interview with Secretary Clinton.

Let me state the obvious here. No matter what Director Comey does, it will never be enough for the Republicans. They are demanding that he bring criminal charges against Secretary Clinton, despite the fact that the evidence simply is not there. And that is something nobody, with integrity, would ever do.

We sat here and we listened to Director Comey. Stated there were two things that matter most to him in his life. He said his family and his reputation.

Last week, the Republicans wanted Director Comey to come up here one more time. But this time he said: Enough is enough. He spoke with Chairman Chaffetz personally and he told him enough is enough. In response, the chairman rushed to call today's emergency hearing. He dashed out letters as late as Thursday night, threatening even more subpoenas.

The problem is that he invited the wrong people. The witnesses here today are the legislative affairs staffers from the FBI and other agencies. They did not make the decisions the chairman is upset about. Those decisions were made by none other than Director Comey.

If the chairman has a problem with Director Comey, he should take it up with him, not beat up on legislative affairs staffers because the FBI director wants no part of any partisan charade. The FBI's legislative affairs staffer has been in his job for just a few weeks, Mr. Herring, and is currently serving in an acting capacity. He has been very responsive with our committee, and it makes no sense to hammer him just because he's following the directives of his boss, Director Comey.

The whole hearing is a bait and switch. I have the invitation letters right here. And the chairman says that this hearing will be held in a classified session. I ask unanimous consent to put them in the record, your letters about this hearing.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. CUMMINGS. Thank you.

Mr. CUMMINGS. So that is what these witnesses prepared for. I don't know whether they spent their weekends preparing for a classified hearing or not, but I assume they did. They did not prepare to answer questions in open session. So what are we doing here?

At the last minute, the chairman decided to hold this hearing in open session to try to generate more headlines rather than obtain the classified information he claims to seek. It is fundamentally unfair and irresponsible to force these witnesses to answer questions about this issue in open session. As we have all heard, the classification level of these documents have changed repeatedly, and dozens of highly trained diplomats did not think many of them were classified.

These witnesses should not be forced to make surprise or on-the-spot determinations about what they can and cannot say in an open session. After all, we've had debates for the last several months about what's classified and what isn't classified. So not only is this unfair, but it risks the inadvertent disclosure of classified information.

We should hold this hearing in a closed session, like the chairman said he would in his letter, rather than gather the information and then review the written transcript to determine what can be released publicly and what cannot. That is how a responsible approach would look, but that is not what is happening here.

I guess this is what happens when you try to schedule a public attack against Hillary Clinton for every day of the week. You get frantic and you swap substantive discussions or set up hearings

and cheap press hits. Democrats who are in this committee have serious questions—and by the way, Republicans have serious questions. It is not just the Democrats. —about our broken classification system. Even the chairman agreed with me last week that the system is broken and we need to work together to do something about it.

And we all have, I think, have concerns about why so many of these documents were retroactively classified long after they were sent. But the only way to have that productive, substantive discussion is to go into closed session as the chairman's letter stated. The only reason for the hearing today is—open is because the Republicans know a closed hearing won't be on camera.

And so with that, Mr. Chairman, I yield back, and thank you.

Chairman CHAFFETZ. I thank the gentleman. And with some indulgence, the ranking member knows it is a requirement in House rules to go into a nonclassified setting to an open session prior to going into a classified setting. We have set up in the House visitor center the classified room that will be closed to the public and the press. We are prepared to go into that setting, but we're required by House rules to first come into this open session first. It does require a vote of the committee.

Mr. CUMMINGS. Would the chairman yield?

Chairman CHAFFETZ. Sure.

Mr. CUMMINGS. Mr. Chairman, I guess what—it would have been helpful if you had laid that out from the beginning, because as I said to you up here at the dais and yesterday on the floor of the House, one of my concerns was that I don't want—I mean, if we're going to—we need to know what the ground rules are. Because when I look at it, if we're going to be discussing documents that were classified, trying to—I don't know how far we can even get in an open session without, you know, crossing that line. And I'm not trying to——

Chairman CHAFFETZ. Sure.

Mr. CUMMINGS. —play any tricks. I just want to make sure that we don't create another situation where people are accusing us of violating the law.

Chairman CHAFFETZ. And with—as the gentleman knows, there is a lot of classified information in Hillary Clinton's emails that should never ever see the light of day. That's why there is so much concern. That's why we're prepared to go into classified setting. That's why we believe we have the right witnesses here.

And also, to clarify the record, I never had a conversation with Director Comey where I asked him to come again and he refused. That just never happened. I asked him some specific questions in a personal phone call that I had with him, if we had all the 302s. I was surprised to learn that we hadn't. I asked him a couple of other questions. He didn't know the answer and that we should work with his staff.

The staff that the FBI has provided to us to work with is the legislative liaison. That's how we work with each of the agencies, is primarily with the legislative liaison. That's why we're here. And when we ask them to come to a briefing in the SCIF on—in closed doors, it is an embarrassment to this Congress that they wouldn't show up and answer those questions.

Mr. CUMMINGS. So how will we proceed today, Mr. Chairman?

Chairman CHAFFETZ. So we will allow them to give opening statements. We will ask questions on this dais in the unclassified. If we want to get into the heart of what is under a certain—certain thing, and we want to get—and it's classified, then we'll have to do that in the classified portion. But we're going to do the unclassified first, then we'll excuse and we'll go to the House visitor center and ask things in a secure facility.

Mr. CUMMINGS. Thank you.

Chairman CHAFFETZ. All right. It is highly recommended, it is part of our committee rules that you are to submit testimony 24 hours prior. You are the legislative liaisons. You know this. You're supposed to know this. None of you have provided testimony, but I'm happy to recognize each of you, and—along the way. But let me do this.

We will hold the record open for 5 legislative days for any member who would like to submit a written statement. We'll recognize our panel of witnesses. If any of you have opening statements, we're happy to hear those. We'll ask the unclassified questions, and then we will go into the classified setting. Fair enough?

Mr. CUMMINGS. Okay.

Chairman CHAFFETZ. Okay.

We're pleased to welcome the Honorable Peter Kadzik, Assistant Attorney General for Legislative Affairs at the United States Department of Justice; the Honorable Julia Frifield, Assistant Secretary of the Bureau of Legislative Affairs at the United States Department of State; Mr. Jason Herring, Acting Assistant Director for Congressional Affairs at the Federal Bureau of Investigation; Ms. Deirdre Walsh, Assistant Director for Legislative Affairs at the Office of the Director of National Intelligence; Mr. Neal Higgins, the Director of Congressional Affairs at the Central Intelligence Agency; Mr. James Samuel, Jr., Chief of Congressional Affairs at the National Geospatial-Intelligence Agency.

And help me with your last name, Mr.——

Mr. SOULE. Soule.

Chairman CHAFFETZ. —Soule. Mr. Trumbull Soule is Director of Legislative Affairs at the Office of the National Security Agency/ Central Security Service.

We thank you for being here. Pursuant to committee rules, all witnesses are to be sworn before they testify.

If you'll please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

Thank you.

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

In order to allow time for discussion, we would appreciate it if you would limit your questions—or your comments to 5 minutes.

WITNESS STATEMENTS

STATEMENT OF PETER KADZIK

Chairman CHAFFETZ. I'm not sure who has an opening statement and who doesn't. We haven't been submitted anything.

Mr. Kadzik, do you have any opening comments?

Mr. KADZIK. No, I do not have an opening statement, Mr. Chairman, but I would note for the record that I was not compelled to be here today. I came here voluntarily.

Chairman CHAFFETZ. Let the record reflect that none of them ultimately accepted service in terms of accepting the subpoena. I'm just saying, in general, it did require us to get to the point where I signed subpoenas and presented those subpoenas, but all of the witnesses here today ultimately came here voluntarily. And I appreciate you highlighting that.

Mr. KADZIK. I'm not sure that those subpoenas were produced too, but they weren't——

Chairman CHAFFETZ. And Mr. Kadzik was not one of those people. Let's be clear here.

Yes, Ms. Frifield.

Ms. FRIFIELD. I don't have a formal opening statement, but I did want to clarify, sir, that I did not refuse to come up. We asked clarifications on what exactly you were looking for because it seemed uncertain to us what you asked the State Department about these documents that were produced by the FBI. So we—I'm happy to be here and try to answer your questions as best I can.

Chairman CHAFFETZ. Mr. Herring.

Mr. HERRING. Thank you, Mr. Chairman. I do have a few opening remarks to make.

Chairman CHAFFETZ. Yes. You're now recognized.

STATEMENT OF JASON HERRING

Mr. HERRING. Thank you, Mr. Chairman, Mr. Cummings——

Chairman CHAFFETZ. You can move that microphone just straight up right in there. Yeah, there you go.

Mr. HERRING. Better.

Thank you, Mr. Chairman, Mr. Cummings, members of the committee for the opportunity to discuss our production of documents in this highly unusual case with intense public interest. I am Special Agent Jason Herring, the Acting Assistant Director for the FBI's Office of Congressional Affairs.

In early July, Director Comey appeared before this committee and answered questions for almost 5 hours to explain the FBI's investigation and conclusions regarding the email matter. At that hearing, and at every opportunity since then, Director Comey has promised that the FBI would be as transparent and forthcoming in this investigation as we could responsibly be.

To that end, on August the 16, the FBI provided to our congressional oversight committees a number of investigative documents to the investigation. It included an investigative summary of the factual information uncovered during the course of our investigation, the relevant FBI interview reports, sometimes known as 302s, and the emails that were determined to contain classified information.

We produced these documents to satisfy the committee's immediate oversight interest in the FBI's conduct in this investigation. This was an unprecedented production and one made with extraordinary speed. We did this because we believe it's important for oversight committees to understand how the FBI reached our conclusion in light of intense public interest in this case.

I am not here today to discuss the merits of the investigation, but rather to discuss and answer process-related questions with the production of our investigative case materials to this committee and our other oversight committees. From my conversations with committee staff late last week, I believe I have an understanding of some of the committee's questions and would like to address those issues head on and up front as best I can.

In order to do that, I do need to be in a closed classified setting. I'll reserve the remainder of my opening remarks for when we go to the closed classified setting. Thank you.

Chairman CHAFFETZ. Thank you.

Ms. Walsh.

STATEMENT OF DEIRDRE WALSH

Ms. WALSH. Thank you, Mr. Chairman. I'll—I have a brief opening statement on behalf of my intelligence community colleagues in the interest of brevity.

Mr. Chairman, Ranking Member Cummings, and members of the committee, my name is Deirdre Walsh, and I serve as Director of Legislative Affairs for the Director of National Intelligence, James Clapper. I'm here in response to the committee's request to answer questions about the recent document production by the FBI to Congress related to former Secretary of State Clinton's email.

While I understand the Intelligence Community Inspector General, or ICIG as we refer to him, may have interacted with the inner agency with regard to these documents, by statute, the ICIG maintains its own interactions with the Congress separate from my office. Accordingly, I cannot speak on behalf of the ICIG.

With regard to the documents produced by the FBI and the subject of this hearing, ODNI was not involved with this document production. I will, however, do my best to answer any of the questions that you may have.

Additionally, I'm joined by my colleagues from the Central Intelligence Agency, the National Geospatial-Intelligence Agency, and the National Security Agency in response to the committee's request. Given the classification of the underlying material, we look forward to discussing sensitive matters in the closed portion of the hearing. Thank you for the opportunity.

Chairman CHAFFETZ. Thank you.

It's my understanding Mr. Higgins, Mr. Samuel, and Mr. Soule, that Ms. Walsh's statements reflect the—I see. Okay.

We'll now recognize myself for the first set of questions.

Mr. Herring, what information do you believe that Congress does not have the right to see?

Mr. HERRING. So we believe it's important for oversight committees to understand how the FBI reached our conclusion.

Chairman CHAFFETZ. No, no, no, no, no. Wait, wait, wait. I'm asking you a philosophical question here. What does Congress not have the right to see?

Mr. HERRING. So I don't know if I can answer that in a way that—you know, I think there's more to it than a simple answer. I think that each case is sort of specific to its own set of facts. I think we try to be—I think Director Comey tried to be as transparent as he could with this committee and with other——

Chairman CHAFFETZ. Do you think he could be—okay.

Mr. HERRING. —other committees as he responsibly can be. So I think when he spoke and he answered his questions——

Chairman CHAFFETZ. Wait, wait. What is it that I as a Member of Congress, or any Member on this Congress, either side of the aisle, what is it that you believe we don't have the right to see?

See, this is the way our government works. We get to do oversight. That's why, since 1814, this committee has been doing that. There's executive—let me help you. There's executive privilege. Has the President invoked executive privilege in this case?

Mr. HERRING. No.

Chairman CHAFFETZ. The answer is no. Good. That's right. The answer is no.

Is there any other situation?

Mr. HERRING. Look, when it comes to classified information and the classification that deals in the executive order, you know, not all the information that we have in our files belongs to us. We defer to other agencies when it comes to access to their classified information.

Chairman CHAFFETZ. But you are the ones that put redactions on personal identifiable information, correct?

Mr. HERRING. We did on the personal identifiable information, that's correct.

Chairman CHAFFETZ. Where in the Constitution does it say that I can't see that?

Mr. HERRING. It doesn't address it specifically in the Constitution.

Chairman CHAFFETZ. So can you cite any legal case, any precedent that says that Congress can't look at personal identifiable information?

Mr. HERRING. I cannot cite any legal case.

Chairman CHAFFETZ. Did—are you aware that Congress is exempt from the Privacy Act?

Mr. HERRING. I am.

Chairman CHAFFETZ. Does the FBI treat congressional document requests as FOIA requests?

Mr. HERRING. No.

Chairman CHAFFETZ. Will the FBI provide Congress all of the 302s?

Mr. HERRING. All of the 302s? We have one set that you've been provided already. The rest of them are coming through the FOIA process.

Chairman CHAFFETZ. Wait, wait, wait. We're not—FOIA process. You mean I got to fill out a FOIA request?

Mr. HERRING. You can. Not necessary.

Chairman CHAFFETZ. When—here's the problem. You handpicked the 302s to give to us. My understanding, your discussion with staff. And I appreciate your accessibility with the staff, you've been good, and you're new. For your first time hearing, this is a tough one, but the reality is, you should give us all the 302s.

Mr. HERRING. So let me say this. I think that—I think the director made principle decisions about what to say to Congress when he was here and also what to provide to Congress. As far as the redactions and——

Chairman CHAFFETZ. Wait. Where do I find that?

Mr. HERRING. —personally identifiable——

Chairman CHAFFETZ. Do we just let everybody in government decide that they're based on their own individual principles, that's what Congress—see, it's trust but verify is how it works. You don't get to decide what I get to see. I get to see it all.

I was elected by some 800,000 people to come to Congress and see classified information. I was elected by my colleagues here to be the chairman of this committee. That's the way our Constitution works.

Will the FBI provide to Congress the full file with no redactions of personal identifiable information?

Mr. HERRING. I cannot make that commitment sitting here today.

Chairman CHAFFETZ. Then I'm going to issue a subpoena and I'm going to do it right now. So let's go—I've signed this subpoena. We want all the 302s, and we would like the full file.

You can accept service on behalf of the FBI?

Mr. HERRING. Certainly.

Chairman CHAFFETZ. You are hereby served.

We have a duty and a responsibility. You can cite no precedent, nothing in the Constitution, no legal precedent. You know this is important to us. You now have your subpoena. We would all like to see this information.

I've gone past my time. I'm coming up on going past my time. I'll now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. You've been at your job 4 weeks?

Mr. HERRING. Yes, sir.

Mr. CUMMINGS. I can't hear you.

Mr. HERRING. Yes, sir.

Mr. CUMMINGS. And you were—you used to work for one of our distinguished colleagues, Mr. Goodlatte. Is that right?

Mr. HERRING. Yes, sir.

Mr. CUMMINGS. A Republican.

So I'm going to—so you're familiar with Congress then?

Mr. HERRING. Yes, sir.

Mr. CUMMINGS. I'm going to save most of my questions for the classified session, but I do want to address the redaction issue briefly.

When the FBI produced these materials to Congress, their cover letter stated, and I quote, "the FBI has redacted personal—personally identifiable information as appropriate," end of quote. Chairman Chaffetz publicly announced he wanted the FBI to lift these redactions. He stated, and I quote, "we are going to call on the FBI next week—this week—to give a version where there is nonclassi-

fied—the unclassified material and the classified material redacted so that it could be out there in the public," end of quote.

The problem is that there is no legitimate basis for the demand. Director Comey has already provided us with an unprecedented level of transparency into the FBI's investigation and internal decisionmaking.

Now, I'm going to stop there for a moment. And you said yourself, I think at least twice, that there has been unprecedented discovery here. I mean, what did you mean by that? And I don't want to take the words out of your mouth.

Mr. HERRING. No, I mean——

Mr. CUMMINGS. Correct me if I'm wrong.

Mr. HERRING. I think in this particular case, you know, we don't typically make our case files available. They're sort of internal work product. There's a lot of sensitive information in there. Even the unclassified stuff is sensitive to a great deal. I think that we made a principle decision with redacting the PII only for those individuals who are not already in the public domain.

You sort of asked why did you do that? Well, from my perspective, as an agent, you know, any investigation, including a high-profile investigation like this one, or any other investigation really, it's critical for us as FBI agents to obtain cooperation from members of the public. As we go out and we talk to members of the public in any case, we need them to be willing to participate in the judicial process.

A lot of times people, their initial reaction is, you know what, I don't want to get involved. As an agent, you talk with somebody, you try to protect them as best you can. Sometimes you have to call them as a witness at trial, sometimes you don't. But witnesses who speak with us need to have confidence that they can talk to the FBI without risk of undue exposure.

In this case, we were concerned about lifting the PII redactions for individuals who are not already in the public domain. It might have a chilling effect on the willingness of other members of the public in the future to cooperate with us, particularly in an investigation like this.

And so I think that Director Comey's—or what we as an agency tried to do was to satisfy the needs of the Oversight Committee by letting you all see exactly what we did in our investigation, the investigative steps we took, and how we came to that conclusion. I think he did it in the form of taking questions for more than 4 hours, but also making our files available, and that's not something that we typically do.

We did make a principle decision as far as how are we going to effect this, how are we going to give that visibility to our oversight committees. We made a very thoughtful, I think, response in redacting only limited PII for the people that are not already in the public. And really, from my perspective as an agent, this is Jason talking——

Mr. CUMMINGS. How long have you been an agent?

Mr. HERRING. 17 years.

Mr. CUMMINGS. Okay.

Mr. HERRING. And so from my perspective as an agent, I think we have to protect the integrity of our investigations, and I don't

want there to be a chilling effect—or I wouldn't want there to be a chilling effect for other people cooperating in similar cases like this going forward.

Mr. CUMMINGS. Well, one of the things that I asked Director Comey about was this whole process, when you've got the Congress getting more and more information from the FBI, and whether it would have a chilling effect. Do we place ourselves in a position where if the Congress does not like a decision made by the agency, then—and then they dig—I mean, how much—you know, how often will that be happening?

In other words, so that chilling effect—and then I—you know, and then—you know, I wonder, well, other people, if a decision—somebody in Congress doesn't like the decision, do we set more and more precedents so that people can come in behind? And Director Comey said he had an all-star group of agents and they had a unanimous decision. And I just, you know—but you were talking about the chilling effect.

So you—do you think that—first of all, who made the decision with regard to the redactions, since that's what we're supposed to be here about? I mean, I'm just curious, who makes those decisions?

Mr. HERRING. I think that was made at the highest levels in the Bureau.

Mr. CUMMINGS. And does that mean Director Comey?

Mr. HERRING. Absolutely.

Mr. CUMMINGS. All right.

Mr. HERRING. If I can say just sort of——

Mr. CUMMINGS. Please do. I have—I thought I had some time, but go ahead.

Mr. HERRING. I mean—I mean, I do think it's reasonable to think there would be a chilling effect. This is a very public case. Everybody out there is watching it. And we start lifting personally identifiable information, I think there—I think that potentially could have some impact going forward.

I do think, though, that, you know, we're not trying to play hide-the-ball with Congress. We want Congress to be able to do its job, this particular Oversight Committee do its job, and to understand really, you know, what we did in the investigation, how we came to that conclusion. And we did that in part by, you know, releasing the investigative summary and the 302s.

Mr. CUMMINGS. Thank you very much.

Mr. HERRING. Thank you.

Chairman CHAFFETZ. Some of the 302s. And when you don't show up at a meeting that we request behind closed doors, kind of lose that opportunity.

Mr. HERRING. If I could——

Chairman CHAFFETZ. No. We're going to recognize the gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Agent Herring, did the FBI interview the sender of all emails that contained classified information?

Mr. HERRING. You know, I don't know the answer to that question, only because I'm a leg affairs guys. I wasn't on the investigative team.

Mr. GOWDY. Can you find? You would agree with me it'd be important. You'd want to interview the person who sent the classified information, right?

Mr. HERRING. Certainly.

Mr. GOWDY. Because the recipient thought the "C" was just the third letter in the alphabet. You might be curious whether or not the sender also was clueless in the way he or she viewed classified information, would you not?

Mr. HERRING. That would be a logical investigative step.

Mr. GOWDY. Can you find out whether or not you interviewed the sender of all emails that contained classified information?

Mr. HERRING. Certainly.

Mr. GOWDY. Do you know if the sender of any of the classified emails knew that the information was classified at the time?

Mr. HERRING. I don't personally know that. I wasn't part of the investigative team. I'm sure that——

Mr. GOWDY. Can you find out?

Mr. HERRING. Certainly.

Mr. GOWDY. Can you find out for me?

Mr. HERRING. Yes, sir.

Mr. GOWDY. There are folks wondering how information gets from a classified source into an email. Did your investigation shed any light on how classified information could get from a classified system into an unclassified email to even be sent? I'm not even talking about the receiving of it. I'm talking about the sending of it.

Mr. HERRING. I'm sure they did look at that. That would be sort of a logical question you would ask as an investigator in a case like this.

Mr. GOWDY. That's what I thought.

Mr. HERRING. But in my legislative sort of affairs capacity, I just don't have that kind of——

Mr. GOWDY. Well, don't sell yourself short. You used to be an agent, right? You're still an agent, right? So you know what you're doing.

Did the FBI grant immunity to anyone during the course of its investigation?

Mr. HERRING. For immunity questions, I'd have to defer to the Department of Justice for that. It wouldn't be an agent who would grant that kind of thing. That would——

Mr. GOWDY. Did the Bureau recommend the granting of immunity?

Mr. HERRING. I do not know.

Mr. GOWDY. Do you know—do you know whether the Department of Justice granted immunity to any witnesses?

Mr. HERRING. I know I saw—I saw some articles last week, but that's the extent of my——

Mr. GOWDY. Well, surely you have better sources than he media for that, don't you? You can ask the guy sitting two people down from you.

Mr. HERRING. I would have to defer to the Department of Justice, sir.

Mr. GOWDY. Do you know whether any witnesses asserted any privileges while they were being interviewed?

Mr. HERRING. I don't know.

Mr. GOWDY. But the Bureau would know that, right, because they would have asserted the privilege while you were in there?

Mr. HERRING. I'm sorry?

Mr. GOWDY. The Bureau would know that, right, because that privilege would have been asserted perhaps while you were in there conducting the interview?

Mr. HERRING. What kind of privilege are you talking about? Like attorney/client privilege or what privilege are you talking about?

Mr. GOWDY. Oh, there are a bunch of privileges. There's priest-penitent. I'm guessing that one didn't come up. There's doctor-patient. I'm guessing that one didn't come up. There's the Fifth Amendment privilege against incrimination. That one might have come up. Attorney-client privilege. Again, there have been media reports that that one came up.

Mr. HERRING. Sir, I just don't know the answer to those questions.

Mr. GOWDY. Have you ever heard the—had the attorney-client privilege come up during any of your investigations?

Mr. HERRING. Certainly.

Mr. GOWDY. Who does the privilege belong to?

Mr. HERRING. The client.

Mr. GOWDY. So the client can waive it, right?

Mr. HERRING. Can.

Mr. GOWDY. You understand why Congress might want to know whether or not the attorney-client privilege was waived and who the client was?

Mr. HERRING. I can certainly imagine.

Mr. GOWDY. Yeah, me, too. That's why we want to see the file, Agent. I mean, you say it's unprecedented. Mr. Cummings used to be a criminal defense attorney. He got to see all your 302s. Ken Buck used to be an Assistant United States Attorney. He got to see all of your 302s. Probation officers get to see all your 302s.

Why can't Congress?

Mr. HERRING. Sir, I think we have tried to provide the information in a way that is understandable. I think the investigative summary tells kind of the story, and I do think that the 302s that we provided are the important ones.

Mr. GOWDY. Let me ask you this. If those summaries were all anyone ever needed, why don't you just introduce those in trial? Why actually call the witness?

Mr. HERRING. Well, certainly we were—we actually were trying to make your life a little bit easier in the light of the Oversight Committee.

Mr. GOWDY. But, see, I don't want my life being made easier. I don't want that. I want to know what was said in the 302s. Because the 302 is itself a summary of an interview, right? It's not a verbatim transcript.

Mr. HERRING. That's correct.

Mr. GOWDY. So you have given me the summary of a summary of an interview. And I'm not asking for a verbatim transcript because you don't have one.

Mr. HERRING. Certainly.

Mr. GOWDY. I'm just asking for the 302 so I don't have to read your summary. I may read the 302 differently from the way you read it. So why not?

Mr. HERRING. So I think we've given you the relevant ones as we find it.

Mr. GOWDY. Relevant according to whom? I am telling you I don't think you've given me all the relevant 302s.

Mr. HERRING. Well, the remainder of the 302s will come out through the FOIA process.

Mr. GOWDY. But since when did Congress have to go through FOIA——

Mr. HERRING. Correct.

Mr. GOWDY. —to obtain 302s from an investigation that's not even resulting in any prosecutions that your boss has already said is over? Since when did we have to go through FOIA?

Mr. HERRING. So I think that the 302s we have provided, I think that we made a principle decision about what to provide. It was certainly made at the highest levels of my agency.

Mr. GOWDY. All right. I'm out of time. That's what that knocking sounds. I'm just going to say, with all due respect, you didn't get to decide what we think is relevant, and I do say that respectfully. The defense attorneys get it all. I think Congress ought to get it all.

Chairman CHAFFETZ. I thank the gentleman.

I now recognize the gentlewoman from New York, Mrs. Maloney, for 5 minutes.

Mrs. MALONEY. Well, thank you, Mr. Chairman. And I'm going to reserve my questions to the closed session, but I would like to clear up some misconceptions.

I would say that the campaign season is upon us, and the accusations and the charges and the attacks are almost out of control. I just spent—I won't get into it, but anyway.

For several weeks the chairman has been appearing on national television saying that the reason that he cannot see these emails is because the FBI produced to Congress is because they are such a highly sensitive, classified, high level. And for example, he stated that these materials were—and I would like to put his quote in the record—"so secure and sensitive that even I, as the chairman of the Oversight Committee, did not have the proper clearance to see it."

But in fact, as I understand it, Mr. Herring, Chairman Chaffetz has not been able to view these documents. The reason he hasn't been able to see them is because the Republican chairman of the Intelligence Committee has not allowed him to do so. The documents were produced and given to the Intelligence Committee, and the Intelligence Committee has a process by which they release the documents to people, and he has the same clearance as any other Member of Congress who's not on the Intelligence Committee. And so the reason he hasn't been able to get them is because his own party's leadership has not voted to give him this clearance.

Now, a—as I understand it, the FBI produced a small subset of these emails only to the Intelligence Committee. And according to House rules, the Intelligence Committee has the jurisdiction over certain agencies, and these agencies report to the Intelligence Committee.

So it has a process in place. And for any member who's not on the Intelligence Committee, to see these documents, and they need to send a letter to the committee, which Chairman Chaffetz did, and I have his letter from September 2, and I request unanimous consent to place it into the record.

Chairman CHAFFETZ. Without objection, so ordered.

Mrs. MALONEY. Okay. So he sent this letter saying he'd like to see them and asked permission, and the Intelligence Committee needs to take a vote. Now, as I understand it, the chairman of the committee has not scheduled a vote that would allow the chairman to see these documents.

Now, I—I just feel that a lot of this is just pure plain politics as usual, stirring up a hornet's nest over documents he can't see, which are being withheld by his own party. And it seems that they do not want to open up the Intelligence Committee's jurisdiction at this point. I don't know why they're not taking the vote that would allow him to see these documents.

But what our committee's engaged in is nothing—in my opinion, nothing more than a partisan election bashing exercise stating that these emails can't be seen when they can be seen if his own party votes to let him see it. So I just say that it's politics as usual, and I'm disturbed about it.

There is a problem with the classification system. We all saw that in the last hearing. Let's work together to correct it. But this whole charade is just that, a charade. These documents are not being withheld from the chairman because of anything any of these witnesses have done. They are being withheld by the Republican chairman of the Intelligence Committee.

So I respectfully suggest to my chairman that we bring in the chairman of the Intelligence Committee and ask him why he doesn't have a vote and release the documents to you. It is not the FBI but the House Select Committee on Intelligence who's withholding these documents. So——

Chairman CHAFFETZ. Will the gentlewoman yield?

Mrs. MALONEY. I most certainly will.

Chairman CHAFFETZ. Any one of the four people from the Intelligence community here can help answer this. Have you made redactions on personal identifiable information to the Intel Committee?

Mr. Higgins, how about you?

Mr. HIGGINS. No, we have not.

Chairman CHAFFETZ. There's no redactions.

Ms. Walsh?

Ms. WALSH. Not to my knowledge.

Chairman CHAFFETZ. Mr. Samuel?

Mr. SAMUEL. No, Mr. Chairman, not to my knowledge.

Chairman CHAFFETZ. Mr. Soule?

Mr. SOULE. No, Mr. Chairman, not to my knowledge.

Chairman CHAFFETZ. Can you release these emails into the public, and if so, what would happen?

Mr. Higgins, what happens if we release these emails that are—that Hillary—on Hillary Clinton's unsecured server, what happens?

Mr. HIGGINS. Mr. Chairman, I can confirm that CIA participated in the classification review process, and I'd be happy to talk about

that process in closed session. Needless to say, some of the materials do include classified information that we do not believe is appropriate for public release.

Chairman CHAFFETZ. And do these—are some of these materials include sources and methods?

Mr. HIGGINS. Mr. Chairman, I'd prefer to discuss any further matters relating to classification in closed session.

Chairman CHAFFETZ. The gentlewoman's time is expired, but thank you so much for yielding to me. I do appreciate it.

Mrs. MALONEY. But reclaiming my time. I get to close in my time. You took all my time. I thought the chairman could——

Chairman CHAFFETZ. It was pretty good, wasn't it?

Mrs. MALONEY. I think the chairman can have all the time he wants.

I'd just like to conclude by saying, and I'd just ask for a second, just a second, what our committee is engaged in is nothing but a partisan attack on Secretary Clinton with an effort to harm or undermine her presidential campaign. That's all it is.

Get the chairman of the Intelligence Committee to release the documents to you. No one is withholding it. The Intelligence Committee has jurisdiction over agencies, including the FBI. They release their information. They have a process. You have appealed to that process. Let's wait for that process. Ask him why he's not taking a vote to give you access to these documents.

You're making it look like there's some conspiracy or some terrible thing happening when it's really nothing but a partisan attack on Secretary Clinton.

Chairman CHAFFETZ. I thank the gentlewoman, and I guess some indulgence. Where I have a problem is when they redact information that is deemed unclassified. I don't understand that. It makes no sense, and it's—classification is one issue, but when they redact information that has already been designated as unclassified, I believe that Congress should be able to see that.

Mrs. MALONEY. Mr. Chairman, may I respond?

Chairman CHAFFETZ. Sure, yeah.

Mrs. MALONEY. In the hearings that we've had, the witnesses have testified that that personal information that has been redacted has been to protect the privacy of people and personal information. That's on record. But in the classified section, we can have more of this clarified.

Chairman CHAFFETZ. Thank you. And I appreciate the dialogue back and forth.

Now let's recognize the gentleman from Ohio, Mr. Jordan, for 5 minutes.

Mr. JORDAN. Mr. Herring, let me just follow up where the chairman was. So did the FBI make the redactions dealing with personal identifiable information?

Mr. HERRING. We did, yes.

Mr. JORDAN. You did. That's what I figured. Okay. Mr. Herring, you've said we don't have all the 302s, we don't have the whole file, and what you did give us, as you just pointed out, had lots of redactions.

Mr. HERRING. Yes, sir.

Mr. JORDAN. And the chairman invited you to a briefing last week in a classified setting which you said, in your opening remarks, where you'd like to discuss this information. So who told you not to come to the briefing? Because the chairman was there, I was there. In fact, every single Republican member was sitting there waiting anxiously for you to come do what you just said in your opening statement you wanted to do. So why didn't you show up?

Mr. HERRING. So let me say a couple of things here, if I could, just to sort of be clear. As far as the 302s and what we provided and what we haven't provided, there are a lot of 302s or dozens of them, and we prioritized up front what we thought were the most important ones. And so those are the ones we gave——

Mr. JORDAN. But you got them all, don't you?

Mr. HERRING. —a couple of weeks—we do have—and we're working on the others.

Mr. JORDAN. So you can get the paper, you can give it to us, or frankly, you could have told us what you just told us right there, you could have told us that last Wednesday but you didn't come. Why didn't you come?

Mr. HERRING. So I actually want to address it in a classified setting, if I could. There were certainly some conversations——

Mr. JORDAN. Someone tell you not to come, Mr. Herring?

Mr. HERRING. —conversations——

Mr. JORDAN. Someone tell you——

Mr. HERRING. There were some conversations between me and some of the committee staff about what the briefing was going to be about.

Mr. JORDAN. No, no, no. I'm asking, did someone tell you not to come? You were invited. We were all waiting. We don't have all the 302s. We don't have the whole file. You've told us you made all the redactions. We were going to ask you about that. We were going to do it in a classified setting, which is what you preferred and what you want, what you've told us today you want, and someone told you not to come. Who told you not to come?

Mr. HERRING. It was my decision, but I'd like to explain it away in a classified setting.

Mr. JORDAN. Wait, wait, wait. You decided on your own? You didn't consult with anyone else?

Mr. HERRING. I certainly consulted with the director's office.

Mr. JORDAN. And the director said: It's up to you, Mr. Herring. I'm not going to decide. You're going to decide. Really?

Mr. HERRING. So a lot of it has to do with what the discussion was going to be in the classified briefing, and I think there was some confusion, at least on my part, about what the expectations were and some of my conversations with committee staff last week.

Mr. JORDAN. Did you have any other discussion? Just you and Director Comey talked about this? You talk to anyone else?

Mr. HERRING. Certainly. We have our general counsel's office, you know, the Department of Justice. There are a number of people that were——

Mr. JORDAN. Mr. Herring, was this case different? You said you've been around the FBI 17 years. You're now the acting director for Legislative Affairs. Was this case different?

Mr. HERRING. I believe this case is different in a lot of ways.

Mr. JORDAN. Lot of ways.

Mr. HERRING. I do.

Mr. JORDAN. Can you tell us, can you give me some—why?

Mr. JORDAN. I know it's different in a lot of ways. How about this difference. Have you ever had a case in your 17 years where the subject of your investigation's husband meets with the Attorney General just a couple days before you're going to interview that individual in your investigation? You ever had that happen in your 17 years?

Mr. HERRING. No, sir.

Mr. JORDAN. That's certainly different. Isn't it?

Mr. HERRING. Yes, sir.

Mr. JORDAN. Yeah. You ever have a case, in your 17 years—and we appreciate your service—you ever have a case where the Attorney General announces publicly that she's going to follow the recommendations of the FBI, even though she has no idea what those recommendations are going to be based on—you ever have that happen in your 17 years?

Mr. HERRING. Not in one of the cases I was assigned.

Mr. JORDAN. Yeah. Well, I don't think it's ever happened because the Attorney General told me she's never done that until this time. Have you ever had—in your 17 years, you ever have a director of the FBI, you ever have them do a big press conference, walk through all the wrongdoings of the person under investigation? You ever have that happen? A big press conference before and then make this big announcement? Or normally the FBI just kind of announces whether they're going to prosecute or not. Right? You ever seen that before?

Mr. HERRING. I mean, certainly we have press conferences. Not quite like that one.

Mr. JORDAN. Not quite like that one. That's exactly right. And then have you ever had this. Now, maybe this happens, but Mr. Cummings said in his opening statement Republicans didn't like the answers Mr. Comey gave. Well, that may be true. But based on what Mr. Comey did last week where he sent a memo to you and all your colleagues, looks to me like a lot of former FBI agents and maybe some even current ones didn't like some of the answers they got from this investigation. You ever seen that before?

Mr. Comey says in this letter, "I explained to our alums, I'm okay if folks have a different view of this investigation." So there's obviously some folks who used to work in the Justice Department didn't like the outcome either. Now, they may be Republicans like Mr. Comey says. They may not be. So I've never seen that before either. Have you, Mr. Herring?

Mr. HERRING. Frequently we get messages from the director on a variety of things.

Mr. JORDAN. Yeah.

Mr. HERRING. I think in this case——

Mr. JORDAN. Two months after he makes the announcements he thinks it's important to send a memo out 2 months later to all his employees and saying: Hey, I better fill you in on some things here, why we did what we did. You ever have that happen 2 months after the fact?

Mr. HERRING. I think oftentimes he wants the employees to understand what's going on and full level of transparency both outside the Bureau and inside the Bureau. We're a big agency——

Mr. JORDAN. So 2 months later you got a memo.

Mr. HERRING. —36,000 or so employees——

Mr. JORDAN. This case was different. But here's the problem, Mr. Herring. It's not supposed to be. It's not supposed to be different. Everyone is supposed to be treated equally under the law. And I know deep down you know that. You're a 17-year servant in our government. And you know that. Don't you? It's all—everyone's supposed to be treated the same. And in this case, this individual was treated different. And everyone in this country knows it. And that's why we're having this hearing. And that's why we'd have liked you there last week to give us the information a little sooner than later tonight when we go into a classified setting.

Mr. HERRING. Sir, can I answer that? I mean, I think it's important for us as an agency to be apolitical, to follow the facts in any case where it takes us. And I do believe that we followed the facts in this particular case. And Director Comey certainly made a very difficult decision. But ultimately, at the Department of Justice, he makes the determination of prosecution.

Chairman CHAFFETZ. No, no, no.

Mr. JORDAN. Real quick. Not in this situation because she said she was going to take his recommendation.

Chairman CHAFFETZ. The gentleman's time is expired.

Mr. JORDAN. It is a false statement.

Chairman CHAFFETZ. We're not going to recognize the gentleman from Massachusetts, Mr. Lynch, for 5 minutes.

Mr. LYNCH. Thank you, Mr. Chairman. First of all, I want to thank you for your service. And then regrettably, second of all, I need to apologize for the way that you're being treated here today. I know that we've worked with a number of you in the past and appreciate your service to the country. And unlike some folks here, I recognize there's a separation of powers.

While I do agree that Congress has a very wide jurisdiction for investigation, I also know that we are not a law enforcement agency. We are not a trial agency. And under the separation of powers in this country, it's not consistent with the constitution for the legislative branch to overturn a decision, especially on an investigation and a potentially criminal investigation and you've decided not to prosecute. It is completely out of bounds for Congress to overturn a decision of a court on one specific case.

And I want to go back right to the beginning. The notice of this hearing, which was supposed to be closed, and so I apologize that you're being lambasted and denigrated in public when you were asked here to come here to a closed hearing, and all this is happening out of bounds and totally inconsistent with the chairman's letter that this would be a closed hearing.

There is a relevant case law, and, Mr. Herring, I would say that there is constitutional language that would prohibit what's going on here today in requiring you to divulge the names of individuals that have been redacted during your investigation, and that that constitutional language is in the Bill of Rights. And particularly the Fifth Amendment.

And I want to go back to a case called Watkins versus the United States. This was a matter brought forward by Senator Joe McCarthy in the House Committee on Un-American Activities. And Watkins was brought forward to—he was subpoenaed to testify before the House Committee on Un-American Activities. And Chief Justice Warren delivered the opinion of the court in that case. And he said, There's no general authority to expose the private affairs of individuals without justifications in terms of the functions of Congress. Nor is the Congress a law enforcement or trial agency. These are the 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 Congress. And investigations conducted solely for the personal aggrandizement of the investigators or to punish those investigated are indefensible.

Now, the notice for this hearing says that, number one, the purpose is to review the redactions that were made by the FBI during their investigation and—excuse me—to review the redactions, omissions, and circumstances surrounding your investigation.

Now, as you said before, Mr. Herring, in bringing witnesses forward to get them to cooperate with the FBI—well, look at it this way. If the law is correct the way the chairman and my Republican colleagues are looking at this, here's what we could do. This committee could identify somebody—we could refer somebody for investigation by you, our secret police, the FBI. You could go out and investigate all these people, and then we would have the ability to publicly embarrass them by removing any redactions that you put in place. That's the world that we could create here. And what is the one instance when this exercise, this overreach of power is being administered? It's when we're investigating the Democratic nominee for President a couple of months before the election. That's when this is going on. This is terrible. This is absolutely terrible. This is a miscarriage of justice.

And the right of people against unreasonable search and seizures, the right of the witnesses that you investigate—and I understand this was a 12-month investigation. Earlier in your testimony you said that it took—you did 3 years of work in about 12 months and pulled in all these people. So if anybody at all is mentioned in any of these by a witness who mentions another person, that person will suffer the glare and their lives will be turned upside down because of what this committee wants to do. And that is a violation of our constitution and the individual rights of those individuals, just from having been mentioned or being approached in an FBI investigation.

So, Mr. Chairman, I think this is going in the totally wrong direction. This is a sad day in the history of this committee, I have to tell you. This is a sad goddamn day that we're doing this.

Chairman CHAFFETZ. The gentleman's time has expired. I think that last comment was a bit inappropriate.

I will now recognize the gentleman from Florida, Mr. Mica.

Mr. MICA. Thank you, Mr. Chairman.

Mr. Herring, we do have an important responsibility as members of this committee. Unlike any other committee in Congress, we're the investigations and oversight committee. The chairman went through the history of the committee and some of the investiga-

tions. This particular case we're talking to dealing with Secretary Clinton's emails, the case was declared closed by the director. Is that correct?

Mr. HERRING. Yes.

Mr. MICA. And that came after—and I pointed this out the day he was here, just an unprecedented series of events. And Mr. Jordan, I think, relayed some of the timetable. On Friday, July 1, the Attorney General said she would take whatever recommendations the FBI came up with. On Saturday, the 2nd of July, the vans pull up and they interviewed the witness for, what, 4 hours was it?

Mr. HERRING. Something like that. I don't really recall.

Mr. MICA. Yeah, something like that. And I asked the questions if it was recorded, and it was no. Did he participate in it, the director? No. Then we found out that there were the 302s that were taken. Is that correct? Summaries were taken.

Mr. HERRING. A 302 from Ms. Clinton?

Mr. MICA. Yes.

Mr. HERRING. Yes.

Mr. MICA. Okay. And then on July 5th, the 4th was a Monday, it was announced by the director there would be no prosecution or case closed by, basically, the Attorney General the next day. That's pretty much the sequence. Isn't it?

Mr. HERRING. I think he made that recommendation, yes.

Mr. MICA. Yeah. And the case is closed. Now, I've been on the committee longer than anyone here. I can never remember an instance—and the chairman went back to before the Teapot Dome scandal—when even during some of these investigations we have always had access to information. And that has been the case, hasn't it, that we've always had access, unfettered access, the committee? Again, the chairman cited time after time——

Mr. HERRING. I don't know about unfettered access. It's before my time——

Mr. MICA. But we've gotten the information. Again, he has that—and I'd like it made part of the record, Mr. Chairman, the report that you have.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. MICA. And we do know that the Secretary used a private server which had emails that contained classified information. Is that not right, Ms. Walsh? Or all of this community would agree on that?

Ms. WALSH. About her use of a private server, sir?

Mr. MICA. The Secretary used a private server, and on it—and going through the server was classified information. I mean, everybody, unless you're on another planet, knows that, including these—they're all shaking their head affirmatively.

The director, when he was here, said that he didn't know if—there was a possibility that it could have been hacked. That information could have been made public. That's really a national security issue here too, that Congress in its responsibility to investigate is now being denied the information about what really took place. You're participating in keeping that information from us, Mr. Herring.

Mr. HERRING. If I could just say a couple of things. You know, one, on the personally identifiable information, obviously I have a

subpoena here for that now. I engaged Mr. Chaffetz's staff earlier today about a compromise that's——

Mr. MICA. Well, we're going to get the 302s one way or another. But you have not given us all the 302s. Right?

Mr. HERRING. Not yet. We did prioritize them and we did the most——

Mr. MICA. That's not a question. You don't get to prioritize, never in the history of investigations that I've participated in. We want the information. We are entitled to the information. We are the investigative branch. Collectively we represent the American people.

Mr. HERRING. Certainly. I think——

Mr. MICA. And you have denied that. Now, we've had to file with you, Mr. Kadzik, a referral. How long before you act on the referral? You have the referrals?

Mr. KADZIK. We have the letter from the chairman and Chairman Goodlatte as well, yes.

Mr. MICA. What's the timetable? I mean——

Mr. KADZIK. I can't give you a timetable. We've referred it. It's being reviewed. And I can't give you a timetable for an investigation.

Mr. MICA. You are again withholding information that this committee legitimately requested. The director is, and he promised that he would provide us. That's not acceptable.

Chairman CHAFFETZ. The gentleman's time has expired.

Mr. CUMMINGS. Chairman?

Chairman CHAFFETZ. Yes, the ranking member?

Mr. CUMMINGS. If the gentleman would just yield for just one second. Mr. Mica asked a question that just sparked my interest. You said you were having discussions with the Republican staff. Is my staff involved in those discussions? I'm just curious.

Mr. HERRING. Not as of today, no, sir.

Mr. CUMMINGS. Not as of today?

Mr. HERRING. Well, I had a conversation with Mr. Chaffetz's staff earlier today. But your staff was not a part of it, sir.

Mr. CUMMINGS. Is that—I mean, is that your normal course of doing things? We do represent 700,000 people each over here.

Mr. HERRING. Yes, sir.

Mr. CUMMINGS. And you are from the Congress. You worked for Goodlatte. Is that right?

Mr. HERRING. Yes, sir.

Mr. CUMMINGS. All right.

Chairman CHAFFETZ. I now recognize the gentleman from Virginia, Mr. Connolly, for 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

First of all, Mr. Chairman, there's an article that appeared today in Newsweek on emails, in Newsweek magazine, and I would ask that the article be entered into the record.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. CONNOLLY. Now, let me just read a little bit from this article. It says, "Clinton's email habits look positively transparent when compared with the subpoena-dodging, email-hiding, private-server-using George W. Bush administration. Between 2003 and 2009, the Bush White House lost 22 million emails." Twenty-two million. "This correspondence included millions of emails written

during the darkest period of America's recent history when the Bush administration was ginning up support for what turned out to be a disastrous war in Iraq with false claims that the country possessed weapons of mass destruction, and later, when it was firing U.S. attorneys for political reasons. Like Clinton, the Bush White House used a private email server. It was owned by the Republican National Committee. And the Bush administration failed to store its emails, as required by law, and then refused to comply with a Congressional subpoena seeking some of those emails." I guess the past is prolonged.

The chairman mentioned that Abraham Lincoln was a member of this committee. Abraham Lincoln—maybe that wasn't auspicious, Mr. Chairman, because he only served one term and couldn't get elected back home. He was a Whig at the time. And he spent his time worried about things like the Wilmot Proviso, trying to end the slave traffic in Washington, D.C., the Nation's capital, and fighting the slavocracy and trying to move this country to limit and ultimately abolish a very evil institution. That's what he spent his time doing.

We're spending our time trying to pillory somebody about how she managed/handled her emails, while she was traveling the world on behalf of this country to 111 countries trying to restore the U.S. Credibility and foreign policy after the incredible damage done in 8 years of the previous administration. I guess if I were in my friend's situation, I'd grasp at this straw too.

Mr. Herring, my friend Mr. Jordan tried to suggest that you, the FBI, have handled this case very differently than the normal course of justice to an American citizen. I guess because of the high profile nature, you handled it very carefully. Is that correct?

Mr. HERRING. Yes, it is. And——

Mr. CONNOLLY. So it was different in that sense. But we had Director Comey, who was a, by the way, registered Republican until very recently, we had him before our committee. And I asked him under oath: Did the witness involved, the primary witness here involving these emails, did she lie? No. Did she deceive? No. Did she evade? No. Did she obfuscate? No. Did she deliberately keep or withhold relevant information requested from the FBI? No. Is that your understanding as well?

Mr. HERRING. I would defer to Director Comey's comments.

Mr. CONNOLLY. Mr. Mica says, or somebody said, you know, the case is closed. And you affirm that?

Mr. HERRING. Yes.

Mr. CONNOLLY. Why? Why is the case closed? What's your understanding of that, Mr. Herring?

Mr. HERRING. Decision made at the highest level.

Mr. CONNOLLY. And the decision was, according, you said you read the newspapers, the director of the FBI says it wasn't even a close call. Is that your understanding?

Mr. HERRING. Correct. Yes.

Mr. CONNOLLY. Correct. No special treatment here. It wasn't even a close call. This is political theatre.

302s. Could you tell us what 302s are? My friend Mr. Gowdy knows what they are, but not all of us do. We're not all lawyers.

Mr. HERRING. So 302 for us is a term of art. It's simply a form that which we summarize an interview.

Mr. CONNOLLY. And how often do you provide 302s to Congress?

Mr. HERRING. Rarely.

Mr. CONNOLLY. Rarely? Why?

Mr. HERRING. Usually, we don't share the investigative files outside of——

Mr. CONNOLLY. So our request is unusual. Is that correct? You said you don't do it very often.

Mr. HERRING. Correct. Yes. In some sense it is. We don't get that request very often and we certainly don't provide them very often.

Mr. CONNOLLY. And to protect people——

Mr. HERRING. Yes, sir.

Mr. CONNOLLY. —from raw interviews. Is that correct?

Mr. HERRING. From——

Mr. CONNOLLY. Or the summaries of those interviews.

Mr. HERRING. To protect people from—I'm sorry. I missed the——

Mr. CONNOLLY. From raw material from an interview.

Mr. HERRING. Certainly.

Mr. CONNOLLY. Right. Redactions. How unusual are redactions? This is unique to this case. Is that correct?

Mr. HERRING. No, no. We do redactions from time to time.

Mr. CONNOLLY. Why?

Mr. HERRING. Really as far as, you know, people do have privacy interests. Anytime we release documents outside of the FBI, if it's in FOIA, if it's another avenue, have to review those and apply——

Mr. CONNOLLY. If the chairman will indulge me one more question, and then I'll cease and desist.

Chairman CHAFFETZ. Gladly.

Mr. CONNOLLY. Thank you, Mr. Chairman. Mr. Herring, were you told at any time before this hearing or at any other time during this process that this is highly political and you should cover up, obfuscate, evade, deceive, or not provide information to protect somebody from our scrutiny?

Mr. HERRING. No, not at all.

Mr. CONNOLLY. Has anybody at this table——

Chairman CHAFFETZ. No, no. The gentleman's time has expired. We have votes on the floor that are 10 minutes away, and we have members who still haven't asked questions. Plus, we need to do a recorded vote. So we're going to have to—we're going to have to leave it here.

And I now recognize——

Mr. CONNOLLY. I appreciate the chairman's indulgence.

Chairman CHAFFETZ. —the gentleman from North Carolina, Mr. Meadows, for 5 minutes.

Mr. MEADOWS. Thank you, Mr. Chairman.

Mr. Herring, would you say that the FBI's investigation and the delivery of documents have been very systematic in principle?

Mr. HERRING. Yes. As far as delivery of——

Mr. MEADOWS. So there's no haphazard method of delivering documents?

Mr. HERRING. The documents we provided to Congress, sir?

Mr. MEADOWS. Yes.

Mr. HERRING. No, I think it's been thoughtful and deliberative and——

Mr. MEADOWS. Okay. Can you tell me why you didn't deliver the documents that the chairman asked for on July 11th to the committee? You didn't deliver them to the committee. You actually delivered them to another entity. Did you not?

Mr. HERRING. That's correct. We delivered them——

Mr. MEADOWS. Why did you not deliver it to the committee?

Mr. HERRING. Well, because those documents contain classified and other sensitive materials. We need to make sure they're handled appropriately.

Mr. MEADOWS. All right. So are you willing to deliver all the unclassified documents to this committee?

Mr. HERRING. So I think that——

Mr. MEADOWS. Yes or no. Because you can't have the first statement without the second statement. If the reason you sent it there was because it was classified, are you willing to give all the unclassified documents to this committee?

Mr. HERRING. So the documents that we——

Mr. MEADOWS. Yes or no.

Mr. HERRING. We will give—so we've given certain documents to the committee already.

Mr. MEADOWS. Yes or no. It's a real simple question. Will you give all the unclassified documents to this committee, since the reason that you gave them to somebody else was that there was classified documents?

Mr. HERRING. So the documents——

Mr. MEADOWS. Yes or no.

Mr. HERRING. The documents have restrictions on them and——

Mr. MEADOWS. Yes or no. Why would they have—who placed the restrictions? You?

Mr. HERRING. No.

Mr. MEADOWS. FBI?

Mr. HERRING. Yes.

Mr. MEADOWS. So the answer is you placed restrictions, so you're not going to give the unclassified documents to this committee.

Mr. HERRING. So we've given this committee access to all the documents through——

Mr. MEADOWS. That's not the question. It's a great answer to a question I didn't ask.

Are you willing to give the unclassified documents to this committee?

Mr. HERRING. All I can do is tell you that I'll take it back.

Mr. MEADOWS. All right. So let me ask you another question. Because you said that it was systematic. I went to the classified room, and there's two big binders there. One binder had some documents. The second binder that we got from the FBI had more documents than the first binder, and yet they were supposed to be identical. Would you say that was——

Mr. HERRING. Sir, I would like to address this in the classified setting, if I could.

Mr. MEADOWS. Was that an oversight?

Mr. HERRING. I think the details are important of what the differences are.

Mr. MEADOWS. But we just asked for a second copy. So would that not be haphazard? It didn't seem too methodical. Because when we went page for page, they didn't match up. So who made the decision to give us a different set?

Mr. HERRING. I'd like to address that in the closed session, please.

Mr. MEADOWS. Well, let me just say this. There was 27 new emails. There was a number of different types of information that didn't seem to go. And I don't want to share anything classified. So you admit that the first set and the second set were not identical?

Mr. HERRING. They were not identical. There were some differences.

Mr. MEADOWS. Okay. So what were the nonclassification agency equities that prevented the initial disclosure of the 27 emails that we got in the second batch?

Mr. HERRING. Again, in the classified session I'd prefer to——

Mr. MEADOWS. Were all of those from one agency?

Mr. HERRING. I prefer to address it outside of this setting.

Mr. MEADOWS. Okay. I understand that all of those were from one agency. Is that correct?

Mr. HERRING. Look, the whole issue is sort of the handling of classified information.

Mr. MEADOWS. So what was the agency?

Mr. HERRING. I don't want to get into that here in this setting. I'm happy to answer your question.

Mr. MEADOWS. Well, I have one of the emails that was withheld that said that it was later marked "unclassified/CIA use only." So was that your justification for withholding it?

Mr. HERRING. I'm sorry. I'm not sure I understand.

Mr. MEADOWS. Well, it said "unclassified/CIA only." So, Mr. Higgins, let me come to you. Did you read those emails that were in the second batch?

Mr. HIGGINS. Sir, I'd prefer to answer any questions about the classification review in a closed setting.

Mr. MEADOWS. All right. So no reason why they were withheld?

Mr. HIGGINS. I'd prefer to answer any questions about the classification review in a closed setting.

Mr. MEADOWS. All right. So I understand you're asking for those documents back. Is that correct? That's not classified. Are you asking for them back?

Mr. HIGGINS. Sir, I'd prefer in a closed session to answer any questions about the classification review.

Mr. MEADOWS. All right. Did Director Brennan talk to you about that, Mr. Higgins?

Mr. HIGGINS. Again, sir, I'd prefer to answer those questions——

Mr. MEADOWS. All right. I can see where this is leading. So let me finish this by saying, you have finished all the redaction, is that correct, Mr. Herring, on what you gave us on the unclassified documents?

Mr. HERRING. What do you mean, finished?

Mr. MEADOWS. The redaction. The copies that we got to see on those unclassified documents, are the redactions done?

Mr. HERRING. For the ones that you all have, yes. They're——

Mr. MEADOWS. All right. So will you comply with the Federal law to release those in 20 days according to FOIA law?

I'll yield back.

Chairman CHAFFETZ. I'm sorry, what was the gentleman's answer? What was your answer to that question?

Mr. HERRING. The redactions are completed for the ones that are here with Congress, the ones we released. We're working on the other—the remaining 302s. The PII redactions for the remaining 302s are in process.

Chairman CHAFFETZ. Well, what I believe Mr. Meadows is asking is that under FOIA, there is a 20-day requirement to respond to a FOIA request. Now that we know that they're all done, will you release those within the 20-day timeframe?

Mr. HERRING. So I'm not a FOIA guy. They're not all completed for the other 302s, the remainder——

Chairman CHAFFETZ. Are there any that are completed?

Mr. HERRING. I'm sorry.

Chairman CHAFFETZ. Are there any that are completed?

Mr. HERRING. I don't know the status. I don't know the status of all——

Chairman CHAFFETZ. We'll go into that tomorrow. We've gone past our time.

Let's now recognize the gentleman from Pennsylvania, Mr. Cartwright, for 5 minutes.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Mr. Herring, I want to give you a better chance to answer some of my colleague Mr. Meadows' questions. First of all, your title is you are the acting assistant director for Congressional Affairs of the FBI. Is that correct?

Mr. HERRING. That's correct.

Mr. CARTWRIGHT. And you're in that post for how long?

Mr. HERRING. About a month.

Mr. CARTWRIGHT. Did you say you used to work for Mr. Goodlatte?

Mr. HERRING. I did a detail to the Hill, to Judiciary, for about 15 months.

Mr. CARTWRIGHT. Oh, okay. And was that reporting to Mr. Goodlatte?

Mr. HERRING. Certainly did. I was actually technically assigned to the Crime Subcommittee and Sensenbrenner was the chair of that.

Mr. CARTWRIGHT. And the Goodlatte we're talking about is the Republican chairman of the House Judiciary Committee. Is that correct?

Mr. HERRING. Yes, sir.

Mr. CARTWRIGHT. Okay. Now, you just were hammered with all of these yes or no questions, and I could see you having trouble with them. The trouble you were having, Mr. Herring, did not stem from your lifelong ambition to protect Secretary Clinton. Did it?

Mr. HERRING. No, sir.

Mr. CARTWRIGHT. All right. In fact, the pointed question that my good friend Mr. Meadows was going over and over about was will you turn over certain documents, yes or no. You're unable to say

yes or no because that's not your call. You have to take it back to the office and take it up the chain of instruction. Don't you?

Mr. HERRING. Yes, sir.

Mr. CARTWRIGHT. That's why you couldn't answer yes or no.

Mr. HERRING. Certainly.

Mr. CARTWRIGHT. Well, how fair was it for anybody to hit you with that kind of yes or no question when you couldn't give a yes or no answer? How fair was that?

Mr. HERRING. I'm here to answer the questions as best I can.

Mr. CARTWRIGHT. Yeah. And I wonder how fair it is to second-guess the FBI officers who are sworn to uphold, defend, and protect our constitution, and not caring where the political chips may fall. When Director Comey came in and testified, up until the time he decided not to prosecute, he was universally applauded on both sides of the aisle, particularly on the Republican side of the aisle, for his judgment, for his service, for his patriotism in this Nation. And then when it was his recommendation, which he now says was not even close, not to prosecute Secretary Clinton for the way she handled her email, all of a sudden he is reviled and all of his decisions up and down are being second-guessed by the Republicans on this committee. And I agree with my colleagues this is nothing but a show trial, it is nothing but political theater. And the only reason, the exceptional reason that this is happening, is in a couple of months from now people are going to have to decide whether to vote for Secretary Clinton for President.

Now, Ms. Frifield, I'm sorry that you and the other witnesses are being put in this awkward position today. The chairman invited you to a classified hearing, but he is now springing this on you. I will withhold most of my questions to the classified bit of this. But we have to talk about the marking of classified documents.

I mean, it's being bandied about that documents can't be produced because they're highly classified. Well, to be classified, it—according to the manual which follows Executive Order 13526, a document has to have something that identifies who originally classified it. It has to identify the agency and office of origin of the classification. It must identify the reason for the classification. It must identify the date of the classification. And they typically also have a banner both across the top and the bottom stating the level of classification: Top secret, confidential, eyes only, whatever it is.

Ambassador Kennedy testified that none of the emails provided to Congress had any of these indicators. And at our hearing, we asked Ambassador Kennedy about three documents, three out of 30,000, that included a small C in parentheses. Even though the documents didn't have any of these other indicators for classified documents, the State Department spokesman John Kirby said the markings on those emails were in error, and they were not, quote, "necessary or appropriate at the time they were sent as an actual email," and Ambassador Kennedy agreed.

We asked him about one of those emails dated August 2, 2012, and he confirmed that the C in parentheses in that email was a mistake. He also confirmed that every paragraph in that email was also marked sensitive but unclassified. And we asked Ambassador Kennedy whether the FBI consulted with the State Department

about the classification status of this particular email, and he said he'd get back to us.

My question to you is: Do you know the status of that request, Ms. Frifield?

Ms. FRIFIELD. I believe he's going to get you the answer in the next day or so.

Mr. CARTWRIGHT. I thank you, and I yield back.

Chairman CHAFFETZ. I thank the gentleman.

It is the intention of the chair to exhaust the questioning appropriate for an opening session. But pursuant to House rule XI, clause 2(g)(2), I move that part of the remainder of the hearing will be closed to all persons other than the Members of the House, staff of the committee with appropriate security clearances, the official reporter and the witnesses and their counsels with appropriate security clearances, because the expected testimony received may include material designated as classified. I remind members that this is not a debatable motion. Pursuant to the House rules, the motion must be approved by a recorded vote.

The question is on closing part of the remainder of the hearing to the public. And, again, it's the intention of the chair to allow members to ask further questions in the unclassified setting and then go into the classified setting.

So the clerk on the question, the question is on closing part of the remainder of the hearing to the public. The clerk will call the roll.

The CLERK. Mr. Chaffetz?

Mr. CHAFFETZ. Aye.

The CLERK. Mr. Chaffetz votes yes.

Mr. Mica?

Mr. MICA. Aye.

The CLERK. Mr. Mica votes yes.

Mr. Turner?

Mr. TURNER. Aye.

The CLERK. Mr. Turner votes yes.

Mr. Duncan?

[No response.]

The CLERK. Mr. Jordan?

[No response.]

The CLERK. Mr. Walberg?

Mr. WALBERG. Aye.

The CLERK. Mr. Walberg votes yes.

Mr. Amash?

Mr. AMASH. Yes.

The CLERK. Mr. Amash votes yes.

Mr. Gosar?

Mr. GOSAR. Yes.

The CLERK. Mr. Gosar votes yes.

Mr. DesJarlais?

[No response.]

The CLERK. Mr. Gowdy?

Mr. GOWDY. Yes.

The CLERK. Mr. Gowdy votes yes.

Mr. Farenthold?

Mr. FARENTHOLD. Yes.

The CLERK. Mr. Farenthold votes yes.
Mrs. Lummis?
Mrs. LUMMIS. Aye.
The CLERK. Mrs. Lummis votes yes.
Mr. Massie?
Mr. MASSIE. Yes.
The CLERK. Mr. Massie votes yes.
Mr. Meadows?
Mr. MEADOWS. Yes.
The CLERK. Mr. Meadows votes yes.
Mr. DeSantis?
Mr. DESANTIS. Yes.
The CLERK. Mr. DeSantis votes yes.
Mr. Mulvaney?
Mr. MULVANEY. Yes.
The CLERK. Mr. Mulvaney votes yes.
Mr. Buck?
[No response.]
The CLERK. Mr. Walker?
[No response.]
The CLERK. Mr. Blum?
Mr. BLUM. Yes.
The CLERK. Mr. Blum votes yes.
Mr. Hice?
Mr. HICE. Yes.
The CLERK. Mr. Hice votes yes.
Mr. Russell?
Mr. RUSSELL. Aye.
The CLERK. Mr. Russell votes yes.
Mr. Carter?
[No response.]
The CLERK. Mr. Grothman?
Mr. GROTHMAN. Yes.
The CLERK. Mr. Grothman votes yes.
Mr. Hurd?
Mr. HURD. Yes.
The CLERK. Mr. Hurd votes yes.
Mr. Palmer?
Mr. PALMER. Yes.
The CLERK. Mr. Palmer votes yes.
Mr. Cummings?
Mr. CUMMINGS. Yes.
The CLERK. Mr. Cummings votes yes.
Mrs. Maloney?
[No response.]
The CLERK. Ms. Norton?
[No response.]
The CLERK. Mr. Clay?
Mr. CLAY. Yes.
The CLERK. Mr. Clay votes yes.
Mr. Lynch?
Mr. LYNCH. Yes.
The CLERK. Mr. Lynch votes yes.
Mr. Cooper?

[No response.]
The CLERK. Mr. Connolly?
Mr. CONNOLLY. Aye.
The CLERK. Mr. Connolly votes yes.
Mr. Cartwright?
Mr. CARTWRIGHT. Yes.
The CLERK. Mr. Cartwright votes yes.
Ms. Duckworth?
[No response.]
The CLERK. Ms. Kelly?
[No response.]
The CLERK. Mrs. Lawrence?
[No response.]
The CLERK. Mr. Lieu?
[No response.]
The CLERK. Mrs. Watson Coleman?
Mrs. WATSON COLEMAN. Yes.
The CLERK. Mrs. Watson Coleman votes yes.
Ms. Plaskett?
[No response.]
The CLERK. Mr. Desaulnier?
[No response.]
The CLERK. Mr. Boyle?
[No response.]
The CLERK. Mr. Welch?
[No response.]
The CLERK. Ms. Lujan Grisham?
[No response.]
Chairman CHAFFETZ. The clerk will report the tally.
The CLERK. On this vote, there are 25 yeas and zero nays.
Chairman CHAFFETZ. The motion is adopted.

It is the intention of the chair to reconvene here 7:30, and then we will close out the remaining of the unclassified questions. We will then, at the appropriate time, depart for HVC–210, the Capitol Visitor Center, as it's been prepared for a closed hearing of the committee. Only members of the committee, designated committee staff, the official reporter, the witnesses and their counsel may be present. The clerk is directed to allow only these persons to enter at that appropriate time. We stand in recess until 7:30.

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will resume. We're going to come back into order.

We now recognize the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

Mr. Herring, it seems that the State Department initially requested the (b)(5) exemption. Is that correct?

Mr. HERRING. Sir, I'm actually—I wasn't in position at the time they were doing all of that. So I'm not——

Mr. HICE. Is that your understanding?

Mr. HERRING. I'm not sure which exemptions they claim. Are you talking about the redactions?

Mr. HICE. Right.

Mr. HERRING. I'm not sure what the State Department asked for.

Mr. HICE. Okay. And it is my understanding that the FBI overruled that. Do you have any awareness of that decision?

Mr. HERRING. We don't typically—we're the investigative agency. So when it comes to matters of classification, we typically defer to the owners of the information. So——

Mr. HICE. Okay. Well, Ms. Frifield, let me go to you, then. Why was State trying to use this extremely broad exemption?

Ms. FRIFIELD. I'm not responsible for FOIA redactions. So I—the FOIA process at all. So I'm afraid I don't have an answer to that question.

Mr. HICE. So you're not familiar with the (b)(5) exemption?

Ms. FRIFIELD. I know what it is, but I don't—I'm not actively involved in the FOIA process and making redactions or anything, any aspect——

Mr. HICE. So you don't have any idea who made that decision?

Ms. FRIFIELD. FOIA's mostly done through our administrative bureau. So I would assume it would be someone in that bureau that would do it, as the normal course of action of the FOIA process.

Mr. HICE. As a normal course of action given that exemption, would anyone outside of State Department have been consulted?

Ms. FRIFIELD. We normally do consult in some cases if there's interagency equities. And then they try to reach an agreement on what the classification level or redaction should be.

Mr. HICE. So it would be your assumption, then, that probably there was some consultation?

Ms. FRIFIELD. I don't know——

Mr. HICE. You don't know that, but that would not be uncommon. It would somewhat from your understanding be something——

Ms. FRIFIELD. From my limited understanding of the way a FOIA process works.

Mr. HICE. Okay. That particular exemption is basically, among at least many people, known as a withhold because you want to withhold exemption. Have you heard that expression before?

Ms. FRIFIELD. No, I have not.

Mr. HICE. Okay. It's very, very broad. And it gives every appearance, at least, that there's a reason to try to hide information. And that's the frustrating point of all this.

Let me ask this: What criteria is used, do you have any idea, when it comes to redacting information?

Ms. FRIFIELD. For FOIA?

Mr. HICE. Well, I would like to draw a distinction between FOIA and a request from Congress.

Ms. FRIFIELD. FOIA is done by—through the FOIA process, as I just said, in the—through the administrative bureau. And they have a series of very formal redactions which they make under the FOIA.

Mr. HICE. So how does that differ from a request from Congress?

Ms. FRIFIELD. We don't do that kind of redaction at all when it comes to Congress.

Mr. HICE. Well, we're filled with redactions with what we have.

Mr. Kadzik, let me ask you the same question.

Mr. KADZIK. I'm sorry?

Mr. HICE. What is the difference between making decisions of redactions from a FOIA request versus Congress?

Mr. KADZIK. Well, I'm not an expert on FOIA requests and redactions with respect to FOIA. But we don't use the FOIA standard when we produce information to Congress. Typically, we provide more information, but we still, you know, protect our law enforcement/prosecutorial equities when we make information available, and we do it consistent with the constitution and statutes that apply.

Mr. HICE. All right. Let me go back to Mr. Herring. Because it seems to me like we're just going around in circles with all of this.

The chairman asked you earlier what you believe Congress should not be allowed to see or have information, and basically you said it varies from case to case. That's a pretty broad difference. Does it vary depending on, some cases, a high-profile individual?

Mr. HERRING. No, sir. Let me try to answer it this way, if I could. When the Bureau provided records to Congress, really, we think that the redactions were very light. We redacted primarily the personally identifiable information for some of the folks. And, honestly, we do usually strive to protect information of a purely personal nature. And so as far as——

Mr. HICE. Excuse me. I've just got 20 seconds left. But there's a whole lot more than that that's been redacted. I mean, on page 48, for example, you redact Ms. Clinton's birth date. The very next sentence, four attorneys of hers are mentioned by name, a fifth one is redacted. That's not personal information. There are hundreds and hundreds of examples like this.

Mr. HERRING. Certainly. I mean, I think a number of the folks mentioned in those documents are out there in the public in some form or fashion, and I don't think that there's any reason to—well, they're——

Mr. HICE. If they're in the public, then why didn't we get it?

Mr. HERRING. The ones that are in the public you did get. The ones that are not in the public are the ones that were redacted, sir.

Mr. HICE. So is the standard for Congress based upon what you would give the public?

Mr. HERRING. No, sir.

Mr. HICE. Well, then we should receive that and much more information.

I see my time has expired, Mr. Chairman. I look forward to continuing this. Thank you.

Chairman CHAFFETZ. Thank you.

I recognize now the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Herring, you had said that the case involving Hillary Clinton is closed. Did you mean that that also includes the perjury referral that the Congress has sent to the FBI? Has that case been disposed of?

Mr. HERRING. No, I'm not aware of—I know there have been referrals. I have to defer to the Department of Justice for where that is in the process.

Mr. DESANTIS. But you can't say that it's been disposed of, correct?

Mr. HERRING. No, sir.

Mr. DESANTIS. Okay. Let me bring you in, Mr. Higgins, about kind of the nature of the information. Do you work or have you worked in your career at the CIA in what is called the SCIF?

Mr. HIGGINS. Yes, sir.

Mr. DESANTIS. What is that?

Mr. HIGGINS. The SCIF is a sensitive compartmented information facility.

Mr. DESANTIS. And what's the purpose of it?

Mr. HIGGINS. It is a secure facility in which one can handle sensitive compartmented information.

Mr. DESANTIS. So if I have that type of information, TS/SCI, am I allowed to store it in my office if my office isn't certified as a SCIF?

Mr. HIGGINS. There are rules for handling classified information. I wouldn't want to misstate those rules. But as a general principle, compartmented material should be stored in a SCIF.

Mr. DESANTIS. And so could I bring it home, even if I lock my door at night, put it in my nightstand, if I lock my bedroom door, would that meet the qualifications of having SCI information if it wasn't certified as a SCIF?

Mr. HIGGINS. Unless you have a SCIF in your home, generally no.

Mr. DESANTIS. Okay. And we have a SCIF underneath the Capitol here. We have briefings here for Members of Congress. And when you are going into the SCIF, there are certain protocols that you have got to follow. Correct?

Mr. HIGGINS. Yes.

Mr. DESANTIS. All the files have to be locked up at the end of the night. Correct?

Mr. HIGGINS. That's correct.

Mr. DESANTIS. And when the SCIF is unoccupied, the door has got to be locked. You can't just leave it open. Right?

Mr. HIGGINS. That's correct.

Mr. DESANTIS. And you're not allowed to bring phones or electronic recording devices in the SCIF. Correct?

Mr. HIGGINS. That is correct.

Mr. DESANTIS. So if I want to sit there and listen to the briefing about payments to Iran, if that's classified and we're down in the SCIF, if I want to bring my iPhone to check my email or to check news clips, I just can't do that, right?

Mr. HIGGINS. I would hope not.

Mr. DESANTIS. Okay. Now, has it happened, at the CIA or any of the other agencies, where employees have brought that type of electronic media into a SCIF?

Mr. HIGGINS. I'm sure that people do on occasion accidentally bring electronic devices in. There's protocol for them reporting that to your security officers and removing it from the building as soon as you discover that you have it.

Mr. DESANTIS. And I would say that there's probably been instances where SCIFs have been unlocked overnight or been unattended and been unlocked, and there's also procedures for reporting that, correct?

Mr. HIGGINS. Yeah. I have no immediate personal knowledge, but I'd assume that there are such cases.

Mr. DESANTIS. Okay. And why do you have to immediately report it? I mean, mistakes happen.

Mr. HIGGINS. To assess whether there were any consequences of a SCIF, for example, of having been unlocked, or an electronic device having been brought into a SCIF.

Mr. DESANTIS. Which—and the consequences could mean that that information is exposed to hostile actors?

Mr. HIGGINS. Potentially exposed one way or another.

Mr. DESANTIS. Okay. And if that happens, what happens at the CIA if somebody has not shown themselves to be able to handle this in accordance with the applicable rules and regulations? Is that something that employees have faced consequences for?

Mr. HIGGINS. Sir, I'd prefer not to speculate or answer a hypothetical. It's a case-by-case basis depending on the——

Mr. DESANTIS. It's not a hypothetical. I'm saying have people been—have there been consequences for employees who have not followed the proper protocol in the past?

Mr. HIGGINS. If people fail to follow security protocols, there are consequences ranging from a conversation with a security officer to administrative action and up from there.

Mr. DESANTIS. Okay. And administrative action could mean loss of security clearance?

Mr. HIGGINS. Depending—again, it all very much depends on the facts of the case at hand.

Mr. DESANTIS. Now, there's an issue about whether classified information is marked or not. Does the fact that it has markings, if something is not marked, does that mean it's not classified?

Mr. HIGGINS. If information is classified, it should be marked as classified, both portion markings and headers and footers on the beginning and end of the document. But the lack of a classification marking does not mean that the material in question is not necessarily classified.

Mr. DESANTIS. And if you have, you know—we have people that are forward and, you know, you have things like signals intelligence and human intelligence, you can get that in forms before it ends up getting reduced to a document, correct?

Mr. HIGGINS. Yes, one could.

Mr. DESANTIS. And the fact that if I got that, I could not then go to an email system or an unclassified area and reduce that to writing if it's not properly protected, correct?

Mr. HIGGINS. When classified information is reduced to writing or put on an electronic system, it should be put on a system that is appropriately secure for that level of classification.

Mr. DESANTIS. Thank you. I'm out of time.

I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I will now recognize the gentleman from Oklahoma, Mr. Russell, for 5 minutes.

Mr. RUSSELL. Thank you, Mr. Chairman. And thank all of you for your lengthy and continued service to our country. It is appreciated.

If none of the documents had a classification mark, as what has been asserted by many, then how would top secret/special access information find its way into an unclassified email's content? Anyone can take that.

Mr. Herring?

Mr. HERRING. I do think this is something we should talk about in the next closed setting.

Mr. RUSSELL. Okay. We will.

If a sender of information knows that they are sending information that came from a classified source, then, I guess, would that be a breach of law? If they're sending it unclassified or if they are providing the details of that information in some form in an—would that be a breach of law?

Mr. HERRING. I think from my perspective, you know, I don't want to speculate what the investigative team did here. I mean——

Mr. RUSSELL. We're not talking intent. We're just talking about——

Mr. HERRING. Well, I mean, I think there is intent. Those things you look at in those kind of cases.

Mr. RUSSELL. Okay.

Mr. HERRING. It's very fact specific. But, you know, we're not really for the investigative team. I mean, I hesitate to——

Mr. RUSSELL. So if they willfully know that they're taking it from a classified source to an unclassified source, is that a breach of law?

Mr. Kadzik? Department of Justice.

Mr. KADZIK. It's hard to answer a hypothetical and——

Mr. RUSSELL. Well, this is pretty straightforward.

Mr. KADZIK. No case is straightforward until you look at the particular facts.

Mr. RUSSELL. So I guess, then, if they didn't know, is it appropriate to have an unqualified person handle that information?

Mr. KADZIK. I don't know what you mean by "unqualified."

Mr. RUSSELL. Not cleared to handle that level of information, top secret/sensitive access program information

Mr. KADZIK. Well, there are restrictions on access and one has to have appropriate clearances——

Mr. RUSSELL. Absolutely.

Mr. KADZIK. —in order to handle——

Mr. RUSSELL. And yet we see that we did have top secret/special access program information. Is that correct?

Mr. KADZIK. I don't know that for a fact. I have not looked at this.

Mr. RUSSELL. Mr. Herring?

Mr. HERRING. That really is something that's for the next——

Mr. RUSSELL. Mr. Comey said in an open source here in this hearing room that it was so. And so I guess if you allow unqualified handlers to access that, then another question would be, if a leader, director, or secretary directed their staff to handle secret or sensitive information in an unauthorized manner, have they breached the law?

Mr. HERRING. Sir, we're here to talk about the process of getting the documents to Congress, not the authorized——

Mr. RUSSELL. But it's very important because I have heard your testimony, Mr. Herring, and others that the FBI clearly was able to deduce what was sensitive access information, what was sensitive information, what was classified information, so much so that in order to guard it, they were able to prohibit even Congress from maybe seeing some of that because of its sensitivity. And we also know Department of State had those same concerns, that this was so sensitive that the skilled people that are trained at the FBI and are long-serving members of the Department of State, serve from administration to administration, they were able to deduce what classified information was and what sensitive information was.

And yet we're to believe somehow that Mrs. Clinton, a former first lady, a former United States Senator, cleared at the highest levels when she was in that capacity, and a former Secretary of State, when she was in that capacity, would not be able to really deduce that.

How is that, Mr. Herring, how do you think that that could be, that you and all of your professionals in the FBI, and Ms. Frifield and all of the professionals that are in the Department of State and that we have all of our intelligence community, they're able to deduce what that is? And when I had a top secret/SCI clearance in my more than two decades in the military, I mean, I understood what top secret information was.

How is it that all of us could figure that out, and yet we're to believe that, oh, there's no marking on it. Oh, gosh, I'm not sure. I don't know. Would you care to answer that, please?

Mr. HERRING. Director Comey addressed this specifically in his testimony before this committee, and I would refer to his record for those types of questions.

Mr. RUSSELL. Well, and that's why I asked the first questions, that how could people even gain access? How can you take it from a cleared one—we just talked about SCIF with Mr. DeSantis' question. How is it that you can take it from one place to a private server? How is it that you can take information from one secure area to an unsecure area? Cut and paste? Willful rewrite? Unqualified handler? These are questions that the American public has a reasonable expectation to answer, and that's why we have oversight.

And I yield back my time. Thank you for your indulgence, Mr. Chairman.

Chairman CHAFFETZ. I thank the gentleman.

We'll now recognize the gentleman from Alabama, Mr. Palmer, for 5 minutes.

Mr. PALMER. Thank you, Mr. Chairman.

And I want to echo the sentiments of several members here about our appreciation for your service. We don't take this lightly.

But Mr. Herring, you have mentioned Director Comey's testimony several times. And one of the reasons that I have the concerns that I have about how things have been handled is because of his testimony in which he referred to the handling of classified information by former Secretary Clinton as extremely careless. I don't recall—I don't ever recall those two words being used to describe the actions of anyone who has ever served as Secretary of State, extremely careless in handling classified information.

I even—I think Director Comey even expressed some concerns that her account, email account or server may have been hacked. So I think you need—I think all of you should appreciate the fact that as members of the Oversight Committee, we have a responsibility to look out for the interest of the whole country. This—you know, some folks who try to make this about politics. It really isn't. I think there's some legitimate concerns here about national security. I think there's legitimate concerns about the safety and well-being of our officers in the field.

I just want to ask you, what would happen—you know, Mr. Russell just brought this up about the handling of national security information, cutting and pasting. What would happen if an employee or a contractor moved classified national security information to an unclassified system or took it outside the SCIF? Would it be taken lightly? What would be the consequences? I mean, would there be a writeup? Would there be a reprimand? I mean, would you investigate it?

Mr. HERRING. I mean, certainly as a legislative affairs person, that's not really my——

Mr. PALMER. I'm not asking you. I'm asking you—take a general—answer in the context the FBI would, would that be a problem? Would that be problem for any of you?

Mr. HERRING. Sure, it would. I think it would be—I think it would be reported to the security division. I think they would take a look at all the facts and circumstances of a particular case.

Mr. PALMER. Let's just do a little hypothetical here. Let's just say——

Mr. HERRING. I prefer not to do any hypotheticals.

Mr. PALMER. Okay. Then I will. I will assume that if you were the director of any part of our national intelligence agencies or the director of the FBI, and you had an employee who repeatedly did—handled classified information with extreme carelessness, I would assume, based on your service, that there would be some pretty severe action taken. Is that a valid assumption?

Mr. HERRING. Yes. I think they're——

Mr. PALMER. Thank you.

Mr. HERRING. —they're very serious sort of——

Mr. PALMER. Do you know of anyone who has been reprimanded for violating security procedures?

Mr. HERRING. Not immediately—not that immediately comes to mind.

Mr. PALMER. Have you ever copied classified information to an unclassified system or accidentally walked out of a classified storage space with a classified document you weren't supposed to remove?

Have you, Mr. Kadzik?

Mr. KADZIK. No, sir.

Mr. PALMER. How about you, Ms. Frifield?

Ms. FRIFIELD. No.

Mr. PALMER. Ms. Walsh?

Ms. WALSH. No, sir.

Mr. PALMER. Mr. Higgins?

Mr. HIGGINS. I can think of one occasion on which I have accidentally removed material from a SCIF, realized it immediately, and returned to the SCIF with that material.

Mr. PALMER. You didn't take it home with you?

Mr. HIGGINS. No.

Mr. PALMER. That's good to know.

Mr. Samuel?

Mr. SAMUEL. No, sir, I have not.

Mr. PALMER. Mr. Soule?

Mr. SOULE. Sir, I can think of one.

Chairman CHAFFETZ. Microphone, please.

Mr. PALMER. Microphone, please.

Mr. SOULE. Sir, I can think of one instance that I made a mistake. I reported it to my staff security officer. The document was destroyed.

Mr. PALMER. So in the two instances where you accidentally did something, you showed due diligence, you took care of the situation, you did what you should have done, and you reported it, in your case, Mr. Soule, to your superior.

That's not what happened here. So my problem with this is, is that—again, I think this committee has a responsibility, I think the chairman's articulated that quite well, to exercise the oversight the Constitution invests us with, and that we need to look into the possibilities of how a Secretary of State acting—handling classified information with extreme carelessness may have compromised agents in the field, possibly our national security.

There's a number of issues here. And it begs the question, if that's not the issue, then why are you withholding 302s? And why is so much of this stuff redacted?

Mr. HERRING. I mean, as far as the 302s go, obviously, we provided some. There's a lot of them. The rest of them are in process. And to the extent that, you know, I can take back and see what we can do as far as getting you the access that you need, I do think that the personally identifiable information is something where I think individuals do have a privacy interest, and we generally do try to protect that type of information.

Obviously, one question that obviously we would consider is, you know, how does it relate to the oversight interest of the committee at hand.

Mr. PALMER. But you have to let us do our job. We want you to do your job, but you have to let us do our job.

My time has expired. I yield back.

Chairman CHAFFETZ. Thank you. We'll now recognize the gentlewoman from Wyoming, Mrs. Lummis, for 5 minutes.

Mrs. LUMMIS. Thank you, Mr. Chairman.

When we're home in our districts, we meet with our constituents. And while I was home in my State of Wyoming over the August work period, among the things people asked me was have you ever read classified documents in the SCIF. And I explained that I had on two occasions. In fact, three, visited a SCIF by myself where I had to surrender my electronic devices, where I was watched while I sat there and read classified documents by people who were ensuring that I would not write anything down, that I would not use

my cell phone to take photographs of classified documents and take them out of the room.

For some of us, it's a little intimidating to just sit there and read while people are staring at you while you're reading, and it's really quiet. So the SCIF experience for—that I have had as a Member of Congress and that I have related to my constituents in Wyoming is very different from the kind of thing we're hearing today, where we have heard, at least on television, that Secretary Clinton had maybe as many as 11 or more devices that she used to communicate with, that she had a private server, that there were—there's a classified server and an unclassified server, and that if someone takes something classified and sort of restates it without noting that it's classified, that it can be discovered by people who are hacking an unclassified server in the basement of, say, a Secretary of State's house.

This is the kind of thing that concerns my constituents. So that's why we're having this hearing. It's not because we're trying to make your lives miserable or our lives miserable by meeting late some Monday night. It's because our constituents are worried that classified information was compromised in ways that might allow hackers to refer that information to people who want to do harm to America and its allies.

My question is this. Have any of you that are on this panel separated or begun to separate the classified information that is in the SCIF from the unclassified information or from the sensitive access information? Anyone?

Mr. Herring, would you—yes or no, have you begun to separate that information?

Mr. HERRING. I'm not exactly sure what you're talking about, but generally, the information in a classified document is portion marked, and that document stays together and it stays in the SCIF.

Mrs. LUMMIS. Okay. So there is some way—if I could go down to the SCIF right now and see those documents that hopefully, and we're going to be talking about in a little bit, would I know whether I was viewing something that was classified, something that was sensitive, something that was unclassified?

Mr. HERRING. The information should be properly portion marked.

Mrs. LUMMIS. Okay.

Mr. HERRING. Should be able to tell if——

Mrs. LUMMIS. So you could separate classified from unclassified from sensitive, based on information available to you in documents that are currently in the SCIF, right?

Mr. HERRING. If it is properly marked, you can certainly distinguish the classified from the unclassified. I do think, though, in our production to Congress, which is what we're really here to talk about——

Mrs. LUMMIS. Uh-huh.

Mr. HERRING. —there are other sensitivities in the unclassified information that's sort of nonpublic information. It's not—certainly not suitable for public release.

Mrs. LUMMIS. Okay. Why have we, as Members of Congress, not been provided access to the nonclassified, nonsensitive information that is in the SCIF?

Mr. HERRING. Ma'am, I think you've—I think you've been given access or certainly the members of this Oversight Committee and appropriately cleared staff have been given access to all the information that's in the SCIF, ma'am.

Mrs. LUMMIS. Mr. Chairman, I would like to yield the balance of my time to you.

Chairman CHAFFETZ. Thank you.

Mr. Herring, the problem that we have is that the redactions that you've given us don't allow us to look at the full and complete file. That's part of the challenge.

Mr. HERRING. Okay.

Chairman CHAFFETZ. Let's start with Mr. Soule there. The NSA, do you have an understanding of the total universe of the compromised classified material that was found in the universe?

Mr. SOULE. Absolutely not.

Chairman CHAFFETZ. What—explain that to me. She had—Hillary Clinton took 4 years of communication outside of a secure communication. Do you or do you not have an understanding of the universe of that breach?

Mr. SOULE. If by universe, sir, you mean the importance of it, I certainly understand the importance of it, but I don't have personal knowledge of everything that is said to have been released.

Chairman CHAFFETZ. Does your agency? Does the NSA understand the universe of the breached material?

Mr. SOULE. My understanding is that every document that was referred to us—but I will want to talk more in closed session, sir—we had the opportunity to review, and I can give you the results of that in closed session.

Chairman CHAFFETZ. But do you have an accounting that shows that you have all of the—there were untold tens of thousands of things that were destroyed. We heard testimony from Under Secretary Kennedy just last week that they now have 14,900 additional emails, plus tens of thousands that have been given to them in the last 30 days.

So I'm asking if the NSA understands how much classified information from NSA has been compromised in a nonsecure setting.

Mr. SOULE. Sir, I'd have to speculate. I do not know that, and I don't know that we do know that, but I could take that back.

Chairman CHAFFETZ. And you'll get that to me by?

Mr. SOULE. Sir, I'll look. I don't know. A week. Is that acceptable?

Chairman CHAFFETZ. That's fair. That's fair.

Mr. Samuel, same question.

Mr. SAMUEL. Sir, while I prefer to discuss this in the closed session, yes, NGA is aware of and has reported back to Congress the extent of our equities found in those emails.

Chairman CHAFFETZ. Can you give us a general sense, though, of—what percentage of the compromise do you believe you're aware of?

Mr. SAMUEL. Sir, again, I prefer to discuss that in a closed session.

Chairman CHAFFETZ. Mr. Samuel, when did you first become aware that there could have been a compromise of this data?

Mr. SAMUEL. Sir, our agency started receiving requests last fall to get this information in earnest, and that's when I first became aware of it.

Chairman CHAFFETZ. Mr. Soule, when did the NSA first become aware that there might have been a breach of this classified information?

Mr. SOULE. Sir, like my NGA colleague, I believe it was last fall, but I don't have that information in front of me.

Chairman CHAFFETZ. Okay. Just so the members know, this criminal referral started because the Inspector General got word that there was classified information in a nonsecure setting, they confirmed that it was in a nonsecure setting, and that's when they gave the criminal referral to the Federal Bureau of Investigation.

Part of what we need to understand is when did ODNI, CIA, NGA, when did they all understand, has all that information been recovered? Are we—it's—we need to know whether or not ODNI understands the scope of what was potentially sent in those emails.

Do you feel, Ms. Walsh, that ODNI knows 100 percent of what was compromised?

Ms. WALSH. Given that that's outside my role in Legislative Affairs, I'd have to take that back.

Chairman CHAFFETZ. Can you get that to me? Is a week fine? Is that—to ask that question?

Ms. WALSH. We'll do our best. It's the best I'm going to say. We'll do our best.

Chairman CHAFFETZ. A week? Is that fair?

Ms. WALSH. Sure.

Chairman CHAFFETZ. Thank you. I appreciate it.

All right. The gentleman—the gentlewoman yields back.

Do any other members have any other questions appropriate for an unclassified setting?

Mr. Gosar is now recognized.

Mr. GOSAR. Thank you, Mr. Chairman.

Mr. Higgins, CIA collects a great deal of human intelligence. That is, it collects information from foreign individuals often at the risk of that individual's life. Is that true?

Mr. HIGGINS. Yes.

Mr. GOSAR. Are you aware that the State Department released some unclassified emails from Secretary Clinton with a FOIA redaction that said, quote, B3CIApersons/org? Are you aware of that?

Mr. HIGGINS. I will admit, I do not remember every classification marking on each of the emails that were released pursuant to the FOIA request.

Mr. GOSAR. So let me get this straight. So CIApersons/org means information redacted with sensitive information about an individual organization affiliated with the CIA, correct?

Mr. HIGGINS. I will take your word for it. I don't have the FOIA manual in front of me, I'm afraid.

Mr. GOSAR. Okay. So if information from a single or small group of CIA officers or agents makes it to our adversaries, that could present a huge risk for their safety, right?

Mr. HIGGINS. Sir, I wouldn't want to speculate without knowing what information we are discussing, and I'd prefer to——

Mr. GOSAR. But potentially. I mean, given that circumstance, it could potentially have some serious ramifications for those people.

Mr. HIGGINS. Again, it would all depend on the information in question, and I'd prefer to discuss the classification review and any classified material in a closed setting.

Mr. GOSAR. Oh, but that's hardly—I mean, a classification that we can't talk about right here, is it?

Mr. HIGGINS. If information relating to CIA sources of methods were disclosed to a foreign adversary, yes, that could have adverse consequences.

Mr. GOSAR. So to some degree, protection of classified information is life or death?

Mr. HIGGINS. It can be, yes.

Mr. GOSAR. Okay. And even a few sentences from a source could reveal the—could expose that source, true?

Mr. HIGGINS. It would all depend on those few sentences.

Mr. GOSAR. But it could?

Mr. HIGGINS. Potentially, yes.

Mr. GOSAR. Okay. So would you say that someone who treats information with our spies abroad exceptionally carelessly should be trusted with a security clearance?

Mr. HIGGINS. Sir, I think that is well outside my realm at——

Mr. GOSAR. Well, I just—I watched the chairman ask each one of you gentlemen and ladies, going back over classified, did you remove any information out of a SCIF or any documentation. And those that said yes, said, hey, you went back. There were some seriousness to it, right?

Mr. HIGGINS. I believe people with access to classified information treat that responsibility seriously, yes.

Mr. GOSAR. Say that one more time.

Mr. HIGGINS. I said I believe people with access to classified information treat that responsibility seriously, yes.

Mr. GOSAR. Really?

Mr. HIGGINS. I do.

Mr. GOSAR. So why are we here?

Mr. HIGGINS. I would defer to the chairman.

Mr. GOSAR. No, no, no, no. So why are we here? Because we have a Secretary of State that had a whole server that was offline. Kind of unusual, wouldn't you say?

Mr. HIGGINS. Again, sir, I am here and ready to answer classified——

Mr. GOSAR. That's fine.

Mr. Soule——

Mr. HIGGINS. —in a closed situation

Mr. GOSAR. —NSA is tasked with collecting intelligence electronically through signals. Is that correct?

Mr. SOULE. Yes, sir, it's correct.

Mr. GOSAR. Would leaking signals intelligence damage national security?

Mr. SOULE. Yes, sir, it would.

Mr. GOSAR. What if the person looking at the intelligence thought the information in question wasn't important? Is that a valid excuse for leaking signals intelligence?

Mr. SOULE. No, sir.

Mr. GOSAR. Leaking any signals intelligence can reveal our signals intelligence capabilities so that even if information collected by NSA seem innocuous. Is that correct?

Mr. SOULE. Generally, I agree, sir. It would depend on the facts.

Mr. GOSAR. It still should be treated as classified, true?

Mr. SOULE. If it was indeed classified and properly classified, it should be treated as classified.

Mr. GOSAR. Has the NSA ever lost an important intelligence collection tool—been burned is the quote—because classified information about that method made it into the wrong hands?

Mr. SOULE. Yes.

Mr. GOSAR. Would you say that someone who treats NSA signals intelligence exceptionally carelessly should be trusted with a security clearance?

Mr. SOULE. Generally, I would agree with you, sir, but I would have to understand the facts. But in the general premise, yes.

Mr. GOSAR. Okay. Mr. Chairman, I yield back.

Chairman CHAFFETZ. I thank the gentleman.

Does anybody have questions for an unclassified setting? Otherwise, it's the intention of the chair to recess and reconvene in a classified setting.

Let's go to Mr. Grothman of Wisconsin.

Mr. GROTHMAN. Sorry. I just have a couple of questions for Ms. Frifield.

She didn't submit her email records to the State Department, right, until December of 2014, almost 2 years after she left the State Department, correct?

Ms. FRIFIELD. I don't have the dates, but I think——

Mr. GROTHMAN. About.

Ms. FRIFIELD. —that's in the range is my understanding.

Mr. GROTHMAN. Right. Was that 2-year delay in turning over Federal records in compliance with your policy? What's your general policy in how quickly the record should be turned over?

Ms. FRIFIELD. I believe the rule is that when you leave, you should—your records should be turned over, but I don't know that there's a time. I don't know if there's a time lag that you——

Mr. GROTHMAN. Maybe a couple of months, not 2 years. Do you know of anybody else who took 2 years to turn over their records?

Ms. FRIFIELD. I'm not aware of any. I'm not aware of that.

Mr. GROTHMAN. Okay. And even then, her submission rate eventually turned out to be incomplete. The FBI submitted thousands of emails to the State Department that uncovered, in the course of their investigation, correct, thousands of emails that she didn't turn over?

Ms. FRIFIELD. I would defer to—I don't know how many she didn't turn over.

Mr. GROTHMAN. Okay.

Chairman CHAFFETZ. Will the gentleman yield?

Mr. GROTHMAN. Sure.

Chairman CHAFFETZ. The Under Secretary for Management Patrick Kennedy testified there were 14,900 additional emails and tens of thousands that he received in the last 30 days. Was he accurate or inaccurate?

Ms. FRIFIELD. I assume he's accurate, but I do legislative affairs, so——

Chairman CHAFFETZ. There we go.

Go ahead, Mr. Grothman.

Mr. GROTHMAN. Okay.

Ms. FRIFIELD. —that's not my specialty.

Chairman CHAFFETZ. It's a huge point for us.

Mr. GROTHMAN. Right. Was her failure to turn over these emails in compliance with State Department policy? Do you know anybody else since you've been there who hasn't turned over that huge number of emails upon leaving?

Ms. FRIFIELD. I don't—I'm not aware of any, but I don't know.

Mr. GROTHMAN. Anybody not turning over any emails since you've been in your position, that you're aware of?

Ms. FRIFIELD. I don't monitor that, but I think we're each responsible for our own emails, and we file them and save them, and they give you—through a process to do that.

Mr. GROTHMAN. You ever hear of anything like this happening since you've been involved in the State, anybody not turning over emails?

Ms. FRIFIELD. I haven't really been involved in the records retention issue, but I know we're working hard to improve our records retention system. We have new processes, new people who are involved in helping us all to understand how it's done.

Mr. GROTHMAN. Okay. Secretary Clinton's IT contractor deleted an email archive from their servers after they were made aware of a preservation order from the Benghazi Committee. Okay. So after they were told to preserve it, they deleted it.

Was the deletion of that email—of those email archives in compliance with State Department policy?

Ms. FRIFIELD. I think the policy is you're not supposed to delete emails.

Mr. GROTHMAN. Delete them, right. And these are particularly severe because she particularly wasn't supposed to delete these. So that would be—what would happen to a regular garden variety employee of the State Department if they had done this sort of thing?

Ms. FRIFIELD. I don't know. But I think usually you save your emails and pass them on as records you're——

Mr. GROTHMAN. I know that's what you're supposed to do. Everybody does it. If another employee, just put somebody in your mind, another employee had deleted emails like this, what do you think would—what would the State have done about it?

Ms. FRIFIELD. I honestly don't know.

Mr. GROTHMAN. They never think about it, never occurred it would happen. Okay.

Will she or any of her aides that helped participate in this face any punishment or negative consequences for her actions in doing this?

Ms. FRIFIELD. I can't speak to specifics, but in general, when there's any kind of a violation or an issue or infraction, it's re-

viewed through administrative procedure out of the Diplomatic Security Office.

Mr. GROTHMAN. Okay. I'll yield the remaining of my time to the chair.

Chairman CHAFFETZ. I thank the gentleman.

Our first round—this round of the unclassified questions has concluded. The committee will take a short recess, reconvene in the House Visitor Center, room 210 of the Capitol Visitor Center to conduct the closed portion of the hearing. We will start—we will give you 15 minutes, and try to reconvene at 8:25.

Committee stands in recess.

[Whereupon, at 8:10 p.m., the committee was recessed, to reconvene in closed session.]

The committee met, pursuant to call, at 5:00 p.m., in Room HVC–210, Capitol Visitor Center, Hon. Jason Chaffetz [chairman of the committee] presiding.

Present: Representatives Chaffetz, Gosar, Meadows, Palmer, and Norton.

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will come to order.

This is a continuation and the conclusion of our September 12 hearing on classifications and redactions in the FBI's investigative file. We are going to encourage members to go to a classified briefing on this topic. But for now, without objection, the hearing is adjourned.

[Whereupon, at 5:01 p.m., the committee proceeded in closed session.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Order Code RL34197

CRS Report for Congress

Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice

October 3, 2007

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Prepared for Members and Committees of Congress

Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice

Summary

Legislative oversight is most commonly conducted through congressional budget, authorization, appropriations, confirmation, and investigative processes, and, in rare instances, through impeachment. But the adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations, or confirmation exercises. While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress' role in our constitutional scheme of separated powers and checks and balances. The rich history of congressional investigations from the failed St. Clair expedition in 1792 through Teapot Dome, Watergate, Iran-Contra, Whitewater, and the current ongoing inquiries into the removal and replacement of United States Attorneys, has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.

A review of the historical experience and legal rulings pertinent to congressional access to information regarding the law enforcement activities of the Department of Justice indicates that in the last 85 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice activities. These investigations have encompassed virtually every component of the DOJ and its officials and employees, from the Attorney General down to subordinate level personnel. It appears that the fact that an agency, such as the Justice Department, has determined for its own internal purposes that a particular item should not be disclosed, or that the information sought should come from one agency source rather than another, does not prevent either House of Congress, or its committees or subcommittees, from obtaining and publishing information it considers essential for the proper performance of its constitutional functions. There appears to be no court precedent that imposes a threshold burden on committees to demonstrate, for example, a "substantial reason to believe wrongdoing occurred" before a jurisdictional committee may seek disclosure with respect to the conduct of specific open and closed criminal and civil cases. Indeed, the case law is quite to the contrary. An inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern. Moreover, there have been only two formal presidential assertions of executive privilege with respect to withholding of internal DOJ documents in the face of a congressional subpoena. Those claims were ultimately abandoned, and it appears under the most recent Supreme Court and appellate court rulings pertinent to the scope of the presidential communications privilege and the "Take Care" clause of the Constitution, that such a claim would be open to serious question as to its validity in the context of a congressional probe of DOJ internal deliberative actions.

Contents

Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice

Introduction

Throughout its history, Congress has engaged in oversight of the executive branch — the review, monitoring, and supervision of the implementation of public policy. The first several Congresses inaugurated such important oversight techniques as special investigations, reporting requirements, resolutions of inquiry, and use of the appropriations process to review executive activity. Contemporary developments, moreover, have increased the legislature's capacity and capabilities to check on and check the executive. Public laws and congressional rules have measurably enhanced Congress's implied power under the Constitution to conduct oversight.[1]

Congressional oversight of the executive is designed to fulfill a number of important purposes and goals: to ensure executive compliance with legislative intent; to improve the efficiency, effectiveness, and economy of governmental operations; to evaluate program performance; to prevent executive encroachment on legislative powers and prerogatives; to investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse, waste, fraud and dishonesty; to assess agency or officials' ability to manage and carry out program objectives; to assess the need for new federal legislation; to review and determine federal financial priorities; to protect individual rights and liberties; and to inform the public as to the manner in which its government is performing its public duties, among others. [2]

Legislative oversight is most commonly conducted through congressional budget, authorization, appropriations, confirmation, and investigative processes, and, in rare instances, through impeachment. But the adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations, or confirmation exercises. While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and of disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress' role in our constitutional scheme of separated powers and checks and balances. The rich history of congressional investigations from the failed St. Clair expedition in 1792 through

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[1] See generally, CRS Report RL30240, *Congressional Oversight Manual*, 5-17, 87-108, 114-140 (Oversight Manual).

[2] Oversight Manual at 2-4.

Teapot Dome, Watergate, Iran-Contra, Whitewater, and the current ongoing inquiries into the removal and replacement of United States Attorneys, has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.

Congress' power of inquiry extends to all executive departments, agencies, and establishments in equal measure. Over time, however, congressional probes of the Department of Justice (Department or DOJ) have proved to be amongst the most contentious, stemming from the presumptive sensitivity of its principal law enforcement mission. Often, inquiries have been met with claims of improper political interference with discretionary deliberative prosecutorial processes, accompanied by refusals to supply internal documents or testimony sought by jurisdictional committees, based on assertions of constitutional and common law privileges or general statutory exemptions from disclosure. But the notion of, and need for, protection of the internal deliberative processes of agency policymaking, heightened sensitivity to premature disclosures of decisionmaking involving law enforcement investigations, civil and criminal prosecutions, or security matters, is not unique to the DOJ, though the degree of day-to-day involvement there with such matters may be greater. An in-depth examination of the nature, scope, and resolution of such past investigative confrontations with the DOJ appears useful for informing future committees determining whether to undertake similar probes of DOJ, or other executive agencies, as to the scope and limits of their investigative prerogatives and the practical problems of such undertakings.

A review of the historical experience and legal rulings pertinent to congressional access to information regarding the law enforcement activities of the Department of Justice indicates that in the last 85 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice activities. These investigations have encompassed virtually every component of the DOJ, and all officials, and employees, from the Attorney General down to subordinate level personnel. It appears that the fact that an agency, such as the Justice Department, has determined for its own internal purposes that a particular item should not be disclosed, or that the information sought should come from one agency source rather than another, does not prevent either House of Congress, or its committees or subcommittees, from obtaining and publishing information it considers essential for the proper performance of its constitutional functions. There appears to be no court precedent that imposes a threshold burden on committees to demonstrate, for example, a "substantial reason to believe wrongdoing occurred" before a jurisdictional committee may seek disclosure with respect to the conduct of specific open and closed criminal and civil cases. Indeed, the case law is quite to the contrary. An inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern. Moreover, there have been only two formal presidential assertions of executive privilege with respect to

withholding of internal DOJ documents in the face of a congressional subpoena.[3] Those claims were ultimately abandoned, and it appears under the most recent Supreme Court and appellate court rulings pertinent to the scope of the presidential communications privilege and the "Take Care" clause of the constitution, that such a claim would be open to serious question as to its validity in the context of a congressional probe of DOJ internal deliberative actions.

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

The discussion will proceed as follows. The legal basis for investigative oversight will be briefly reviewed, followed by several prominent examples of congressional oversight that reflect significant milestones in the establishment of the breadth and reach of the legislative investigative prerogative vis-a-vis the Department. Next we will review and assess the Department's contentions, based on policy and common law and constitutional privilege, that it has asserted to attempt to limit congressional access to agency information. An appendix to this report provides summaries of 18 inquiries in which committees have successfully obtained documents and testimony respecting the internal deliberative processes involving open and closed civil and criminal cases, as well as programmatic matters that are part of the Department's statutory mission.

The Legal Basis for Oversight

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

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[3] The subpoenaed documents in Burford I, discussed *infra* at 8-9, included "memoranda by Agency or Department of Justice attorneys containing litigation and negotiation strategy, settlement positions, and other similar material." H.Rept. 97-968, 97th Cong. 2d. Sess. 18, 28-29 (1982). The documents sought in the Boston FBI matter were all internal DOJ materials. See discussion *infra* at 14.

Although there is no express provision of the Constitution that specifically authorizes Congress to conduct investigations and take testimony for the purposes of performing its legitimate functions, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress.[4] Thus, in *Eastland v. United States Servicemen's Fund*, the Court explained that "[t]he scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[5] In *Watkins v. United States,* the Court described the breadth of the power of inquiry: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[6] The Court went on to emphasize that Congress's investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[7] "[T]he first Congresses," it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"[8] 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."[9] Accordingly, the Court stated, it recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[10]

The breadth of a jurisdictional committee's investigative authority may be seen in the two seminal Supreme Court decisions emanating from the Teapot Dome inquiries of the mid-1920's, both involving, directly and indirectly, the Department of Justice. As part of its investigation, the Senate select committee issued a subpoena for the testimony of Mally S. Daugherty, the brother of the Attorney General. After Daugherty failed to respond to the subpoena, the Senate sent its Deputy Sergeant at Arms to take him into custody and bring him before the Senate. Daugherty petitioned in federal court for a writ of *habeas corpus* arguing that the Senate in its investigation had exceeded its constitutional powers. The case ultimately reached the Supreme Court, where, in a landmark decision, *McGrain v. Daugherty,*[11] the Court upheld the Senate's authority to investigate charges concerning the Department:

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

[5] 421 U.S. at 504, n. 15 (quoting *Barenblatt v. United States*, 360 U.S. 109, 111).

[6] 354 U.S. 178, 187 (1957).

[7] *Id.*

[8] *Id.* at 182.

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

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

[11] 273 U.S. 135 (1927).

> [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.[12]

The Court thus underlined that the Department of Justice, like all other executive departments and agencies, is a creature of the Congress and subject to its plenary legislative and oversight authority.

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,*[13] a different witness at the congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts... and shall respectfully decline to answer any questions propounded by your committee."[14] The Supreme Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness' contention that the pendency of lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."[15] The Court further explained: "It may be conceded that Congress is without authority to compel disclosure for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[16] The *Sinclair* ruling inferentially indicates that the Department's oft-proffered distinction between open and closed cases has little weight.

Illustrative Investigations and Case Law

Perhaps most instructive and illuminating for present purposes is a review of important precedents over the last 85 years regarding oversight of the Justice Department. Appended to this report are brief summaries of 18 selected

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[12] 273 U.S. at 177-78.

[13] 279 U.S. 263 (1929).

[14] *Id.* at 290.

[15] *Id.* at 295.

[16] *Id.*

congressional investigations from the Palmer Raids and Teapot Dome in the 1920's to Watergate and through Iran-Contra, Rocky Flats, corruption in the FBI's Boston regional office, and the recent inquiries into the termination and replacement of United States Attorneys. Those investigations demonstrate that DOJ has consistently been obligated to submit to congressional oversight, regardless of whether litigation is pending or is anticipated, so that Congress is not delayed unduly in investigating maladministration, misfeasance and/or malfeasance in the Justice Department and elsewhere. A number of these investigations spawned seminal Supreme Court rulings that today provide the foundation for the broad congressional power of inquiry. All were contentious and involved Department claims that committee demands for agency documents and testimony were precluded either on the basis of constitutional or common law privilege or policy. In the majority of instances reviewed, the testimony of subordinate DOJ employees, such as line attorneys and FBI field agents, was taken formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. In all instances, investigating committees were provided with documents respecting open or closed cases that often included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases, confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrest of subjects, and documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, among other similar "sensitive" materials. The instances of DOJ oversight reviewed of course are not exhaustive of such inquiries. The consequences of these historic inquiries at times have been profound and far reaching, directly leading to important remedial legislation and the resignations (Harry M. Daugherty, J. Howard McGrath, Alberto R. Gonzales) and convictions (Richard Kleidienst, John Mitchell) of five attorneys general.

Teapot Dome

The Teapot Dome scandal in the mid-1920's provided the model and indisputable authority for wide ranging congressional inquiries. While the Senate Committee on Public Lands and Surveys focused on the actions of the Department of the Interior in leasing naval oil reserves, a Senate select committee was constituted to investigate "charges of misfeasance and nonfeasance in the Department of Justice"[17] in failing to prosecute the malefactors in the Department of the Interior, as well as other cases.[18] The select committee heard from scores of present and former attorneys and agents of the Department and its Bureau of Investigation, who offered detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. Not all of the cases upon which testimony was offered were closed, as one of the committee's goals in its questioning was to identify cases

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

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

in which the statute of limitations had not run out and prosecution was still possible.[19]

The committee also obtained access to Department documentation, including prosecutorial memoranda on a wide range of matters. However, given the charges of widespread corruption in the Department and the imminent resignation of Attorney General Daugherty, it would appear that some of the documents furnished the committee early in the hearings may have been volunteered by the witnesses and not officially provided by the Department. Although Attorney General Daugherty had promised cooperation with the committee, and had agreed to provide access to at least the files of closed cases,[20] such cooperation apparently had not been forthcoming.[21]

In two instances immediately following Daugherty's resignation, the committee was refused access to confidential Bureau of Investigation investigative reports pending the appointment of a new Attorney General who could advise the President about such production,[22] though witnesses from the Department were permitted to testify about the investigations that were the subject of the investigative reports and even to read at the hearings from the investigative reports. With the appointment of the new Attorney General, Harlan F. Stone, the committee was granted broad access to Department files. Committee Chairman Smith Brookhard remarked that "[Stone] is furnishing us with all the files we want, whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked."[23] For example, with the authorization of the new Attorney General, an accountant with the Department who had led an investigation of fraudulent sales of property by the Alien Property Custodian's office appeared and produced his confidential reports to the Bureau of Investigation. The reports described the factual findings from his investigation and his recommendations for further action, and included the names of companies and individuals suspected of making false claims. The Department had not acted on those recommendations, though the cases had not been closed.[24] 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.[25]

Burford I: The Superfund Investigation

In 1982, during the second session of the 97th Congress, the House Transportation Committee's Public Works Subcommittee on Oversight and the House Energy and Commerce's Subcommittee on Oversight and Investigations

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

[20] *Id.* at 1120.

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

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

[23] *Id.* at 2389.

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

[25] *Id.* at 1790.

initiated investigations of the Environmental Protection Agency's (EPA) enforcement of the "Superfund" law.[26] The committees requested documents relating to a number of on-going enforcement investigations from EPA Administrator Anne Gorsuch Burford. The documents sought included memoranda of EPA and DOJ attorneys containing litigation and negotiation strategy, settlement positions, and other similar materials.[27] After Ms. Burford's initial refusal, the subcommittees issued subpoenas but compliance was resisted on the grounds that the documents requested were "enforcement sensitive"and were to be found in open law enforcement files. At the direction of President Reagan, Ms. Burford claimed executive privilege to prevent their disclosure.

The House Transportation Subcommittee acted first, citing Ms. Burford for contempt of Congress, an action that was affirmed by the full Committee. The full House of Representatives voted 259 to 105 to support the contempt citation.[28] After the DOJ's failed attempt at obtaining a federal court order enjoining the House from forwarding the contempt citation to the U.S. Attorney for prosecution pursuant to the criminal contempt statute,[29] and following a brief period of negotiation with the Public Works and Transportation Committee, it was agreed that the documents would be released to the subcommittee in stages, beginning first with briefings and redacted copies, and eventually ending with unredacted copies that could only be examined by committee members and up to two designated committee staffers.[30]

The Chairman of the House Energy and Commerce Committee, Representative John Dingell, refused to accept the agreement between the DOJ and the House Public Works and Transportation Committee given its limitations on access and time delays. After a threat to issue new subpoenas and pursue a further contempt citation, negotiations were resumed. The result was an agreement that all documents covered by the initial subpoena were to be delivered to the subcommittee. There were to be no briefings and no multi-stage process of redacted documents leading to unredacted documents.[31] The subcommittee agreed to handle all "enforcement sensitive" documents in executive session, giving them confidential treatment.[32] The subcommittee, however, reserved for itself the right to release the documents or use

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[26] See H.Rept. 97- 968, 97th Cong. 2d Sess. (1982) [hereinafter House Report].

[27] House Report at 13-20.

[28] See 8 Op. O.L.C. 101, 107 (1984) [hereinafter 1984 OLC Opinion].

[29] See *United States v. U.S. Houses of Representatives,* 556 F.Supp. 150 (D.D.C. 1983): See *also,* 2 U.S.C. § 192, 194 (1980).

[30] See Memorandum of Understanding Between the Committee on Public Works and Transportation and the Department of Justice, Concerning Documents Subpoenaed from the Environmental Protection Agency, February 18, 1983; see *also* H. Rept. No. 323, 98th Cong., 1st Sess., 18-20 (1983) (copy on file with authors).

[31] See *EPA Document Agreement*, CQ WEEKLY REPORT, March 26, 1983 at 685 (copy on file with authors).

[32] *Id.*

them in public session, after providing "reasonable notice" to the EPA.[33] If the EPA did not agree, the documents would not be released or used in public session unless the Chairman and Ranking Minority Member concurred.[34] If they did not concur, the subcommittee could vote on the release of documents and their subsequent use in a public session.[35] Staff access was to be decided by the Chairman and Ranking Minority Member.[36] The agreement was signed by Chairman Dingell, Ranking Member James T. Broyhill, and White House Counsel Fred F. Fielding on March 9, 1983.[37] The ultimate agreement is an illustration of the autonomy of jurisdictional committees in the House of Representatives.

Burford II: The Investigation of the Claim of Presidential Privilege

After committee access to the Superfund enforcement documents was obtained, a number of questions about the role of the Department during the controversy remained: whether the Department, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the United States Attorney for the District of Columbia not to present the contempt certification of Burford to the grand jury for prosecution and had made the decision to sue the House; and, generally, whether there was a conflict of interest in the Department's simultaneously advising the President, representing Burford, investigating alleged Executive branch wrongdoing, and enforcing the congressional criminal contempt statute. These and related questions raised by the Department's actions were the subject of an investigation by the House Judiciary Committee beginning in early 1983. The committee issued a final report on its investigation in December 1985.[38]

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

> [T]he Department of Justice, through many of the same senior officials who were most involved in the EPA controversy, consciously prevented the Judiciary Committee from obtaining information in the Department's possession that was

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] See, Report of the House Comm. on the Judiciary on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-1983, H.Rept. 99-435, 99th Cong., 1st Sess. (1985) ("EPA Withholding Report").

> essential to the Committee's inquiry into the Department's role in that controversy. Most notably, the Department deliberately, and without advising the Committee, withheld a massive volume of vital handwritten notes and chronologies for over one year. These materials, which the Department knew came within the Committee's February 1983 document request, contained the bulk of the relevant documentary information about the Department's activities outlined in this report and provided a basis for many of the Committee's findings.[39]

Among the other abuses cited by the committee were the withholding of a number of relevant documents until the committee had independently learned of their existence,[40] as well as materially "false and misleading" testimony before the committee by the head of the Department's Office of Legal Counsel.[41]

The committee's initial request for documentation was contained in a February 1983 letter from its chairman, Peter Rodino, to Attorney General William French Smith. The committee requested the Department to "supply all documents prepared by or in the possession of the Department in any way relating to the withholding of documents that Congressional committees have subpoenaed from the EPA."[42] The letter also specifically requested, among other things, a narrative description of the activities of each division or other unit of the Department relating to the withholding of the EPA materials, information about the Department's apparent conflict of interest in simultaneously advising the Executive Branch while being responsible for prosecuting the Burford contempt citation, and any instructions given by the Department to the United States Attorney for the District of Columbia not to present the Burford contempt to the grand jury.

At first the Department provided only publicly available documents in response to this and other document requests of the committee.[43] However, after a series of meetings between committee staff and senior Department officials, an agreement was reached whereby committee staff were permitted to review the materials responsive to these requests at the Department to determine which documents the committee would need for its inquiry.[44] Committee staff reviewed thousands of documents from the Land and Natural Resources Division, the Civil Division, the Office of Legal Counsel, the Office of Legislative Affairs, the Office of Public Affairs, and the offices of the Attorney General, the Deputy Attorney General, and the Solicitor General.[45]

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

[40] *Id.* at 1164.

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

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

[43] *Id.* at 1184.

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

[45] *Id.* at 1168.

In July 1983, the committee chairman wrote to the Attorney General requesting copies of 105 documents that committee staff had identified in its review as particularly important to the committee's inquiry.[46] By May 1984, only a few of those documents had been provided to the committee, and the chairman again wrote to the Attorney General requesting the Department's cooperation in the investigation. In that letter, the chairman advised the Attorney General that the committee's preliminary investigation had raised serious questions of misconduct, including potential criminal misconduct, in the actions of the Department in the withholding of the EPA documents.[47] The committee finally received all of the 105 documents in July 1984, a full year after it had initially requested access. The committee at that time also obtained the written notes and a number of other documents that had been earlier withheld.[48]

There was also disagreement about the access that would be provided to Department employees for interviews with committee staff. The Department demanded that it be permitted to have one or more Department attorneys present at each interview. The committee feared that the presence of Department representatives might intimidate the Department employees in their interviews and stated that it was willing to permit a Department representative to be present only if the representative was "walled-off' from Department officials involved with the controversy, if the substance of interviews was not revealed to subsequent interviewees, and if employees could be interviewed without a Department representative present if so requested. The Department ultimately agreed to permit the interviews to go forward without its attorneys present. If a Department employee requested representation, the Department employed private counsel for that purpose. In all, committee staff interviewed twenty-six current and former Department employees, including four Assistant Attorney Generals, under this agreement.[49]

Partly as a result of these interviews, as well as from information in the handwritten notes that had been initially withheld, the committee concluded that it also required access to Criminal Division documents concerning the origins of the criminal investigation of former EPA Assistant Administrator Rita Lavelle in order to determine if the Department had considered instituting the investigation to obstruct the committee's inquiry. The committee also requested information about the Department's earlier withholding of the handwritten notes and other documents to determine whether Department officials had deliberately withheld the documents in an attempt to obstruct the committee's investigation.[50] The Department at first refused to provide the committee with documents relating to its Lavelle investigation "[c]onsistent with the longstanding practice of the Department not to provide access

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[46] *Id.* at 1169.

[47] *Id.* at 1172.

[48] *Id.* at 1173.

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

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

to active criminal files."[51] The Department also refused to provide the committee with access to documentation related to the Department's handling of the committee's inquiry, objecting to the committee's "ever- broadening scope of ...inquiry."[52]

The committee chairman wrote the Attorney General and objected that the Department was denying the committee access even though no claim of executive privilege had been asserted.[53] The chairman also maintained that "[i]n this case, of course, no claim of executive privilege could lie because of the interest of the committee in determining whether the documents contain evidence of misconduct by executive branch officials."[54] With respect to the documents relating to the Department's handling of the committee inquiry, the chairman demanded that the Department prepare a detailed index of the withheld documents, including the title, date, and length of each document, its author and all who had seen it, a summary of its contents, an explanation of why it was being withheld, and a certification that the Department intended to recommend to the President the assertion of executive privilege as to each withheld document and that each document contained no evidence of misconduct.[55] With respect to the Lavelle documents, the chairman narrowed the committee's request to "predicate" documents relating to the opening of the investigation and prosecution of Lavelle, as opposed to FBI and other investigative reports reflecting actual investigative work conducted after the opening of the investigation.[56] In response, after a period of more than three months from the committee's initial request, the Department produced those two categories of materials.[57]

Rocky Flats

Another revealing investigation involved a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology which commenced a review of the plea bargain settlement by the Department of Justice of the government's investigation and prosecution of environmental crimes committed by Rockwell International Corporation in its capacity as manager and operating contractor at the Department of Energy's (DOE) Rocky Flats nuclear weapons facility. [58] The settlement was a culmination of a five-

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[51] *Id.* at 1265.

[52] *Id.* at 1265.

[53] *Id.* at 1266.

[54] *Id.*

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

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

[57] *Id.* at 1270.

[58] See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Committee on Science, Space and Technology, 102d Cong., 2d Sess., Vols. I and II (1992) ("Rocky Flats Hearings");

(continued...)

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

The subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the United States Attorney for the District of Colorado; an assistant U.S. Attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI field agent; and received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e).[59]

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

A last minute agreement forestalled the contempt citation. Under the agreement (1) DOJ issued a new instruction to all personnel under subpoena to answer all questions put to them by the subcommittee, including those which related to internal deliberations with respect to the plea bargain. Those instructions were to apply as well to all Department witnesses, including FBI personnel, who might be called in the future. Those witnesses were to be advised to answer all questions fully and

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[58] (...continued)
Meetings: To Subpoena Appearance by Employees of the Department of Justice and the FBI and To Subpoena Production of Documents From Rockwell International Corporation, Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology, 102d Congress, 2d Sess., (1992)("Subpoena Meetings").

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

truthfully and specifically instructed that they were allowed to disclose internal advice, opinions, or recommendations connected to the matter. (2) Transcripts were to be made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing. (3) Witnesses were to be interviewed by staff under oath. (4) The subcommittee reserved the right to hold further hearings in the future at which time it could call other Department witnesses who would be instructed by the Department not to invoke the deliberative process privilege as a reason for not answering subcommittee questions.[60]

Corruption in the FBI's Boston Regional Office

The most recent and definitive exploration and resolution of the question of the nature and breadth of Congress' oversight prerogative with respect to DOJ operations occurred as a consequence of the President's December 2001 claim of executive privilege in response to a subpoena by the House Government Reform Committee. That subpoena sought, among other material, Justice Department documents relating to alleged law enforcement corruption in the Federal Bureau of Investigation's Boston office that 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 a cooperating witness and two informants in order to protect the undercover activities of those informants. Thereafter, Regional Office agents knowingly permitted two other informants to commit some 21 additional murders during the period they acted as informants, and, finally, gave the informants warning of an impending grand jury indictment which allowed one of them to flee. The President directed the Attorney General not to release relevant 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 power doctrine, "which was to protect individual liberty." In defending the assertion of the privilege the Justice Department claimed a historical policy of withholding deliberative prosecutorial documents from Congress in both open and closed civil and criminal cases.[61] Pending at the time were a number of Federal Tort Claims Act suits brought by the convicted persons and their families, alleging that the government was aware of and knowingly allowed the false testimony.

Initial congressional hearings after the claim was made demonstrated the rigidity of the Department's position. The Department later agreed 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. "There is no such bright-line policy, nor did

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

[61] Louis Fisher, "The Politics of Executive Privilege," Carolina Academic Press, 108 (2004)(Fisher).

we intend to articulate any such policy." 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 documents against public or congressional disclosure" unless a committee showed a "compelling or specific need" for the documents.[62] 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 the Department of Justice allowing congressional 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 of DOJ's failure to prosecute meritorious cases. In all the described instances, investigating committees were provided with documents respecting open and closed cases that often included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during undercover operations, and documents presented to grand juries not protected by Rule 6(e), among other similar "sensitive materials." Shortly after the hearing the committee was given access to the disputed documents.[63]

The committee's final report concluded that the documents withheld from it were indispensable to its inquiry and that the claim of presidential privilege was part of a pattern of obstruction that impeded its investigation:

> When the FBI Office of Professional Responsibility conducted an investigation of the activities of New England law enforcement, it concluded in 1997: "There is no evidence that prosecutorial discretion was exercised on behalf of informants [James] Bulger and/or [Stephen] Flemmi." This is untrue. Former U.S. Attorney Jeremiah O'Sullivan was asked in the December 5, 2002 Committee hearing whether prosecutorial discretion had been exercised on behalf of Bulger and Flemmi and he said that it had. A review of documents in the possession of the Justice Department also confirms this to be true. Had thecommittee permitted the assertion of executive privilege by the President to be unchallenged, this

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[62] Fisher, *Id.*

[63] "Everything Secret Degenerates: The FBI's Use of Murderers As Informants," H.Rept. 108-414, 108th Cong., 2d Sess. 2-9, 121-134 (2004)(House Report); Hearings, "Investigation Into Allegations of Justice Department Misconduct In New England-Volume I", House Comm. on Government Reform, 107th Cong., 1st and 2d Sess's. 520-556, 562-604 (May 3, December 13, 2001; February 6, 2002) (Hearings); *McIntyre v. United States*, 367 F.3d 38, 42-51 (1st Cir. 2004)(recounting background of FBI corrupt activities); *United States v. Salemme*, 91 F. Supp. 2d 141, 148-63, 208-15, 322 (D.Mass. 1993) (same); *United States v. Flemmi,* 195 F. Supp 243, 249-50 (D. Mass. 200); (same) Charles Tiefer, "President Bush's First Executive Privilege Claim: The FBI/Boston Investigation", 33 Pres. Stud. Q. 201(2003). On July 26, 2007, a Massachusetts federal district court judge awarded the convicted persons and their families $101.7 million under the Federal Tort Claims Act, finding the government liable of malicious prosecution, civil conspiracy, infliction of emotional distress, and negligence. Shelly Murphy and Brian R. Ballou, "FBI Condemned in Landmark Ruling," Boston Globe, July 27, 2007, A3; Robert Barrens and Paul Lewis, "FBI Must Pay $102 Million In Mob Case," Washington Post, July 27, 2007, A3.

> information would never have been known. That the Justice Department concluded that prosecutorial discretion had not benefitted Bulger or Flemmi — while at the same time fighting to keep Congress from obtaining information proving this statement to be untrue — is extremely troubling. [64]

Ruby Ridge

The instances of successful committee access to DOJ documents and witnesses related in the above discussed inquiries (as well as those detailed in the Appendix to this report) encompassed a wide number of divisions, bureaus, and offices at Main Justice and U.S. Attorneys offices in the field, and involved the Department's politically sensitive Public Integrity Section,[65] and provide a substantial basis for arguing that no element of the DOJ is exempt from oversight by a jurisdictional committee of the Congress. One additional case study, involving the DOJ Office of Professional Responsibility, which monitors the conduct of Department personnel, is notable for its revelations of a number of sensitive, undisclosed internal investigations in the face of extraordinary agency resistance. That occurred during the 1995 investigation by the Senate Judiciary Committee's Subcommittee on Terrorism, Technology and Government Information of allegations that several branches of the Department of Justice and the Department of the Treasury had engaged in serious criminal and professional misconduct in the investigation, apprehension, and prosecution of Randall Weaver and Kevin Harris at Ruby Ridge, Idaho. The subcommittee held 14 days of hearings in which it heard testimony from 62 witnesses, including Justice, Federal Bureau of Investigation, and Treasury officials, line attorneys and agents, and obtained various Justice, FBI and Treasury internal reports,[66] and issued a final report.[67]

The subcommittee's hearings revealed that the involved federal agencies conducted at least eight internal investigations into charges of misconduct at Ruby Ridge, none of which had ever been publically released.[68] DOJ expressed reluctance to allow the Subcommittee to see the documents out of a concern they would interfere with the ongoing investigation but ultimately provided some of them under conditions with respect to their public release. The most important of those

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[64] House Report at 3, 134-135.

[65] See Hearings, *supra*, at 549-50, 555.

[66] Hearings, "The Federal Raid on Ruby Ridge, Idaho," before the Senate Subcommittee on Terrorism, Technology, Government Information, Committee on the Judiciary, 104th Cong., 1st Sess. (1995) (Ruby Ridge Hearings).

[67] Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary (Ruby Ridge Report). The 154-page document appears not to have been officially reported by the full Committee. A bound copy may be found in the United States Senate Library, catalogue number HV 8141.U56 1995.

[68] Ruby Ridge Report at 1; Ruby Ridge Hearings at 722, 954, 961.

documents was the Report of the Ruby Ridge Task Force.[69] The Task Force was established by the DOJ after the acquittals of Randy Weaver and Kevin Harris of all charges in the killing of a Deputy United States Marshal[70] to investigate charges that federal law enforcement agents and federal prosecutors involved in the investigation, apprehension and prosecution of Weaver and Harris may have engaged in professional misconduct and criminal wrongdoing. The allegations were referred to DOJ's Office of Professional Responsibility (OPR). The Task Force was headed by an Assistant Counsel from OPR and consisted of four career attorneys from DOJ's Criminal Division and a number of FBI inspectors and investigative agents. The Task Force submitted a 542 page report to OPR on June 10, 1994, which found numerous problems with the conduct of the FBI, the U.S. Marshals Service, and the U.S. Attorneys office in Idaho, and made recommendations for institutional changes to address the problems it found. It also concluded that portions of the rules of engagement issued by the FBI during the incident were unconstitutional under the circumstances, and that the second of two shots taken by a member of the FBI's Hostage Rescue Team (HRT), which resulted in the death of Vicki Weaver, was not reasonable. The Task Force recommended that the matter of the shooting be referred to a prosecutorial component of the Department for a determination as to whether a criminal investigation was appropriate. OPR reviewed the Task Force Report and transmitted the Report to the Deputy Attorney General with a memorandum that dissented from the recommendation that the shooting of Vicki Weaver by the HRT member be reviewed for prosecutorial merit based on the view that given the totality of circumstances, the agent's actions were not unreasonable. The Deputy Attorney referred the Task Force recommendation for prosecutorial review to the Criminal Section of the Civil Rights Division which concluded that there was no basis for criminal prosecution. The Task Force Report was the critical basis for the Subcommittee's inquiries during the hearings and its discussion and conclusions in its final report.[71]

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[69] The Task Force Report was never publically released or printed in the subcommittee's hearing record. A bound copy of the Report provided the subcommittee may be found in the United States Senate Library, catalogue number HV814.U55 1995.

[70] Weaver was convicted for failure to appear for a trial and for commission of an offense while on release.

[71] See, e.g., Ruby Ridge Hearings at 719-737, 941-985; Ruby Ridge Report at 10-11 ("With the exceptions of the [Ruby Ridge] Task Force Report, which was partially disavowed by the Department, and the April 5, 1995 memorandum of Deputy Attorney General Jamie Gorelick, it appeared to the subcommittee that the authors of every report we read were looking more to justify agency conduct than to follow the facts wherever they lead."), 61-69, 115, 122-23, 134-35, 139, 145-49.

Assessment of DOJ's Opposition to Congressional Access to Information in Open and Closed Litigation Files and to Internal Deliberative Materials

The Department's Position

The reasons advanced by the executive for declining to provide information to Congress about open and closed civil and criminal proceedings, most famously articulated by then Attorney General Robert Jackson in 1941, have included avoiding prejudicial pre-trial publicity, protecting the rights of innocent third parties, protecting the identity of confidential informants, preventing disclosure of the government's strategy in anticipated or pending judicial proceedings, avoiding the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys, and precluding interference with the President's constitutional duty to faithfully execute the laws all of which would "seriously prejudice law enforcement."[72]

Jackson's views were reiterated by Attorney General William French Smith in 1982 during the Superfund dispute, there applying the policy to documents "which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analyses, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals. I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorney generals." Acceding to congressional investigation demands, the Attorney General asserted, would make Congress "in a sense, a partner in the investigation" raising " a substantial danger that congressional pressures will influence the course of the investigation." This policy is said to be "premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to 'Take Care that the Laws be faithfully executed.'"[73]

Finally, in the 2001-2002 House Government Reform Committee investigation of the FBI misuse of informants, the Department maintained its historic position of withholding internal deliberative prosecutorial documents until just weeks before its eventual abandonment. In a February 1, 2002, letter to Chairman Burton, the DOJ Assistant Attorney General for Legislative Affairs explained;

> Our particular concern in the current controversy pertains to the narrow and especially sensitive categories of advice memoranda to the

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[72] 40 Op. A.G. 45. 46-47 (1941).

[73] Letter to Hon. John D. Dingell Chairman, House Subcommittee on Oversight and Investigation, Committee on Energy and Commerce, from Attorney General William French Smith, dated November 30, 1982, *reprinted in* H. Rept. No. 97-968, *supra*, at 37-38.

> Attorney General and the deliberative documents making recommendations regarding whether or not to bring criminal charges against individuals. We believe that the public interest in avoiding the polarization of the criminal justice process required greater protection of those documents which, in turn, influences the accommodation process. This is not an "inflexible position," but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making.[74]

Assessment of the Department's Position

1. Concerns with Pre-Trial Publicity, Due Process, and Concurrent Investigations.

As has been recounted previously, the Supreme Court has repeatedly reaffirmed the breadth of Congress' right to investigate the government's conduct of criminal and civil litigation.[75] The courts have also explicitly held that agencies may not deny Congress access to agency documents, even in situations where the inquiry may result in the exposure of criminal corruption or maladministration of agency officials. The Supreme Court has noted, "[B]ut surely a congressional committee which is engaged in a legitimate legislative investigation need not grind 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 exposed."[76] The Court further explained:

> The suggestion made in dissent that the questions which petitioner refused to answer were 'outside the power of a committee to ask' under the Due Process Clause because they touched on matters then pending in judicial proceedings cannot be accepted for several reasons: First, the reasoning underlying this proposition is that these inquiries constituted a legislative encroachment on the judicial function. But such reasoning can hardly be limited to inquiries that may be germane to existing judicial proceedings: it would surely apply as well to inquiries calling for answers that my be used to the prejudice of witnesses in any future judicial proceeding. If such were the reach of 'due process' it would turn a witness' privilege against self-incrimination into a self-operating restraint on congressional inquiry, and would in effect *pro tanto* obliterate the need for that constitutional protection.[77]

Nor does the actual pendency of litigation disable Congress from the investigation of facts which 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.[78]

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[74] Hearings, *supra* note 62, at __.

[75] See discussion of case law, *supra* at notes 3-15, and accompanying text.

[76] *Hutcheson v. United States,* 369 U.S. 599, 617 (1962).

[77] 369 U.S. at n. 16.

[78] *Sinclair v. United States,* 279 U.S. 263, 294 (1929).

Although several lower court decisions have recognized that congressional hearings may have the result of generating prejudicial pre-trial publicity, they have not suggested that there are any constitutional or legal limitations on Congress' right to conduct an investigation during the pendency of judicial proceedings. Instead, the cases have suggested approaches, such as granting a continuance or a change of venue, to deal with the publicity problem.[79] For example, the court in one of the leading cases, *Delaney v. United States,* entertained "no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it" but went on to describe the possible consequences of concurrent executive and congressional investigations:

> We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.[80]

The *Delaney* court distinguished the case of a congressional hearing generating publicity relating to an individual not under indictment at the time (as was Delaney):

> Such a situation may present important differences from the instant case. In such a situation the investigative function of Congress has its greatest utility: Congress is informing itself so that it may take appropriate legislative action; it is informing the Executive so that existing laws may be enforced; and it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity. Also, if as a result of such legislative hearing an indictment is eventually procured against the public official, then in the normal case there would be a much greater lapse of time between the publicity accompanying the public hearing and the trial of the subsequently

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[79] See e.g., *Delaney v. United States,* 199 F.2d 107 (1st Cir. 1952); *United States v. Mitchell,* 372 F.Supp. 1259, 1261 (S.D.N.Y. 1973). For discussion of issues in addition to prejudicial publicity that have been raised in regard to concurrent congressional and judicial proceedings, including allegations of violation of due process, see, Contempt of Congress, H.R. Rpt. No. 97-968, 97th Cong., 2d Sess. 58 (1982).

[80] 199 F.2d 107, 114 (1st Cir. 1952). The court did not fault the committee for holding public hearings, stating that if closed hearings were rejected "because the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was of course free to go ahead with its hearing, merely accepting the consequence that the trial of Delaney on the pending indictment might have to be delayed." 199 F.2d at 114-5. It reversed Delaney's conviction because the trial court had denied his motion for a continuance until after the publicity generated by the hearing, at which Delaney and other trial witnesses were asked to testify, subsided. See also, *Hutcheson v. United States,* 369 U.S. 599, 613 (1962)(upholding contempt conviction of person who refused to answer committee questions relating to activities for which he had been indicted by a state grand jury, citing *Delaney*)

> indicted official than would be the case if the legislative hearing were held while the accused is awaiting trial on a pending indictment.[81]

The absence of indictment and the length of time between congressional hearing and criminal trial have been factors in courts rejecting claims that congressionally generated publicity prejudiced defendants.[82] Finally, in the context of adjudicatory administrative proceedings, courts on occasion have held that pressures emanating from questioning of agency decisionmakers by Members of Congress may be sufficient to undermine the impartiality of the proceeding.[83] But the courts have also made clear that mere inquiry and oversight of agency actions, including agency proceedings that are quasi-adjudicatory in nature, will not be held to rise to the level of political pressure designed to influence particular proceedings that would require judicial condemnation.[84]

Thus, the courts have recognized the potentially prejudicial effect congressional hearings can have on pending cases. While not questioning the prerogatives of Congress with respect to oversight and investigation, the cases pose a choice for the Congress: congressionally generated publicity may result in harming the prosecutorial effort of the Executive; but access to information under secure conditions can fulfill the congressional power of investigation and at the same time need not be inconsistent with the authority of the executive to pursue its case. Nonetheless, it remains a choice that is solely within Congress' discretion to make irrespective of the consequences. The observation of the Iran-Contra Independent Counsel is pertinent here: "The legislative branch has the power to decide whether it is more important perhaps to destroy a prosecution than to hold back testimony

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[81] 199 F.2d at 115.

[82] See, *Silverthorne v. United States,* 400 F.2d 627 (9th Cir. 1968), *cert. denied,* 400 U.S. 102 (1971)(claim of prejudicial pretrial publicity rejected because committee hearings occurred five months prior to indictment); *Beck v. Washington*, 369 U.S. 541, 544 (1962)(hearing occurred a year before trial); *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976), *cert. denied,* 433 U.S. 933 (1977); *United States v. Ehrlichman,* 546 F.2d 910, 917 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1120 (1977); *United States* v. *Romano*, 583 F. 2d. 1, 4 (1st Cir. 1978) (Senate Committee determined not to heed warnings from DOJ that insistence on defendant's testimony would threaten or absolutely bar future prosecutions but conviction was nonetheless upheld); *United States v. Mitchell,* 372 F. Supp. 1239, 1261 (S.D.N.Y. 1973)(post-indictment Senate hearing but court held that lapse of time and efforts of committee to avoid questions relating to indictment diminished possibility of prejudice); *United States v. Mesarosh*, 223 F.2d 449 (3rd Cir. 1955)(hearing only incidentally connected with trial and occurred after jury selected).

[83] See, e.g., *Pillsbury Co. v. FTC,* 354 F.2d 952 5th Cir. (1968).

[84] See e.g., *ATX, Inc. v. Department of Transportation* 41 F.3d 1522 (D.C. Cir. 1994); *State of California v. FERC,* 966 F.2d 154 (9th Cir. 1992); *Peter Kiewet Sons' v. U.S. Army Corps of Engineers,* 714 F.2d 163 (D.C. Cir. 1983); *Gulf Oil Corp. v. FPC,* 563 F.2d 588 (3d Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978); *United States v. Armada Petroleum Corp.,* 562 F.Supp 43 (S.D. Tex. 1982). See also, Morton Rosenberg and Jack Maskell, Congressional Intervention in the Administrative Process: Legal and Ethical Considerations," CRS Report RL32113, September 25, 2003.

they need. They make that decision. It is not a judicial decision, or a legal decision, but a political decision of the highest importance."[85]

In the past the executive frequently has made a broader claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is thereby limited. Prosecutorial discretion is seen as off-limits to congressional inquiry and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor with respect to pursuing criminal cases.

2. Concerns Over Revelations of Government Strategies or Methods or Weaknesses of Investigation.

Attorney General and DOJ/OLC opinions raise concerns that congressional oversight that calls for information which reflects on the government's strategy or its methods or weaknesses is somehow inappropriate. Arguably, however, if this type of concern were recognized as enabling the blocking of congressional inquiry, it would end a major portion of legislative oversight. Congressional inquiries into foreign affairs and military matters call for information on strategy and weaknesses in national security matters; congressional probes into waste, fraud, and inefficiency in domestic operations calls for information on strategy and weaknesses. For Congress to forego such inquiries might signal an abandonment of its oversight duties: The best way to correct either bad law or bad administration is to closely examine these matters. The many examples congressional probes recounted above and in the Appendix to this report underline the efficacy and necessity of the revelation of such matters.

3. The Claim That Prosecution Is a Core Presidential Power Subject to Assertions of Executive Privilege.

Initially, it must be noted that the Supreme Court has rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. Rather, the Court noted in *Morrison v. Olson,* [86] sustaining the validity of the appointment and removal conditions for independent counsels under the Ethics in Government Act, that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by Executive Branch officials, but held that the exercise of prosecutorial discretion is in no way "central" to the functioning of the Executive Branch.[87] 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

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[85] Lawrence E. Walsh, "The Independent Counsel and the Separation of Powers," 25 Hous. L. Rev. 1, 9 (1988).

[86] 487 U.S. 654 (1988).

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

counsel's activities ... [are] functions that we have recognized as generally incidental to the legislative function of Congress," citing *McGrain v. Daugherty.*)[88]

The breadth of *Morrison's* ruling that the prosecutorial function is not an exclusive function of the executive was made clear in a decision of the Ninth Circuit Court of Appeals in *United States ex rel Kelly* v. *The Boeing Co.*,[89] which upheld, against a broad based separation of powers attack, the constitutionality of the *qui tam* provisions of the False Claims Act vesting enforcement functions against agencies by private parties. Boeing argued, *inter alia*, that Congress could not vest enforcement functions outside the Executive Branch in private parties. Applying *Morrison* the appeals court emphatically rejected the contention.

> Before comparing the *qui tam* provisions of the FCA to the independent counsel provisions of the Ethics in Government Act, we must address Boeing's contention that only the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law. *It is clear to us that no such absolute rule exists. Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "it is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "there is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." 487 U.S. at 692 (emphasis added). Use of the world "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not always be undertaken by Executive Branch officials. See Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent, 99 Yale L.J. 1069, 1070 (1990)(Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). *Thus, we reject Boeing's assertion that all prosecutorial power of any kind belongs to the Executive Branch.*[90]

Prosecution, not being a core or exclusive function of the Executive, cannot claim the constitutional stature of Congress' oversight prerogative. In the absence of a credible claim of encroachment or aggrandizement by the legislature of essential Executive powers, the Supreme Court has held the appropriate judicial test is one that determines whether the challenged legislative action "'prevents the Executive Branch from accomplishing its assigned functions'," and, if so, "'whether that impact is

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[88] *Id.* at 694.

[89] 9 F.3d 743 (9th Cir. 1993).

[90] 9 F.3d at 751 (emphasis supplied). See also, *Vermont Agency of National Resources* v. *U.S. ex. rel. Stevens*, 529 U.S. 765(2000)(holding that *qui tam* relators meet Article III standing requirements).

justified by an overriding need to promote objectives within the constitutional authority of Congress'." [91]

Congressional oversight and access to documents and testimony, unlike the action of a court, cannot stop a prosecution or set limits on the management of a particular case. Access to information by itself would not seem to disturb the authority and discretion of the Executive Branch to decide whether to prosecute a case. The assertion of prosecutorial discretion in the face of a congressional demand for information is arguably akin to the "generalized" claim of confidentiality made in the Watergate executive privilege cases. That general claim — lacking in specific demonstration of disruption of executive functions — was held to be overcome by the more focused demonstration of need for information by a coordinate branch of government.[92]

Given the legitimacy of congressional oversight and investigation of the law enforcement agencies of government, and the need for access to information pursuant to such activities, a claim of prosecutorial discretion by itself would not seem to be sufficient to defeat a congressional need for information. The congressional action itself does not and cannot dictate prosecutorial policy or decisions in particular cases. Congress may enact statutes that influence prosecutorial policy, and information relating to enforcement of the laws would seem necessary to perform that legislative function. Thus, under the standard enunciated in *Morrison v. Olson* and *Nixon v. Administrator of General Services,* the fact that information is sought on the executive's enforcement of criminal laws would not in itself seem to preclude congressional inquiry.

In light of the Supreme Court's consistent support of the power of legislative inquiry, and in the absence of a countervailing constitutional prerogative of the executive, reviewing courts may be disposed to be "sensitive to the legislative importance of congressional committees on oversight and investigations and recognize that their interest in the objective and efficient operation of ... agencies serves a legitimate and wholesome function with which we should not lightly interfere."[93] More particularly, future judicial decisions involving presidential claims of privilege with respect to prosecutorial decisionmaking by DOJ likely will be informed by two District of Columbia Circuit rulings that filled important gaps in the law of presidential privilege that had been developed between 1977 and 1983.[94]

The *Nixon* and post-Watergate cases established the broad contours of the presidential communications privilege. Under those precedents, the privilege, which

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[91] *Nixon v. Administration of General Services*, 433 U.S. 425,433 (1977); *Commodity Futures Trading Commission v. Schor*, 487 U.S. 833, 851 (1986); *Morrison v. Olson*, 487 U.S. 654, 693-96 (1988).

[92] *U.S. v. Nixon,* 418 U.S. 683, 705-706, 711-712 (1974).

[93] *Gulf Oil Corp. v. FPC,* 563 F.2d 588, 610 (3d Cir. 1977).

[94] For an in-depth discussion of the *Nixon* and post-Watergate case law, see "Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments," CRS Report RL30319, 2-9, by Morton Rosenberg.

is constitutionally rooted, could be invoked by the President when asked to produce documents or other materials or information that reflect presidential decisionmaking and deliberations that he believes should remain confidential. If the President does so, the materials become presumptively privileged. The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need. Finally, while reviewing courts have expressed reluctance to balance executive privilege claims against a congressional demand for information, they have acknowledged they will do so if the political branches have tried in good faith but failed to reach an accommodation.

However, until the District of Columbia Circuit's 1997 ruling in *In re Sealed Case,*[95] and its 2004 ruling in *Judicial Watch, Inc. v. Department of Justice,*[96] these judicial decisions had left important gaps in the law of presidential privilege which increasingly became focal points, if not the source, of interbranch confrontations. Among the more significant issues left open included whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the Executive Branch; whether the privilege encompasses all communications with respect to which the President may be interested or is it confined to presidential decisionmaking and, if so, is it limited to any particular type of presidential decisionmaking; and precisely what kind of demonstration of need must be shown to justify release of materials that qualify for the privilege. The unanimous panel in *In re Sealed Case* addressed each of these issues in a manner that may have drastically altered the future legal playing field in resolving such disputes. The recent ruling in the *Judicial Watch* case reinforces that likelihood.[97]

In re Sealed Case (Espy)[98] arose out of an Office of Independent Counsel (OIC) investigation of former Agriculture Secretary Mike Espy. When allegations of improprieties by Espy surfaced in March of 1994, President Clinton ordered the White House Counsel's Office to investigate and report to him so he could determine what action, if any, he should undertake. The White House Counsel's Office prepared a report for the President, which was publically released on October 11, 1994. The President never saw any of the underlying or supporting documents to the report. Espy had announced his resignation on October 3, to be effective on December 31. Meanwhile, the Independent Counsel had been appointed on September 9 and the grand jury issued a subpoena for all documents that were accumulated or used in preparation of the report on October 14, three days after the report's issuance. The President withheld 84 documents, claiming both the executive and deliberative process privileges for all documents. A motion to compel was resisted on the basis of the claimed privileges and after *in camera* review the district court quashed the subpoena, but in its written opinion did not discuss the documents

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[95] 121 F.3d 729 (D.C. Cir. 1997).

[96] 365 F.3d 1108 (D.C. Cir. 2004).

[97] Neither case, however, involved congressional access to information.

[98] 121 F.3d 729 (D.C. Cir. 1997).

in any detail and provided no analysis of the grand jury's need for the documents. The appeals court reversed.

At the outset, the court's opinion carefully distinguishes between the "presidential communications privilege" and the "deliberative process privilege." Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decisionmaking. The deliberative process privilege applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and "disappears altogether when there is any reason to believe government misconduct has occurred."[99]

On the other hand, the court explained, the presidential communications privilege is rooted in "constitutional separation of powers principles and the President's unique constitutional role" and applies only to "direct decisionmaking by the President."[100] The privilege may be overcome only by a substantial showing that "the subpoenaed materials likely contain[] important evidence" and that "the evidence is not available with due diligence elsewhere."[101] The presidential privilege applies to all documents in their entirety[102] and covers final and post-decisional materials as well as pre-deliberative ones.[103]

Turning to the chain of command issue, the court held that the presidential communications privilege must cover communications made or received by presidential advisers in the course of preparing advice for the President even if those communications are not made directly to the President. The court rested its conclusion on "the President's dependence on presidential advisers and the inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight" and "the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources".[104] Thus the privilege will "apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to

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[99] 121 F.3d at 745, 746; see also *id.* at 737-738 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government'").

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

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

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

[103] *Id.* at 745.

[104] *Id.* at 752.

communications authored or received in response to a solicitation by members of a presidential adviser's staff."[105]

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

> We are aware that such an extension, unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigation and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. *See* AAPS, 997 F.2d at 910 (it is "operational proximity" to the President that matters in determining whether "[t]he President's confidentiality interests" is implicated)(emphasis omitted).
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> Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters. This restriction is particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President, and thus are subject to FOIA and other open government statutes. See *Armstrong v. Executive Office of the President,* 90 F.3d 553, 558 (D.C. Cir. 1996), *cert denied* — U.S. —-, 1 17 S.Ct. 1842, 137 L. Ed.2d 1046 (1997). The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President. If the government seeks to assert the presidential communications privilege in regard to particular communications of these "dual hat" presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.[106]

The appeals court's limitation of the presidential communications privilege to "direct decisionmaking by the President" makes it imperative to identify the type of decisionmaking to which it refers. A close reading of the opinion makes it arguable that it is meant to encompass only those functions that form the core of presidential

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[105] *Id.*

[106] *Id.* (footnote omitted).

authority, involving what the court characterized as "quintessential and non-delegable Presidential power."[107] In the case before it the court was specifically referring to the President's Article II appointment and removal power which was the focal point of the advice he sought in the Espy matter. But it is clear from the context of the opinion that the description was meant to juxtapose appointment and removal power in contrast with "presidential powers and responsibilities" that "can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of authority or statutory framework."[108] The reference the court uses to illustrate the latter category is the President's Article II duty "to take care that the laws are faithfully executed," a constitutional direction that the courts have consistently held not to be a source of presidential power but rather an obligation on the President to see to it that the will of Congress is carried out by the executive bureaucracy.[109]

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

Such a reading of this critical passage is consonant with the court's view of the source and purpose of the presidential communications privilege and its expressed need to confine it as narrowly as possible. Relying on *United States* v. *Nixon*,[110] the In *re Sealed Case* court identifies "the President's Article II powers and responsibilities as the constitutional basis of the presidential communications privilege. Since the Constitution assigns these responsibilities to the President alone, arguably the privilege of confidentiality that derives from it also should be the

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[107] *Id.* at 752.

[108] *Id.* at 752-53.

[109] See, e.g., Kendall ex rel. Stokes v. United States, 37 U.S. (12 Pet.) 522, 612-613 (1838); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952); *Myers v. United States,* 272 U.S. 52, 177 (1926)(Holmes, J., dissenting); *National Treasury Employees Union v. Nixon,* 492 F.2d 587, 604 (D.C. Cir. (1974): *Biodiversity Associates, et al* v. *Cables*, 357 F. 3d. 1152, 1161-63(10th Cir. 2004)("[W]hen Congress is exercising its own powers with respect to matters of public rights, the executive role of 'tak[ing] Care that the Laws be faithfully executed,' U.S. Const. Art. II, §3, is entirely derivative of the laws passed by Congress, and Congress may be as specific in its instruction to the executive as it wishes.").

[110] 418 U.S. 683 (1974).

President's alone."[111] Again relying on *Nixon* the appeals court pinpoints the essential purpose of the privilege: "[Tlhe privilege is rooted in the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and knowledge. Confidentiality is what ensures the expression of 'candid, objective, and even blunt or harsh opinions' and the comprehensive exploration of all policy alternatives before a presidential course of action is selected."[112] The limiting safeguard is that the privilege will apply in those instances where the Constitution provides that the President alone must make a decision. "The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President."[113]

The District of Columbia Circuit's 2004 decision in *Judicial Watch, Inc. v. Department of Justice*[114] appears to lend substantial support to the above-expressed understanding of *Espy*. *Judicial Watch* involved requests for documents concerning pardon applications and pardon grants reviewed by the Justice Department's Office of the Pardon Attorney and the Deputy Attorney General for consideration by President Clinton.[115] Some 4,300 documents were withheld on the grounds that they were protected by the presidential communications and deliberative process privileges. The district court held that because the materials sought had been produced for the sole purpose of advising the President on a "quintessential and non-delegable Presidential power" — the exercise of the President's constitutional pardon authority — the extension of the presidential communications privilege to internal Justice Department documents which had not been "solicited and received" by the President or the Office of the President was warranted.[116] The appeals court reversed, concluding that "internal agency documents that are not solicited and received by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege." [117]

Guided by the analysis of the *Espy* ruling, the panel majority emphasized that the "solicited and received" limitation "is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far."[118] *Espy* teaches, the appeals court explained, that the privilege may be invoked only when presidential advisers in close proximity to the President

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[111] *Id.* at 748.

[112] *Id.* at 750.

[113] *Id.* at 752.

[114] 365 F.3d 1108 (D.C. Cir. 2004). The panel split 2-1, with Judge Rogers writing for the majority and Judge Randolph dissenting.

[115] The President has delegated the formal process of review and recommendation of his pardon authority to the Attorney General who in turn has delegated it to the Deputy Attorney General. The Deputy Attorney General oversees the work of the Office of the Pardon Attorney.

[116] 365 F.3d at 1109-12.

[117] *Id.* at 1112, 1114, 1123.

[118] *Id.* at 1114.

who have significant responsibility for advising him on non-delegable matters requiring direct presidential decisionmaking, have solicited and received such documents or communications or the President has received them himself. In rejecting the Government's argument that the privilege should be applicable to all departmental and agency communications related to the Deputy Attorney General's pardon recommendations for the President, the panel majority held that "such a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of serving the public interest. Communications never received by the President or his Office are unlikely to be revelatory of his deliberations ... nor is there any reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal documents. Any pardon documents, reports or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate Presidential advisors will remain protected. It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege"[119] Indeed, the *Judicial Watch* panel makes it clear that the *Espy* rationale would preclude cabinet department heads from being treated as being part of the President's immediate personal staff or as some unit of the Office of the President:

> Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case*, pose a significant risk of expanding to a large swatch of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.[120]

The *Judicial Watch* majority took great pains to explain why *Espy* and the case before it differed from the *Nixon* and post-Watergate cases: "Until *In re Sealed Case*, the privilege had been tied specifically to direct communications of the President with his immediate White House advisors"[121] The *Espy* court, it explained, was for the first time confronted with the question whether communications that the President's closest advisors make in the course of preparing advise for the President which the President never saw should also be covered by the presidential privilege. The *Espy* court's answer was to "espouse[ ] a 'limited extension' of the privilege' 'down the chain of command' beyond the President to his immediate White House advisors only," recognizing "the need to ensure that the President would receive full and frank advice with regard to his non-delegable appointment and removal powers, but was also wary of undermining countervailing considerations such as openness in government.... Hence, the [*Espy*] court determined that while 'communications

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[119] *Id.* at 1117.

[120] *Id.* at 1121. See also *Id.* at 1122.

[121] *Id.* at 1116.

authored or solicited and received' by immediate White House advisors in the Office of the President could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisors could not."[122]

The situation before the *Judicial Watch* court tested the *Espy* principles. While the presidential decision involved — exercise of the President's pardon power — was certainly a non-delegable, core presidential function, the operating officials involved, the Deputy Attorney General and the Pardon Attorney, were deemed to be too remote from the President and his senior White House advisors to be protected. The court conceded that functionally those officials were performing a task directly related to the pardon decision but concluded that an organizational test was more appropriate for confining the potentially broad sweep that would result from a functional test; under the latter test, there would be no limit to the coverage of the presidential communications privilege. In such circumstances, the panel majority concluded, the lesser protections of the deliberative process privilege would have to suffice.[123]

4. The Claim of Deliberative Process Privilege.

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

Even before *Espy,* courts and committees had consistently resisted withholding claims of agencies as attempts to establish a species of agency privilege designed to thwart congressional oversight efforts. Thus it has been pointed out that the claim that internal communications need to be "frank" and "open" does not merit special support and that coupling that characterization with the notion that those communications were part of a "deliberative process" will not add any weight to the argument. In effect, such arguments have been seen as attempting to justify a withholding from Congress on the same grounds that an agency would use to

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[122] *Id.* at 1116, 1117.

[123] *Id.* at 1118-24.

withhold such documents from a citizen requester under Exemption 5 of the Freedom of Information Act (FOIA).[124]

Such a line of argument is likely to be found to be without substantial basis. As has been indicated above, Congress has vastly greater powers of investigation than those of citizen FOIA requesters. Moreover, in the FOIA itself, Congress carefully provided that the exemption section "is not authority to withhold information from Congress."[125] The D.C. Circuit, in *Murphy v. Department of the Army*,[126] explained that FOIA exemptions were no basis for withholding from Congress because of:

> the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others ... . Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively. If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private persons, that is but an incidental consequence of the need for informed and effective lawmakers.[127]

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

Moreover, every federal official, including attorneys, could assert the imperative of timidity — that congressional oversight, by holding up to scrutiny the advice he gives, will frighten him away from giving frank opinions, or discourage others from asking him for them. This argument, not surprisingly, has failed over the years to persuade legislative bodies to cease oversight. Indeed, when the Supreme Court discussed the "secret law" doctrine in *NLRB v. Sears, Roebuck & Co.*[128] it addressed why federal officials — including those giving legal opinions — need not hide behind such fears:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if *adopted*, will become public is slight. First, when adopted, the reasoning becomes that of agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy

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[124] 5 U.S.C. 553(b)(5)(1994).

[125] 5 U.S.C. 552 d).

[126] 613 F. 2d 1151 (D.C. Cir. 1979).

[127] 613 F. 2d at 1155-56, 1158.

[128] 421 U.S. 132 (1975).

> suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports ...[disclosure].[129]

Arguably, a "chilling effect" argument needs to be demonstrated concretely in particular cases or else it would overwhelm investigative prerogatives.

Concluding Observations

Congress has an established right and judicially recognized prerogative, pursuant to its constitutional authority to legislate, to receive from officers and employees of the agencies and departments of the United States accurate and truthful information regarding the federal programs and policies administered by such employees 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 affect or change"[130], and thus, what observers might characterize as political gamesmanship must yield, according to the courts, to the clear public interest of providing the peoples' elected representatives in the Congress with accurate and truthful information upon which to effectively fashion or revise the laws for the Nation. There is no countervailing right or interest for a federal official in an agency or department to intentionally withhold, conceal or prevent the disclosure of truthful public policy information from the United States Congress concerning legislation affecting the programs and policies administered by that agency, when requested by a jurisdictional committee of the Congress. This understanding applies with equal force to the law enforcement activities of the Department of Justice. As detailed in this report, as a matter of law, buttressed by 85 years history and practice, congressional committees with jurisdiction and authority that have exercised the full panoply of oversight and investigatory power 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 the officer or employee with the information or required knowledge.

Judicial rulings over the past two decades rejecting assorted presidential prerogatives that might deny congressional access to agency information appear to have buttressed congressional oversight authority. The Supreme Court's ruling in *Morrison* v. *Olsen* casts significant doubt whether prosecutorial discretion is a core presidential power over which executive privilege may be asserted, a doubt that has been magnified by the appellate court rulings in *Espy* and *Judicial Watch*. In those latter 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 include only decisions that the President alone can make under the Constitution: appointment and removal, pardoning, receiving ambassadors and other public ministers, negotiating treaties, and exercising powers

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[129] 421 U.S. at 161 (emphasis in original).

[130] *McGrain v. Daugherty*, 272 U.S. 135, 175 (1927).

as Commander-in-Chief. *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 complex and not to the departments and agencies, even if the actions there related to a core power, unless they are "solicited and received" by a close White House advisor or the President himself. *Judicial Watch*, which dealt with pardon documents in DOJ that had not been "solicited and received" by a close White House advisor, determined that "the need for the presidential communications privilege becomes 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 predecisional communications."[131] Of course these rulings did not involve congressional requests, but until reviewed by the Supreme Court they are the law of the circuit most likely to hear and rule on future claims of presidential privilege.

This is not meant to gainsay or dismiss out of hand the weight and applicability of the DOJ policy arguments in particular situations and circumstances. Our review of the historical record of congressional inquiries and experiences with committee investigations of DOJ has indicated that committees normally have been restrained by prudential considerations informed by weighing the considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight against the potential burdens and harms that may be imposed on DOJ or any other agency if deliberative process matter is publically disclosed. The sensitive law enforcement concerns and duties of the Justice Department often 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. Rather we have addressed here the oft-repeated rhetorical notion that the Department never has allowed congressional access to open or closed litigation files or other "sensitive" internal deliberative process matter and examine the legal weight to assertions to withhold vis a vis congressional oversight authority.

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[131] 365 F. 3d. at 1123.

Appendix. Selected Congressional Investigations of The Department of Justice, 1920-2007

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

Palmer Raids

In 1920 and 1921, investigations were held in the Senate and House into the so-called "Palmer raids" in which, under the direction of Attorney General A. Mitchell Palmer, thousands of suspected Communists and others allegedly advocating the overthrow of the government were arrested and deported. See Charges of Illegal Practices of the Department of Justice: Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 66th Congress, 3d Session (1921)(hereinafter "Senate Palmer Hearings"); Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F . Post and Others: Hearings Before the House Committee on Rules, 66th Congress, 2d Session (1920)(hereinafter "House Palmer Hearings"). Attorney General Palmer, accompanied by his Special Assistant, J. Edgar Hoover, during three days of testimony at the Senate hearings discussed the details of numerous deportation cases, including cases which were on appeal. Senate Palmer Hearings at 38-98, 421-86, 539-63. House Palmer Hearings at 3-209. In support of his testimony, Palmer provided the Subcommittee with various Department memoranda and correspondence, including Bureau of Investigation reports concerning the deportation cases. E.g., Senate Palmer Hearings at 431-43, 458- 69, 472-76. Among the materials provided were the Department's confidential instructions to the Bureau outlining the procedures to be followed in the surveillance and arrest of the suspected Communists, *id.* at 12-14, 18-19, and a lengthy "memorandum of comments and analysis" prepared by one of Palmer's special assistants, which responded to a District Court opinion, at the time under appeal, critical of the Department's actions in these deportation cases, *id.* at 484-538. See also, Harlan Grant Cohen, "The (Un)Favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History," 78 NYU. L. Rev. 1431, 1451-1456 (2003)(recounting historical context of Palmer Raids).

Teapot Dome

Several years later, the Senate conducted an investigation of the Teapot Dome scandal. While the Senate Committee on Public Lands and Surveys focused on the actions of the Department of the Interior in leasing naval oil reserves, a Senate select committee was constituted to investigate "charges of misfeasance and nonfeasance in the Department of Justice," *McGrain v. Daugherty,* 273 U.S. 135, 151 (1927), in failing to prosecute the malefactors in the Department of the Interior, as well as other cases. Investigation of Hon. Harry M. Daugherty, Formerly Attorney General of the United States: Hearings Before the Senate Select Committee on Investigation of the

Attorney General, vols. 1-3, 68th Congress, 1st Session (1924). The select committee heard from scores of present and former attorneys and agents of the Department and its Bureau of Investigation, who offered detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. Not all of the cases upon which testimony was offered were closed, as one of the committee's goals in its questioning was to identify cases in which the statute of limitations had not run out and prosecution was still possible. *See, e.g., id.* at 1495-1503, 1529-30, 2295-96.

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

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

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

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

273 U.S. at 177.

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

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

Investigations of DOJ During the 1950's

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

1. Grand Jury Curbing .

Extensive testimony was heard about a charge that the Department had attempted improperly to curb a grand jury inquiry in St. Louis into the failure to enforce federal tax fraud laws. After taking testimony in executive session from one witness, the subcommittee suspended its hearings on this subject pending the discharge of the grand jury. DOJ Investigation Hearings at 753. The subcommittee resumed its hearings several months later, at which time testimony was taken from the former Attorney General, a former Assistant Attorney General, the Chief of the appellate section of the Tax Division, and an Assistant U .S. Attorney. Several members of the St. Louis grand jury also testified before the subcommittee. In addition to intradepartmental correspondence, *see id.* at 1256-57, 1270- 71, among the materials that the subcommittee reviewed and included in the public record were transcripts of telephone conversations between various Department attorneys concerning the grand jury investigation. *Id.* at 759-66.[132]

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

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[132] Other memoranda and documents from the Department were reviewed by the subcommittee and kept in its confidential files, for example, a letter of instruction from the Attorney General to the Department attorney that had been sent to St. Louis. *Id.* at 890. In addition, the district court judge that had convened the grand jury gave the subcommittee permission to use the notes of the U .S. Attorney in St. Louis and of one of the grand jurors, with all names deleted. *Id.* The judge also submitted a deposition to the subcommittee about the Department's interference with the grand jury. *Id.* at 891-93.

2. Prosecution of Routine Cases.

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

For example, in investigating charges that the Department was often dilatory in its handling of routine cases, the subcommittee staff undertook a detailed analysis of a number of cases in which delay was alleged to have occurred. To demonstrate publicly the nature of this problem, the subcommittee chose a procurement fraud case that had been recently closed, and conducted a "public file review" of the case at a subcommittee hearing. Attorneys from the Department at the hearing went document by document through the Department's file in the case. DOJ Investigative Hearings (82d Congress) at 895-964. The subcommittee was granted access to all of the documentation collected in the case, with the exception of confidential FBI reports which the subcommittee had agreed not to seek. However, certain communications from the FBI to the Department concerning the prosecution of the case were provided. *Id.* at 897.

3. New York City Police Brutality.

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

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

Investigation of Consent Decree Program

In 1957 and 1958, the Antitrust Subcommittee of the House Judiciary Committee conducted an inquiry into the negotiation and enforcement of consent decrees by the Antitrust Division, and their competitive effect, with particular emphasis on consent decrees that had been recently entered into with the oil-pipeline industry and AT&T. See Consent Degree Program of the Department of Justice: Hearings before the Antitrust Subcomm. (Subcomm. No.5) of the House Comm. on the Judiciary, parts I & II, 85th Cong., 1st & 2d Sess. (1957-58)(hereafter "Consent Decree Hearings"); Antitrust Subcomm. (Subcomm. No.5), 86th Cong., 1st Sess., Report on Consent Decree Program of the Department of Justice (Comm. Print 1959)(hereafter "Consent Decree Report"). The subcommittee developed a 4,492-page hearing record, holding seventeen days of hearings on the AT&T consent decree and four days of hearings on the oil pipeline consent decree.

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

Deputy Attorney General William P. Rogers asserted two grounds to support the Department's refusal to provide the subcommittee with such access. First, that the files contained information voluntarily submitted by AT&T in the course of consent decree negotiations. Rogers wrote the subcommittee chairman that "[w]ere [the files] made available to your subcommittee, this Department would violate the confidential nature of settlement negotiations and, in the process, discourage defendants, present and future, from entering into such negotiations." *Id.* at 1674-75. In a later letter, the head of the Antitrust Division, Victor Hansen, added that "[t]hose considerations which require that the Department treat on a confidential basis communications with a defendant during consent decree negotiations also apply to the enforcement of a decree." *Id.* at 3706.

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

> Because it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions,

> concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before [congressional] committees not to testify to any such conversations or communications or to produce any such document or reproductions. This principle must be maintained regardless of who would be benefitted by such disclosures.

Id.

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

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

Cointelpro and Related Investigations of FBI-DOJ Misconduct

Over the period 1974-1978, Senate and House committees examined the intelligence operations of a number of federal agencies, including the domestic intelligence operations of the FBI and various units of the Justice Department such as the Interdivision Information Unit. See S. Rep. No.755, Books 1-3, 94th Cong., 2d Sess. (1976)(hereafter "Senate Intelligence Report"); Intelligence Activities, Senate Resolution 21: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, vols. 1-6, 94th Cong., 1st Sess. (1975)(hereafter "Senate Intelligence Hearings"); FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. of the Judiciary, parts 1-3, 94th Cong., 1st & 2d Sess. (1975-1976), par1;s 1-2, 95th Cong., 1st & 2d Sess. (1978)(hereafter "House FBI Hearings"). A select Senate committee examined 800 witnesses: 50 in public session, 250 in executive sessions and the balance in interviews. Senate Intelligence Report, Book II, at ix n.7. A number of those providing public testimony were present and former officials of the FBI and the Department of Justice.

The Select Committee estimated that in the course of its investigation it had obtained from these intelligence agencies and other sources approximately 110,000 pages of documents (still more were preliminarily reviewed at the agencies). *Id.* Hundreds of FBI documents were reprinted as hearing exhibits, though "[u]nder criteria determined by the Committee, in consultation with the Federal Bureau of

Investigation, certain materials have been deleted from these exhibits to maintain the integrity of the internal operating procedures of the FBI. Further deletions were made with respect to protecting the privacy of certain individuals and groups. These deletions do not change the material content of these exhibits." Senate Intelligence Hearings at iv n.1. The select committee concluded in its final report that the "most important lesson" learned from its investigation was that "effective oversight is impossible without regular access to the underlying working documents of the intelligence community. Top level briefings do not adequately describe the realities. For that the documents are a necessary supplement and at times the only source." Senate Intelligence Report, Book II, ix n. 7.

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

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

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

White Collar Crime in the Oil Industry

In 1979, joint hearings were held by the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Crime of the House Judiciary Committee to conduct an inquiry into allegations of fraudulent pricing of fuel in the oil industry and the failure of the Department of Energy and DOJ to effectively investigate and prosecute alleged criminality. See, White Collar Crime in the Oil Industry: Joint Hearings before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Crime of the House Commerce on the Judiciary, 96th Cong., 1st Sess. (1979)(hereinafter "White Collar Crime Hearings"). During the course of

the hearing, testimony and evidence were received in closed session regarding open cases in which indictments were pending and criminal proceedings were in progressing. The Chairman of the Subcommittee on Energy and Power remarked: "We know indictments are outstanding. We do not wish to interfere with rights of any parties to a fair trial. To this end we have scrupulously avoided any actions that might have affected the indictment of any party. In these hearings we will restrict our questions to the process and the general schemes to defraud and the failure of the Government to pursue these cases. Evidence and comments on specific cases must be left to the prosecutors in the cases they bring to trial." White Collar Crime Hearings at 2. DOJ's Deputy Attorney General, Criminal Division, praised the Chairmen and committee members for their discreet conduct of the hearings: "I would like to commend Chairman Conyers, Chairman Dingell, and all other members of the committee and staff for the sensitivity which they have shown during the course of these hearings to the fact that we have ongoing criminal investigations and proceedings, and the appropriate handling of the question in order not to interfere with those investigations and criminal trials." *Id.* at 134.

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

Billy Carter/Libya Investigation

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

Although there was early disagreement as to the extent of the subcommittee's access to certain information from the White House, there was no attempt by the Department to limit access to its attorneys involved with the Billy Carter case. The subcommittee heard testimony from several representatives of the Department, including Attorney General Civiletti, the Assistant Attorney General in charge of the Criminal Division, Philip B. Heymann, and three of his assistants. These witnesses

testified about the general structure of decisionmaking in the Department, the nature of the investigation of Billy Carter's Libyan ties, the Attorney General's failure to immediately communicate intelligence information concerning Billy Carter to the Criminal Division attorneys conducting the investigation, the decision to proceed civilly and not criminally against Carter, and the effect of various actions of the Attorney General and the White House on that prosecutorial decision. Billy Carter Hearings at 116-30, 683-1153. The subcommittee also took depositions from some of these witnesses. Pursuant to a Senate Resolution providing it with such power, subcommittee staff took 35 depositions, totaling 2,646 pages. *Id.* at 1741-42.

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

Undercover Law Enforcement Activities (ABSCAM)

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

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

of their value to you as fact witnesses and because you have assured us that they will be asked to testify solely as to matters of fact within their personal knowledge and not conclusions or matters of policy ." *Id.*

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

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

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

Under the general framework established by this agreement, there was considerable give and take between the committee and the Department as to the degree of access that would be provided to specific documents. For example, the committee's counsel had sought access to a report prepared in the Criminal Division on FBI undercover operations. Abscam Hearings at 514. The committee's chairman had also written the Attorney General requesting access to that report. Abscam Report at 485. An agreement was reached whereby the report could be examined by committee members or counsel at the Department and notes taken on its contents, but it could neither be copied or removed from the Department. *Id.* at 494. Committee counsel utilized this procedure, but the committee determined that such limited access made it impractical for its members to personally review the report, and the

committee's chairman again wrote the Attorney General asking for release of a copy. *Id.* at 498. The Department ultimately agreed to provide a copy of the report to each member of the committee, with the understanding that the report would not be disseminated beyond the members of the committee and its counsel, no additional copies would be made, and the copies provided by the Department would be returned at the conclusion of the committee's work. *Id.* at 501.

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

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

Investigation of Withholding of EPA Documents

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

Ultimately, the lawsuit was dismissed, *U.S. v. House of Representatives,* 557 F. Supp. 150 (D.D.C. 1983), the documents were provided to Congress, and the contempt citation was dropped. However, a number of questions about the role of the Department during the controversy remained: whether the Department, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the United States Attorney for the District of Columbia not to present the contempt certification of Burford to the grand jury for prosecution

and had made the decision to sue the House; and, generally, whether there was a conflict of interest in the Department's simultaneously advising the President, representing Burford, investigating alleged Executive branch wrongdoing, and enforcing the Congressional criminal contempt statute. These and related questions raised by the Department's actions were the subject of an investigation by the House Judiciary Committee beginning in early 1983. The committee issued a final report on its investigation in December 1985. See Report of the House Comm. on the Judiciary on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-1983, H.Rept. 99-435, 99th Cong., 1st Sess (1985) ("EPA Withholding Report").

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

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

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

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

At first the Department provided only publicly available documents in response to this and other document requests of the committee. *Id.* at 1184. However, after a series of meetings between committee staff and senior Department officials, an

agreement was reached whereby committee staff were permitted to review the materials responsive to these requests at the Department to determine which documents the committee would need for its inquiry. *Id.* at 1168 & 1233. Committee staff reviewed thousands of documents from the Land and Natural Resources Division, the Civil Division, the Office of Legal Counsel, the Office of Legislative Affairs, the Office of Public Affairs, and the offices of the Attorney General, the Deputy Attorney General, and the Solicitor General. *Id.* at 1168.

In July 1983, the committee chairman wrote to the Attorney General requesting copies of 105 documents that committee staff had identified in its review as particularly important to the committee's inquiry. *Id.* at 1169. By May 1984, only a few of those documents had been provided to the committee, and the chairman again wrote to the Attorney General requesting the Department's cooperation in the investigation. In that letter, the chairman advised the Attorney General that the committee's preliminary investigation had raised serious questions of misconduct, including potential criminal misconduct, in the actions of the Department in the withholding of the EPA documents. *Id.* at 1172. The committee finally received all of the 105 documents in July 1984, a full year after it had initially requested access. The committee at that time also obtained the written notes and a number of other documents that had been earlier withheld. *Id.* at 1173.

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

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

Department's handling of the committee's inquiry, objecting to the committee's "ever- broadening scope of ...inquiry." *Id.* at 1265.

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

E.F. Hutton Investigation

In 1985 and 1986, the Crime Subcommittee of the House Judiciary Committee conducted an investigation to determine why no individuals were charged in connection with an investigation of E.F. Hutton in which the company pled guilty to 2,000 felony counts. See, E.F. Hutton Mail and Wire Fraud, Report of the House Subcommittee on Crime, Committee on the Judiciary, 99th Cong. 2d Sess. (Committee Print, Serial No. 13, December 1986) (Hutton Report). As part of this investigation, the subcommittee sought letters to Hutton employees promising not to prosecute, draft indictments, and internal DOJ communications regarding proposals by or within the Justice Department regarding the disposition of charges against Hutton employees. Hutton Report at 1119. Assistant Attorney General Trott responded to the request by stating:

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

The Justice Department also recommended that the subcommittee go to court to obtain access to all of the information, including that covered by Rule 6(e). Hutton

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

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

Iran-Contra

In the late 1980s, an intense Congressional investigation focused, in part, on Attorney General Meese's conduct during the Iran-Contra scandal. The House and Senate created their Iran-Contra committees in January, 1987. The Iran-Contra committees demanded the production of the Justice Department's files, to which Assistant Attorney General John Bolton responded, on behalf of Attorney General Meese, by attempting to withhold the documents on the claim that providing them would prejudice the pending or anticipated litigation by the Independent Counsel. The Iran-Contra committees disputed that contention, required the furnishing of all Justice Department documents, and questioned all knowledgeable Justice Department officers up to, and including, Attorney General Meese.

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

the Iran-Contra Affair, H.R. Rep. No.433 and S. Rep. No.216, 100th Cong., 1st Sess. 310, 317, 314, 317-18, 647 (1987).

Rocky Flats Environmental Crimes Plea Bargain

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

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

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

At one point in the proceedings all the witnesses who were under subpoena, upon written instructions from the Acting Assistant Attorney General, Criminal Division, refused to answer questions concerning internal deliberations in which decisions were made about the investigation and prosecution of Rockwell, the DOE and their employees. Two of the witnesses advised that they had information and, but for the DOJ directive, would have answered the subcommittee's inquiries. The subcommittee members unanimously authorized the chairman to send a letter to President G. H. W. Bush requesting that he either personally assert executive

privilege as the basis for directing the witnesses to withhold the information or direct DOJ to retract its instructions to the witnesses. The President took neither course and the DOJ subsequently reiterated its position that the matter sought would chill Department personnel. The subcommittee then moved to hold the U .S. Attorney in contempt of Congress.

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

Investigation of the Justice Department's Environmental Crimes Section

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

The Subcommittee's investigation was delayed for months by DOJ refusals of requests to interview DOJ line attorneys and the denial of access to numerous primary decisionmaking documents as well as documents prepared in response to the Subcommittee's investigation. The initial phase of the investigation required overcoming refusals to produce internal EPA documents bearing on 17 closed criminal environmental cases. The documents ultimately produced by EPA included Reports of Investigation, case agent notes, internal reports and memoranda, communications with private parties, and correspondence with DOJ. The next phase concentrated on attempts to obtain staff interviews with DOJ line attorneys with first hand information on whether various closed cases had been mishandled, including three Assistant United States Attorneys. DOJ officials initially refused on the ground

of the chilling effect such access would have and the historic reluctance of the Department to allow such access, offering instead to provide access to the head of ECS instead. The Subcommittee responded that it was premature to interview the ECS head without interviewing line attorneys who had first hand knowledge of the facts in question. The change of administration in 1993 did not result in an easing of DOJ's resistant posture and in May 1993 the Subcommittee voted to issue 26 subpoenas to present and former DOJ attorneys. In June 1993 DOJ acquiesced to staff interviews of the subpoenaed attorneys pursuant to a negotiated agreement. Document subpoenas were also authorized but not issued. However, continued refusal to voluntarily produce the documents resulted in their issuance and service in March 1994 on the Attorney General and the Acting Assistant Attorney General for the Environment and Natural Resources Division. Some of these documents involved closed cases, but DOJ claimed they were "deliberative" in nature and that only limited access could be allowed for them. Other documents withheld involved internal DOJ communications respecting responses to the Subcommittee's investigation after the six cases were closed. At the time the subpoenas were served, the Acting Assistant Attorney General's nomination for the position was before the Senate Judiciary Committee. The Chairman of the Subcommittee advised the Judiciary Committee of the withholding and a hold was put on her nomination. In late March, DOJ agreed to comply with the subpoena and the documents were provided over a period of months. Coincidentally the Senate hold was lifted.

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

Campaign Finance Investigations

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

In 1997, the Senate Governmental Affairs Committee began an investigation into allegations of improprieties with respect to the flow of money into campaigns, particularly into the Republican and Democratic National Committees, and especially with respect to money from foreign sources. After the first round of hearings, the committee became concerned with the quality of DOJ's prosecution efforts as well as with evidence of a lack of cooperation and coordination between Main Justice and the FBI. In 1999 the committee held hearings on DOJ's handling of the investigation of Yah Lin "Charlie" Trie, a person from Arkansas with a long time friendly relationship with President Clinton, who had frequent access to the White House and was alleged to have funneled $220,000 from foreign sources to the Democratic National Committee. Mr. Trie also provided the President's Legal Expense Trust (PLET) with $789,000 in sequentially numbered money orders. During the course

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

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

On March 10, 2000, following press reports indicating that the La Bella memo had been leaked in its entirety to a newspaper, the committee again subpoenaed the memos. The Attorney General still refused to release the memos but offered to allow committee staff unredacted review but without any note taking. Negotiations continued but the committee began review under the DOJ conditions. Ultimately, an

accommodation was reached in which all memoranda subject to subpoena were to be produced to the committee. The documents would be kept in a secure facility with access restricted to a limited number staff. The committee agreed to give DOJ notice in advance of its intent to release the documents and to allow DOJ the opportunity to explain why they should not be disclosed. The committee notified the Attorney General of its intent to release the documents at a June 6 hearing. The memos were released to the public on that date by unanimous consent.

Misuse of Informants in the FBI's Boston Regional Office

In early 2001, the House Committee on Government Reform commenced an investigation on FBI corruption in its Boston Regional office that encompassed events that extended back to the mid-1960's. After repeated instances of lack of cooperation with requests for documents, the committee issued a subpoena on September 6, 2001, for a number of prosecution and declination memoranda relating to its investigation of the handling of a confidential informants in New England. DOJ officials made it clear that it would not comply. In December 2001 the committee renewed its request for the subpoenaed documents. (A hearing on the request scheduled for September 13, 2001 had been postponed because of the September 11 terrorist attacks.) That subpoena sought, among other material, Justice Department documents relating to alleged law enforcement corruption in the Federal Bureau of Investigation's Boston office that 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 a cooperating witness and two informants in order to protect the undercover activities of those informants. Later, the FBI knowingly permitted two other informants to commit some 21 additional murders during the period they acted as informants, and, finally, gave the informants warning of an impending grand jury indictment which allowed one of them to flee.

The President directed 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 power doctrine, "which was to protect individual liberty." In defending the assertion of the privilege the Justice Department claimed a historical policy of withholding deliberative prosecutorial documents from Congress in both open and closed civil and criminal cases. See, Louis Fisher, "The Politics of Executive Privilege," Carolina Academic Press, 108 (2004)(Fisher). Pending at the time were a number of Federal Tort Claims Act suits brought by the falsely convicted persons and their families, claiming the government knowingly used fabricated testimony to achieve the conviction.

Initial congressional hearings after the privilege claim was made demonstrated the rigidity of the Department's position. The Department later agreed there might be some area for compromise, and on January 10, 2002, White House Counsel 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. "There is no such bright-line policy, nor did we intend to articulate any such policy." 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 documents against public or congressional disclosure" unless a committee showed a "compelling or specific need" for the documents. See, Fisher, *id.* 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 the Department of Justice giving 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 of DOJ's failure to prosecute meritorious cases. In all instances, investigating committees were provided with documents respecting open and closed cases that often included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during undercover operations, and documents presented to grand juries not protected by Rule 6(e), among other similar "sensitive materials." Shortly after the hearing the committee was given access to the disputed documents."Everything Secret Degenerates: The FBI's Use of Murderers As Informants," H.Rept. 108-414, 108th Cong., 2d Sess. 2-9, 121-134 (2004) (House Report); Hearings, " Investigation Into Allegations of Justice Department Misconduct In New England-Volume I," House Comm. on Government Reform, 107th Cong., 1st and 2d Sess's. 520-556, 562-604 (May 3, December 13, 2001; February 6, 2002) (Hearings); *McIntyre v. United States*, 367 F.3d 38, 42-51 (1st Cir. 2004)(recounting background of FBI corrupt activities); *United States v. Salemme*, 91 F. Supp. 2d 141, 148-63, 208-15, 322 (D.Mass. 1993) (same); *United States v. Flemmi,* 195 F. Supp 243, 249-50 (D. Mass. 200) (same); Charles Tiefer, "President Bush's First Executive Privilege Claim: The FBI/Boston Investigation," 33 Pres. Stud. Q. 201(2003). On July 26, 2007, a Massachusetts federal district court judge awarded the convicted persons and their families $101.7 million under the Federal Tort Claims Act, finding the government liable for malicious prosecution, civil conspiracy, infliction of emotional distress, and negligence. Shelly Murphy and Brian R. Ballou, "FBI Condemned in Landmark Ruling," Boston Globe, July 27, 2007, A3; Robert Barrens and Paul Lewis, "FBI Must Pay $102 Million In Mob Case," Washington Post, July 27, 2007, A3.

The committee's final report concluded that the documents withheld from it were indispensable to the success of its investigation and that the claim of presidential privilege was part of a pattern of obstruction that impeded its investigation:

> When the FBI Office of Professional Responsibility conducted an investigation of the activities of New England law enforcement, it concluded in 1997: "There is no evidence that prosecutorial discretion was exercised on behalf of informants [James] Bulger and/or [Stephen] Flemmi." This is untrue. Former U.S. Attorney Jeremiah O'Sullivan was asked in the December 5, 2002 committee hearing whether prosecutorial discretion had been exercised on behalf of Bulger and Flemmi and he said that it had. A review of documents in the possession of the Justice Department also confirms this to be true. Had the committee permitted the assertion of executive privilege by the President to be unchallenged, this information would never have been known. That the Justice Department concluded that prosecutorial discretion had not benefitted Bulger or Flemmi — while at the same time fighting to keep Congress from obtaining information

proving this statement to be untrue — is extremely troubling. See, House Report at 3, 134-135.

Removal and Replacement of United States Attorneys

Commencing in early 2007, the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law and the Senate Judiciary Committee began investigations of the termination and replacement of nine United States Attorneys in 2006; The committees sought an explanation of the reasons for the terminations, who was involved in the removal and replacement decisions, and what factors may have influenced the considerations for removal and replacement. During the initial phase of the investigations DOJ voluntarily provided former and current Department officials and employees for closed door interviews and testimony at hearings. The House subcommittee held five days of hearings, on March 6, March 29, May 3, June 21, and July 12, 2007. The full committee held two days of hearings, on May 10 and May 23, 2007. DOJ personnel provided included, among others, the Attorney General; the Deputy Attorney General; the removed Untied States Attorneys; the Chief of Staff to the Deputy Attorney General; the former Chief of Staff to the Attorney General; the acting Associate Attorney General; the Principal Associate Deputy Attorney General; the Deputy Assistant Attorney General and Chief of Staff of the Criminal Division; the Principal Deputy Director of the Executive Office of U.S. Attorneys; the former Director of the Office of U.S. Attorneys and current U.S. Attorney for the Western District of Pennsylvania; the Associate Deputy Attorney General; and the Acting Attorney General for New Mexico.

On the basis of the testimony of the witnesses and records produced by them and DOJ, the committees turned their attention to the role the White House played in the removals and sought similar voluntary provision of witnesses and documents. The White House Counsel responded with a proposal under which the committees were offered limited availability to some documents and limited access to witnesses in closed sessions, but without any transcripts of the interviews and under limitation as to permissible areas of questions. Also, as a condition of this proposal the committees had to commit in advance not to subsequently pursue any additional White House-related information by any other means, regardless of whatever the initial review of documents should reveal.

Upon the failure to procure White House documents and witnesses on a voluntary basis, on June 13, 2007 the chairman of the House and Senate committee issued subpoenas to Joshua Bolten, the White House Chief of Staff (as custodian of the White House Documents) for relevant White House documents, returnable on June 28, 2007. On that date, the House committee chairman issued a subpoena for documents and testimony to former White House Counsel Harriet Meirs, returnable on July 12, 2007; and the Senate committee chairman issued a similar subpoena to former White House Political Director Sara Taylor, returnable on July 11, 2007. The White House Counsel thereafter announced that no documents would be produced by Mr. Bolten on the basis of a claim of Executive privilege by the President, and that no logs of the withheld documents would be provided; and that Ms. Miers had been directed to claim Executive privilege by the President and not to appear at the hearing at all based on the notion that the assertion of presidential privilege cloaked

a witness with "absolute immunity" from even appearing in response to a subpoena. On the return dates of the subpoenas Ms. Miers did not appear and Mr. Bolten did not supply the subpoenaed documents.

On July 12, the House subcommittee voted 7-5 to hold Miers in contempt of Congress, and on July 19, Bolten was held in contempt by the subcommittee by a 7-3 vote. On July 25 both Miers and Bolten were held in contempt by the full Judiciary Committee by a vote of 21-17. As of the date of this writing the resolution of contempt has not been acted upon by the House. See, "Resolution Recommending That The House of Representatives Find Harriet Miers and Joshua Bolten, Chief of Staff, White House In Contempt of Congress For Refusal to Comply With Subpoenas Duly Issued By the Committee on the Judiciary," 110th Cong. 1st Sess. (July 25, 2007) (with additional views); and CRS Report RL30319, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, by Morton Rosenberg.

December 3, 2007

The Honorable Michael B. Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

I am writing to seek your assistance in the Oversight Committee's investigation into the circumstances surrounding the leak of the covert identity of CIA officer Valerie Plame Wilson. As the recent disclosure from former White House Press Secretary Scott McClellan underscores, there remain many unanswered questions surrounding this incident and the involvement of the President, the Vice President, and other senior White House officials in the security breach and the White House response.

The Special Counsel, Patrick Fitzgerald, has been cooperating with the Committee's investigation. Over the summer, Mr. Fitzgerald agreed to provide relevant documents to the Committee, including records of interviews with senior White House officials. Unfortunately, the White House has been blocking Mr. Fitzgerald from providing key documents to the Committee.

I hope you will not accede to the White House objections. During the Clinton Administration, your predecessor, Janet Reno, made an independent judgment and provided numerous FBI interview reports to the Committee, including reports of interviews with President Clinton, Vice President Gore, and three White House Chiefs of Staff. I have been informed that Attorney General Reno neither sought nor obtained White House consent before providing these interview records to the Committee. I believe the Justice Department should exercise the same independence in this case.

I have been careful in my dealings with Special Counsel Fitzgerald to narrow the Committee's request to documents that would not infringe on his prosecutorial independence or intrude upon grand jury secrecy. Before the Committee requested any documents, my staff, Justice Department staff, and Mr. Fitzgerald's staff discussed the types of documents that could

be properly provided to the Committee. Mr. Fitzgerald's staff agreed that the Committee's request was appropriate and has already produced a number of the requested documents relating to CIA and State Department officials and other individuals. To date, however, Mr. Fitzgerald has been frustrated in his attempts to transmit documents relating to White House officials to the Committee.

Equal application of the law means that there should not be one standard applied by the Justice Department to congressional investigations of Democratic administrations and another standard applied to congressional investigations of Republican administrations. I ask that you personally look into this matter and authorize the production of the documents to the Committee without any further delay.

Background

On March 16, 2007, the Committee held a hearing to examine the leak of Valerie Plame Wilson's covert identity. Witnesses at the hearing included Ms. Wilson; James Knodell, the Director of the White House Security Office; and William Leonard, the Director of the Information Security Oversight Office at the National Archives. As I announced in my opening statement at the hearing, the purpose of the Committee's inquiry is to examine three questions:

> (1) How did such a serious violation of our national security occur? (2) Did the White House take the appropriate investigative and disciplinary steps after the breach occurred? And (3) what changes in White House procedures are necessary to prevent future violations of our national security from continuing?[1]

Following the hearing, my staff engaged in discussions with Justice Department officials representing Mr. Fitzgerald and Mr. Fitzgerald's staff to determine an appropriate way for Mr. Fitzgerald to assist the Committee's inquiry without jeopardizing Mr. Fitzgerald's prosecutorial independence or grand jury secrecy. These discussions resulted in a formal document request that I sent to Mr. Fitzgerald on July 16, 2007, a copy of which is enclosed. Both the Justice Department and Mr. Fitzgerald's staff agreed that the final document request was reasonable and appropriate.

This document request sought seven categories of documents. Some of the requests, such as the request for "[d]ocuments relating to the existence or systems at the White House to ensure that classified information would be protected," require the Special Counsel to conduct

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[1] House Committee on Oversight and Government Reform, *Hearing on White House Procedures for Safeguarding Classified Information, 110th Cong.* (Mar. 16, 2007).

document searches.[2] Other requests asked for enumerated documents. One important request sought:

> Transcripts, reports, notes, and other documents relating to any interviews outside the presence of the grand jury of any of the following individuals:
>
> a. President George W. Bush
> b. Vice President Dick Cheney
> c. Andrew Card
> d. Stephen Hadley
> e. Karl Rove
> f. Dan Bartlett
> g. Scott McClellan[3]

Since the Committee's letter was sent on July 16, Mr. Fitzgerald and his staff have cooperated with the Committee's investigation and have produced a number of responsive documents to the Committee. Among the documents that Mr. Fitzgerald has produced to the Committee are "FBI 302 reports" of interviews with CIA and State Department officials and other individuals.

Production of Records of White House Interviews

According to a Justice Department official, Mr. Fitzgerald has also designated for production to the Committee reports of interviews of certain White House officials. However, to date, four months after the Committee's request, he has been unable to produce these documents to the Committee because the White House has not consented to their production. Committee staff has asked Justice Department staff to provide, but has not received, a date by which the White House will determine whether it will allow Mr. Fitzgerald to produce the documents.

There is no legitimate basis for the withholding of these documents. Mr. Fitzgerald has apparently determined that these documents can be produced to the Committee without infringing on his prosecutorial independence or violating the rules of grand jury secrecy. As records of statements made by White House officials to federal investigators, outside the framework of presidential decision-making, the documents could not be subject to a valid claim of executive privilege.

Moreover, there is direct precedent for the production of these records to the Committee. During the Clinton Administration, the Justice Department provided the Committee with dozens

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[2] Letter from Henry A. Waxman, Chairman, to Patrick J. Fitzgerald, Special Counsel (July 16, 2007).

[3] *Id.*

of FBI 302 reports of interviews with White House officials. No White House official — including the President and the Vice President — was exempted from the production. Among the White House officials whose FBI 302 reports were provided to the Committee were:

- President Clinton
- Vice President Gore
- Erskine Bowles (Chief of Staff to the President)
- Mack McLarty (Chief of Staff to the President)
- Leon Panetta (Chief of Staff to the President)
- Roy Neel (Chief of Staff to the Vice President)
- Jack Quinn (Counsel to the President)
- Steven Ricchetti (Deputy Chief of Staff to the President)
- Bruce Lindsey (Assistant to the President and Deputy Counsel to the President)
- Harold Ickes (Assistant to the President)
- Doug Sosnik (Assistant to the President)
- Cheryl Mills (Deputy Counsel to the President)

In the case of the Clinton Administration interview records, former Attorney General Janet Reno made her own determination that they were relevant to the Committee's inquiries and produced them to the Committee. I understand that she neither requested nor received White House approval before transmitting the documents.

Request for Assistance

The Committee is conducting a vitally important inquiry into whether the White House followed the required safeguards in protecting Ms. Wilson's identity and responding to an exceptionally serious breach of national security. As Mr. McClellan, the former White House Press Secretary, now asserts:

> I had unknowingly passed along false information. And five of the highest ranking officials in the administration were involved in my doing so: Rove, Libby, the Vice President, the President's chief of staff and the President himself.[4]

Because of the implications of Mr. McClellan's assertions, I am asking for your personal assistance in obtaining the documents being withheld by the White House. These documents are directly relevant to the Committee's investigation, and they have been determined by Mr. Fitzgerald to be appropriate for release to the Committee. I believe they should be provided to the Committee without any additional delay and without redactions or other limitations dictated by the White House.

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[4] *Ex-Aide: Bush, Cheney Involved in Misleading Media*, CNN.com (Nov. 21, 2007).

I recognize that President Bush and his counsel may not want this information provided to Congress. But the role of the Attorney General is to administer the laws with impartiality. The Justice Department provided the exact same information to Congress during the Clinton Administration. There is no special standard for President Bush that exempts him and his senior advisors from responsible congressional oversight.

If you have any questions regarding my request, please contact me personally or ask your staff to contact David Rapallo or Theodore Chuang of the Committee staff at (202) 225-5420.

Sincerely,

Henry A. Waxman
Chairman

Enclosure

cc: Tom Davis
Ranking Minority Member

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
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http://www.house.gov/judiciary

September 10, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Mr. Attorney General:

We are writing to follow up on our July 17, 2007, letter concerning the issue of selective or politically-motivated prosecutions, in light of Principal Deputy Assistant Attorney General Brian A. Benczkowski's letter to us of September 4, 2007. We were very disappointed that Mr. Benczkowski largely rejected our request for documents that would shed light on the Department's decisionmaking in three cases where concerns have been raised that prosecutorial decisions were influenced by improper political factors: United States v. Don Siegelman, United States v. Georgia Thompson, and United States v. Cyril Wecht. We urge that you immediately take steps to ensure that the Department fully cooperates with our request, so that these troubling concerns about political influence in prosecutorial decisionmaking and the reputation of the Department of Justice can be effectively resolved.

Our request does not arise in a vacuum. The Committee's investigation into the firing of nine U.S. attorneys in 2006 has surfaced substantial evidence that improper political pressure has been brought to bear on the U.S. Attorney corps, and that prosecutors who did not serve the Administration political goals were fired while others who were dubbed "loyal Bushies" were retained.[1] Since our original letter, even more evidence has come to light showing an aggressive effort run by White House political operatives to use the machinery of government for partisan advantage and establishing that top members of your staff attended political briefings led by Karl

[1] See July 24, 2007, Memorandum from Chairman Conyers to Members of the Committee on the Judiciary re Consideration of Report of the Refusal of Former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten to Comply With Subpoenas By the House Judiciary Committee.

Rove.[2] Also in the time since our original letter, public concern and information about the issue of selective or politically-motivated prosecutions has only increased.[3]

Against this backdrop, the Committee has identified a number of cases where substantial questions of political interference have been raised. Of these cases, we have so far limited our request for information to only the three matters referenced in our July 17, 2007, letter. Each of these cases raises substantial, particularized concerns about the role of politics in the exercise of prosecutorial power and whether any of these defendants were targeted for partisan reasons. Needless to say, it is extremely disappointing that the Department has responded by producing only a handful of relevant documents and by focusing its energies on arguing the facts of these cases.

The few materials that the Department has provided are clearly insufficient. You have offered approximately 350 pages of public pleadings, but even this production has been limited to pleadings that represent *the Government's* position in those matters. We understand that the Committee may obtain publicly filed documents from the courts without the Department's assistance, but we question the value of the Department selectively providing those few pleadings supporting its arguments but not providing any responsive pleadings or court decisions that present contrary arguments and facts.

Far more important, Mr. Benczkowski's blanket refusal to provide materials deemed "deliberative" such as prosecution memoranda, even as to closed matters, and his refusal to provide any non-public materials concerning matters that have not been closed, is unacceptable. While the Committee appreciates the sensitivity of these materials, and we are open to reasonable accommodations of those concerns, as described below, we believe it is improper to simply declare such materials off limits, particularly in view of the substantial questions that have been raised about the Department's action in these cases. While Mr. Benczkowski's letter recites the Department's "longstanding" position, relying on a statement by the White House counsel made in 2002, in fact Congress repeatedly has obtained prosecution memoranda and other deliberative materials of the Department regarding both open and closed criminal matters during past

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[2] See Solomon, MacGillis & Cohen, *How Rove Directed Federal Assets for GOP Gains*, Washington Post, August 19, 2007; Eggen & Kane, *Gonzales Now Says Top Aides Got Political Briefings*, Washington Post, Aug. 4, 2007.

[3] See, e.g., Savage & Hamburger, *In Chertoff's Record, Shades of Politics*, Los Angeles Times, Sept. 4, 2007; Editorial, *Selective Prosecution*, New York Times, Aug. 6, 2007.

Congressional investigations.[4] Indeed, this Administration ultimately agreed to make available to Congress prosecution memoranda that were at issue when the White House counsel made the statement quoted in Mr. Benczkowski's letter. Such documents, which dealt with prosecution decisions in murder cases and related issues, and which the Department claimed were related to ongoing litigation, were made available to Congress despite being subject to a formal claim of executive privilege by President Bush, on terms negotiated by then-Assistant Attorney General Michael Chertoff and the then Government Reform Committee staff.[5]

Other examples are plentiful. As early as the Teapot Dome scandal in the 1920s, under Attorney General (and later Chief Justice of the United States Supreme Court) Harlan Stone, a Senate Select investigative committee received broad access to Department files, including investigative reports, recommendations for prosecutorial action, and testimony of investigating agents and attorneys.[6] A great deal of deliberative and investigative material, including "predicate documents relating to the opening of the investigation and prosecution of" an EPA official, were made available to this Committee during Chairman Rodino's investigation into the Department's role in the EPA's decision to withhold documents from Congress, which helped lead to the citation of EPA Administrator Ann Gorsuch Burford for contempt of Congress.[7] And in the aftermath of the Ruby Ridge shootings, Congress received core deliberative materials

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[4] See Statement of Morton Rosenberg, Specialist in American Public Law, Congressional Research Service, Before the House Committee on Government Reform Concerning The History of And Basis For Congressional Access to Deliberative Justice Department Documents, Feb. 6, 2002 (containing a detailed Appendix listing "18 significant Congressional investigations of the Department of Justice which involved either open or closed investigations in which the Department agreed to supply documents pertaining to those investigations, including prosecutorial decisionmaking memoranda and correspondence, and to provide line attorneys and investigative personnel for staff interviews and for testimony before committees").

[5] Everything Secret Degenerates: The FBI's Use of Murderers As Informants, Third Report of the Committee on Government Reform, 108th Congress, 2d Session, Report 108-414, Vol. 1, at 132-33.

[6] Investigation of Hon. Harry M. Daughtery Before the Senate Select Committee on Investigation of the Attorney General, vols. 1-3, 68th Congress, 1st Session, 1924; Rosenberg, supra, at CRS-4 to CRS-7.

[7] Rosenberg, supra, at CRS-7 to CRS-10.

reflecting the Department's prosecutorial and other decisions arising out of those shootings.[8] There is thus ample precedent for production or review of the materials requested by the Committee.

Let us be clear. We have not prejudged the outcome of our investigation. However, without meaningful cooperation from the Department, including access to materials that would reflect the decisionmaking process that led to the indictment of these individuals, it will simply be impossible to make fair judgments or to allay suspicions that improper factors played a role in these and other cases. Accordingly, we must reiterate our request for access to relevant materials that you have so far declined to provide, such as: (i) case impression and prosecution or declination memoranda, including drafts, and notes or emails discussing same, (ii) indictment review files/memoranda, and notes or emails discussing same, (iii) discovery correspondence, (iv) FBI 302s and other witness interview records or memoranda, (v) witness immunity agreements and Giglio materials, (vi) Brady materials, and (vii) any other emails or documents discussing the strengths, weaknesses, merits, wisdom, or political implications of these prosecutions.

As stated above, we recognize the sensitivity of some of the requested materials, and appreciate the Department's interest in preserving the confidentiality of its internal deliberations on prosecution matters. To accommodate those concerns, we are prepared to agree that, instead of the Department producing all the requested materials to the Committee, Committee members and staff would review the most sensitive materials on Department premises, assuming mutually agreeable conditions of reasonable access can be arranged. Such procedures have been used in the past for sensitive executive branch materials, such as some internal Department investigation records relevant to the U.S. Attorney firings and White House materials relevant to the death of Corporal Pat Tillman and the Administration's public statements on that subject. We also are open to your offer of a briefing from U.S. Attorney Biskupic regarding the Georgia Thompson prosecution, but such a briefing would not be productive until the Committee has had a reasonable opportunity to review the documents and memoranda possessed by the Department that are relevant to that case but which have not been produced.

As a primary reason for declining to provide the information that we have requested, Mr. Benczkowski's letter states that "We want to avoid any perception that the conduct of our criminal investigations and prosecutions is subject to political influence." This concern should

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[8] Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary, 104th Congr., 1st Sess. (1995).

lead to precisely the opposite result. Due to the events and revelations of recent months, the "perception that the conduct of our criminal investigations and prosecutions is subject to political influence" already exists, and a refusal to cooperate with the Committee's investigative efforts can only reinforce it. To carry out the pledge that you and others have made to help move the Department forward past these difficult issues and begin the long process of restoring the Department's reputation and credibility, we urge you and all present and future Department officials to cooperate with our efforts, and to provide the materials we have requested on a voluntary basis.

Thank you in advance for your prompt cooperation.

Sincerely,

John Conyers, Jr.
Chairman

Linda T. Sánchez
Chair, Subcommittee on Commercial and Administrative Law

Artur Davis
Member, Committee on the Judiciary

Tammy Baldwin
Member, Committee on the Judiciary

cc: Hon. Brian A. Benczkowski
Hon. Lamar S. Smith
Hon. Bobby Scott
Hon. Chris Cannon
Hon. J. Randy Forbes

UNCLASSIFIED

JASON CHAFFETZ, UTAH
CHAIRMAN

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Majority (202) 225-5074
Minority (202) 225-5051

http://oversight.house.gov

September 2, 2016

Ms. Deirdre Walsh
Assistant Director for Legislative Affairs
Office of the Director of National Intelligence
Washington, D.C. 20511

Dear Ms. Walsh:

I understand you declined to appear for an informal briefing with the Committee on Wednesday, September 7, 2016. Your declination to attend this briefing is particularly dismaying, given that as a legislative affairs official, your role is to facilitate the flow of information to Congress. In light of your decision, the Committee has no choice but to convene a hearing on Monday, September 12, 2016, at 5:00 p.m. in room 2154 of the Rayburn House Office Building. We request your testimony at the hearing. If necessary, the Committee will employ compulsory process to ensure your attendance.

The hearing is titled "Classifications and Redactions in FBI's Investigative File." The hearing will relate to the Federal Bureau of Investigation's document productions on August 16 and 17, 2016, regarding its investigation of former Secretary of State Hillary Clinton's use of a private email server for official State Department business. The Committee plans to examine decisions to redact, omit, or classify certain information in the production. You should be prepared to provide a five-minute opening statement and answer questions posed by Members.

This will be a closed hearing and include discussion of classified national security information up to and including information classified SECRET//NOFORN with additional dissemination controls. You and any of your staff attending should pass appropriate clearances to the Office of House Security no later than September 7, 2016. If you have questions, please contact Liam McKenna with the Committee staff at (202) 225-5074.

Sincerely,

Jason Chaffetz
Chairman

Enclosure

UNCLASSIFIED

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States

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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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http://oversight.house.gov

September 8, 2016

Mr. Neal Higgins
Director of Congressional Affairs
Central Intelligence Agency
Room 7-C38 OHB
Washington, DC 20505

Dear Mr. Higgins:

The Committee on Oversight and Government Reform requests your testimony at a hearing on Monday, September 12, 2016, at 5:00 p.m. in room 2154 of the Rayburn House Office Building.

The hearing is titled "Classifications and Redactions in FBI's Investigative File." The hearing will relate to the Federal Bureau of Investigation's document productions on August 16 and 17, 2016, regarding its investigation of former Secretary of State Hillary Clinton's use of a private email server for official State Department business. The Committee plans to examine decisions to redact, omit, or classify certain information in the production. You should be prepared to provide a five-minute opening statement and answer questions posed by Members.

This will be a closed hearing and include discussion of classified national security information up to and including information classified SECRET//NOFORN with additional dissemination controls. You and any of your staff attending should pass appropriate clearances to Laura Rush, Chief Clerk for the Committee. If you have questions, please contact Liam McKenna with the Committee staff at (202) 225-5074.

Sincerely,

Jason Chaffetz
Chairman

Enclosure

UNCLASSIFIED

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

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September 2, 2016

Mr. Jason V. Herring
Acting Assistant Director for Congressional Affairs
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Mr. Herring:

I understand you declined to appear for an informal briefing with the Committee on Wednesday, September 7, 2016. Your declination to attend this briefing is particularly dismaying, given that as a legislative affairs official, your role is to facilitate the flow of information to Congress. In light of your decision, the Committee has no choice but to convene a hearing on Monday, September 12, 2016, at 5:00 p.m. in room 2154 of the Rayburn House Office Building. We request your testimony at the hearing. If necessary, the Committee will employ compulsory process to ensure your attendance.

The hearing is titled "Classifications and Redactions in FBI's Investigative File." The hearing will relate to the Federal Bureau of Investigation's document productions on August 16 and 17, 2016, regarding its investigation of former Secretary of State Hillary Clinton's use of a private email server for official State Department business. The Committee plans to examine decisions to redact, omit, or classify certain information in the production. You should be prepared to provide a five-minute opening statement and answer questions posed by Members.

This will be a closed hearing and include discussion of classified national security information up to and including information classified SECRET//NOFORN with additional dissemination controls. You and any of your staff attending should pass appropriate clearances to the Office of House Security no later than September 7, 2016. If you have questions, please contact Liam McKenna with the Committee staff at (202) 225-5074.

Sincerely,

Jason Chaffetz
Chairman

Enclosure

UNCLASSIFIED

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

September 2, 2016

The Honorable Julia Frifield
Assistant Secretary for Legislative Affairs
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Ms. Frifield:

I understand you declined to appear for an informal briefing with the Committee on Wednesday, September 7, 2016. Your declination to attend this briefing is particularly dismaying, given that as a legislative affairs official, your role is to facilitate the flow of information to Congress. In light of your decision, the Committee has no choice but to convene a hearing on Monday, September 12, 2016, at 5:00 p.m. in room 2154 of the Rayburn House Office Building. We request your testimony at the hearing. If necessary, the Committee will employ compulsory process to ensure your attendance.

The hearing is titled "Classifications and Redactions in FBI's Investigative File." The hearing will relate to the Federal Bureau of Investigation's document productions on August 16 and 17, 2016, regarding its investigation of former Secretary of State Hillary Clinton's use of a private email server for official State Department business. The Committee plans to examine decisions to redact, omit, or classify certain information in the production. You should be prepared to provide a five-minute opening statement and answer questions posed by Members.

This will be a closed hearing and include discussion of classified national security information up to and including information classified SECRET//NOFORN with additional dissemination controls. You and any of your staff attending should pass appropriate clearances to the Office of House Security no later than September 7, 2016. If you have questions, please contact Liam McKenna with the Committee staff at (202) 225-5074.

Sincerely,

Jason Chaffetz
Chairman

Enclosure

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UNCLASSIFIED

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Majority (202) 225-5074
Minority (202) 225-5051
http://oversight.house.gov

September 8, 2016

Trumbull Soule
Director, Legislative Affairs Office
National Security Agency/Central Security Service
Department of Defense, Suite 6282
Fort George Meade, MD 20755

Dear Mr. Soule:

The Committee on Oversight and Government Reform requests your testimony at a hearing on Monday, September 12, 2016, at 5:00 p.m. in room 2154 of the Rayburn House Office Building.

The hearing is titled "Classifications and Redactions in FBI's Investigative File." The hearing will relate to the Federal Bureau of Investigation's document productions on August 16 and 17, 2016, regarding its investigation of former Secretary of State Hillary Clinton's use of a private email server for official State Department business. The Committee plans to examine decisions to redact, omit, or classify certain information in the production. You should be prepared to provide a five-minute opening statement and answer questions posed by Members.

This will be a closed hearing and include discussion of classified national security information up to and including information classified SECRET//NOFORN with additional dissemination controls. You and any of your staff attending should pass appropriate clearances to Laura Rush, Chief Clerk for the Committee. If you have questions, please contact Liam McKenna with the Committee staff at (202) 225-5074.

Sincerely,

Jason Chaffetz
Chairman

Enclosure

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Witness Instruction Sheet
Governmental Witness
Full Committee Hearing

The following are pertinent rules and procedures applicable to a witness testifying before the Committee on Oversight and Government Reform.

1. The witness should prepare written testimony and provide a short biographical summary. **These two documents need to be provided to the Committee no later than 10:00 a.m. two business days prior to the hearing.**

    a. Electronic submission: The witness should submit an electronic version of the written testimony and biographical information to Willie Marx at William.Marx@mail.house.gov

        i. The Committee prints the final record after the hearing. Considering printing costs, please submit your testimony single-spaced and no font size larger than 12 point.

    b. Delivery of hard copies: The witness should print 70 copies of the written testimony and staple a copy of the biographical summary behind each copy of the written testimony. These 70 packets should be delivered to William Marx at 2157 Rayburn House Office Building. Please do not send the packets by U.S. Mail, UPS, Federal Express, or other shippers. Such packages are processed through an offsite security facility and will arrive 7-10 days late.

2. At the hearing, the witness will be asked to summarize his or her written testimony in five minutes or less in order to maximize the time available for discussion and questions. However, the written testimony may extend to any reasonable length.

3. At the conclusion of the hearing, the witness' written testimony and biographical summary will be posted on the Committee's website. The documents will also be entered into the hearing record. Therefore it is recommended that personally identifiable information, such as addresses and phone numbers, not be included.

4. The Committee does not provide financial reimbursement for witness travel or accommodations. However, a witness with extenuating circumstances may submit a written request for such reimbursements to Robin Butler, Financial Administrator, 2157 Rayburn House Office Building, at least one week prior to the hearing. Reimbursements will not be made without prior approval.

5. A witness with a disability should contact Committee staff to arrange any necessary accommodations.

6. The Committee on Oversight and Government Reform is the principal oversight committee in the U.S. House of Representatives. The jurisdiction of the Committee is set forth in the House Rules X, clauses 1(m), 2, 3, and 4.

7. Committee Rules governing this hearing are online at http://oversight.house.gov/.

For inquiries regarding these rules and procedures, please contact the Committee on Oversight and Government Reform at (202) 225-5074.

UNCLASSIFIED

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
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September 8, 2016

Mr. James Samuel, Jr.
Chief of Congressional Affairs
National Geospatial-Intelligence Agency
7500 Geoint Drive
Springfield, VA 22150

Dear Mr. Samuel:

The Committee on Oversight and Government Reform requests your testimony at a hearing on Monday, September 12, 2016, at 5:00 p.m. in room 2154 of the Rayburn House Office Building.

The hearing is titled "Classifications and Redactions in FBI's Investigative File." The hearing will relate to the Federal Bureau of Investigation's document productions on August 16 and 17, 2016, regarding its investigation of former Secretary of State Hillary Clinton's use of a private email server for official State Department business. The Committee plans to examine decisions to redact, omit, or classify certain information in the production. You should be prepared to provide a five-minute opening statement and answer questions posed by Members.

This will be a closed hearing and include discussion of classified national security information up to and including information classified SECRET//NOFORN with additional dissemination controls. You and any of your staff attending should pass appropriate clearances to Laura Rush, Chief Clerk for the Committee. If you have questions, please contact Liam McKenna with the Committee staff at (202) 225-5074.

Sincerely,

Jason Chaffetz
Chairman

Enclosure

UNCLASSIFIED

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

September 2, 2016

Mr. Peter J. Kadzik
Assistant Attorney General for Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Kadzik:

I understand you declined to appear for an informal briefing with the Committee on Wednesday, September 7, 2016. Your declination to attend this briefing is particularly dismaying, given that as a legislative affairs official, your role is to facilitate the flow of information to Congress. In light of your decision, the Committee has no choice but to convene a hearing on Monday, September 12, 2016, at 5:00 p.m. in room 2154 of the Rayburn House Office Building. We request your testimony at the hearing. If necessary, the Committee will employ compulsory process to ensure your attendance.

The hearing is titled "Classifications and Redactions in FBI's Investigative File." The hearing will relate to the Federal Bureau of Investigation's document productions on August 16 and 17, 2016, regarding its investigation of former Secretary of State Hillary Clinton's use of a private email server for official State Department business. The Committee plans to examine decisions to redact, omit, or classify certain information in the production. You should be prepared to provide a five-minute opening statement and answer questions posed by Members.

This will be a closed hearing and include discussion of classified national security information up to and including information classified SECRET//NOFORN with additional dissemination controls. You and any of your staff attending should pass appropriate clearances to the Office of House Security no later than September 7, 2016. If you have questions, please contact Liam McKenna with the Committee staff at (202) 225-5074.

Sincerely,

Jason Chaffetz
Chairman

Enclosure

UNCLASSIFIED

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
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Congress of the United States

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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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MAJORITY (202) 225–5074
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http://oversight.house.gov

August 24, 2016

The Honorable Devin Nunes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Capitol Visitor Center HVC-304
Washington, D.C. 20515

Dear Mr. Chairman:

In accordance with Rule 14(f) of the Rules of Procedure for the House Permanent Select Committee on Intelligence (HPSCI), I write to express my desire to examine classified materials provided by the Federal Bureau of Investigation on August 16, 2016. The materials center on the evidence collected by the FBI during its investigation of former Secretary Hillary Clinton's use of a personal email system during her time as Secretary of State.

The Committee on Oversight and Government Reform (OGR) made the request for this information to Director Comey following its July 7 hearing.[1] Based on my initial review of the documents on August 21, I am further concerned that certain evidence directly contradicts several aspects of former Secretary of State Clinton's testimony before Congress. Chairman Goodlatte and I have written two letters to the United States Attorney for District of Columbia Channing Phillips asking for an investigation of this.[2]

The information provided to HPSCI will assist OGR in its investigation of the State Department's handling of classified information and its compliance with the Federal Records Act. I appreciate your consideration of my request.

Sincerely,

Jason Chaffetz
Chairman

[1] H. Comm. on Oversight & Gov't Reform, *Oversight of the State Department: Hearing before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 201-202 (July 7, 2016).

[2] Letter from Chairman Jason Chaffetz, H. Comm. on Oversight and Gov't Reform, and Chairman Bob Goodlatte, H. Comm. on the Judiciary, to Channing D. Phillips, U.S. Att'y for the District of Columbia, July 11, 2016; Letter from Chairman Jason Chaffetz, H. Comm. on Oversight and Gov't Reform, and Chairman Bob Goodlatte, H. Comm. on the Judiciary, to Channing D. Phillips, U.S. Att'y for the District of Columbia, August 15, 2016.

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
114TH CONGRESS
ROLL CALL

Vote #: 1

Vote on: To Move to Closed Hearing **Date: 9-12-16**

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. CHAFFETZ (UT) *(Chairman)*	X			MR. CUMMINGS (MD) *(Ranking)*	X		
MR. MICA (FL)	X			MRS. MALONEY (NY)			
MR. TURNER (OH)	X			MS. NORTON (DC)			
MR. DUNCAN (TN)				MR. CLAY (MO)	X		
MR. JORDAN (OH)				MR. LYNCH (MA)	X		
MR. WALBERG (MI)	X			MR. COOPER (TN)			
MR. AMASH (MI)	X			MR. CONNOLLY (VA)	X		
MR. GOSAR (AZ)	X			MR. CARTWRIGHT (PA)	X		
MR. DesJARLAIS (TN)				MS. DUCKWORTH (IL)			
MR. GOWDY (SC)	X			MS. KELLY (IL)			
MR. FARENTHOLD (TX)	X			MS. LAWRENCE (MI)			
MRS. LUMMIS (WY)	X			MR. LIEU (CA)			
MR. MASSIE (KY)	X			MS. WATSON COLEMAN (NJ)	X		
MR. MEADOWS (NC)	X			MS. PLASKETT (VI)			
MR. DeSANTIS (FL)	X			MR. DeSAULNIER (CA)			
MR. MULVANEY (SC)	X			MR. BOYLE (PA)			
MR. BUCK (CO)				MR. WELCH (VT)			
MR. WALKER (NC)				MS. LUJAN GRISHAM (NM)			
MR. BLUM (IA)	X						
MR. HICE (GA)	X						
MR. RUSSELL (OK)	X						
MR. CARTER (GA)							
MR. GROTHMAN (WI)	X						
MR. HURD (TX)	X						
MR. PALMER (AL)	X						

Roll Call Totals: Ayes: 25 Nays: 0 Present:

Passed: X Failed: _____