INVESTIGATION INTO ALLEGATIONS OF JUSTICE DEPARTMENT MISCONDUCT IN NEW ENGLAND—VOLUME 1

HEARINGS

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

MAY 3; DECEMBER 13, 2001; AND FEBRUARY 6, 2002

Serial No. 107–56

Printed for the use of the Committee on Government Reform

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THE FBI'S CONTROVERSIAL HANDLING OF ORGANIZED CRIME INVESTIGATIONS IN BOSTON: THE CASE OF JOSEPH SALVATI

THURSDAY, MAY 3, 2001

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

The committee met, pursuant to notice, at 10:25 a.m., in room 2154, Rayburn House Office Building, Hon. Dan Burton (chairman of the committee) presiding.

Present: Representatives Burton, Gilman, Morella, Shays, Horn, LaTourette, Barr, Jo Ann Davis of Virginia, Putnam, Otter, Kanjorski, Norton, Cummings, Kucinich, and Tierney.

Also present: Representatives Delahunt, Frank, and Meehan.

Staff present: Kevin Binger, staff director; James C. Wilson, chief counsel; David A. Kass, deputy chief counsel; Mark Corallo, director of communications; Thomas Bowman, senior counsel; Pablo Carrillo, investigative counsel; James J. Schumann, counsel; Sarah Anderson, staff assistant; Robert A. Briggs, chief clerk; Robin Butler, office manager; Michael Canty and Toni Lightle, legislative assistant; Josie Duckett, deputy communications director; John Sare, deputy chief clerk; Danleigh Halfast, assistant to chief counsel; Corrine Zaccagnini, systems administrator; Phil Schiliro, minority staff director; David Rapallo, minority counsel; Michael Yeager, minority senior oversight counsel; Ellen Rayner, minority chief clerk; Jean Gosa, minority assistant clerk; and Teresa Coufal, minority staff assistant.

Mr. BURTON. Good morning. A quorum being present, the committee will come to order. I ask unanimous consent that all witnesses' and Members' statements be included in the record. Without objection so ordered. I ask unanimous consent that all articles, exhibits, and extraneous or tabular material referred to be included in the record. Without objection so ordered. I ask unanimous consent that a set of exhibits which have been prepared for today's hearing be inserted into the record and without objection, so ordered. I ask unanimous consent that Representatives Barney Frank, Bill Delahunt and Marty Meehan who are not members of the committee, be allowed to participate in today's hearing and without objection, so ordered.

I ask unanimous consent that questioning in this matter proceed under clause 2(j)(2) of House rule 11, and committee rule 14 in which the chairman and ranking minority member may allocate time to committee counsel as they deem appropriate for extended

questioning, not to exceed 60 minutes equally divided between the majority and minority and without objection, so ordered.

Today's hearing is going to focus on an injustice done by the FBI that went on for nearly 30 years. We're going to hear about a terrible wrong that was done to one man and his family. As terrible as this story is, it's only one small part of a much larger picture. I have always supported law enforcement. I remember I used to watch "I Led Three Lives" on television, and I used to watch the FBI programs and I thought that the FBI Director walked on water. And my great faith in Mr. Hoover has been shaken by what I have learned in just the last few weeks. Over the years, I have worked with Director Louie Freeh on a number of issues, and I think Louie Freeh has done a terrific job, and I'm sorry to see him leave this summer.

I think that, on the whole, the FBI has done great work protecting the people of this country. But we are a Nation of laws and not of men. In this country, no one is above the law. If a Federal law enforcement agency does something wrong, they have to be held accountable. That's why we held hearings on the Drug Enforcement Agency last December. I have a lot of respect for the men and women of the DEA. They have a tough job and they do it well. But there was a very important drug investigation going on in Houston, TX. It was shut down because of political pressure that was brought to bear. And then the head of the Houston office for the DEA came up here and mislead the Congress about it. That cannot be tolerated. What the FBI did to Boston 30 years ago cannot be tolerated.

We will hear today from Joseph Salvati. Mr. Salvati spent 30 years in prison for a murder he didn't commit. 30 years. Think about that. That is 1971. Do you remember what you were doing in 1971? Think about it, what it would be like if you were in prison for 30 years. It was a death penalty crime. He went to prison in 1968. He had a wife and four children. His oldest child at the time was 14, his youngest was 6 and he wasn't released from prison until 1997, 30 years later.

The reason Joe Salvati went to prison was because an FBI informant lied about him which is unthinkable. But the reason he stayed in jail was because the FBI agents knew their informant lied and they covered it up, and that's much worse. Documents we've received show that this case was being followed at the highest levels of the FBI in Washington. J. Edgar Hoover was kept informed on a regular basis. It is hard to believe he didn't know about this terrible injustice. The informant who put Joe Salvati in prison was Joseph "the Animal" Barboza. He was a contract killer in Boston. He was also a prized FBI informant. He was considered so valuable that they created the Witness Protection Program to protect him.

Most of the evidence now indicates that Joseph Barboza and his associates planned and executed the murder. Barboza pointed the finger at Joe Salvati because Salvati owed him $400. Because of $400, Joe Salvati spent 30 years in prison. Joe Salvati and his wife Marie are going to testify today. And I want to express to both of you how deeply sorry we are for everything that has been taken away from you and that you have had to go through over these

past 30 years, and I want to thank you for being here today. And I intend to participate in making sure that you are compensated for—money can't pay for what you went through—but you should be compensated for what you went through and the time you spent away from your family. We will try to make sure that happens.

Joseph Barboza was a criminal. You would expect him to lie, but the FBI is another story. They are supposed to stand for the truth. The FBI had a lot of evidence that Joe Salvati didn't commit that crime and they covered it up. Prior to the murder, the FBI was told by informants that Joseph Barboza and his friend, Vincent Flemmi, were planning to commit the murder of Teddy Deegan. Two days before Deegan was murdered, J. Edgar Hoover, the head of the FBI, got a memo about Vincent Flemmi: One the FBI's own informants was going to kill Deegan.

The author was H. Paul Rico, who will testify later today. He was a member of the FBI at the time. After the murder, the FBI was told by informants that Barboza and Flemmi had committed the crime. J. Edgar Hoover was told that Barboza and Flemmi had committed the crime. FBI memos spell all of this out. The FBI was compelled to make these documents public just in the last few months. They had all this information but they let Joseph "the Animal" Barboza testify anyway and put Mr. Salvati away for life.

Originally it was the death penalty. But that wasn't the end of it. In the 1970's, Barboza tried to recant his testimony. The FBI pressured him not to do it. Mr. Barboza's lawyer was F. Lee Bailey, and Mr. Bailey is going to testify about what happened later today. Mr. Bailey told the Massachusetts attorney general's office that his clients had lied and the wrong man was in prison. He was ignored. Mr. Bailey asked Joe Barboza to take a lie detector test to make sure he was telling the truth this time. Barboza was in prison at the time on a separate offense. When the FBI got wind of this, they went to the prison and told Barboza not to take the polygraph and to fire his lawyer, Mr. Bailey, or he'd spend the rest of his life in jail.

So the FBI once again was trying to protect their tails and cover this thing up. I think that is just criminal. Not only did the FBI conceal the evidence that they had on Joe Salvati that Joe Salvati was innocent, they went out and actively suppressed other evidence. To say what they did was unseemly was an understatement. It was rotten to the core.

And this is just one small part of the story. Joe "the Animal" Barboza wasn't the only mob informant the FBI official cultivated in Boston. There was James Whitey Bulger, who was a killer. There was Steve "the Rifleman" Flemmi, and there were others.

While they worked with the FBI, they went on a crime spree that lasted for decades. There were dozens of murders. There were predatory sexual crimes. They committed all of these crimes with virtual impunity because they were under the protection of the FBI. When informants emerged that tied these men to crimes, they were tipped off by the FBI and the informants were murdered.

So the FBI were complicitous and involved in the murders of some of these people that were informants. It was apparently a very cozy relationship. We understand there were FBI agents that got cash, they got money from the mobsters. Then got cases of

wine, tickets for girlfriends and other favors, and we'll get to those issues in later hearings.

Joseph Barboza committed a murder while he was in the Witness Protection Program. Paul Rico, who will testify today, actually flew out to California to help Barboza's defense, and so did a man who is now a Federal judge. I have issued subpoenas to two of the principal FBI agents who were involved with Joseph Barboza: Paul Rico and Dennis Condon. Mr. Condon is not here today. I understand he is in very poor health, but that does not excuse the things he is accused of doing and we have still have a lot of questions to ask him.

I can assure everyone that one way or another, we will be interviewing Mr. Condon. Mr. Rico is here. I understand that there is a possibility he may take the fifth amendment because he's under criminal investigation. I hope that will not be the case. We have a lot of questions, and I think that Joe Salvati and the American people deserve answers. Years ago FBI agents would heap scorn when organized crime figures took the fifth amendment. I hope Mr. Rico does the right thing today and testifies.

One thing that really troubles me about our third panel comes from the document we have just received. Paul Rico and Dennis Condon interviewed Joseph Barboza in 1967. That report is exhibit 24, which we will show later. Barboza told him he would never provide information that would allow James Vincent Flemmi to fry but that he will consider furnishing information on these murders. Mr. Rico and Condon had lots of evidence that Flemmi was in on the Deegan murder. They knew that Barboza would not incriminate Flemmi, yet they stood by while Barboza protected his partner and put Joe Salvati in a death penalty crime.

[Exhibit 24 follows:]

JOSEPH BARON, also known as JOE BARBOZA, was interviewed at the Massachusetts Correctional Institution, Walpole, Massachusetts.

BARON stated that he would not mind talking to the Agents if the Agents would not end up testifying against him for what he said. BARON was told that if he wanted to talk in confidence that "we would respect his confidence."

BARON advised that he has always tried to make a living outside of the law and that if anyone in law enforcement could prove that he was doing wrong, he is willing to pay the consequences. However, he said, when you find that a police officer that you know "fingered scores, acted as lookout when scores were being pulled, and divided up the proceeds of these scores" turns around and manufactures evidence and testimony against you, you have a feeling that maybe you, the criminal, have played by the wrong standards.

BARON said that he never wanted to physically hurt anyone in law enforcement but added that "If my life is ruined by this individual trying to benefit his own ambitions, the day I come out of jail could be the day this Lieutenant becomes nervous."

BARON said that he knows that INCEGNERI is friends with the "connected people" and that these people wanted to see him hurt. BARON advised that he has always tried to get along with these people and that, as a matter of fact, he used to see RAYMOND PATRIARCA and get an "OK" before he made most of his moves. Since they killed three of his friends, however, (THOMAS J. DE PRISCO, ARTHUR C. BRATSOS and JOSEPH W. AMICO) and stole $70,000 from him (This is in reference to the money allegedly in BRATSOS' possession when he was murdered), he had made statements that he was going to kill several of them. BARON said that after thinking the entire situation over, he realized that he could not possibly

On 3/8/67 at Walpole, Massachusetts File # [redacted]

by SA's DENNIS M. CONDON and H. PAUL RICO:pol'b 3 Date dictated

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

EXHIBIT 24

[redacted]

DMC:HPR:po'b

2

[redacted] BARON, knows what has happened in practically every murder that has been committed in this area. He said that he would never provide information that would allow JAMES VINCENT FIDDMI to "fry" but that he will consider furnishing information on these murders.

[redacted]

Mr. SHAYS. I don't know how they can sleep at night when they do things like that. I think this whole episode is disgraceful. It was one of the greatest, if not the greatest failure in the history of Federal law enforcement.

If there is one institution that the American people need to have confidence in, it's the FBI. I think that 99 percent of the time the men and women of the FBI are honest and courageous, and I don't want to tar the entire organization with the misdeeds of a few. But if we're going to have confidence in our government, we cannot cover up corruption when we find it. It needs to have a full public airing, and that's what we're going to try to start to do today.

I want to thank all of our witnesses for being here, and I will now yield to my colleagues for opening statements. Do you have an opening statement, Mr. Tierney?

[The prepared statement of Hon. Dan Burton follows:]

Opening Statement
Chairman Dan Burton
Committee on Government Reform
"The FBI's Controversial Handling of Organized Crime Investigations in Boston: The Case of Joseph Salvati"
May 3, 2001

Good Morning. Today's hearing is going to focus on an injustice done by the FBI that went on for nearly thirty years. We're going to hear about a terrible wrong that was done to one man and his family. As terrible as this story is, it's only one small part of a much larger picture.

I've always supported Federal law enforcement. I've been a strong supporter of the FBI. Over the years, I've worked with Director Freeh on a number of issues. I think he's done a terrific job, and I'm sorry to see him leaving this summer. I think that, on the whole, the FBI has done great work protecting the people of this country.

But we are a nation of laws and not of men. In this country, no one is above the law. If a Federal law enforcement agency does something wrong, they have to be held accountable.

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The reason Joe Salvati went to jail was because an FBI informant lied about him -- which is terrible.

But the reason that he stayed in jail was because FBI agents knew that their informant lied and they covered it up -- and that's worse.

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Mr. Bailey told the Massachusetts Attorney General's office that his client had lied and the wrong man was in prison. He was ignored. Mr. Bailey asked Joe Barboza to take a lie detector test to make sure he was telling the truth this time. Barboza was in prison at the time on

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Flemmi to 'fry' but that he will consider furnishing information on these murders."

Mr. Rico and Mr. Condon had lots of evidence that Flemmi was in on the Deegan murder. They knew that Barboza wouldn't incriminate Flemmi. Yet they stood by while Barboza protected his partner and put Joe Salvati in a death penalty crime. I don't know how they can sleep at night.

I think this whole episode is disgraceful. It's the greatest failure in the history of Federal law enforcement. If there's one institution that the American people need to have confidence in, it's the FBI. I think that 99% of the time, the men and women of the FBI are honest and courageous. I don't want to tar the entire organization with the misdeeds of a few. But if we're going to have confidence in our government, we can't cover up corruption when we find it. It needs to have a full public airing. That's what we're going to try to do today.

I want to thank all of our witnesses for being here, and I yield to Mr. Waxman for his opening statement.

Mr. TIERNEY. Thank you, Mr. Chairman. I have some opening remarks. First of all, I think what happened to Mr. and Mrs. Salvati is just a disgrace. I look forward to hearing your comments today and know that this is hopefully just the beginning of what we're going to do with this. I think it is important to get your remarks on the record and to talk about some of the things we will discuss today. This is not in any sense of the way a partisan hearing, and that is a good thing for this hearing, but I hope we use this as a basis to go forward and talk about the FBI's practice of using confidential informants and what that means for the future.

I know that we've been asked for the present to not delve in that area too deeply because it would interfere supposedly with the Justice task force work that is going on. But I don't think we can allow that to go neglected, and I hope this sets just the foundation for inquiring as to what that practice is, what the FBI intends to do going forward, and whether or not they have a set of proper procedures so we do not see this case of disgrace happen again.

Mr. Garo, I just want to say I think you are a credit to the legal profession for what you did, and I thank you for that. I know that there are other lawyers, some who will join us today and others in the profession that do that. I think you shine to the public on that and you let the public know there are good lawyers out there who do the right thing for people.

My remarks to the Salvatis are that it is shameful what you went through, I think, Mrs. Salvati, particularly of your strength and your support, and I am glad things are working for a change. I don't know how it is that society will make it up to either of you and your family for what went on. But I appreciate and thank you very much for participating in today's hearing, and hopefully some good will come of this in terms of going forward. Thank you.

Mr. BURTON. Thank you, Mr. Tierney. I might point out Mr. Tierney made reference to it, but Mr. Garo worked pro bono for 25, 30 years trying to get Mr. Salvati exonerated, and that is really something.

Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman. Thank you so much for holding these hearings. Under our Constitution, we are a Nation founded to secure the blessings of liberty. The power we have in government to take away a citizens liberty, strictly prescribed by the bill of rights and is vested only in those sworn to enforce and uphold the law. Yet before us today is Mr. Joseph Salvati, a citizen whose liberty was stolen from him for 30 years by his own government.

So profound an injustice is almost unimaginable. But it takes very little imagination to reconstruct the sordid saga of official malfeasance, obstruction, brutality and corruption that brings us here this morning. In this tragic tale, ends justified means, cascading down a legal and ethical spiral until both the ends and means became utterly unjust. Protecting criminals in the name of catching criminals, agents of the Federal Bureau of Investigation [FBI], became criminals, willing accomplices in the problem they have set out to solve, organized crime.

Thomas Jefferson said, the sword of law should never fall but on those whose guilt is so apparent as to be pronounced by their

friends as well as foes. Only Joe Salvati's foes pronounced his alleged guilt for a crime sworn law enforcement officers from the Director of the FBI to the local police knew he did not commit.

Solely on the basis of false testimony from a known killer, Joseph "the Animal" Barboza, with conclusive exculpatory evidence suppressed and ignored, an innocent man faced the death penalty; the death penalty. Because he made the mistake of borrowing money from a thug, local, State and Federal law enforcement officers joined the thug in a criminal conspiracy to take Joseph Salvati's life. And they did, 30 years of it; 30 years. A generation.

His young wife, Marie Salvati, suddenly on her own, raised a family. She visited her husband every week. Their four children, then ages 4, 7, 9 and 11 grew up seeing their only father in prison. Birthdays, first communions, proms, graduations, weddings, the birth of grandchildren, priceless events in the life of a family, forever denied him because the FBI considered his freedom an acceptable cost of doing business with mobsters.

The Reverend Martin Luther King, Jr. observed that injustice anywhere is a threat to justice everywhere. Joseph Salvati is not here today because of a local ethnic turf battle between Boston's Irish and Italian gangs who corrupted a few rogue FBI agents. Joseph Salvati is here today after spending 30 years in prison because he is the victim of a corrupted State and Federal criminal justice system. The protection of confidential informants by law enforcement in what can amount to a nonjudicial street immunity and an official license to commit further crimes is a national practice and national problem.

The Federal Witness Protection Program was created to shield the same man who falsely accused Joseph Salvati. The tentacles of Joseph "the Animal" Barboza, FBI's protected criminal, stretched well beyond Massachusetts, from Connecticut to California. New Federal guidelines on the use of informants might help prevent the abuses that put Joseph Salvati in prison. But they will not necessarily break the self-justifying protective culture of some law enforcement agency that allow this gross miscarriage of justice to occur and to persist for 30 years. Only an official apology from the FBI will do that; only compensation from the State of Massachusetts and the Federal Government will do that. Only bringing those responsible before the bar of justice they swore to defend, but betrayed will do what must be done to right this wrong.

Mr. and Mrs. Salvati, thank you for being here. As a fellow citizen of a land that holds liberty sacred, let me say that I am profoundly sorry for what has happened to you. We can never replace what has been taken from you, but we are grateful for your openness and your willingness to share what you have. Your story of faith, incredible faith, Marie, incredible faith, family, your story of faith, your story of family, your story of courage and perseverance is a gift to your Nation, and we cherish it.

Your testimony will help ensure no one else has to endure the outrageous indignities and injustices you, Mr. Salvati and your family, Marie, and your family have suffered.

Mr. Garo, let me say something to you. You are a hero. You are an absolute hero, and you share that with some in the press who wrote this story up for years and years and years. I have just wished we heard it sooner.

[The prepared statement of Hon. Christopher Shays follows:]

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SUBCOMMITTEE ON NATIONAL SECURITY, VETERANS AFFAIRS,
AND INTERNATIONAL RELATIONS
Christopher Shays, Connecticut
Chairman
Room B-372 Rayburn Building
Washington, D.C. 20515
Tel: 202 225-2548
Fax: 202 225-2382
GROC.NS@mail.house.gov
http://www.house.gov/reform/ns/

Statement of Rep. Christopher Shays
May 3, 2001

Under our Constitution, we are a nation founded "to secure the Blessings of Liberty." The power of government to take away a citizen's liberty is strictly proscribed by the Bill of Rights and is vested only in those sworn to enforce and uphold the law.

Yet before us today is Mr. Joseph Salvati, a citizen whose liberty was stolen from him for 30 years by his own government. So profound an injustice is almost unimaginable.

But it takes very little imagination to reconstruct the sordid saga of official malfeasance, obstruction, brutality and corruption that brings us here this morning. In this tragic tale, ends justified means, cascading down a legal and ethical spiral until both the ends and means became utterly unjust. Protecting criminals in the name of catching criminals, agents of the Federal Bureau of Investigation (FBI) became criminals, willing accomplices in the problem they set out to solve - organized crime.

Thomas Jefferson said, "The sword of the law should never fall but on those whose guilt is so apparent as to be pronounced by their friends as well as foes." Only Joseph Salvati's foes pronounced his alleged guilt for a crime sworn law enforcement officers – from the Director of the FBI to the local police – knew he did not commit.

Solely on the basis of testimony from a known killer, Joseph "The Animal" Barbosa, with conclusive exculpatory evidence suppressed and ignored, an innocent man faced the death penalty. Because he made the mistake of borrowing money from a thug, local, state and federal law enforcement officers joined the thug in a criminal conspiracy to take Joseph Salvati's life.

Statement of Rep. Christopher Shays
May 3, 2001
Page 2 of 2

And they did – 30 years of it. Thirty years. A generation. His young wife, suddenly on her own, raised a family. She visited her husband every week. Their four children, then ages 4, 7, 9 and 11, grew up seeing their father only in prison. Birthdays, first communions, proms, graduations, weddings, the birth of grandchildren – priceless events in the life of a family – forever denied him because the FBI considered his freedom an acceptable cost of doing business with mobsters.

The Rev. Martin Luther King, Jr. observed that "Injustice anywhere is a threat to justice everywhere." Joseph Salvati is not here today because he is the victim of a local ethnic turf battle between Boston's Irish and Italian gangs who corrupted a few rogue FBI agents.

Joseph Salvati is here today, after spending 30 years in prison, because he is the victim of a corrupted state and federal criminal justice system. The protection of confidential informants by law enforcement, in what can amount to non-judicial street immunity and an official license to commit further crimes, is a national practice and a national problem.

The federal witness protection program was created to shield the same man who falsely accused Joseph Salvati. The tentacles of Joseph "The Animal" Barbosa's FBI-protected criminality stretched well beyond Massachusetts, from Connecticut to California.

New federal guidelines on the use of informants might help prevent the abuses that put Joseph Salvati in prison. But they will not necessarily break the self-justifying, protective culture of some law enforcement agencies that allowed this gross miscarriage of justice to occur, and to persist for 30 years.

Only an official apology from the FBI will do that. Only compensation from the State of Massachusetts and the federal government will do that. Only bringing those responsible before the bar of justice they swore to defend, but betrayed, will do what must be done to right this wrong.

Mr. and Mrs. Salvati, thank you for being here. As a fellow citizen of a land that holds liberty sacred, let me say I am profoundly sorry for what has happened to you.

We can never replace what has been taken from you, but we are grateful for your openness and your willingness to share what you have. Your story of faith, family, courage and perseverance is a gift to your nation, and we cherish it. Your testimony will help ensure no one else has to endure the outrageous indignities and injustices you and your family have suffered.

Mr. BURTON. Thank you, Mr. Shays. With the approval of the committee, I would like to read one paragraph from the statement of FBI Director, Louie Freeh, we just received this this morning. It says,

> The allegations that have been made concerning the circumstances of Mr. Salvati's conviction and 30-year incarceration speak directly to the need for integrity and commitment in the pursuit of justice under the rule of law. These allegations that the law enforcement personnel turned a blind, including the FBI, eye to its exculpatory information and allowed an innocent man serve 30 years of a life sentence are alarming and warrant thorough investigation.
>
> Under our criminal justice system, no one should be convicted and sentenced contrary to information known to the Federal Government. As with the conviction earlier this week in the Birmingham civil rights bombing case, we cannot allow the egregious actions of 30 years ago to prevent us from doing now what is right and what must be done to ensure justice is ultimately served.

I would like to insert into the record the rest of his letter. With that we'll go to Mr. Kucinich and then to you, Mr. Delahunt.

[The information referred to follows:]

MAY-03-2001 09:51 OPCA FRONT OFFICE

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

May 3, 2001

Statement of FBI Director Louis J. Freeh:

The allegations that have been made concerning the circumstances of Mr. Salvati's conviction and thirty-year incarceration speak directly to the need for integrity and commitment in the pursuit of justice under the Rule of Law. These allegations, that law enforcement personnel, including the FBI, "turned a blind eye" to exculpatory information and allowed an innocent man to serve thirty years of a life sentence, are alarming and warrant thorough investigation. Under our criminal justice system, no one should be convicted and sentenced contrary to information known to the federal government. As with the conviction earlier this week in the Birmingham civil rights bombing case, we cannot allow the egregious actions of thirty years ago to prevent us from doing now what is right and what must be done to ensure justice is ultimately served.

To that end, since January 1999, an independent Justice Task Force, lead by Special Attorney John Durham, has been charged with investigating law enforcement corruption arising out of the FBI's handling of criminal informants James "Whitey" Bulger and Stephen Flemmi. The allegations under investigation by the Justice Task Force span the time period from the mid-1960s to the present, covering all periods of time that either Bulger or Flemmi was being operated as a confidential informant of the FBI, and include specific allegations concerning the FBI's role in the Deegan murder investigation and prosecution.

As a result of the Justice Task Force's ongoing investigation, charges have already been brought against former FBI Agent John Connolly for his actions, not related to the Deegan murder investigation, both during and after the time he was an FBI employee. I have provided the Committee with a brief summary of the history of the Justice Task Force and allegations under investigation pertaining to the Deegan murder. I look forward to working with the Committee to ensure that not only the troubling allegations raised by Mr. Salvati's case, but each of the allegations, is investigated fully.

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U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

Justice Task Force Investigation

History of the Justice Task Force

In 1997, the Department of Justice and the FBI initiated an investigation to determine whether any Government official committed criminal acts in connection with investigations into the New England LCN and James "Whitey" Bulger's Winter Hill Gang. The investigative team was lead by the Deputy Chief of DOJ's Public Integrity Section. The Assistant Director of the FBI's Office of Professional Responsibility was the senior FBI official. Then-Inspector Charles S. Prouty (currently SAC Boston) was the senior FBI official on the scene. SSA William D. Chase (currently ASAC Boston) also participated in the investigation.

The investigation concluded after five weeks without filing any criminal charges. The report issued by the task force marked the completion of the "first phase of investigation" and stated that all reasonable and apparent leads had been covered. The report anticipated additional investigation at the conclusion of pre-trial hearings in criminal trial of Bulger, Stephen Flemmi, Frank Salemme and others. Boston press reports have characterized this investigation as a "whitewash," focusing on the fact that SAC Prouty and ASAC Chase were involved and subsequently promoted.

The Justice Task Force (JTF) was created in January 1999 pursuant to a joint directive from then-Attorney General Janet Reno and FBI Director Louis Freeh. The creation of the Task Force was prompted by a request from the United States Attorney for the District of Massachusetts and then-Boston Special-Agent-in-Charge Barry Mawn to establish a group of independent prosecutors and investigators to focus on possible law enforcement corruption relating to the FBI's handling of criminal informants James "Whitey" Bulger and Stephen Flemmi. While many of these allegations surfaced during hearings conducted by Judge Wolf in connection with the criminal prosecution of Bulger, Flemmi, Salemme, and others, the JTF is not connected with the 1997 investigation.

The JTF, comprised of prosecutors and investigators from outside Massachusetts, operates in the District of

Massachusetts as an independent investigative and prosecutive arm of the Criminal Division of DOJ and the Criminal Division of the FBI. There is significant overlap between the matters being addressed by the JTF and those at issue in other pending federal prosecutions involving Flemmi and Bulger.

Allegations under review by the JTF span the time period from the mid-1960s to the present, which includes all periods of time that either Bulger or Flemmi was being operated as a confidential informant of the FBI.

In December 1999, as a result of the JTF's investigation, a grand jury in the District of Massachusetts returned an indictment charging retired FBI SSA John Connolly, Bulger and Flemmi with participating in racketeering activities. A superceding indictment was returned in October 2000 alleging additional federal offenses against Connolly and Flemmi. A trial on these charges has not been scheduled.

The Edward "Teddy" Deegan Murder

One of the allegations under review by the JTF concerns the FBI's role in the investigation and prosecution of the March 12, 1965 murder of Edward "Teddy" Deegan. This matter falls within the scope of JTF's investigation because of issues arising from the role played by Vincent James Flemmi, brother of long-time FBI informant Stephen Flemmi. At different times, both Vincent Flemmi and Stephen Flemmi were operated by the same FBI SA, H. Paul Rico.

Two days before Teddy Deegan was murdered, the FBI received informant information that Vincent Flemmi had advised the informant that an order had been given for Deegan to be killed. That same day, an FBI file was opened to target Vincent Flemmi for possible development as an informant.

The day after Teddy Deegan was killed, SA Rico reported information, provided by the original informant, that identified the individuals who had committed the murder. The informant attributed this information to Vincent Flemmi. Among those Flemmi told the informant did the killing were Flemmi himself, Joseph Barboza, Wilfredo Roy French, Ronald Cassesso and Romeo Martin. FBI files reflect that this information was promptly disseminated to a Captain in the Chelsea, Mass. Police Dept.

In March 1967, while incarcerated and during his first interview as an FBI cooperating witness, Joseph Baron (also known as Joseph Barboza) agreed to provide information

concerning the Deegan murder; however Barboza advised that he would never provide information that would allow Vincent Flemmi to 'fry'. SA H. Paul Rico conducted the first interview with Barboza. Information and eventual testimony provided by Barboza in state court did not implicate Vincent Flemmi, but did implicate, among others, Peter Limone and Joseph Salvati.

On July 31, 1968, Limone and Salvati were among six persons convicted of having played a role in the Deegan murder. Salvati received a life sentence and Limone was sentenced to death. Limone's sentence was subsequently commuted to a life sentence. Barboza was the key prosecution witness in this trial.

In July 1970, Barboza signed an affidavit recanting his trial testimony against Limone, Salvati and two others. However, during an interview conducted one month later by government prosecutors, Barboza reaffirmed his trial testimony. Mr. Barboza was murdered in San Francisco in February 1976.

In August 2000, Limone's attorney, John Cavicchi, was interviewed by the JTF. Later that year, in support of a motion for a new trial for Mr. Limone, Cavicchi made a limited FOIA request to the FBI's Boston office. This request was promptly processed and the three documents sought by Cavicchi were disclosed. Thereafter, Cavicchi made a request to the JTF for Limone related information. Initial JTF attempts to locate responsive material were not successful due largely to the fact that many FBI files from the late 1960s had been destroyed, pursuant to standard FBI policy. However, after a hand search of archived intelligence files, documents were identified and delivered to the prosecution and defense in the Limone and Salvati matters.

Limone was released from prison on January 5, 2001, after his motion for a new trial was granted. Limone's motion was not opposed by the District Attorney's office. The presiding local judge cited the documents released by the JTF as playing a significant role in her decision. Salvati's sentence was commuted in 1997 after exculpatory information concerning Salvati's role was obtained by the US Attorney's office and forwarded to the District Attorney. Salvati was subsequently released from prison.

The House Government Reform Committee has scheduled a hearing on May 3, 2001 concerning the Deegan murder. Over 1200 pages of documents were located by the Boston Office

and the JTF and have been provided to the Committee through the Department of Justice.

The JTF is currently investigating not only the FBI's role in the Deegan murder investigation and prosecution, but the FBI's overall relationship with Bulger and Flemmi. The allegations currently under investigation by the JTF closely track the issues of interest to the House Govt. Reform Committee.

The JTF's ongoing Deegan inquiry is focused on:

- Whether the FBI's assistance to local authorities in this murder investigation was designed, at least in part, to protect Vincent James Flemmi from being prosecuted;
- Whether the FBI's motivation linked to Flemmi's status as a former FBI informant and/or the informant status of his brother, Stephen Flemmi, and
- Whether the FBI properly disseminated potentially exculpatory information to local investigators/ prosecutors.

Mr. KUCINICH. I yield to Mr. Delahunt.

Mr. BURTON. Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman; and I applaud you for initiating these hearings.

I just want to associate myself with the remarks of Mr. Shays. I think, Mr. Salvati and Mrs. Salvati, that his eloquence, his obvious emotion really reflect the sentiment of everyone on this panel and I am sure most Americans. I want to congratulate my colleague from Connecticut for seeing it as it is.

I recently read a newspaper piece describing your story, Mrs. Salvati; and in that story you have indicated that no one ever had said sorry to you. You have heard that here today, and let me also state my profound sorrow for what you experienced.

And, Mr. Salvati, you should know that you and your family and your splendid attorney are making a real contribution to the United States. As Mr. Shays indicated, justice is something very special in a democracy; and your testimony and your story has opened up many, many eyes. We thank you for that and also express profound sorrow for what you experienced.

And, yes, Mr. Garo, you are a hero. I am proud that I am an attorney, that we belong to a profession that represents often, often those causes that are so unpopular, but that are so righteous. In this particular case, I am confident that if it had not been for the literally tens of thousands of hours that you have spent on this case, your persistence, your perseverance, that Joe and Marie Salvati would have never been reunited and that this injustice never would have been redressed. You are a hero.

Victor, we met recently in your office. You provided the muffins and the coffee. You know my background, that I served as the district attorney in the metropolitan Boston area for more than 21 years.

I would be remiss at this point in time not to note at this point on the second panel two of America's finest lawyers will also testify, Mr. Bailey, Mr. Balliro. All of you reflect such great credit on our profession. In an era when sometimes attorneys are held in low esteem, you represent the very best.

Let me conclude, Mr. Chairman, by thanking you for allowing me to participate in this hearing.

I know my two other colleagues from Massachusetts who served with me on the Judiciary Committee, Mr. Meehan and Mr. Frank, will also be here during the course of the hearing.

Also, let me indicate that I have been informed that Mr. Waxman, who is the ranking Democrat on this committee, is tied up with a hearing in the Commerce Committee dealing with the issues of energy in California; and since he represents California he will obviously be there for a considerable portion of this hearing. But I do have a statement that I have been asked to submit into the record on behalf of Mr. Waxman.

Mr. BURTON. Without objection, so ordered.

[The prepared statement of Hon. Henry A. Waxman follows:]

Statement of Rep. Henry A. Waxman
Hearing on "The FBI's Controversial Handling of Organized Crime Investigations in Boston"
May 3, 2001

I'd like to welcome Joseph and Marie Salvati, Victor Garo, and our other witnesses who agreed to testify later today. I am pleased to say that this is not a partisan hearing. It is a hearing about an enormous failure in our justice system that took 30 years from a citizen, Joseph Salvati, and his family.

In 1968, Joseph Salvati and five others were tried for the 1965 murder of Edward Deegan in Chelsea, Massachusetts. The Commonwealth of Massachusetts sought the death penalty against Mr. Salvati. Mr. Salvati and others in the case were convicted on the uncorroborated testimony of Joseph Barboza and sentenced to life without parole. He served 30 years until the Governor of Massachusetts commuted his sentence in 1997. The Suffolk County District Attorney later sought to set aside the conviction and decided not to take further actions against Mr. Salvati. This happened after a Justice Department task force released FBI documents tending to show that Joseph Barboza framed Mr. Salvati to settle a personal grudge.

These documents, which I'm sure will be discussed at length during the course of this hearing, show that FBI agents in Boston knew or had very good reason to know that Mr. Salvati was being framed. But the FBI in Boston failed to disclose important evidence to the defense that would have cast serious doubt on the government's theory of prosecution in this case. The documentary evidence suggests that case agents wanted to protect the identity of confidential witnesses who were valuable to the FBI's investigation of organized crime figures in New England.

This hearing raises serious questions, not only about what happened in the case of Joseph Salvati, but about how the FBI handles its relationships with confidential informants. The Justice Department, which is conducting an active criminal investigation in this area, has asked that we not delve into matters beyond Mr. Salvati's case so as not complicate the ongoing work of its Justice Task Force. I am sensitive to that concern, but I think these questions need to be examined at an appropriate time and in an appropriate manner.

Finally, I am aware that Victor Garo, Mr. Salvati's attorney, has worked tirelessly on this case for over 25 years without compensation. I would just like to acknowledge Mr. Garo and say that his work on this case is a credit and an example to the entire legal profession.

Thank you all for appearing here today. I look forward to hearing your testimony.

Mr. BURTON. We will now go to Mr. Barr, but, before we do that, let me just thank Mr. Shays for being so diligent in bringing this to the committee's attention and making sure we had this hearing. If it hadn't have been for all of his hard work, we wouldn't be here today.

Mr. SHAYS. You were not a hard sell.

Mr. BURTON. Mr. Barr.

Mr. BARR. Thank you very much, Mr. Chairman, for not only convening this hearing today but also for the outstanding work of the staff. They have, over the past weeks, put in tremendous effort in both quality and quantity of effort, and I appreciate very much the dedication of Mr. Wilson and his fine staff in pursuing this evidence.

I appreciate your reading into the record part of the letter from FBI Director Freeh. He makes reference in his letter to the case earlier this week in Birmingham involving the civil rights bombing where four little girls were killed many years ago. Just in that case, the inference of those who would not let injustice sleep as in this case, even though very, very late and after a tremendous injustice has been done, at least some folks have stepped forward, including yourself and Mr. Shays and our witnesses here today and others, to try and see that at least at some point, at some level justice is done.

While this, the letter from the Director, is important, I would like to refer also to the very last sentence of Director Freeh's statement in which he says that he looks forward to working with the committee to ensure that not only the troubling allegations raised by Mr. Salvati's case but each of the allegations is investigated fully.

We certainly look forward to working very closely with the FBI, even though Director Freeh is leaving; and we certainly wish him well. We have tremendous regard for him. We hope that his successor is equally committed to pursuing this case so that all vestiges of it are aired.

The purpose of it, as you have indicated, Mr. Chairman, go far. I don't understand simply the injustices that were done to this family, these individuals, that alone would justify this action. But it's important that we also recognize that, in trying to correct the injustices in this case, we are taking some steps to ensure hopefully that similar cases will not arise in the future, both through the example of these hearings and, hopefully, further action by the Federal Government and the local authorities in directing these injustices but also perhaps through looking at legislation, perhaps looking at legislation too, that deals with how informants are dealt with by the government.

We certainly recognize that the use of informants is an essential law enforcement tool, but it must be done within the bounds of the Constitution, the same as all the other things law enforcement does.

So this hearing today is not certainly the end of either correcting the injustices in this case, nor is it looking at the ways—the very specific ways, Mr. Chairman, that we can help ensure that these kind of things will not happen in the future, if not through legislation then certainly policy changes at a bare minimum.

Thank you, Mr. Chairman, for convening this hearing and for the work of the staff; and I want to testify, beginning here, thank very much the witnesses here today and for what they represent. Thank you.

Mr. BURTON. Thank you, Mr. Barr.

Mr. Kanjorski—or did you want to make a comment? Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Chairman, members of the committee, to the Salvati family.

Franz Kafka once wrote a book called "The Trial" in which an individual was prosecuted, didn't even know why. I don't think that Franz Kafka, even with his great skills as a writer, could have countenanced the kind of trial and tribulations that Mr. Salvati and the Salvati family had to go through for decades.

The scriptures say that blessed are they who suffer persecution for justice's sake. The persecution of Mr. Salvati is a cautionary tale about the American justice system, and it shows the importance of attorneys who are willing to support the cause of justice without failing, without flagging but with persistence, with integrity, with the willingness to take a stand. It shows the quality of character of a family whose name was smeared, who endured trials that are of biblical proportions and yet who today come before this committee of the U.S. Congress fully vindicated and standing for all of America to see as a family in triumph, with a wonderful name as a family whose name will always be remembered for its perseverance, for its endurance and for its love of country. God bless you.

Mr. BURTON. Thank you, Mr. Kucinich.

Mr. Horn.

Mr. HORN. Mr. Chairman, I commend you for holding this hearing and withhold any comment for the question and answer period.

Mr. BURTON. Mr. Horn, thank you.

Mr. Kanjorski, do you have any comment?

Mr. KANJORSKI. No.

Mr. BURTON. Mr. LaTourette.

Mr. LATOURETTE. Thank you, Mr. Chairman. I will be, I think, brief.

There is no doubt in my mind, as I look at this case and others, that back in the 1950's and 1960's organized crime was a scourge upon the landscape of America; and it isn't surprising to me that law enforcement used ordinary and extraordinary measures to bring those who would rape, murder and extort others to justice.

However, as Mr. Delahunt has mentioned and others I think will mention, prosecuting officials, be they enforcement or prosecuting attorneys, have a different responsibility than the defense attorney or those lawyers who are hired as advocates. Those individuals are bound by ethical considerations and confidentialities. But a lot of people who get into the business of prosecuting and law enforcement think it's about winning and whether or not you can rack up a conviction. It's not. It's about doing justice.

I have always believed prosecuting officials have a higher responsibility than others who engage in the practice of law. I think the saying is, the power to indict is the power to destroy. Simply by taking a good person to the grand jury and causing an indictment

to be issued with faulty evidence, let along convicting and placing that person in prison, you can ruin literally a person for life.

That is why, built into the system are a number of safeguards, beginning with the Brady decision in the 1960's. The Federal rules and I think State rules have something known as rule 16 that indicate that prosecuting officials have a responsibility and a duty to hand over exculpatory materials so that all facts are known when a jury or judge makes a consideration as to a defendant's guilt or innocence.

If this hearing develops the facts that we believe they will over the next few hours, this represents a failure of the system. It represents a failure of the responsibility of the prosecuting officials involved. It represents a failure of ethics; and, more basically, it represents a failure of human decency to those who have been involved. And I am glad you are here, Mr. Salvati.

Thank you.

Mr. BURTON. Thank you, Mr. LaTourette.

Mr. Frank.

Mr. FRANK. Mr. Chairman, along with my colleague, we very much appreciate the initiative you have taken of having this hearing. I hope there will be further hearings here and in the Judiciary Committee because I think we have a very serious problem of abuse by law enforcement. Abuse that is the result of good motivation and a desire to do good is also abuse. It is clear by what has been brought out by Judge Wolf in Boston, by the media, that some agents in the FBI violated their oath and, in fact, perpetrated injustice, having started out to bring justice to people.

My view is that it is unlikely that what we are now dealing with, either here or in the case that Judge Wolf talked about, are isolated instances. The nature of bureaucracy is such that it is not at all persuasive to me that these are the only instances of this. So I think we need a systematic investigation so that the important essential and very well-performed work of the FBI in general is not called into question by a certain pattern of actions by a few people that causes problems. I think it is important for us to find out what and how high up people in the FBI knew and what they did about it. So I appreciate your giving us the chance to begin this.

I will now apologize for the fact that the Housing Subcommittee, which I am the senior ranking Democrat, is meeting simultaneously down the hall, so I will be in and out. But I leave with the confidence that my colleague from Massachusetts, my former State legislative colleague who spent more than 20 years as a first-rate prosecuting attorney in Massachusetts and has a good deal of first-hand information about this, will be here. Because this is a matter about which I have a great deal of confidence in his judgment and his knowledge.

But I do appreciate your beginning this process, and I think it is very important for us in the nature of the integrity of law enforcement to do a very thorough study to why this sort of event happened, again growing out of the zeal to do right. But just because bad things were originally motivated by the zeal to do right does not in any way justify them or mean that they should be overlooked.

I will say that, in closing, that I have been disappointed over a series of events in what seems to me an unwillingness on the part of the FBI to be self-critical. We still have the Wen Ho Lee case where an FBI agent admittedly gave false testimony in court that was material to the outcome that led to a man's confinement in part. That happened well over a year ago. The FBI still has not dealt with that.

So I appreciate your being willing, Mr. Chairman, to take this on.

Mr. BURTON. Thank you, Mr. Frank.

Mrs. Davis. No opening statement?

If not, I think we have covered the panel.

Mr. and Mrs. Salvati and Mr. Garo, would you please rise to be sworn.

I'm sorry. Mrs. Morella, do you have an opening statement?

Mrs. MORELLA. No opening statement.

Mr. BURTON. Would you please rise?

[Witnesses sworn.]

Mr. BURTON. I guess we will start with Mr. Garo. Would you like to make an opening statement? Then we'll go to Mr. Salvati and Mrs. Salvati.

STATEMENTS OF VICTOR J. GARO, ATTORNEY FOR JOSEPH SALVATI; JOSEPH SALVATI; AND MARIE SALVATI

Mr. GARO. Thank you, Mr. Chairman.

At the very outset, I would like to thank you, Mr. Chairman, and the members of your committee for holding this hearing and with the promise of other hearings, because it is a story that has to be told. We live in America, not Russia.

In trying to find the opening remarks that I wanted to say, I thought very deeply as to how I wanted to begin; and I would like to begin as follows, if I may, Mr. Chairman: With liberty and justice for all. Those are famed words from our Pledge of Allegiance to our flag. Many dedicated men and women gave their lives for those words. Those words are the foundation of our country.

However, the FBI's investigation and participation in the Deegan murder investigation has made a mockery of those words. The FBI determined that the lives of these people were expendable; that the life of Joe Salvati, my friend and client, was expendable; that the life and future of his wonderful wife and my friend, Marie, was expendable; and that the four young lives of their children, at the time ages 4, 7, 9 and 11, were expendable.

From the very beginning, I said, no, they were not expendable. I don't believe a life is expendable.

What has gone on here, and as you will find out from the evidence as presented and the herculean efforts of counsel and his staff of putting together these documents, that this is probably the most classic example of man's inhumanity to man.

We are a system of laws. We are supposed to be a system of justice. Only justice failed Joseph Salvati, justice failed Marie Salvati, and justice failed their four young children.

As was just indicated, the FBI has always had a gloried background. What happened here in the big view of what was going on I think is important to understand.

The FBI determined that it was important to bring down organized crime in the Northeast area. At that time, the alleged organized crime figure in Massachusetts was Mr. Angiulo. The alleged organized crime boss of the New England crime family was allegedly Raymond Patriarca. In the Deegan murder investigation there was the right arms of Mr. Angiulo and Mr. Patriarca and other people that they wanted off the street. And with one witness, Joseph "the Animal" Barboza, who gave uncorroborated testimony in three cases, the government had what they wanted. The Federal Government had what they wanted. They wanted the press and the recognition that they were crime fighters, and based on that premise they issued propaganda to the press and to anyone who would listen to them.

There's more than just an apology that should be made to my clients. There is an apology that should be made to the citizens of the United States and to the premises of the United States. Because you were all taken in by the name of the FBI. It was more important to the FBI that they protected their prized informants than it was for innocent people not to be framed.

The truth be damned. It didn't matter, the truth. We want convictions. We don't care what happens to Joe Salvati. We don't care what happens to Marie Salvati. We don't care what happens to their four young children.

I care. I have cared for over 26 years.

The entire saga here can be summed up like this: The FBI determined who got liberty, the FBI determined who got justice, and justice was not for all. It was for they who determined that justice was for.

What Constitution? What Bill of Rights? What human rights? What human decency? We're the FBI. We don't have to adhere to those principals so long as we have good press and so long as we get convictions. That will show that the ends justify the means.

Many defense lawyers like myself have through the decades fought difficult battles because the whispering campaigns would begin, such as, yeah, right, Salvati is innocent? He comes from the north end, you know what I mean? Right.

The mere fact that they were the FBI and those are the type of comments that they would make, it was all done with a purpose in mind so that the press that is here today would not get involved with the stories. They didn't want anyone investigating the investigators. Because they couldn't pass the smell test of honesty. No human rights, no human decency.

From the evidence that you will have before you, Mr. Chairman, and the evidence that I have, I believe it allows me to say the following: It is my opinion that J. Edgar Hoover, former Director of the FBI, conspired with FBI agents to murder Joseph Salvati. The manner of means by which that murder was to be committed was by way of an indictment on October 25, 1967 where the penalty was death by the electric chair.

J. Edgar Hoover knew the evidence of his prized informants, and he allowed Barboza to commit perjury in that first degree murder case. In my opinion, the date of October 25, 1967, will go down in the annals of the FBI as their day of infamy. Because it was on

that day that the Director of the FBI crossed over the line and became a criminal himself.

Mr. Chairman and members of the committee, we're not here to paint with the same brush all of the FBI and agents of the FBI or law or law enforcement. Because they do a good job. Because we need them to protect us from those that would harm us.

But they who are under sacred oath and trust of allegiance to our country have to be accountable for their actions. And it isn't just the role of a few. It was known from the agents to those who were in charge of the Boston office of the FBI and with the evidence that you have that J. Edgar Hoover himself knew exactly what was going on. The truth be damned. Convictions are what we want.

What has been very worrying to my clients, who are my friends, is that there is a complete denial in the Boston office of the FBI that they have done anything wrong. Now the flip side of that argument would be, we haven't done anything wrong, so therefore we're going to continue and keep doing the same things over and over.

That's unacceptable to us. In saying those words, they are trivializing my client's 30 years in prison. They are trivializing his wife's 30 years without a husband. They are trivializing the four young children growing up without the love and companionship of their father. And we won't allow that to happen.

When did the FBI stop having a heart? When did our justice system stop caring for our citizens? When did they stop caring about a loving family being broken apart?

On the date of January 30, 2001, Mr. Chairman, I was asked by many reporters, you must feel very vindicated, Mr. Garo, and you must feel very happy that your client has walked out a free man. And it was just the contrary, Mr. Chairman. It was a very sad day in my life.

Because everything that I had been saying for all those years, 26 of them, came to be true. That means that the government stole my client's life for 30 years, his wife's life for 30 years and the children's lives for 30 years. The FBI acted like a god. They determined liberty and justice for all. Not our justice system. The FBI.

In closing, I would like to just make some examples of the emotional part of this case.

I used to have meetings, Mr. Chairman, with my client's children and Mrs. Salvati. I would meet with them every 3 or 4 months to bring them some type of hope. Because H-O-P-E, those four letters, that's all they had. They had this fat bald guy. That is all they had to try to explain, we'll try a new way to do it. We'll find another door maybe we can open. We will find another way. Maybe we can do this. But we'll do it.

I said to the son, Anthony, the youngest of the children, in one of our meetings, I said, Anthony, when I get your dad home, you're going to say I created a monster. Because he's going to follow you around, and he's going to want to know everything you have done. Anthony is a rather emotional young gentleman, and gentleman he is. And he came over, and he sat beside me on the couch, and he said, no, Victor. He says, I have never seen my father get up in the morning, I have never had breakfast with my father in the morn-

ing, I've never taken a walk with my father, and I have never gone to a ball game with my father. I sure do want to do that in the future with my dad.

A second example is their daughter, Sharon. In returning from one of the visits before the trial of her father, she came home and asked her mother and then asked her father, daddy, what's the electric chair? They say you're going to get the electric chair. Are they giving you a present?

Tell me how a father and tell me how a mother explains that to a young child around 8 or 9 years old.

Finally, there is a story about love, commitment and devotion, of good people. When I used to visit Marie Salvati and her children at home, small one bedroom apartment, I always used to see a card on top of the TV stand, on top of the TV; and I saw it many times. I never asked a question, but I always noticed when I got there it was always a different card. I said one time, Marie, can I go over and look at that card? She said, yes, Victor.

Mr. Chairman, I have to say to you that when I went there and I saw it, a tear came to my eye. Because she never, ever mentioned this to me for decades, and neither did my client. How Joe and Marie kept their love and life together was by small, little things. Every Friday Marie Salvati would receive from her husband beautiful love cards. And inside those cards was always a statement of Joe Salvati to his wife. What else can I say? I love you. I love you. I have everything. I miss you, and I love you, Joe.

Marie Salvati has said to me, Mr. Chairman, that sometimes her life has been lived in a shoe box. Mr. Chairman and members of the committee, they have several shoe boxes of all the cards that she has saved over the years of his incarceration.

I bring those out, Mr. Chairman and members of committee, and I know maybe I have taken a little bit more time, and I'm sorry. But these are stories that people don't want to have told. They don't want you to understand the pain and the suffering that this family has endured. It is inhuman.

So I say to you, Mr. Chairman, in closing, that I think when you have this hearing and the other hearings that you're going to conduct, I have an opinion. It came true in the Joe Salvati case, and I have an opinion that I would like to share with you, Mr. Chairman and members of committee.

It is my opinion, when you discover all of the evidence in this case and the hearings, that you are going to hold that this is a scandal that is bigger than Watergate. It is broader than Watergate. It deals with people's lives, whether they get killed or not killed. It depends on whether you go to jail or not to jail. They determined, as God, who lived, who died and who went to prison. Out of control. That's what was happening in four decades in Boston.

So I say, Mr. Chairman, that I cannot thank you enough for allowing us to come here today to share with you our thoughts and evidence. God bless you.

Mr. BURTON. Thank you, Mr. Garo.

I understand you have a chronology of events that you want to go into. Why don't we have Mr. Salvati and Mrs. Salvati make a statement, and then we'll come back to you. And if you could quickly go through the chronology I would appreciate it.

[The prepared statement of Mr. Garo follows:]

May 3, 2001

Remarks - Victor J. Garo

At the very outset, on behalf of Joe Salvati, his wife Marie and their four children, as well as myself, I want to thank this Committee for holding this hearing. We believe that this is a story that should be told. It is a story of power, ego and greed. It is also a story of love, devotion, and commitment of a family who stayed strong together through a nightmare. It is also an emotional story, as you will find out.

I first met Joseph Salvati in 1976. I had a client who was serving prison time and he asked me if I would come down to talk to an inmate who needed a lawyer. On a rainy, dreary day, I met Joe Salvati. He told me the facts upon which he was convicted, and I felt right away that something was wrong with the conviction. Before I took the case, I did my own research and found that the facts were as he stated. His family gave me a retainer to help him win his freedom. After a short period of time, I learned that the family did not have much money so I returned the retainer, and told them that I would help him for free.

I have spent over 25 years and over 20,000 free hours to help this man and his family. He was not a man of power, position or money, but he was a human being. When I was sworn in as lawyer on November 9, 1965, my Mother and Father were very proud of me and took me to lunch after the ceremony. My Mother had been brought up as an orphan from age 3, and my Dad was born into abject poverty. They both said to me that since I

was now a lawyer, I can help people; don't do it just for the money; the money will come - go help people. My Mother and Father instilled certain values in my life that I have tried to follow.

On January 30, 2001, the charges against Mr. Salvati were dropped and he was able to leave court that day as a totally free person. As you investigate this case you will find that the Federal and State government hid the evidence, asked for the death penalty and the Federal government knew that he was innocent before his indictment. The people that we depend upon to seek truth and justice were violating their sacred oaths and trust. The Federal government determined that it was more important for them to protect informants than it was for innocent people to be framed. The arrogance of power is all too familiar. The government was saying "we know what is best for society". The Federal government determined that Joe Salvati's life was expendable; they determined that Marie Salvati's life was expendable; they determined that the four young children's' lives were expendable. They were not expendable to me.

The date of December 19, 2000 will always stand out in my mind, for it was on that date that Assistant U.S. Attorney John Durham, who is in charge of the Justice Task Force investigating criminal activities FBI agents, came to my office and handed me certain evidence that has literally shocked those who have seen it or heard it. From the evidence I received that night, it can be argued that J.Edgar Hoover and FBI agents conspired to murder Joseph Salvati. J. Edgar Hoover and the FBI had obtained evidence from one of their prized informants as to how the Deegan murder occurred and who committed it. Notwithstanding this information, Hoover and the FBI allowed Joseph the

Animal Barboza to commit perjury before a Grand Jury on October 25, 1967. The manner and means of the conspiracy to murder Joe Salvati would be by way of this indictment for first degree murder, because the penalty in 1967 for first degree murder was dealt with in the electric chair. The date of October 25, 2967 will go down in the annals of the FBI as their day of infamy, for it was on that date that J. Edgar Hoover crossed over the line and became a criminal himself.

In painting this grim picture, however, we do not paint all FBI agents with the same brush. Indeed, if it were not for the honesty and integrity of the FBI agents and John Durham who found the evidence and turned it over to us, we probably would not be before you today. There are a lot of bad people out there and we need agencies like the FBI to protect us from those who would harm us.

When I first decided to take this case in 1976, many people thought I was crazy because I would have to battle both the State and Federal governments. They said I wouldn't have a chance to do anything in this case. But I kept true to my beliefs and now Joe is a totally free person. Many people have asked why I have represented this family for so long, and for free. As I said at the outset of my statement, this is a case about love, devotion and commitment. Joe Salvati would often call me at my home, and my Mother would speak with him. My Mother was my "home" secretary. My Mother passed away on January 20, 1988, and sometime before she died she stated "I want you to keep representing Joe; I believe he is innocent, just like you and your Father do; promise me that you will stay with him until you walk him of out of jail". True to my promise, and with

the wonderful help of the Massachusetts Department of Corrections, I walked Joe Salvati

out of prison on March 20, 1997. I had kept my promise to my Mother. On that same day, Joe, Marie, my Father and I placed red roses on her grave. I know that she was smiling.

In conclusion, our quest before your committee is a simple one: please use your power and wisdom to enact appropriate legislation of checks and balances so that another family will not have to endure the nightmare and hardships that this family went through.

1. BIG PICTURE: Barboza testified against
   A) Angiulo - alleged head of Mass. organized crime
   B) Patriaca - alleged head of N.E. organized crime
   C) Deegan Murder - right arm of Patriaca and Angiulo
      -killer that they wanted off the streets

2. "Injustice anywhere is a threat to Justice Everywhere"

Mr. BURTON. Mr. Salvati.

Mr. SALVATI. Thank you, Mr. Chairman.

I want to thank this committee for holding this hearing. This is a story that needs to be told so the country can know what awesome power the government has over our lives.

When I was arrested on October 25, 1967, for participating in the Edward "Teddy" Deegan murder, I was devastated. How do you prove that you're innocent? There were constant stories in the media that I was a very bad person and one not to be respected.

The government stole more than 30 years of my life. Just the statement of 30 years in prison can run shivers up and down your spine. My life as a husband and father came to a tumbling halt.

In order to clear my name, it has been a long and frustrating battle. Yet, through all the heartbreak and sometimes throughout the years, my wife and I have remained very much in love. Prison may have separated us physically, but our love has always kept us together mentally and emotionally. Our children have always been foremost in our minds. We tried our best to raise them in a loving and caring atmosphere even though we were separated by prison walls.

More than once my heart was broken because I was unable to be with my family at very important times. However, through love and courage, all of us have battled back through times of adversity. We were strong in bad times, and we are still strong in good times.

I am here to talk about our most precious possession of all: Freedom.

As you know, I have served 30 hard and long years in prison for a crime I did not commit. However, I still consider our justice system to be the greatest system in the world. But sometimes it fails, as in my case. I became a casualty in the war against crime.

The justice system has finally worked for me, although it has taken over 34 years. I wouldn't be here before you today if it weren't for an honest, dedicated assistant U.S. attorney by the name of John Durham. The FBI agents working for him found documents, and these documents were sent to my lawyer. We need agencies like the FBI, because there are many out in the world that want to hurt us; however, when the FBI or any other similar agencies break the law, they must be held accountable for their crimes.

Finally, I'd like to say a few things about my wife. She is a woman with great strength and character. She has always been there for me in my darkest hours. She brought up our four children and gave them a caring and loving home. When God made my Marie, they threw the mold away.

Mr. BURTON. It's OK. Take your time.

Mr. GARO. Mr. Chairman, may I please finish those last two sentences for Mr. Salvati?

Mr. BURTON. Sure.

Mr. GARO. When God made my Marie, the mold was thrown away. I am one of the luckiest men in the world to have such a devoted and caring wife, my precious Marie.

Mr. BURTON. Thank you, Mr. Salvati.

[The prepared statement of Mr. Salvati follows:]

May 3, 2001

Remarks - Joseph Salvati

I want to thank this Committee for holding this hearing. This is a story that needs to be told so that the country can know what awesome power the Government has over our lives. When I was arrested on October 25, 1967 for participating in the Edward "Teddy" Deegan murder, I was devastated. How do you prove that you are innocent? There were constant stories in the media that I was a very bad person and one not to be respected.

The Government stole more than 30 years of my life. Just the statement of 30 years in prison can run shivers up and down your spine. My life as a husband and father came to a tumbling halt.

In order to clear my name, it has been a long and frustrating battle. Yet, through all of our heartbreaking disappointments throughout the years, my wife and I have remained very much in love. Prison may have separated us physically, but our love has always kept us together

mentally and emotionally. Our children have always been foremost in our minds. We tried our best to raise them in a loving and caring atmosphere even though we were separated by prison walls. More than once my heart was broken because I was unable to be with my family at very important times. However, through love and courage, all of us have battled back through times of adversity as a family. We were strong in the bad times and we are still strong in the good times.

I am here today to talk about our most precious possession of all: FREEDOM!!! As you all know, I have served 30 long and hard years in prison for crimes that I did not commit. However, I still consider our Justice System to be the best in the world; but sometimes it fails, as in my case. I became a casualty in the war against crime.

The Justice System has finally worked for me, although it has taken over 34 years. I wouldn't be before you today if it weren't for an honest and dedicated Assistant U.S. Attorney by the name of John Durham. The FBI agents working for him found documents, and these documents were sent to my lawyer. We need agencies like the FBI because there are many out in the world that want to hurt us; however, when the FBI or any other similar agency breaks the law then they must be held accountable for their actions.

Finally, I would like to say a few things about my wife. She is a woman of great strength and character. She has always been there for me in my darkest hours. She brought up our four children and gave them a caring and loving home. When God made my Marie, the mold was thrown away. I am one of the luckiest men in the world to have such a devoted and caring wife. My precious Marie.

Mr. BURTON. Ms. Salvati, do you have a statement?

Mrs. SALVATI. Yes, thank you.

Mrs. SALVATI. Chairperson and everybody here, it's just overwhelming. OK. At the very outset, I want to thank this committee for holding this hearing and for asking us to participate in order that we can tell our story.

From October 25, 1967, the date my husband was arrested, until January 30, 2001, when all the charges were dropped, my life was extremely difficult. The government took away my husband and the father of our four children in 1967. My world was shattered. This wonderful life that we shared was gone. I was looked down upon by many. As we all know, children can sometimes be cruel. Other children in our neighborhood would make fun of the fact that their father had been arrested for murder, and they would taunt some of them and say, shoot you, bang-bang. Your father is going to die; you know, things that would really hurt the family. And my children would come home crying to me. And I did my best to comfort them in bad times, but I had no one to comfort me when my children went to bed. Many a night I cried by myself, and I suffered in silence.

When my husband was arrested on October 25, 1967, I found out that the punishment for the crime was death in the electric chair. That potential sentence weighed heavily on me until he was sentenced on July 31, 1968, and received a life sentence without parole.

The government stole 30 years of my life. I was unable to share with my husband the joys of being a husband and a wife. The government stole 30 years from my children, because they grew up without their father. However, the government was never able to break our spirit. Our love grew stronger, and I always knew my husband was innocent. I know the moral character my husband possessed. I did not accept as my destiny that my husband would never come home again. I always had faith and love.

Our lawyer, Vic Garo, always instilled in us that the glass was half full and not half empty. We gathered strength from this fact and that he believed Joe was innocent from the very beginning of his representation of my husband and my family.

While my husband was in prison, the pact between us was I would not inform him of the problems at home. You know, I used to say to my husband, you take care of yourself on the inside, and I'll take care of the family on the outside.

From the very beginning of imprisonment, I knew that it would be important for the children to have constant contact with their family, with their father. And every weekend, you know, I'd dress up, pack a little lunch, and we'd go off to see him for their hugs and their kisses and whatever went on. And he would give them a father's guidance, even though he was not home with them. Sometimes it took hours to get there, and every time you got there, you were all nervous.

My husband and I have endured many hardships. As we grow older, we still have the cherished feeling that a husband and wife can have. We love each other very much. God bless you all.

[The prepared statement of Mrs. Salvati follows:]

May 3, 2001

Remarks - Marie Salvati

At the very outset, I want to thank this Committee for holding this hearing and for asking us to participate in order that we can tell our story. From October 25, 1967, the date my husband was arrested, until January 30, 2001, when all the charges were dropped, my life was extremely difficult. The Government took away my husband and the father of our four children in 1967. My world was shattered. The wonderful home life that we shared was gone. I was looked down upon by many. As we all know, children can sometimes by very cruel. Other young children in our neighborhood would make fun of the fact that their father had been arrested for murder. They would taunt my children with words and statements such as "bang-bang" your father is a killer"; "your father is going to die"; "your father is never coming home again". My children would come home crying to me and I did my best to comfort them in those bad times. But I had no one to comfort me when I put my children to bed. Many nights I cried myself to sleep.

When my husband was arrested on October 25, 1967, I found out that the punishment for the crime was death in the electric chair. That potential sentence weighed heavily on me until he was sentenced on July 31, 1968, and received a life sentence without parole.

The Government stole 30 years of my life. I was unable to share with my husband the

joys of being a husband and wife. The government stole 30 years from our children's lives, because they grew up without their father.

However, the Government was never able to break our spirit. Our love grew stronger. I always knew my husband was innocent. I knew the moral character my husband possessed. I did not accept as my destiny that my husband would never come home again. I had faith and love. Our lawyer, Vic Garo, always instilled in us that the glass was half full and not half empty. We gathered strength from his strength and the fact that he believed Joe was innocent from the very beginning of his representation of my husband and the family.

While my husband was in prison, there was a pact between us. I would not inform him of problems at home and he would not inform me of any problems in prison. Both of us did our part to keep the family strong and together. From the very beginning of his imprisonment I knew that it would be important for the children to have constant contact with their father. Almost every weekend I would dress up the children and take them to prison so that they would still have their father's guidance, even though he was not at home with them. Sometimes it took almost two hours just to get to the prison for our visits.

My husband and I have endured many hardships since October 25, 1967. But as we grow older together, we still have the most cherished feeling that a husband and wife can have - we lover each other very much.

God Bless all of you.

Mr. BURTON. Let me just say to both of you, Mr. and Mrs. Salvati, this has got to be a very difficult time to bring all of this out, but I'll tell you, it's important for not only the Congress, but the American people to see the emotion and the heartache that you guys had to suffer through for 30 years. And so I apologize for you having to make these statements, but I think you're doing an awful lot of good, because it's going to show the country that we must never allow innocent people to suffer like you folks have.

Mr. Garo, you want to go through that real quickly, the chronology of events?

Mr. GARO. Thank you, Mr. Chairman. As I said in the beginning, it is a very emotional case, and I thank you for allowing us to make those statements.

My representation of Mr. Salvati began in 1976 when I was asked to come down to see him by a client of mine who was in prison. I met Mr. Salvati. It was a dark, dreary, rainy day, and I went down to see him, and he told me the facts upon which that he was convicted. From the very facts he told me, I said, this doesn't seem correct to me. How could you be convicted on those facts?

I then did my own independent investigation, Mr. Chairman, and I found that what he said was so, not that I did not believe him. I just had to check the facts. I agreed to represent him and help him to gain freedom, and they gave me a retainer. Shortly after that, I found out that this family did not have a lot of money. I returned the money back to him, Mr. Chairman, and I said that I would stay with you. It's true, I never thought it would be 26 years later and over 20,000 free hours of my time, but I was brought up that when you make a commitment, you keep a commitment, and I've kept that commitment.

If I may, Mr. Chairman, I'd like to go over just for a few minutes, if I may, about the facts that were told in court by Joe "the Animal" Barboza concerning Mr. Salvati. On or about January 20, 1965, Barboza testified that one Peter Limone offered him a contract for $7,500 to kill one Teddy Deegan. Barboza then said it took from January 20th until March 12, 1965 to put together his death squad. He went around the country, he said, to go get participants in this murder. They were going to do this through a setup, Mr. Chairman, of Mr. Deegan being involved in a breaking and entering in the Chelsea alley of a finance company, and it was supposed to be set up by certain people. Deegan would go in the alley and would be shot to death.

On March 12, 1965, the day of the killing, Barboza in the middle of the afternoon said, Salvati has got to be involved in the killing tonight. As a matter of fact, he's going to be my getaway car driver, and he's going to wear three disguises. He's going to wear a wig to make him look bald. He's going to wear a pair of sunglasses and a mustache. Later that night, at about 7:30, Barboza testified that when he went to the Ebb Tide Restaurant and Lounge, which was a hangout for organized crime, he saw Joe Salvati at the bar, and he said to Joe Salvati, go outside and warm up the car, Joe.

Now, mind you, that night, they did not know if the breaking and entering was going to happen. The murder would depend on whether or not there was going to be a breaking and entering that night. Since they didn't know that was going to happen, no one

knew the time that it would happen or if it would happen, but Joe Salvati is still warming up the car. It's 7:30. At 9 o'clock, Barboza receives the nod from a Roy French, indicating that the breaking and entering was going to take place and that Deegan would be there. That was the signal for Barboza to leave and to go and kill Teddy Deegan.

Barboza goes out to the car sometime about quarter past 9 and gets in and drives the car, tells Salvati to get in the back seat. Barboza then says, we go to the area and we bend the license plates—in those days you had a front license plate and a rear license plate—and they bent it in half to hide their identity. As they were in the car, a person was walking toward them, and Barboza said, I think it's the law. And it was. It was a captain of the Chelsea Police Department. Barboza saw him and said he took off at a high rate of speed. The captain later said that he saw a man in the back seat with a bald head, bald spot, and he was able to find the first three numbers of the license plate, 404.

Barboza then said he went back to the Ebb Tide. He told Joe Salvati, go throw away the guns, throw away the disguises, and meet me in the bar. He then said that he split up the money with Salvati the next day. All that testimony came from Joe "the Animal" Barboza, uncorroborated, no other witness, just him.

Three things that always bothered me, Mr. Chairman, from the first time I ever heard the story: Timing. Why would Barboza hire someone to be involved in a killing that afternoon when it had taken him 2 months to put together his death squad? It didn't make sense to me. Two, he was going to be my getaway car driver. Getaway car driver? Salvati and Barboza never hung with each other, never associated with each other, were not partners. Barboza was a killer. Salvati was never. Barboza was a hit man. Salvati was not. And they knew who Barboza's partners were. Salvati never hung with Barboza, never associated with Barboza, other than a year later when he borrowed $400 from one of Barboza's associates. And we said, wouldn't there be a dry run? Salvati came from the north end of Boston. This was a killing that was supposed to take place in Chelsea, and I said, wouldn't a getaway car driver, at that—want to know the street that you could go up and down? That bothered me, Mr. Chairman.

And the third one is that of all the killers in this case, Salvati had to wear three disguises, and the three disguises were a wig to make him look bald, a pair of sunglasses and a mustache. Now, from what I understand of law enforcement is that the reason why you wear disguises, because everybody knows who you are. Mr. Salvati had one criminal conviction in 1956. He was not known to the police, not known to the Chelsea Police Department, not known to the Boston Police Department as a driver or somebody for Barboza; didn't hang with Barboza. And I said, why would Barboza want somebody to wear three disguises?

Well, now, of course, you know from the evidence that you have seen and that your counsel Mr. Wilson and his staff so ably has put together, you have come to find out that story was all made up and a fabrication. But one thing wasn't a fabrication. They did do a dry run. Can you imagine Mr. Salvati at 7:30 warming up the car, quarter of 8 warming up the car, 8 o'clock warming up the car,

quarter past 8 warming up the car, 8:30 warming up the car, quarter of 9 warming up the car? They didn't know what time this was going to be. That was the best heated car in the world. This could have ran anyplace. They almost ran out of gas. Did that make sense to anybody? It didn't make sense to me.

Now, what is it that has happened? The biggest break in this case happened in 1989 when we were receiving a commutation hearing that took place in August 1989. About 3 weeks before that event, I obtained a copy of a hidden Chelsea Police Department report. In that report it had an informant who mentioned who left the Ebb Tide that night, who went out to do the killing, and then when they came back, he said, we nailed him.

Now, under the law at that time under *Rowe* v. *United States,* if they knew there were informants and that defense counsel would have known it, they could have made a motion for the name of the informant. But, of course, the FBI was protecting informants, because, lo and behold, who were their informants back at that time? I had always said that Barboza was hiding a friend or a close associate. Yeah, Vinny Flemmi was his partner. Vinny Flemmi was bald. Vinny Flemmi had a bigger criminal record than Joe Barboza. He was a killer, a known thug, and known as a driver for Barboza 90 to 95 percent of the time, because he was his chauffeur, because he trusted him.

When I received that report, I then went out and did my own investigation, because I was not an organized criminal defense attorney. Most of my work was in white collar crimes. When I looked at it, I had my investigators go out and check out who these people were. Lo and behold, Mr. Chairman, we find out that one of the men mentioned was Vincent Flemmi. I went out and checked who Vincent Flemmi was. He was bald. I found out his record. I said my God, that's who was there that night. It wasn't Joe Salvati. It was Vincent Flemmi.

When I brought that to the attention of the parole board in 1989, we received the unanimous vote of the parole board. The only problem is, Mr. Chairman, from 1986 to 1989, the FBI told the parole board that my client was going to get indicted, so don't give him a commutation hearing. Four years went by, and they said, don't you understand it's all phony information you're receiving? I appeared in 1989, Mr. Chairman, before the parole board. Mr. Salvati, after the unanimous vote of the parole board, finally gets out on his commutation on March 20, 1997.

Make no mistake about it, the Federal Government and the State government never wanted Mr. Salvati ever to get out of prison, because dead men tell no tales, and we wouldn't be here today before you if they had succeeded. Three of the six, though, have died in prison. Mr. Salvati is here today before you because he survived 30 hard years in prison.

Now, in 1993, Mr. Chairman, I obtained new evidence, and finally I was able to obtain coverage by the press in this case because of an event that occurred on the commutation, Mr. Chairman. On January 20, Governor William Weld at that time denied my client's commutation because of his long criminal record, one criminal conviction in 1956. I said, I need some help. And I did get that help from a reporter back in Boston by the name of Dan Rea,

CBS affiliate, channel 4, WBZ, and he became my advocate through the press of our story. And through the years, he did many, many stories, and we found much, much evidence, as you have here documented before you. But no one wanted to listen to it. No one wanted to see it, because, you know, Salvati, yeah, he's innocent, right, yeah, right, all those words.

In 1997, we obtained a commutation, and probably the most important day in the history of this case occurred in my office, Mr. Chairman, on the date of December 19, 2000. And that was when an assistant U.S. attorney named John Durham, who was in charge of the Justice Task Force in Boston that is investigating criminal activities of FBI agents, called me and said, Mr. Garo, I have some evidence for you. I'd like to come over to your office and see you. He delivered those documents that you have, Mr. Chairman, and it showed a shocking, shocking story that now we know the entire story that Mr. Barboza made up was untrue. When we saw that evidence, Mr. Chairman, it was shocking to me, and I just sat down looking at it.

On January 18, 2001, Mr. Chairman, the Suffolk County district attorneys on its own motion made a motion to vacate the judgment and the sentence and requested a motion for new trial that was allowed. On January 30, 2001, Mr. Chairman, Mr. Salvati walked out of the courtroom a free man for the first time since October 25, 1967.

Mr. BURTON. Thank you, Mr. Garo.

We will now go to questioning. We'll start—Mr. Shays, would you like to start?

Mr. SHAYS. Thank you, Mr. Chairman.

Mr. BURTON. Mr. Shays. We will proceed under the 5-minute rule today, so every Member that wants to ask questions will be able to quickly.

Mr. SHAYS. Mr. Salvati, I love your gentleness, and I love your wife.

Mr. Salvati, has anyone in the government ever told you or your children that they're sorry for what happened to you?

Mr. SALVATI. No, they haven't.

Mr. SHAYS. Do you think people knew all along that you were innocent?

Mr. SALVATI. A lot of people did, yes.

Mr. SHAYS. Mr. Garo, why does this case mean so much to you? You told me a story about your mother. Real short, tell it to us.

Mr. GARO. My mother was brought up as an orphan from age 3, and my father was born into abject poverty. When I passed the bar exam on November 9th, and when I was sworn in as an attorney on November 9, 1965, my mother and father took me to afternoon lunch that day. They were very proud, as I was, about the accomplishment. And my mother and father said to me that day, Congressman, that, look, now that you're a lawyer, you can go out and help people. Go help people. Don't do it for the money. Do it to go help them. The money will come, but don't do it just for the money. And I followed certain values I believe that my mother and father instilled in me.

I had a one-man law office, and the only way that I would keep business was to have personalized service. My mother for years

talked to Joe Salvati, and they became friends over the phone, and my mother knew all the evidence that we had and were trying to do for Joe Salvati. And my mother was very sickly toward the end of the 1980's, and shortly before she passed away, my mother said to me as follows: "No one will represent Joe Salvati in this matter unless you stay with him. So I want you to promise me that you will stay with Joe Salvati until you walk him out of prison."

On March 20, 1997, with the wonderful help of the Massachusetts Department of Corrections, they allowed only two people to walk out of prison that day, and that was Joe Salvati and myself. After we left the prison and went to the parole officer that Joe had to go to, Joe and Marie, my father and myself all went to my mother's gravesite, and I placed roses on her grave, and I said, "Mommy, I kept my promise."

Mr. SHAYS. Thank you for keeping your promise.

Mrs. Salvati, I am amazed at your strength. I am amazed at the love you had for a man who was in prison for 30 years. I would love to know how you did it.

Mrs. SALVATI. You know how I did it. We were always a happy, loving couple, and I wouldn't have it any other way. My family values, my children, it was so important for me to keep it all together. You know, and when I went to visit him, like on the weekends, my children needed the hugs. They needed the kisses from their father. They needed all that stuff. So I tried to put it all together the best I could.

I reevaluated myself, you know, and I put my goals and my objectives, and I feel like I've done the right thing in life. I've worked. I went on to be a program director of the Head Start Program, and, you know, you do what you have to do. And we always believed in his innocence, and it was just, you know, like I said in my opening remarks here, you know, it wasn't hard to do. In a way it wasn't, because we had the love of my husband. I had my family, and I was just a—I don't know. I was driven. It was something that I felt like I could never give up, and that's how I felt about it.

And then, like, 10 years came, and we put in appeals, and then you get some—you know, get some good reports, and then you still have——

Mr. SHAYS. You still kept hope alive?

Mrs. SALVATI. Yes, yes. Never gave up.

Mr. SHAYS. I have other questions, but I won't get to them now.

Mr. Salvati, I want to know about your first attorney. I want to know if you were under a jury trial. I want to know why you didn't win that case in the first time around, and I'll ask that later, but it's not now.

Mr. Chairman, thank you.

Mr. BURTON. Did the gentleman yield his time or——

Mr. SHAYS. I finished.

Mr. BURTON. Oh, you finished. OK.

Mr. Kanjorski.

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

Mr. Garo, being a lawyer, you make me proud of the profession. That doesn't happen too often when you're sitting on this side of the aisle and dealing with——

Mr. GARO. Thank you, Mr. Congressman.

Mr. KANJORSKI [continuing]. This profession in Washington.

Let me ask you this, though. Looking at the statement of facts and the evidence, is this peculiar to the Boston area, or is it possible that this is occurring in other American cities and in other FBI offices across this country?

Mr. GARO. That's a good question, Mr. Congressman, and I guess my best answer that I can give to that is this, that if you have a cookie cutter and it works one place, that it should be able to work a second place, a third place and the fourth place. I have a distinct feeling that this is not just a situation that happens only here in Boston. I think there are those and many around that would like us to believe that it was only happening in Boston, and when these actions and these events were allowed to happen by the Director of the FBI, I just don't believe it just happened in Boston. And I think that the good that can come out of this hearing and other hearings will be that maybe other people will come forward with similar situations and would have the courage to face up and say what they have to say.

Mr. KANJORSKI. Do we in the Congress have a process of oversight of the FBI and to look through these complaints that may have occurred across the country, or is this a unique situation?

Mr. GARO. I think, Mr. Congressman, that if you people don't have this type of power, then who is investigating or watching over the investigators? Because there has to be some accountability, there has to be some checks and balances, and that's one of the reasons why we ask this honorable committee in all of your power and wisdom that you might be able to help us so that another family doesn't go through this again.

Mr. KANJORSKI. Mr. Garo, a lot of discussions are occurring in the country right now on the question of capital punishment. At this time the State of Massachusetts—or the Commonwealth of Massachusetts did have capital punishment——

Mr. GARO. At that time, yes, Mr. Congressman.

Mr. KANJORSKI. If, in fact, Mr. Salvati had been sentenced to die in the electric chair or by lethal injection, 30 years he would have been executed; is that correct?

Mr. GARO. That's correct.

Mr. KANJORSKI. So this is another very strong piece of evidence for us to reexamine the whole concept of capital punishment, particularly many cases of convictions of uncorroborated testimony.

Mr. GARO. Absolutely. And you hit the nail right on the head, Mr. Congressman, when you're dealing with the uncorroborated testimony of a person who is more of a killer than anything else, because the FBI, Mr. Congressman, at that time made the determination that it was far more important for them to protect the integrity of the informant system than it was to see innocent people go to prison or to potentially die in the electric chair.

Mr. KANJORSKI. I'm aware of some of the investigations of organized crime that have occurred in the Northeast and the Philadelphia area, and I am aware of what I tend to believe is selective prosecution; that when you read the wiretap evidence or other material, there are a host of crimes against sometimes very involved and very impressive people that seem to be totally ignored, and the FBI and the Federal attorneys seem to narrow in and focus in on

their hunt, if you will, or their bait. Do you find that in Boston to be the factor?

Mr. GARO. I would say that whatever you can think of, you'll find it in Boston. If there's any type of corruption that hasn't come forward and it hasn't been prosecuted, when you still have the FBI in Boston, Mr. Congressman, still maintaining today that they did nothing wrong, and a superior court judge has already discharged the cases, and the district attorney's office refuses to retry them because of what they have done, then we're out of control.

Mr. KANJORSKI. Mr. Garo, I complimented you as a lawyer in the legal profession, but it's almost impossible for me to believe that Federal prosecutors and members of the Justice Department and the FBI were not aware of this miscarriage of justice. Has any disbarment or prosecution of any of the professionals involved in this case taken place?

Mr. GARO. Mr. Congressman, I would say to you that other than certain investigations that are being conducted by John Durham, assistant U.S. attorney in Boston, especially assigned to the Justice Task Force, he is trying to get to the bottom of what FBI agents and what the statute of limitations problems are and the prosecution of those agents is really about.

You will find, Mr. Congressman, if you check in the newspapers and in the records in Massachusetts, that we have been saying things about this case for decades, Mr. Congressman, and no one has bothered to ever investigate any part of this. There are State crimes, Mr. Congressman, that have been committed here, and there's been no grand juries held for accountability of what local law enforcement officials did. Let us hope, Mr. Congressman—and that's our hope here, Mr. Chairman, is that through your committee and through your hearings that maybe the truth will finally come out.

And it's interesting that my pastor at my church has said it well: The truth will set them free, but no one wants to tell the truth.

Mr. KANJORSKI. Thank you, sir.

Mr. GARO. Thank you, Mr. Congressman.

Mr. BURTON. Mr. LaTourette.

Mr. LATOURETTE. Thank you, Mr. Chairman and Mr. Garo.

You described in your testimony—your written statement that your first big break, I think you called it, was the delivery to you of the Chelsea police report, and that was in 1989 at the——

Mr. GARO. That is correct, Mr. Congressman.

Mr. LATOURETTE [continuing]. Commutation hearing. Have you had a chance to talk to the lawyer that represented Mr. Salvati at this trial?

Mr. GARO. Let me just say about this very eminent counsel here, Mr. Balliro, who was a lawyer at that time and representing the case, that case was stacked, Mr. Congressman; that God could have come down and tried that case, and he would have never won that case. The chicanery that was involved with the evidence in this case, and the hiding of the evidence, and the wheeling and dealing behind the scenes, no one had an opportunity to win that case. And that's why, if I may just——

Mr. LATOURETTE. Sure. Sure.

Mr. GARO. That's why I have never and will never, ever say anything about legal counsel at that trial. They tried their damnedest, but they were up against an insurmountable wall.

Mr. LATOURETTE. And by asking that question, I wasn't meaning to disparage the trial counsel.

Mr. GARO. I understand.

Mr. LATOURETTE. But my question was, do you feel comfortable and confident that this 3-page—it's exhibit 11 in the book in front of you, but do you feel comfortable and confident that no one in the defense had access to or——

Mr. GARO. Absolutely not.

Mr. LATOURETTE [continuing]. Knew of the existence of this report?

[Exhibit 11 follows:]

Page # 1

Statement by Lieut.Thomas F.Evans Chelsea Police Department.

On March 12,1965 I received a call from the station that a man had been shot and was in the alley in the rear of the Lincoln National Bank.I received this call at 11:15P.M.

I arrived at the above location at approximately 11:30 P.M.In this alley at that time were Chief Burgin,Lieut.Fothergill,Sergt.Charles McHatton,Capt.Renfrew and Officer James O'Brien.There were about fifteen or twenty people standing about the sidewalks and street that were being kept away from the alley by other uniformed officers.

On eneering this alley a distance of thirty feet,I observed a man who I knew as Edward "Teddy" Deegan lying on his back with his feet in the direction of Fourth St.He was fully clothed with a suit and topcoat,white shirt but no tie.There were gloves on his hands.There was a 12"screwdriver with a black handle and red top on the ground about ten inches from his left hand.There was a fresh pool of blood by his left knee and blood appeared to be still oozing from the rear of his head.There were two metal clad doors ajacent to the body that lead into a office building at #375 Broadway.These doors are 4'8" X 6'3"in height.The alley is 203'long and 8'wide from the sidewalk on Fourth St.to approximately 105' into the alley where it then widens 9'6".There is a fire escape on the left side of the alley about 140' in from Fourth St.This escape is for the tenants at #387 Broadway.

Officer O'Brien told me that he was checking doors prior to making his 11 P.M.ring at Box #22(Broadway & Fourth Sts)and when he went into the above alley he observed a figure crouched over by the above mentioned doors on closer observation with his flash light he observed the blood.He then went to Box #22 and called for assistance O'Brien stated he had last tried these doors at 9 P.M.all was okay. At that time he had put the lights on in the alley.These lights are controlled by a switch that is located on the door casing on the last doorway on the left side of the alley.(Putting these lights on at dusk is the regular routine of the Officers that work route #12.) When O'Brien found the body the lights had been turned off and the door leading into the rear of 375 Broadway was open.

Lieut.Edward Fothergill gave me two complete metal jacket bullets with a right hand rifling twist,one smaller jacketed bullet with full metal jacket also four pieces of copper jacket and a piece of lead core that had been picked up in the alley. I later turned these over to Lieut.John F.Collins of State Police Firearms Identification.Lieut.Fothergill told me that they had to move Deegans bodyyfrom a crouched position to one lying flat on his back so that they could enter the open doorway and make search of the hallways of #375 Broadway.Nothing was found.

Shortly after I had arrived at the scene Attorney Alfred Farese accompanied by Anthony J.Stathopoules,he was allowed into the alley where he made identification of Deegan.He then was engaged in conversation with Chief Burgin and Capt. Renfrew.I was later informed by the Chief and Capt.that Farese had stated that he had received a telephone call from a former client that Deegan and Roy French were in trouble in Chelsea and had been arrested while doing a B & E.This client also told him that a policeman was to make arrangements to leave the door open.

EXHIBIT 11

As a result of having the above information given to me,I spoke to Farese and he repeated the story to me. I asked him if Stathopoulos was the former client of whom he spoke and he said no that he had

asked Stathopoulos to give him a ride to the Chelsea Police Station.He would not reveal the name of this party.

Dr.Meyer Kraft came to the scene and pronounced Deegan dead at 11:43 P.M. The Medical Examiners Office had been notified and Dr.Luongo came to the scene and viewed the body and removed same.

I had received information from Capt.Joseph Kozlowski that about 10 P.M.he had observed a red motor vehicle parked on Fourth St about 150' from the alley in question and there were three men in this car,two in front and one in the rear.He observed the first three digits of this plate as 404 but could see no other numbers as the plate had been bent over from right to left.As he went over to discuss the plate with the occupants the car pulled away from the curb and made a right turn on Broadway.

At approximately 12:30 A.M.on 3-13-65 with Capt.Renfrew, Det.Moore,Revere detectives and myself we went to the Ebb Tide on the Revere Beach Boulevard and made observations of a red,1963 Olds.Conv.Mass.Reg.404-795 that was registered to Joseph Martin of 19 Fleet St.No.End Boston.The plate on the rear of this vehicle was creased down the middle.We went into the cafe and told Wilfred Roy French that were were placing him under arrest for S.P.of a Felony-Murder and that were would be taking him to the Chelsea Police Station.I then requested Martin to bring his car to the station and he agreed to do so.Franis Imbuglia went along with Martin in Martin's car. On arriving at the station I had French taken up to the detective bureau and Martin and Imbuglia waited down stairs in the Seargeants room.With Capt.Renfrew I had Capt. Kozlowski view Martin's car that was parked in front of the station. He stated that the car looked like the one that he had seen earlier in the evening on Fourth St.but that he could not say it was the car.We then went into the Seargeants room to talk with Martin but both he and Imbuglia said they had nothing to say and that if it was not a pinch that they were going to leave. They then left the station.Capt.Kozlowski could not recognize these men.

I them went up to the detective bureau with Capt.Renfrew where I informed French of his rights.He said that he would have nothing to say until he spoke to his lawyer.At about 1:45 A.M. his Attorney,John Fitzgerald of Farese's office,arrived and had a conversation with French.French then gave us the information necessary for the booking card.In reply to a question of his occupation he stated that he was employed as a Maitre De at the Ebb Tide at a salary of $100.00 weekly.Asked as to what time he had gone to work on the evening of 3-12-65 he said that he had gone to work about 8 P.M. and had been there until we had taken him from there. At this point French refused to answer any more questions.I had Capt.Kozlowski look at French but he could not recognize him as being ~~being~~ in the car that he had observed earlier. I then observed what appeared to be bloodstains on the right sleeve of French's coat and also on his right shoe.It appeared that a attempt had been made to remove these stains by rubbing them. I had Capt.Renfrew view these objects.I then asked French how he had this blood on the coat and shoes.French said that while working at the Ebb Tide on 3-12-65 that there had been two different fights and that while breaking them up he had got blood on his clothes.A later check with one Joseph Errico of 37 Atwood St.Revere,a reserve police officer

of the Revere Police Department,reveals that Errico had been working on Friday and Saturday nights at the Ebb Tide for the past month.He goes to work at 9:15 P.M. until 1:30 A.M. He stated while working on 3-12-65 that some unknown fellow had been bothering a girl and that a other unknown party had punched this fellow cutting him about the eye and causing him to bleed profusely.States that because of the numbers of people in the Cafe that he could not say if French had left the place or not.He could not remember what time that this fight had occured.Also employed as a special police officer at this cafe is one Richard Currie of 39 Agawam St.Revere from whom we received no information.

French was allowed to sign a release waiver and leave the station with his attorney John Fitzgerald.

On the morning of 3-13-65,by arrangement,I had Attornies Farese,Fitzgerald and Anthony Stahopoulos come to the detective bureau where I again asked Farese to repeat his story of the previous evening relative to his exclient calling him to tell him of Deegan and French having been arrested by the Chelsea Police.He repeated the same story.I asked if this caller was at present a client of his and he said no.I asked for the name of his informant and he refused to name him.I asked if the name of the police officer who was alleged to have left the door open was known to him and he said no.

Stahopoulos refused to answer questions on advice of his attorney.

Attorney Fitzgerald informed me that he had received a telephone call from Deegan at 8:15 P.M.on 3-12-65 and that he could hear music in the background.I asked Fitzgeral the reason for the call and he told me that Deegan called him every night to let him know that he (Deegan) was okay.

I received information from Capt.Renfrew that a informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 P.M. on 3-12-65 and after a short conversation he had left the cafe with the following men; Joseph Barboza,Ronald Cassesso,Vincent Flemmi,Francis Imbuglia, Romeo Martin,Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a "Strongarm".They are said to have returned at about 11:P.M. and Martin was alleged to have said to French,"We nailed him".

Information received from a Mr.John T.Asten a tenant in apartment #8 at #387 Broadway. Asten states that at 9:30 P.M. on 3-12-65 he heard five sharp cracks and went out onto the fire escape which leads into the alley in question and that the lights were out in the alley and he could see or hear nothing.

I spoke with Vito Pagliarulo,age 55,of 98 Carroll St. Chelsea who is employed as a janitor at 375 Broadway and he informed me that he had left work on 3-12-65 at 3P.M. and he did not know if the rear door had been locked at this time or not.

Mr. GARO. Absolutely not. As much as the judicial opinions in the case have tried to place it in the hands, through unbelievable miscarriage of the facts in the case, no, it was never had.

Mr. LATOURETTE. And just for the purposes of the record, the reason that the report, I think, written by a lieutenant in the Chelsea Police Department, was significant, on page 3 of the report, it mentioned confidential information as to who the murderers were eventually?

Mr. GARO. That is correct. As a matter of fact, from the evidence that you have in your pamphlets, provided by chief legal counsel and the staff, you will see that the exact killers that were mentioned in the Chelsea police—hidden police report were the same as the killers that were mentioned on March 13, 1965 by Vincent Jimmy "the Bear" Flemmi to a prized informant of the FBI, who I say, Mr. Chairman, in my opinion, was his brother Steven Flemmi.

Mr. LATOURETTE. OK. Did you have the opportunity to chat with the individual prosecuting authorities about this Chelsea Police Department report after it was discovered to you in 1989?

Mr. GARO. Yes, I did.

Mr. LATOURETTE. And who was the prosecuting——

Mr. GARO. The prosecutor in the case was an attorney Jack Zalkind.

Mr. LATOURETTE. And can you relate to the committee what the substance of that conversation was?

Mr. GARO. Surely. In fact, he has filed an affidavit that I have filed in court, and Mr. Zalkind said that he had never known that Chelsea police report ever existed as to whether or not there was an informant in there. He said if he had known that there was an informant there that night that did not see Mr. Salvati, that he would have done a more thorough investigation, and Mr. Salvati may never have been indicted.

Now, what's interesting to note, Mr. Congressman, is that when I filed my motion for new trial in 1993, the District Attorney's Office of Suffolk County filed that affidavit by a Mr. McDonough, who was the legal assistant to Mr. Zalkind, who stated in his affidavit that that police report was in the files when he was there as a legal assistant to Mr. Zalkind. So what we have, Mr. Congressman, is we have prosecutors saying, I didn't have it, a legal assistant who said that it was there. I don't care who had it or what had it. If they said it was there, they didn't do anything with it, and you're going to have people die in the electric chair. My God. Don't you think you have a duty to go and investigate that? It's unconscionable, Mr. Congressman.

Mr. LATOURETTE. Did you—it was written by a Lieutenant Thomas Evans. Did you ever have a chance to chat with him about when it was prepared or anything of that nature?

Mr. GARO. No. Lieutenant Evans had passed away.

Mr. LATOURETTE. Had he? OK.

Mr. GARO. But what I did do, Mr. Congressman, and that's an excellent point, is that when I found out Lieutenant Evans had died, I then sent my investigators out to go find out if he had a partner. Lo and behold, I found he had a partner. I contacted their partner, and he said, sure, we worked on that together, and we

filed it. As a matter of fact, we knew who the killers were that night. They had——

Mr. LATOURETTE. Did he say who he had filed it with?

Mr. GARO. Lieutenant Evans.

Mr. LATOURETTE. OK. And the last question that I have for you, who is John Doyle?

Mr. GARO. I don't think I'd have enough time probably to answer that question, but suffice it to say he was the liaison at the Suffolk County District Attorney's Office, Garrett Byrne, with the FBI at that time. And he was the head detective that would put together the cases on organized crime. That's who he was.

Mr. LATOURETTE. OK. Thank you.

Thank you, Mr. Chairman.

Mr. BURTON. Mr. Cummings, did you have a question?

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

And, Mr. Garo, from one lawyer to another, I'm very glad that you do what you do and that you take your job as seriously as you do, and I wish more people had an opportunity to hear the testimony. And I understand you're just doing what you believe what you should be doing, and this is your job.

Mr. GARO. Thank you, Mr. Congressman.

Mr. CUMMINGS. You know, I really wish that more people would have an opportunity to hear this testimony, because so often I think what happens is that when someone lands in prison and they declare their innocence, although they have come through the criminal justice system, there are some who believe that the criminal justice system in our country does not—I mean, there's some that believe that it's perfect. And one thing is very, very clear, and that is that one of the things that will get us as close to perfection as we can get is that if the people that we trust, such as FBI agents and others and judges, it is important that they do their job in an honest and truthful manner, because I think that's what leads to the trust of the public.

And that leads me to my first question. You know, in reading your testimony, Mr. Garo, you seem to have kind words about John Durham, the prosecutor heading up the Justice Department's Task Force.

Mr. GARO. I do.

Mr. CUMMINGS. Why is that, sir?

Mr. GARO. He is the first prosecutor, in my opinion, that I have met in the entire investigation of this case for over 26 years that had as his motive in this case to let the truth come out, and that it would have been very easy for him, Mr. Congressman, to have thrown away these documents, and that the FBI agents that were working for him found these documents, and they found them because they were misfiled in other files, Mr. Congressman, and they were in the Boston office. All of the regular files had already been destroyed at that time, Mr. Congressman. This was all done—Mr. Congressman, if you throw away the evidence, it can't come back to haunt you. The only problem is that it had been misfiled, and they spent hours and days and weeks and months poring over these documents to give me those documents.

And that's why we say, Mr. Congressman, that we still have the greatest justice system in the world. And when you have a person

like John Durham, and you have a person like Judge Mark Wolf in the Federal court who took on the investigation here of informants back in Boston, they're heroes. They're the ones who have fought the system, and they have let come out the evidence that we have. And it makes us feel good, because we don't paint all the FBI with the same brush, and we say we need them, but, darn, when you break the sacred oath of trust—when I represent defendants in court and it's a public official, the first thing that the prosecutor says is, because he was a public official and he broke his sacred trust, we throw the book at him. Conversely in this case, no book has been thrown at any of the Federal officials.

Mr. CUMMINGS. Do you think the book should be thrown at them?

Mr. GARO. Absolutely. For those that are guilty, for those that took part in this, because how can anybody be so inhuman? Because we wanted, Mr. Chairman, you to see how much this affected this family.

That's what people don't want you to see, Mr. Congressman, and that's why this is difficult for the three of us. We're not here for publicity. I don't practice criminal law. I'm not looking to get referral cases. But we're here—when we first got approached by Mr. Wilson, who I have the deepest respect for and his staff, both on the Democratic side and the Republican side, and the work and the hours that they have put into this, we knew that sooner or later this is important to say, and this has never been about money, power, prestige. Those that know me know that I'm not like that, but if we can help you out, we have pledged that we will be here for you at any time. I said that I would give and help Mr. Wilson, Mr. Yeager behind the scenes on anything that your staff wants, Mr. Chairman, and I'll be here for you all the time.

Mr. CUMMINGS. Mr. Garo, your client was facing the death penalty. Is that what you said?

Mr. GARO. Yes, sir. That's true.

Mr. CUMMINGS. And, Mrs. Salvati, how did that affect you?

Mrs. SALVATI. I became numb. I just couldn't believe it that our lives could be so shattered with all this here, and, you know, it's devastating. It's just devastating. You get yourself in a state when the verdict came in, and I just—you know, I had a horrible night that night. Especially when the verdict came in, my children were my first priority. I went to get them from school, you know, because I didn't want them to hear nothing in the street. So I took them home, and I told them what had happened to, you know, Dad. We call him Dad. And he said—you know, I said, you know, you're going to hear a few things. You're going to read things in the paper. You know, families talk when they go home. You know how people are. So I tried to comfort them and tried to, you know, not tell them more than what I had to because they were little, you know, especially the young—the 4-year-old.

And we got through that. Then the very next day, my husband had the chaplain call me, and he wanted to see me right away. So we needed that bonding between us to go through the sorrow, this heartache together. All I could think of him was the night before being shackled in jail. I had no concept of what jail was about or how anything was, and, you know, we needed each other, too, but

you have to be there for each other, and we had that bonding with us all the time.

Mr. CUMMINGS. Mr. Chairman, just one quick statement. I just want to express to you and your husband, you know, something that Mr. Garo said. We do have an outstanding system of justice. It does fail. We have a lot of great people in our justice system, but I hope and I pray that God will give you the strength and the courage to continue on. You both have held up tremendously. I mean, a lot of people would not have held up under these circumstances, and I thank God for you and for your lives, and certainly you'll be in my prayers.

Mrs. SALVATI. Thank you.

Mr. SALVATI. Thank you.

Mr. BURTON. Thank you for your comments, Mr. Congressman.

Before I yield to Mr. Barr, one of the things that I will ask our legal counsel and our staff to investigate is whether or not there were some other injustices done as well. I understand that Mr. Barboza testified in some other criminal trials, and people were sent to jail. I don't know if anybody was sent to death or not, but we're going to investigate that as well. And so what you're telling us here today is not going to just reflect on the injustice done to the Salvatis, but also we're going to look at other things as well.

Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

Could the staff prepare exhibits 15, 8 and 7, please, beginning with 15.

Counsel, when I first started learning about this case from counsel and from the chairman and from Mr. Shays, probably, as most people, I was skeptical. You know, it reads like a novel. And then as you get into it, you say, yeah, well, maybe this sort of stuff did happen, but certainly the head of the FBI didn't know about it. He would have stopped it. But the fact of the matter is that there appears to be documentation that indicates very clearly that the Director of the FBI, Mr. Hoover, knew exactly what was going on, and that's very, very disturbing as a former U.S. attorney, as a citizen. You don't have to be a former U.S. attorney or an attorney to be disturbed by that. It's disturbing deeply as a citizen.

Document exhibit No. 15 is an airtel—this is back in the days before all the technology. We didn't have e-mails and so forth—dated March 19, 1965, which was, I think, about a week after the Deegan murder, and that document is to Director, FBI. In your knowledge, which is certainly extensive, my understanding is that Mr. Hoover kept very close tabs on what happened in the FBI.

[Exhibits 15, 8 and 7 follow:]

3/19/65

AIRTEL

TO : DIRECTOR, FBI [redacted] F

FROM: SAC, BOSTON [redacted] P

CRIMINAL INTELLIGENCE PROGRAM
BOSTON DIVISION

The following are the developments during the current week:

On 3/12/65, EDWARD "TEDDY" DEEGAN was found killed in an alleyway in Chelsea, Mass. in gangland fashion.

Informants report that RONALD CASESSA, ROMEO MARTIN, VINCENT JAMES FLEMMI, and JOSEPH BARBOZA, prominent local hoodlums, were responsible for the killing. They accomplished this by having ROY FRENCH, another Boston hoodlum, set DEEGAN up in a proposed "breaking & entering" in Chelsea, Mass. FRENCH apparently walked in behind DEEGAN when they were gaining entrance to the building and fired the first shot hitting DEEGAN in the back of the head. CASESSA and MARTIN immediately thereafter shot DEEGAN from the front.

ANTHONY STATHOPOULOS was also in on the burglary but had remained outside in the car.

3-Bureau
1-Boston

JFK:pos'b
(4)

SEARCHED ____
SERIALIZED 0
INDEXED ____
FILED 0

F [redacted] -1820

0000 4

EXHIBIT
15

[redacted] F

When FLEMMI and BARBOZA walked over to STATHOPOULOS's car, STATHOPOULOS thought it was the law and took off. FLEMMI and BARBOZA were going to kill STATHOPOULOS also. "OK."

Immediately thereafter, STATHOPOULOS proceeded to Atty. AL FARESE. FARESE called the Chelsea, Mass. PD before Chelsea knew of the killing and FARESE wanted to bail out ROY FRENCH and "TEDDY" DEEGAN. Shortly thereafter the Chelsea PD found the body of DEEGAN and immediately called Atty. FARESE's office, and Atty. JOHN FITZGERALD, FARESE's law partner, came to the Chelsea PD.

Efforts are now being made by the Chelsea PD to force STATHOPOULOS to furnish them the necessary information to prosecute the persons responsible.

It should be noted that this information was furnished to the Chelsea PD and it has been established by the Chelsea Police that ROY FRENCH, BARBOZA, FLEMMI, CASESSA, and MARTIN were all together at the Ebb Tide night club in Revere, Mass. and they all left at approximately 9 o'clock and returned 45 minutes later.

It should be noted that the killing took place at approximately 9:30 p.m., Friday, 3/12/65.

[redacted]

[redacted] B

Informant also advised that [redacted] had given the "OK" to JOE BARBOZA and "JIMMY" FLEMMI to kill [redacted] who was killed approximately one month ago.

63

Page 3 of serial 1870 is being deleted in its entirety for codes: F, B.

0000 6

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's.

B

[redacted]

F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B [redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted]

B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

000015

EXHIBIT 8

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F [redacted]-2597pg.2

Boston Airtel to Director, 3/10/65 entitled: [redacted]

B, M

F [redacted] advised on 3/3/65 that [redacted] contacted Patriarca and stated he had brought down VINCENT FLEMMI and another individual (who was later identified as Joe Barboza from East Boston, Mass.) It appeared that [redacted], Boston hoodlum, was giving orders to FLEMMI to "hit this guy and that guy".

B

Raymond Patriarca appeared infuriated at [redacted] giving such orders without his clearance and made arrangements to meet FLEMMI and Barboza in a garage shortly thereafter. He pointed out that he did not want FLEMMI or Barboza contacting him at his place of business.

F [redacted]-2597pg.5

Angiulo told Patriarca that VINCENT FLEMMI was with Joe Barboza when he, Barboza, killed [redacted] in Revere, Mass. several months ago. It appeared that [redacted], Boston hoodlum, had ordered the "hit". Patriarca again became enraged that [redacted] had the audacity to order a "hit" without Patriarca's knowledge.

B

Patriarca told Angiulo that he explained to FLEMMI that he was to tell [redacted] that no more killings were to take place unless he, Patriarca, cleared him.

Jerry explained that he also had a talk with FLEMMI. He pointed out that Patriarca has a high regard for FLEMMI but that he, Patriarca, thought that FLEMMI did not use sufficient common sense when it came to killing people.

Angiulo gave FLEMMI a lecture on killing people, pointing out that he should not kill people because he had an argument with him at any time. If an argument does ensue, he should leave and get word to Raymond Patriarca who, in turn, will either "OK" or deny the "hit" on this individual, depending on the circumstances.

M [redacted]

EXHIBIT 7

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's. B

[redacted] F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B [redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted] B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

Mr. GARO. He was getting information on a weekly basis, Mr. Congressman, on exactly what was happening back in Boston, because Boston in the 1960's was going through a gang war, and there were approximately 50 to 60 people who got killed. And they weren't able to get any convictions on a lot of the murders, and he wanted to be on top of everything that was happening in the Boston area during that period of time. So he was being informed on a weekly basis. This is only one of the documents that was left as misfiled. Other documents that Mr. Durham believes has either been destroyed or may even be around in other places and have not surfaced yet.

But there are documents, also, Mr. Congressman, that show that the Director knew exactly what was going on. What happened here, if I can, Mr. Congressman, that in March 1965—if I could do just a little chronology of this, in February 1965, Steven "the Rifleman" Flemmi had been targeted as a top-echelon informant. On March 9, 1965, his brother was being targeted as an informant. On March 10——

Mr. BARR. When you say targeted as an informant, you mean by the FBI?

Mr. GARO. Yes. Absolutely.

Then on March 10th, they received information that Flemmi and Barboza might be going to kill Teddy Deegan. On March 12th, Teddy Deegan was killed. On March 13th, Vincent Flemmi told the same informant that he and Joe Barboza killed Teddy Deegan the night before with three other guys, told them how it happened, how they were going to get in and do the B&E, how it happened, who was there, who did what. And they did a very sloppy job.

On March 19th, all this information now is given to the Director of the FBI. Now what happens is—now you have to go 2–1/2 years later, because in March, April or May 1967, Barboza becomes a witness for the Federal and State governments on various defendants that I've talked about previously.

Now, when Barboza was willing to take down and give false and perjurious statements on first degree murder cases, and it's all uncorroborated testimony, now—in my opinion, what happens now is between March, April, May 1967 and October 25, 1967, when the indictments came down as a result of Barboza's testimony on October 25th, the previous information just got in the way of the prosecution of these three cases. So now they let Barboza tell another story. No one is ever going to find out about these documents, because we're going to bury the documents and destroy them.

Mr. BARR. In your view, are there sufficient checks and balances and access to information now that weren't available back in the 1960's——

Mr. GARO. No.

Mr. BARR [continuing]. So that you would have a confidence level that this sort of thing would not happen?

Mr. GARO. No. I have no confidence right now that won't happen, because this has been happening in the 1960's, 1970's, 1980's and the 1990's. It's occurring right up today, Mr. Congressman, because there's still a denial at the FBI in Boston that anything was wrong, they have done nothing wrong.

Mr. BARR. But I don't mean just in this case, in other cases. I mean, we have additional safeguards that have been put in place, both statutorily as well as is in guidelines for the use of informants, as well as court decisions that have come down in the intervening decades. Do you have a confidence level that with all of those safeguards that we have in place now, that this sort of thing could not happen again?

Mr. GARO. None whatsoever.

Mr. BARR. Do you have some recommendations for us on specific steps that could be taken to help raise your comfort level?

Mr. GARO. I think that should be done, Mr. Congressman, with the defense bar. When everybody makes guidelines determining what's going to happen within the FBI or the government, they go to government. They don't go to the criminal defense bar. I think that the criminal defense bar, as over here, are two of the finest criminal defense lawyers that there are in the country. I think that they ought to be sitting down around the country and determining what legislation is necessary. I don't practice criminal law anymore, Mr. Congressman, and—other than for the Joe Salvati case for all these years, so I'm not maybe the best person in the world to tell you how to do that, but I know that the Massachusetts Association of Criminal Defense Lawyers would make themselves very available to sit down and talk, either with you or the committee, to find what can be done with the legislation and checks and balances to make sure that something like this, Mr. Chairman, will never happen again.

Mr. BARR. Thank you, sir.

Thank you, Mr. Chairman.

Mr. BURTON. It's really troubling to think that this has continued to go on. As I understand it, the assistant U.S. attorney up there, they're working on this right now to dig out all the dirt that they possibly can. Is that not correct?

Mr. GARO. That is correct.

Mr. BURTON. OK. Thank you.

Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman. It is not out of lack of respect that I keep leaving, and I apologize for that. Like Mr. Waxman, I have another Committee on Education that is marking up a bill.

Mr. GARO. We understand, Mr. Congressman. Thank you.

Mr. TIERNEY. I appreciate that.

I would like to yield my time to Mr. Delahunt, who I know is prepared to go forward on that at this time, and so I would yield to Mr. Delahunt.

Mr. BURTON. Mr. Delahunt.

Mr. DELAHUNT. Yes. I thank you. I thank my colleague from Massachusetts for yielding, and I thank the Chair again, for allowing us to participate.

Mr. Garo, you stated that it is your belief that the informant alluded to, in the various reports that have come to your attention—the report by the FBI, by a Special Agent Paul Rico; a Chelsea Police Department report authored by a captain—or a Lieutenant Evans; and a Boston police report authored by one William Stewart; a State police report authored by a Lieutenant Cass—refer to

the same individual when they reference an informant. Is that correct?

Mr. GARO. No. No. I say that there are several different informants, Mr. Congressman. On the Chelsea police report, that is one informant. The informants on the FBI documents that were handed to me by Mr. Durham, that's a second informant, in my opinion, and in the documents that were provided on the others, I think that in the Detective Richard Cass's report from the State police, that he had further information that no one else had, and I say that there was another informant.

Mr. DELAHUNT. OK. Let me go back then again. I know you mentioned the name of one Steven——

Mr. GARO. Flemmi.

Mr. DELAHUNT [continuing]. Flemmi. And it's your belief that he was the informant referred to in the report by Special Agent Paul Rico?

Mr. GARO. That is my opinion.

Mr. DELAHUNT. Are you aware of any documents or any reports whatsoever that exist that reveals the name of that informant?

Mr. GARO. No, I do not. As a matter of fact, Mr. Durham in his investigation was unable to find that, because the informant documents had already been destroyed.

Mr. DELAHUNT. Well, that answers my question, because I was going to request the Chair of this particular committee to inquire of the FBI to reveal the name of that particular informant.

Mr. GARO. Mr. Congressman, though, I would say this to you, that I wish you would still make that request, because I have a feeling that there's still information——

Mr. DELAHUNT. Well, then——

Mr. GARO [continuing]. That's around.

Mr. DELAHUNT [continuing]. I will make that request then.

Mr. GARO. Because I think it's an excellent request.

Mr. DELAHUNT. I yield to the Chair.

Mr. BURTON. If the gentleman will yield—and I thank you for yielding. We certainly will contact the head of the current—acting head of the FBI and whoever his successor is, and we'll ask for any documents pertaining to this investigation and what's going on in Boston.

Mr. GARO. I think that's an excellent point.

Mr. DELAHUNT. I just simply can't imagine any basis, in terms of what has gone on in Boston, pursuant to the proceedings presided over by Judge Wolf, why the name of that particular informant cannot be revealed, because it's simply my opinion that would remove some of the mystery surrounding the case against Mr. Salvati.

We spoke, as I indicated earlier, last Saturday regarding the case of Mr. Salvati, and I took a particular interest in your explanation of the efforts that you made to seek a commutation on behalf of Mr. Salvati. Could you just repeat them once more for members of the panel? And maybe, Mr. Garo, you could start with explaining to members of the panel what the commutation process is and how one proceeds and its significance in the Commonwealth of Massachusetts. If you could start there, please.

Mr. GARO. Certainly. Thank you, Mr. Congressman.

In Massachusetts when you are convicted of murder in the first degree, you have no right to parole. The only way that you have the right to parole is if you receive a commutation, and a commutation is considered to be an extraordinary legal remedy. In order to get a commutation, three votes have to be taken, one by the parole board sitting as the advisory board of pardons, the second vote by the Governor of the Commonwealth of Massachusetts, and the third by the Governor's Council, not legal council, the Governor's Council, a duly elected body. The three of those votes have to be situated for you to get a commutation. It is not easy to obtain.

So that I had filed for a commutation in 1986, but I was told by the then current chairman of the parole board that they weren't going to hold the hearing. In granting, Mr. Chairman, a commutation hearing in the Commonwealth of Massachusetts by a parole board, that means that they are very seriously contemplating giving you your commutation, because they don't do it to raise the hopes of an inmate that you're going to get out. They don't do that. So it's—Mr. Salvati's really to lose—95 percent for him to win it, 5 percent for him not to win it.

The chairman of the parole board said to me in 1986 that he was contacted by the FBI that they were doing an investigation, and Salvati was part of it, and that he was going to get indicted.

Mr. DELAHUNT. Will you just repeat that slowly? You were contacted by the chair—or the Massachusetts Parole Board was contacted by the FBI, indicating that they were conducting an investigation that implicated Mr. Salvati?

Mr. GARO. That is correct, Mr. Congressman.

Mr. DELAHUNT. Proceed, please. Do you know the name of the FBI agent?

Mr. GARO. No, I do not. No, I do not.

Mr. DELAHUNT. Could you identify the individual on the Massachusetts Parole Board who——

Mr. GARO. Yes. Jim Curran, who is now currently a judge out in the western part of the State.

Mr. DELAHUNT. And Mr. Curran was the Chair at the time?

Mr. GARO. Yes, sir.

Mr. DELAHUNT. And he indicated——

Mr. BURTON. If the gentleman will yield. We will contact the judge, and we will ask who the FBI agent was that informed him it was an ongoing investigation.

Mr. DELAHUNT. I thank the Chair.

Would you proceed, Mr. Garo?

Mr. GARO. Thank you.

I was very well known to the parole board, because I used to knock on their doors all the time for many years. As a matter of fact, when they heard I was in the building, they would say, hey, Vic, come on and have a cup of coffee with us, because I believe that I've always conducted myself as a gentleman. I believe I've always conducted my representation of Mr. Salvati always on another level.

Mr. DELAHUNT. But what happened to that investigation, Mr. Garo——

Mr. GARO. Nothing.

Mr. DELAHUNT. Nothing?

Mr. GARO. After 3 years——

Mr. DELAHUNT. After 3 years nothing happened?

Mr. GARO. That is correct.

Mr. DELAHUNT. And what did you do then, Mr. Garo?

Mr. GARO. I went to Mr. Curran and I said, they are trying to prevent you from ever having a hearing on Mr. Salvati.

Mr. DELAHUNT. And what did Mr. Curran say to you?

Mr. GARO. He said, you're right, we're going to hold a hearing.

Mr. DELAHUNT. And did he hold a hearing?

Mr. GARO. Yes, they did, sir.

Mr. DELAHUNT. And what was the conclusion of that hearing?

Mr. GARO. It was held in August 1989, and at a date that I still don't know, Mr. Congressman, they voted unanimously for the parole——

Mr. DELAHUNT. Mr. Garo, how many members on the parole board?

Mr. GARO. At that time I had five members that were present at——

Mr. DELAHUNT. And each and every one of them voted in favor of commuting the first degree murder sentence of Mr. Salvati, and that was in 1989?

Mr. GARO. I don't know the date they——

Mr. DELAHUNT. You don't know——

Mr. GARO. It's always been hidden from me because——

Mr. DELAHUNT. It's been hidden from you?

Mr. GARO. And I would explain——

Mr. DELAHUNT. And I would hope that the Chair of this particular committee would request the documents from the Massachusetts Parole Board relative to when that unanimous vote was taken.

Proceed, Mr. Garo.

Mr. GARO. Thank you, Mr. Congressman. At that time when—I received a phone call from a member of the parole board who said to me, Mr. Garo, I have some good news and bad news for you. You have received the unanimous vote of the parole board, but the documents are not going to be placed on Governor Dukakis' desk; and I said, can you tell me why? He said, because of the Willy Horton scandal that had happened and other matters, that they really don't want to deal with your commutation. And that was a major blow to us, Mr. Congressman, because I then had to meet with my client Mr. Salvati and his wife and four children, because at that time——

Mr. DELAHUNT. Are you aware of any communication between the then Governor Dukakis' office and the Chair of the parole board regarding concern about the Willy Horton case?

Mr. GARO. Only what I was told by the parole board themselves.

Mr. DELAHUNT. At some point in time, could you give the names of the——

Mr. GARO. Yes. I will be glad to give that to you at the appropriate time, Mr. Chairman—I mean, Mr. Congressman.

Mr. DELAHUNT. And what happened then, Mr. Garo? If I could indulge the Chair for the additional time.

Mr. GARO. What happened then——

Mr. SHAYS. I'm happy to yield the gentleman my 5 minutes.

Mr. BURTON. We'll give you time. Without objection, we'll——

Mr. DELAHUNT. There's a particular line of questioning I want to pursue.

Mr. SHAYS. You just stay right at it, sir.

Mr. DELAHUNT. Mr. Garo, please.

Mr. GARO. We had a very difficult decision, Mr. Congressman, as you well know, that if I filed a motion for new trial, I'd lose my unanimous vote of the parole board, and knowing the history here of the judicial handling of these cases, I told him, we're not going to overturn this case.

Mr. DELAHUNT. So that's when you made the decision not to pursue the motion for the new trial?

Mr. GARO. That is correct.

Mr. DELAHUNT. Fine.

Mr. GARO. We gave that up because we had a unanimous vote of the parole board, and we said, let's keep what we have. Why go into waters where we don't know what we're going to get?

Mr. DELAHUNT. Right.

Mr. GARO. 1992, then came Governor Weld. On January 20, 1993, Mr. Salvati's commutation was turned down by Governor Weld.

Mr. DELAHUNT. And what was the reason expressed by the then Governor for rejecting the unanimous recommendation of the parole board?

Mr. GARO. My client's long and involved criminal record.

Mr. DELAHUNT. Can you relate to us how long and involved Mr. Salvati's criminal record was?

Mr. GARO. A conviction in 1956 for breaking and entering and possession of a precarious implement and a couple of traffic tickets.

Mr. DELAHUNT. You referenced earlier that one Jack Zalkind was the prosecutor in the case against Mr. Salvati?

Mr. GARO. That is correct.

Mr. DELAHUNT. And during our conversation last Saturday, I requested any documents that you might have relative to this commutation process?

Mr. GARO. That you did, sir.

Mr. DELAHUNT. And I have a bunch of them here, and I will ask the Chair to submit them.

And if I——

Mr. BURTON. Without objection.

[The information referred to follows:]

LAW OFFICES
JACK I. ZALKIND
AND ASSOCIATES
FIFTEEN COURT SQUARE
BOSTON, MASSACHUSETTS 02108
617-227-3951

March 12, 1979

TO WHOM IT MAY CONCERN:

Re: Joseph Salvati

I have been asked by Attorney Victor Garo to write you regarding my feelings concerning the commutation of Joseph Salvati whom I prosecuted in the case of Commonwealth v. French, et al in 1968.

During the investigation of this case, prior similar activities by Mr. Salvati never came to my attention, and it was my belief at that time that it was Mr. Salvati's first serious criminal involvement. The evidence at the trial indicated that he was not involved with the actual shooting of the victim. Indeed, at the time of the actual shooting, Mr. Salvati had left the scene because of an unrelated event.

At the conclusion of the trial, the jury recommended leniency for Mr. Salvati and he was sentenced accordingly. Throughout the preparation of the trial, Mr. Salvati never tried to impede my investigation and at trial he behaved without incident. There were no plea negotiations in this case; however, I would have recommended a plea to Second Degree Murder if that situation ever came about.

I now understand that Mr. Salvati has served his sentence over the last twelve years as a model inmate and that he has shown remarkable efforts in his attempt to rehabilitate himself to a constructive life.

Based upon all of the aforementioned reasons and factors, I would recommend to your Honorable Board that his sentence be commuted and that he be released accordingly.

Very truly yours,

Jack I. Zalkind

JIZ/ls

FRANK L. WALSH
21 HAZELMERE ROAD ROSLINDALE, MASSACHUSETTS 02131

March 15, 1979

To Whom It May Concern:

I retired as a Sergeant Detective from the Boston Police Department after 32 years of service and currently am employed as manager of security for a large multi-purpose center, located in Boston.

While with the Department and during my assignment in the Organized Crime Unit, I was involved in the investigation, arrest, and prosecution of James Salvati, (and others) which resulted in the sentence he is now serving.

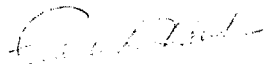
During my investigations prior to his indictment, subsequent sentencing and to this date, I have never become aware that Mr. Salvati has been even remotely connected with firearms or physical violence.

Over the recent past, I have maintained contact with the people in the North End, among them the family of Joe Salvati. It is because of these continuing contacts that my opinion is he has been thoroughly rehabilitated and bears no ill will against our prosecutive or corrective system.

My knowledge of the prisoner's background, and his family, convince me that he is deserving of the opportunity to rejoin his community and serve a useful life.

In my long personal involvement with law enforcement, I have written only two letters of this type recommending consideration for parole and both have been for Joseph Salvati.

Respectfully,



LAW OFFICES
JACK I. ZALKIND
AND ASSOCIATES
FIFTEEN COURT SQUARE
SUITE 1100
BOSTON, MASSACHUSETTS 02108
(617) 227-3950
FACSIMILE: (617) 227-1780

OF COUNSEL:
MELVIN FOSTER
ELLEN Y. SUNI

August 14, 1989

Mr. Chairman and
Members of the
Massachusetts Parole Board
27-43 Wormwood Street
South Boston, MA 02210

Re: Joseph Salvati

Dear Mr. Chairman and Members:

On March 12, 1979, I was asked to write a letter on behalf of the above-named, Joseph Salvati, who, I understand, is appearing before your Board for a sentence commutation. (See enclosed copy of letter marked Exhibit "1").

My feelings, as expressed in the aforementioned letter, have not changed. Indeed, I have become more firmly convinced that Mr. Salvati, if possible, should have his sentence commuted. It is my understanding that during the 22 years that he has been incarcerated, he has completed many many furloughs and has never once violated any of the terms and conditions of this program. I also feel that the time that Mr. Salvati has served for the crime of which he was convicted is, indeed, sufficient.

As I stated in my letter written in 1979, I would have recommended a plea to Second Degree Murder back in 1968 and, indeed, if this were the case, Mr. Salvati would have been eligible for parole seven (7) years ago.

I have had no personal relation with either Mr. Salvati or any of his relatives or friends. My feelings are based upon what I believe to be in the best interests of justice.

I, therefore, recommend to the Board that Mr. Salvati's Petition for Commutation be acted upon favorably.

Very truly yours,

Jack I. Zalkind

JIZ/ls

Encls.

Frank L. Walsh
21 Hazelmere Road
Roslindale, Massachusetts 02131

August 15, 1989

TO THE CHAIRMAN AND MEMBERS OF THE PAROLE BOARD:

At the request of Victor J. Garo, attorney for Joseph Salvati, I am submitting an update of my letter of March 15, 1979, regarding Joseph Salvati.

Since that time, I have received no further knowledge or information that would cause me to change the opinions expressed in that communication.

I sincerely believe, that Mr.Salvati is deserving of your consideration for commutation, and that justice will be served if he is returned to his family and community as a useful citizen.

Respectfully submitted,

Frank L. Walsh

Frank L. Walsh

Attached: Copy of letter dated March 15,1979.

Exhibit 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CR. NO. 32368,
32369 and 32370

COMMONWEALTH)
)
v.) AFFIDAVIT OF JACK I. ZALKIND
)
JOSEPH SALVATI, et al)

On or about February 2, 1993, I had a meeting in my office at 15 Court Square, Boston, MA 02108, with Attorney Victor Garo who informed me that he was representing Joseph Salvati, a defendant that I had prosecuted in the above-mentioned case in 1968. (Commonwealth v. French, 357 Mass. 357 (1970)).

At this meeting, Attorney Garo showed me an three-page typed report which was a purported statement by Lt. Thomas F. Evans of the Chelsea Police Department. Lt. Evans was an officer who was assisting the Suffolk County District Attorney's Office in the investigation and prosecution of the aforementioned "French" trial. I reviewed the alleged statement and/or report which was given to me by Attorney Garo and although the information contained on pages 1 and 2 and half of page 3 was familiar to me, a paragraph on page 3 contained information that I did not have at the time that I prosecuted the aforementioned case. Indeed, I have no present memory of ever seeing any portion of this report, although much of the information was familiar to me.

The paragraph referred to states that Lt. Evans

> "received information from Capt. Renfrew that a informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 P.M. on 3-12-65 and after a short conversation he had left the cafe with the following men: Joseph Barboza, Ronald Cassesso,

> Vincent Flemmi, Francis Imbruglia, Romeo Martin, Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a "Strongarm". They are said to have returned at about 11 P.M. and Martin was alleged to have said to French, "We nailed him".

I believe that if I had received this information prior to the return of indictments in the above-mentioned case or, indeed, during the trial, I certainly would have caused a more concentrated investigation into the whereabouts of the men mentioned in the report but who were not named in the indictment. Whether or not I would have turned over this report to defense counsel at that time, of course, would depend upon the results of my investigation. Certainly, if my inquiry divulged exculpatory material, I would have given this information to defense counsel.

Three or four years after the conviction in the French case, I prosecuted Vincent Flemmi, who was mentioned on page 3 of the "Statement". It became apparent to me that Flemmi fit the description of the man that was described by Capt. Joseph Kozlowski as being the occupant that was seated in the back of the vehicle which we knew was being driven by Joseph Barboza and who had been described at trial by Barboza as being Joseph Salvati. Barboza testified that Salvati wore a disguise over his hair which made him appear to be bald. Indeed, Capt. Kozlowski said that the man in the back seat appeared to be bald. In the Flemmi trial, I observed that he was bald and, in fact, it was revealed to me that he was a friend and associate of Barboza for many years, although Salvati was never known to be associated with Barboza in any way. Further, I discovered that Flemmi had an extensive criminal record and Salvati's record was practically non-existent. This revelation did

not appear to be significant at the Flemmi trial, since there were convictions in the "French" case, and there was no evidence indicating that Barboza was not telling the truth when he described Salvati's disguise and involvement other than the defendant's denial. However, once again, if I had received the information contained in the previously referred to report, I believe that I would have re-evaluated the position of Salvati and would have ordered an intensive investigation as to the possibility of Salvati being erroneously named as a defendant by Barboza and would have considered the possibility that Flemmi was the person in the rear seat.

The facts and information that I have supplied are based upon my present memory and recollections of events that have taken place over the last 25 years and may not be exact in many aspects, but they are presented in this Affidavit as my best present day recollection subject to unintentional failure of memory due to the passing of time.

The aforementioned information is submitted under the pains and penalties of perjury subject to unintentional lapses in memory.

Lee I. Zalkind
BBO #538840
15 Court Square
Boston, MA 02108
(617) 227-3950

August 5, 1993

FRANK L. WALSH
21 Hazelmere Road
Boston, Massachusetts 02131

January 15,1997

To Members of the Governor's Council

At the request of Victor J. Garo, attorney for Joseph Salvatti, I am submitting an update of my previous letters regarding Joseph Salvati.

Since that time, I have received no further knowledge or information that would cause me to change the opinions expressed in those communications.

I sincerely believe that Mr. Salvati is deserving of your consideration for commutation and he should be returned to his family and community as a useful citizen.

Respectfully,

Frank L. Walsh

Frank L. Walsh

LAW OFFICES
JACK I. ZALKIND
AND ASSOCIATES
ONE STATE STREET
BOSTON, MASSACHUSETTS 02108

(617) 227-3950
FACSIMILE: (617) 227-1760

January 22, 1997

Governor's Council
Room 184
State House
Boston, MA 02133

RE: Joseph Salvati

Dear Council Members:

On March 12, 1979 and again on August 14, 1989, I wrote to the Chairman and members of the Massachusetts Parole Board recommending that Mr. Salvati's Petition for Commutation be granted. Nothing has happened since that time to change my feelings that his commutation should be acted upon favorably. Indeed, I have learned from various sources of Mr. Salvati's exemplary life while incarcerated. From the information that has been supplied to me over the last seven years, it would seem that Mr. Salvati has strong family ties and values and the support of his community.

Accordingly, based upon the information that I have received, I respectfully support the fact that Joseph Salvati should be granted a commutation.

Very truly yours,

Jack I. Zalkind

JIZ/gi

Exhibit 4

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY, ss

SUPERIOR COURT
DOCKET NOS.
32368, 32369, 32370

COMMONWEALTH
V.
JOSEPH L. SALVATI

AFFIDAVIT

I, Frank L. Walsh, hereby swear and affirm that each of the following facts are true and accurate to the best of my knowledge and belief:

1. In 1965, I was a detective with the Boston Police Department.
2. While with the Boston Police Department, and during my assignment in the Suffolk County District Attorney's Office, I was involved in the investigation, arrest, and prosecution of Joseph Salvati and others.
3. During my investigations prior to his indictment, during trial, and subsequent sentencing, I had never become aware that Joseph Salvati had been even remotely connected with firearms or physical violence.
4. When I arrested Joseph Salvati in October of 1967, he had a full head of hair.
5. I did not see the police report that is attached as an exhibit to the Motion for a New Trial.
6. To my knowledge, Joseph Salvati was never mentioned as a suspect in the Deegan murder case until Joseph Barboza mentioned his name.
7. I retired as a Sergeant Detective from the Boston Police Department after thirty-two years of service.

Signed under the pains and penalties of perjury.

Frank L. Walsh

Then personally appeared the above-named Frank L. Walsh and acknowledged the foregoing to be his free act and deed before me

Notary Public

My commission expires March 7, 1997

Mr. DELAHUNT. Back on March 12, 1979, Mr. Garo, did you receive a letter from Jack Zalkind?

Mr. GARO. Yes, I did.

Mr. DELAHUNT. And if you could read—if you have it before you, if you could read the second paragraph for the benefit of the committee, please.

Mr. GARO. Surely. And this is a letter dated March 12, 1979.

To whom it may concern, Re Joseph Salvati.

Second paragraph: During the investigation of this case, prior similar activities by Mr. Salvati never came to my attention, and it was my belief at that time that it was Mr. Salvati's first serious criminal involvement.

Mr. DELAHUNT. Can you repeat that again for the benefit of the panel?

Mr. GARO. It was my belief at that time that it was Mr. Salvati's first serious criminal involvement.

Mr. DELAHUNT. And that was a letter dated to you on March 12, 1979?

Mr. GARO. That is correct, Mr. Congressman.

Mr. DELAHUNT. And back in 1979, did you also receive the communication from a Frank Walsh?

Mr. GARO. Yes, I did.

Mr. DELAHUNT. Could you inform the panel who Mr. Walsh is?

Mr. GARO. Mr. Walsh was a detective in the Boston Police Department assigned to organized crime activities and homicides, and he was involved in the investigation and arrest of Joseph Salvati.

Mr. DELAHUNT. OK. Referring—if you have before you a letter from Mr. Walsh, dated March 15, 1979, and if you would refer to the third paragraph. Could you read it to the committee?

Mr. GARO. Certainly, Mr. Congressman.

During my investigations prior to his indictment, subsequent sentencing, unto this date I have never become aware that Mr. Salvati has been even remotely connected with firearms or physical violence.

Mr. DELAHUNT. Thank you. And both of these letters—and they were subsequent letters similar in nature. Is that a fair statement——

Mr. GARO. That's a very fair statement.

Mr. DELAHUNT [continuing]. Recommended—from the prosecutor and the investigator, recommended a commutation for Mr. Salvati; is that accurate?

Mr. GARO. That is very accurate.

Mr. DELAHUNT. And yet we have the then Governor of Massachusetts in 1992 making a statement that it was because of his long criminal history. And I also remember reading something about his association with organized crime. Is that——

Mr. GARO. That was part of it also, yes, Mr. Congressman. That was in 1993, January 20, 1993.

That was January 20, 1993.

Mr. DELAHUNT. Did you ever have any communication with anyone from Governor Weld's office?

Mr. GARO. No, I was like persona non grata. No one would talk to me.

Mr. DELAHUNT. Do you have any reason to believe that anyone from the Federal Bureau of Investigation would have communicated with the Governor's Office relative to the commutation of Mr. Salvati?

Mr. GARO. May I, Mr. Congressman, do that with an old evidence trick that we were once taught in law school, that when it snows during the night and you wake up the next morning and you see footprints around the building—I can't tell you who the footprints belonged to, but I can tell you that the footprints are there. The footprints are all there that no doubt Governor Weld was talked to.

Mr. BURTON. Would the gentleman yield?

Mr. DELAHUNT. Yes.

Mr. BURTON. I think this is important. I know Governor Weld. I think he relied on some staff people for this.

Do you know who at the Governor's Office would have been contacted about this?

Mr. GARO. I have no idea.

Mr. BURTON. You have no idea. We will contact former Governor Weld and ask him who gave him that information.

Mr. DELAHUNT. I think that is very important. Because I presume, given what I have read in newspaper reports, that the FBI—and even today in—the Special Agent in Charge of the FBI office, one Charles Prouty, has indicated that, while they had this information, they did transmit it to local authorities. It would seem that, at least in terms of Mr. Prouty's statements, that it's his opinion that terminated any obligation that the FBI had relative to providing this exculpatory information about Mr. Salvati.

But it's clearly different if the FBI took an active role and involvement in impeding the process of the commutation of Mr. Salvati, extending those years for maybe 10 or 15 years, that is clearly a significant injustice, to some 30 years. It's disgraceful, and I hope the Chair proceeds to examine that matter very closely.

Mr. GARO. Mr. Chairman, may I make one comment? Maybe you are now beginning to get the flavor of what I was going through all of these years. Because no one was listening.

Mr. BURTON. Well, we're listening; and we will contact Governor Weld to find out what transpired.

Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman.

Mr. Chairman, I hope Mr. Delahunt continues to participate in these hearings that we will be having.

I have a close friend named Austin McGuigan, who is the Chief State's Attorney in Connecticut; and 20 years ago he predicted to me that some day there would be a story about the corruption that existed in the FBI operation in New England. Part of what motivated him to say that is that he was questioning witnesses that were being—in dealing with the World Jai Alai, and they were being murdered. And he was puzzled by the fact that so many retired FBI agents were working for organized crime in Connecticut.

I have such a difficult time understanding the early stages of this. Mr. Salvati, I need to ask you a question, too, and I'm sure I will understand it after you tell me, but, first, was this trial a jury trial or was it a trial by a judge?

Mr. SALVATI. Jury trial.

Mr. SHAYS. Jury trial.

Mr. SALVATI. Yes.

Mr. SHAYS. Was it pointed out that the witness had an incredible, despicable record? Was it made clear to the jury?

Mr. SALVATI. Yes, and they used that to say that you need the bad guy to catch the bad guy.

Mr. SHAYS. OK. Didn't you have an alibi?

Mr. SALVATI. No, I did not.

Mr. SHAYS. Explain that to me. You were somewhere.

Mr. SALVATI. I don't know where I was that night.

Mr. SHAYS. That is because——

Mr. SALVATI. Because I wasn't there. Why do I need an alibi?

Mr. SHAYS. What you don't have is what I have. I have a Franklin planner, and I can tell you where I was. Obviously, we didn't have Franklin planners then, and you didn't have one. But I'm smiling because I am so incredulous. Because there was such a timeframe between—it would be like asking me what I did——

Mr. GARO. 2½ years earlier.

Mr. SHAYS [continuing]. So I would have had to have identify now what I did 2½ years earlier on a particular day.

Mr. SALVATI. Right.

Mr. GARO. And, Mr. Congressman, that's what is so unbelievable, is that Joe Salvati did not invent an alibi and did not create an alibi. He just said, look, I wasn't there. I don't know where I was, but I certainly wasn't there, because I had nothing to do with that situation.

Mr. SHAYS. The problem for me is someone who—this is causing me——

Mr. BURTON. Would the gentleman yield?

Mr. SHAYS. It makes me wonder about so many things I have read and heard.

Mr. BURTON. Let me ask you about one question that needs to be asked, but I hope it's not too uncomfortable for you. But in your first trial there were a number of defendants along with you, and others who were innocent of this crime as well as you, and we have been told that that the head of the Mafia up there paid the legal expenses for everybody that was involved in that case. Is that correct?

Mr. SALVATI. No, it's not.

Mr. BURTON. Who paid for your legal expenses?

Mr. SALVATI. I paid whatever I had saved, and they ran a benefit for me, and that was it.

Mr. BURTON. So you paid for your own legal expenses.

Mr. SALVATI. Yes.

Mr. BURTON. So the information I have was erroneous then.

Mr. Shays.

Mrs. SALVATI. Excuse me. I can attest to that. Because we had a fundraising in the community, and the little money we had we put toward legal counsel for him, and he didn't have the best.

Mr. BURTON. OK, thank you very much.

Mr. Shays.

Mr. SHAYS. I would like to make mention to exhibit 11 which Mr. LaTourette had showed earlier. I'd love to have you turn to the third—and it's the third to the last paragraph.

Just explain to me, first, Mr. Garo, what this exhibit is. It is my understanding this is the Police Department of Chelsea's statement by the officer, Lieutenant Thomas Evans, of what he saw when he investigated this crime.

[Exhibit 11 follows:]

Statement by Lieut.Thomas F.Evans Chelsea Police Department.

On March 12,1965 I received a call from the station that a man had been shot and was in the alley in the rear of the Lincoln National Bank.I received this call at 11:15P.M.

I arrived at the above location at approximately 11:30 P.M.In this alley at that time were Chief Burgin,Lieut.Fothergill,Sergt.Charles McHatton,Capt.Renfrew and Officer James O'Brien.There were about fifteen or twenty people standing about the sidewalks and street that were being kept away from the alley by other uniformed officers.

On eneering this alley a distance of thirty feet,I observed a man who I knew as Edward "Teddy" Deegan lying on his back with his feet in the direction of Fourth St.He was fully clothed with a suit and topcoat,white shirt but no tie.There were gloves on his hands.There was a 12"screwdriver with a black handle and red top on the ground about ten inches from his left hand.There was a fresh pool of blood by his left knee and blood appeared to be still oozing from the rear of his head.There were two metal clad doors ajacent to the body that lead into a office building at #375 Broadway.These doors are 4'8" X 6'3"in height.The alley is 203'long and 8'wide from the sidewalk on Fourth St.to approximately 105' into the alley where it then widens 9'6".There is a fire escape on the left side of the alley about 140' in from Fourth St.This escape is for the tenants at #387 Broadway.

Officer O'Brien told me that he was checking doors prior to making his 11 P.M.ring at Box #22(Broadway & Fourth Sts)and when he went into the above alley he observed a figure crouched over by the above mentioned doors on closer observation with his flash light he observed the blood.He then went to Box #22 and called for assistance O'Brien stated he had last tried these doors at 9 P.M.all was okay. At that time he had put the lights on in the alley.These lights are controlled by a switch that is located on the door casing on the last doorway on the left side of the alley.(Putting these lights on at dusk is the regular routine of the Officers that work route #12.) When O'Brien found the body the lights had been turned off and the door leading into the rear of 375 Broadway was open.

Lieut.Edward Fothergill gave me two complete metal jacket bullets with a right hand rifling twist,one smaller jacketed bullet with full metal jacket also four pieces of copper jacket and a piece of lead core that had been picked up in the alley. I later turned these over to Lieut.John F.Collins of State Police Firearms Identification.Lieut.Fothergill told me that they had to move Deegans bodyyfrom a crouched position to one lying flat on his back so that they could enter the open doorway and make search of the hallways of #375 Broadway.Nothing was found.

Shortly after I had arrived at the scene Attorney Alfred Farese accompanied by Anthony J.Stathopoules,he was allowed into the alley where he made identification of Deegan.He then was engaged in conversation with Chief Burgin and Capt. Renfrew.I was later informed by the Chief and Capt.that Farese had stated that he had received a telephone call from a former client that Deegan and Roy French were in trouble in Chelsea and had been arrested while doing a B & E.This client also told him that a policeman was to make arrangements to leave the door open.

EXHIBIT 11

As a result of having the above information given to me,I spoke to Farese and he repeated the story to me. I asked him if Stathopoulos was the former client of whom he spoke and he said no that he had

asked Stathopoulos to give him a ride to the Chelsea Police Station.He would not reveal the name of this party.

Dr.Meyer Kraft came to the scene and pronounced Deegan dead at 11:43 P.M. The Medical Examiners Office had been notified and Dr.Luongo came to the scene and viewed the body and removed same.

I had received information from Capt.Joseph Kozlowski that about 10 P.M.he had observed a red motor vehicle parked on Fourth St about 150' from the alley in question and there were three men in this car,two in front and one in the rear.He observed the first three digits of this plate as 404 but could see no other numbers as the plate had been bent over from right to left.As he went over to discuss the plate with the occupants the car pulled away from the curb and made a right turn on Broadway.

At approximately 12:30 A.M.on 3-13-65 with Capt.Renfrew, Det.Moore,Revere detectives and myself we went to the Ebb Tide on the Revere Beach Boulevard and made observations of a red,1963 Olds.Conv.Mass.Reg.404-795 that was registered to Joseph Martin of 19 Fleet St.No.End Boston.The plate on the rear of this vehicle was creased down the middle.We went into the cafe and told Wilfred Roy French that were were placing him under arrest for S.P.of a Felony-Murder and that were would be taking him to the Chelsea Police Station.I then requested Martin to bring his car to the station and he agreed to do so.Franis Imbuglia went along with Martin in Martin's car. On arriving at the station I had French taken up to the detective bureau and Martin and Imbuglia waited down stairs in the Seargeants room.With Capt.Renfrew I had Capt. Kozlowski view Martin's car that was parked in front of the station. He stated that the car looked like the one that he had seen earlier in the evening on Fourth St.but that he could not say it was the car.We then went into the Seargeants room to talk with Martin but both he and Imbuglia said they had nothing to say and that if it was not a pinch that they were going to leave. They then left the station.Capt.Kozlowski could not recognize these men.

I them went up to the detective bureau with Capt.Renfrew where I informed French of his rights.He said that he would have nothing to say until he spoke to his lawyer.At about 1:45 A.M. his Attorney,John Fitzgerald of Farese's office,arrived and had a conversation with French.French then gave us the information necessary for the booking card.In reply to a question of his occupation he stated that he was employed as a Maitre De at the Ebb Tide at a salary of $100.00 weekly.Asked as to what time he had gone to work on the evening of 3-12-65 he said that he had gone to work about 8 P.M. and had been there until we had taken him from there. At this point French refused to answer any more questions.I had Capt.Kozlowski look at French but he could not recognize him as being ~~being~~ in the car that he had observed earlier. I then observed what appeared to be bloodstains on the right sleeve of French's coat and also on his right shoe.It appeared that a attempt had been made to remove these stains by rubbing them. I had Capt.Renfrew view these objects.I then asked French how he had this blood on the coat and shoes.French said that while working at the Ebb Tide on 3-12-65 that there had been two different fights and that while breaking them up he had got blood on his clothes.A later check with one Joseph Errico of 37 Atwood St.Revere,a reserve police officer

of the Revere Police Department,reveals that Errico had been working on Friday and Saturday nights at the Ebb Tide for the past month.He goes to work at 9:15 P.M. until 1:30 A.M. He stated while working on 3-12-65 that some unknown fellow had been bothering a girl and that a other unknown party had punched this fellow cutting him about the eye and causing him to bleed profusely.States that because of the numbers of people in the Cafe that he could not say if French had left the place or not.He could not remember what time that this fight had occured.Also employed as a special police officer at this cafe is one Richard Currie of 39 Agawam St.Revere from whom we received no information.

French was allowed to sign a release waiver and leave the station with his attorney John Fitzgerald.

On the morning of 3-13-65,by arrangement,I had Attornies Farese,Fitzgerald and Anthony Stahopoulos come to the detective bureau where I again asked Farese to repeat his story of the previous evening relative to his exclient calling him to tell him of Deegan and French having been arrested by the Chelsea Police.He repeated the same story.I asked if this caller was at present a client of his and he said no.I asked for the name of his informant and he refused to name him.I asked if the name of the police officer who was alleged to have left the door open was known to him and he said no.

Stahopoulos refused to answer questions on advice of his attorney.

Attorney Fitzgerald informed me that he had received a telephone call from Deegan at 8:15 P.M.on 3-12-65 and that he could hear music in the background.I asked Fitzgeral the reason for the call and he told me that Deegan called him every night to let him know that he (Deegan) was okay.

I received information from Capt.Renfrew that a informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 P.M. on 3-12-65 and after a short conversation he had left the cafe with the following men; Joseph Barboza,Ronald Cassesso,Vincent Flemmi,Francis Imbuglia, Romeo Martin,Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a "Strongarm".They are said to have returned at about 11:P.M. and Martin was alleged to have said to French,"We nailed him".

Information received from a Mr.John T.Asten a tenant in apartment #8 at #387 Broadway. Asten states that at 9:30 P.M. on 3-12-65 he heard five sharp cracks and went out onto the fire escape which leads into the alley in question and that the lights were out in the alley and he could see or hear nothing.

I spoke with Vito Pagliarulo,age 55,of 98 Carroll St. Chelsea who is employed as a janitor at 375 Broadway and he informed me that he had left work on 3-12-65 at 3P.M. and he did not know if the rear door had been locked at this time or not.

Mr. GARO. What this document represents, Mr. Congressman, is the investigation done by Lieutenant Evans and his partner Bill Moore on the night of the murder and the next day of the murder and what they observed and what they have found out from all different sources.

Mr. SHAYS. And the Chelsea Police Department is a small police department.

Mr. GARO. Not that small. A good size.

Mr. SHAYS. How big is the town, the community of Chelsea?

Mr. GARO. I can't tell you.

Mr. SHAYS. Is it part of Boston?

Mr. GARO. Yes, it is a suburb of Boston.

Mr. SHAYS. But it is its own entity, its own community.

Mr. GARO. Yes, it is.

Mr. SHAYS. But this was the report of the officer who was investigating.

Do I have your permission to proceed, Mr. Chairman.

Mr. BURTON. Yes.

Mr. SHAYS. And this is a document that was not made available to the prosecutor or the defendant.

Mr. GARO. That is correct.

Mr. SHAYS. And this is a document that at one time people denied even existed?

Mr. GARO. That is correct.

Mr. SHAYS. What I don't understand, though, is Lieutenant Evans knew it existed because he wrote it.

Mr. GARO. That is correct.

Mr. SHAYS. So when Mr. Evans says in this paragraph—excuse me, it's not Mr. Evans, he's Lieutenant Evans—I received information from Captain Renfrew—did he work in the department?

Mr. GARO. Yes, he did.

Mr. SHAYS [continuing]. That an informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 p.m. on March 12, 1965; and after a short conversation he left the cafe with the following men. And then it lists six people: Joseph Barboza, Ronald Cassesso, Vincent Flemmi, Francis Imbuglia, Romeo Martin and Nicky Femia, and a man by the name of Freddie, who is about 40 years old and said to be a "strong man." They are said to have returned at 11 p.m., and Martin was alleged to have said to French, we nailed him.

Now this was actually in a police document.

Mr. GARO. That is correct.

Mr. SHAYS. What I don't understand is there is more than one person who is aware of this document.

Mr. GARO. Correct.

Mr. SHAYS. Who did you ask this document for and who denied it existed?

Mr. GARO. Well, first of all, I obtained a copy of this document, Mr. Congressman, about 3 weeks before the beginning of the commutation hearing in August 1989.

Mr. SHAYS. August 1989.

Mr. GARO. I received it about 3 weeks before.

Mr. SHAYS. Where did you receive it from?

Mr. GARO. I would rather not disclose that, Congressman.

Mr. SHAYS. Was it in the possession of the Chelsea Police Department.

Mr. GARO. That's an interesting story, and if I could answer that, Mr. Congressman. When I had obtained a copy of this document, I used it on the commutation hearing of Mr. Salvati. And when Governor Weld denied the commutation back on January 20, 1993 because of his long criminal record, etc., I said I needed someone in the press to start helping me. And I found a wonderful ally who has done a wonderful job, Dan Rea, who is here today in chambers, and Dan has done wonderful investigative reporting in the case, also.

When I showed him the report in March 1993, he then went out and did his own investigation also. He went to the Chelsea Police Department, and he said, do you have an old file on the Deegan murder case? And they said, I'll go look for one. Lo and behold, they came back with a folder. The first document he opens up is the original of this document. So that the original of this document was in a small file folder on the Deegan murder case.

Mr. SHAYS. I thought you said they didn't have the document.

Mr. GARO. That's what they said.

Mr. SHAYS. They is what——

Mr. GARO. If what you're being confused about—and I know you're not confused—is this: Are you saying the Chelsea Police Department conspired with the FBI in this case, the answer is yes. Do I think that the Boston Police Department conspired with the FBI office in this case? Yes, I do. Do I believe that certain police officers associated and did things with the FBI concerning this case? The answer is yes. Because for this document to come out, Congressman, then they would be coming out with information about informants.

Mr. SHAYS. Why weren't you able to get the document when someone from the police was able to get the document? Explain that to me.

Mr. GARO. No one ever looked at that time.

You have to understand, Congressman, no one wanted to talk about this case.

Mr. SHAYS. In other words, when you asked, they didn't even bother to look.

Mr. GARO. When was that? I was not the trial counsel.

Mr. SHAYS. Didn't you ask for this document earlier?

Mr. GARO. No, no. I obtained a copy of it 3 weeks before my commutation hearing.

Mr. SHAYS. I'm sorry. If I can just make sure. I am confused.

Mr. GARO. I'm sorry. I'm confusing you.

Mr. SHAYS. It's not your fault.

I want to know this. You would have clearly gone to the Chelsea Police Department to ask for any record they had. You did that before, correct?

Mr. GARO. There were no documents that were ever turned over to me from the Chelsea Police Department having anything to do with Salvati's case.

Mr. SHAYS. And you did ask for it.

Mr. GARO. The lawyers had asked for it. There were motions filed, and the request made. It would almost seem, Mr. Congress-

man, didn't it, that maybe somebody had been keeping that document hidden for a lot of years.

Mr. SHAYS. I'm saying you didn't specifically ask for it. It didn't come into your possession, and you didn't feel you had to ask for it. You would have thought it had to have been given to you. And it just so happens that someone asked for this document, and they were handed it.

Mr. GARO. What happened, Mr. Congressman, in reading the 8,000 pages of transcript, you would come to find out that all the reports they had were in evidence. This was an additional document.

Mr. SHAYS. I hear you. I hear you. This is something totally——

Mr. GARO. That is correct—out of the blue. That is why I said, Mr. Congressman, the most important document that I ever received in the case, because this hidden Chelsea Police Department shows who the real killers were.

Mr. SHAYS. What strikes me is that Lieutenant Evans didn't somehow feel compelled to come forward. But also Captain Renfrew, did you ever speak to him?

Mr. GARO. Captain Renfrew would not speak to me.

Mr. SHAYS. And he's living today.

Mr. GARO. He died.

Mr. SHAYS. And evidently Lieutenant Evans——

Mr. GARO. He passed away.

Mr. SHAYS. Well, I will say to all three of you that I rejoice in the fact that, Mr. Salvati, that you're out and, Mrs. Salvati, that you get to hug your husband without anyone watching. But I wonder now who else is like you, Mr. Salvati, who is still there, and maybe he doesn't have a lawyer like Mr. Garo, and I wonder how many people died in prison who were in your circumstance and were not able to celebrate their being out.

Mr. GARO. More than a few, Congressman, more than a few.

Mr. SHAYS. Thank you.

Mr. BURTON. Let me just say to my colleague we will, as far as we can—we can't cover every case that took place up in the Boston area, but any case involving Barboza and others we will try to get information, and if we find that there are similar circumstances we will look into them.

Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman; and, Mr. Chairman, I want to thank you for holding this hearing. This is a critically important case. The revelations about the relationship between the Boston FBI agents and Boston area underworld figures are obviously are a matter of concern to us in Massachusetts but really to the entire country.

To get back to what Congressman Shays has just indicated, this isn't just a question of what happened in this case or what happened in a series of cases but a culture in the FBI that may be taking place or have taken place not only in Boston but throughout the country.

I want to go quickly to this 1993 report. You had indicated that WBZ's Dan Rea had a police report that was found in a file in 1993.

Mr. GARO. Yes, Mr. Congressman.

Mr. MEEHAN. Where had it been all these years?

Mr. GARO. I don't know.

Mr. MEEHAN. Does anybody know?

Mr. GARO. You will probably have to ask somebody on the Chelsea Police Department, Mr. Congressman.

Mr. MEEHAN. Well, Mr. Chairman, I want to thank you, Congressmen Frank and Delahunt, and I appreciate the fact that we can participate here.

We had called for congressional hearings not because we wanted to cripple the FBI. We respect what the FBI does on a daily basis to protect people from violence and terrorism and fraud. But I think, at a minimum, we want to find out the truth. Because sunlight and accountability ultimately prevent a repeat of the mistakes that have severely tarnished the FBI here.

We also want the truth to come out so that Mr. Salvati and others whose lives have been shattered at least can be heard. They deserve so much more than that, but, at a minimum, they deserve to be heard.

Actually, I called for hearings as far back as the summer of 1998 when the relationship between the FBI agents and two particular Boston area gangsters was revealed. In general, this isn't a new story for us from Boston, but the revelations that have been leaking out over the 4 or 5 years with Judge Wolf's 260-page opinion being, from my perspective, a watershed event in pulling back the curtains of decades of the incestuous relationship between the agents and the informants and the destructive consequences. I didn't know much or focus back in the summer of 1998.

The most tragic part of this story, the most tragic thing of all is one that we hear today. It's hard to believe that this could happen in America. It is hard to believe that FBI agents could know of a murder in the making and not stop it from happening. It's hard to believe that FBI agents could know a man was innocent of a crime yet allow him to be jailed for what was to be life.

We've heard about the process with the Governor—first, Governor Dukakis and then Governor Weld, and to allow him to be stripped from his family, his life, his liberty—and the FBI says they were forthcoming. They say they didn't conceal information indicating Mr. Salvati's innocence, and they didn't attempt to frame anybody. Well, there is plenty of dispute here over how the FBI handled the information it received in this case, the information exonerating Mr. Salvati.

But one way or the other, I think that we deserve better than "we didn't attempt to frame anyone." It is the FBI's job to protect us. Obviously, it failed miserably here.

Ultimately, we can never undo the pain and suffering inflicted in this case. At least we can offer apologies. We can ensure that this doesn't happen again.

One of the issues is the so-called guidelines that the Justice Department has reported. But I can't help but look back to early in the Ford administration, I think it was Attorney General Levi went through a process of guidelines at that time, but they didn't seem to have much in effect here. The guidelines didn't affect the culture of the FBI.

I would add, Mr. Chairman, that at the time, the early 1970's, it was a congressional hearing shedding light on that process of guidelines that resulted in getting the new guidelines and resulted in putting some guidelines that at least took into account—so that's why these hearings are so critical, Mr. Chairman.

But I wonder if you have a perspective, Mr. Garo, as to how you change this culture. It is one thing to make guidelines and to have hearings and continue—I am happy to hear the chairman is going to continue this process, get information and get to the bottom of it. How do you change the culture, notwithstanding the attempt to have guidelines?

Mr. GARO. I don't think you can just do it, build guidelines. I think there has to be some checks and balances that are in there.

What I'd offered earlier, Mr. Congressman, is this, is that whenever guidelines or anything comes down of the government doing its own checks and balances, that never works. What happens is we have in Massachusettes a wonderful organization called the Massachusettes Association of Criminal Defense Lawyers; and it would seem to me, Mr. Congressman, that when and if this committee or if your committee in the future investigates further, that some of the more practicing attorneys—because I don't practice criminal law anymore, Mr. Congressman——

Mr. MEEHAN. The case burned you out, huh?

Mr. GARO [continuing]. And I'm not looking for more business like this.

But Mr. Balliro is here. Mr. Bailey is here. They are wonderful criminal defense lawyers. Actually, they're the ones that should be part of any process in the future because that is where the tire meets the road. They're out there every day fighting the system. And we were told in law school that the system has to work for the very worst of us to work for the very best of us.

Mr. MEEHAN. I was detained earlier. You think this case has been frustrating. I was in a meeting. We are trying to get campaign finance reform passed, and I am reminded of the frustrations trying to do that with a lot of the frustrations you have had.

But I wanted to ask you, the Supreme Court in *Brady* v. *Maryland, Rivero* v. *the United States,* held the government had certain obligations to give exculpatory information to defendants in criminal cases; isn't that right?

Mr. GARO. Absolutely.

Mr. MEEHAN. Could you explain in general terms what that means?

Mr. GARO. What it means in the general sense is the government is a human being. It doesn't just look to convict. It looks for justice.

What they're looking for there shouldn't even have to be a rule of law like Brady. If there's a situation and you have evidence of a person as being innocent and you're going to put him to death in the electric chair, you would think that human rights and human decency—forgetting the law—would make the government want to comply with that. But, as we know, they didn't obey the law, they didn't obey their conscience. It is, the truth be damned, full blown speed ahead for convictions only.

Mr. MEEHAN. In the Rivero case, the court stated specifically where the disclosure of an informer's identity or the content of his

communication is relevant and helpful to the defense of an accused or is essential for a fair determination of a case, the information must be disclosed or the case must be dismissed. Now is that your understanding what the law was at the time of Mr. Salvati's trial?

Mr. GARO. That was a 1959 Supreme Court of the United States' decision. I had used it successfully many times in the past. I don't have to tell Mr. Balliro or any of the good criminal defense lawyers that were involved in the Deegan murder case at the time. They knew all about those laws. That's the reason why, Mr. Congressman, it was withheld from them that there was informants.

Because, under Rivero, the law is, if you make a demand from an informant during trial and you can show it will be relevant and helpful, you will get the name of the informant 95 to 99 percent of the time. And if the government doesn't give it to you, the charges are dismissed.

Can you imagine how the chicanery was going on in the Boston office of the FBI, the Suffolk County District Attorney's Office, the Boston Police Department, the Chelsea Police Department, the U.S. attorney's office? If anybody finds out that we have informants and we don't give the name of the informants, we're going to blow the cases. I think that's a pretty big incentive not to come forward with the fact that there were informants in this case.

Mr. MEEHAN. So in this case the government failed to disclose this information to the defense because——

Mr. GARO. It could have—since they would have never given away the names of informants, they would have had to dismiss the cases. I had done that myself about a year earlier in 1966. I understood the *Rivero* case very, very well because I used it many sucessful times.

Mr. MEEHAN. So if the system had worked correctly in this case how should the government have handled the information received from the confidential informants?

Mr. GARO. If they're looking for the truth and you don't want to put someone in prison or to die in the electric chair, you would think that the common decency is that—let me give them this evidence. But if I am bent only on convictions and I have an agenda that I don't want to share with anybody else, I am looking to hide all the good evidence, conjure and perjure and make up the bad evidence and let's go with the convictions—because, as has been stated, the criminal—the Witness Protection Program began with Joseph Barboza. I say it was a misnomer. I say it was the criminal protection program, and it wasn't the Witness Protection Program. When Joe Barboza went out to California under the Witness Protection Program, he killed three to five more people. He's in the Federal Witness Protection Program, and he is killing people in California.

As a matter of fact, he goes to trial on a first degree murder case in 1971 and is still in the Witness Protection Program. And the head of the organized strike force and two FBI agents go out to California and help the defense of Barboza in his 44-day trial of a first degree murder case by saying he was a good guy and he helped us with crime back here.

Mr. Bailey will be able to tell you more about that because he was going to be a witness out there, and that's what caused—it

was said—Barboza to finally plead to second degree murder while in the Federal Witness Protection Program and get a sentence, I believe, that is 5 to life. And he has killed others, and no one wanted to investigate it. No one wanted to talk about it.

Mr. DELAHUNT. Would the gentleman yield for a moment?

Mr. MEEHAN. Sure.

Mr. DELAHUNT. Mr. Garo, I'm aware of the fact that two FBI agents testified on behalf of Mr. Barboza in that capital case. Could you identify them for the record?

Mr. GARO. H. Paul Rico and Dennis Condon.

Mr. DELAHUNT. Thank you.

Mr. MEEHAN. What's really repulsive about the behavior in this case is, before I got elected to Congress, I was a first assistant district attorney in Middlesex County up in Massachusetts. We take young lawyers and we take them into the office and train them, basically a training ground; and we teach the ethics of making sure that they balance the enormous power that the prosecutor has with making sure that the police are getting it right, making sure that they always maintain their responsibility, their integrity to disclose exculpatory information and to get it right. I know that's the way Mr. Delahunt's office operates, and to see that it can get this bad is just very very concerning.

Again, Mr. Chairman, I look forward to participating with you further.

Mr. BURTON. I hope you gentleman will be able to be with us for the next panel. We have some interesting testimony coming there as well. Thank you.

Mr. LaTourette.

Mr. LATOURETTE. Thank you, Mr. Chairman.

Mr. Garo, I want to go back to exhibit 11 just to clean up some stuff, if I can. Those of us that have been involved in prosecutions and law enforcement know that there are informants and there are informants. I think you were talking to Mr. Delahunt earlier about that fact, and I think you indicated that in the various reports you think there may have been up to three different informants supplying law enforcement with information concerning this homicide.

Exhibit 11 to the layman is startling because it indicates very early on, even though it's not dated, very early on Lieutenant Evans had information from an informant as to who the murderers of Mr. Deegan were. My question is, given the fact that there are informants that are good informants and there are bad informants, did you ever discover who the informant was that supplied this information to the Chelsea Police Department back in 1965?

Mr. GARO. No, the identity of that informant has not been made known yet.

Mr. LATOURETTE. When I had the chance to talk to you before in my 5 minutes, I asked you who John Doyle was. It sort of brought a smile to your face, and you sort of indicated it was a long story, and you identified what his position was. But I want to spend the rest of my time, if I could, talking to you about what it is he did or didn't do in this case; and, specifically, the staff of this committee has indicated to me that after this document came to light that it may have been offered or brought to his attention. Is there such a story you can relate to us?

Mr. GARO. Yes, there is; and I'll gladly share it with you. Dan Rea, who was the only voice that I had for this case from 1993, had been talking to—we call him Commander Doyle, and he wanted to know from Doyle—he had a relationship with Mr. Doyle for many years, and Dan told him that he was getting involved in the case with me. And he says, why do you want to do that? That's a dead end case. Why don't you just forget about it and go on home? And Dan said, no, I think it's a story that I'm going to follow. He says, I think you're barking up the wrong tree. Dan at that time had then found the original of the police report in the Chelsea Police Department.

Mr. LATOURETTE. Was there a public record law that was passed in Massachusetts when all of this took place?

Mr. GARO. Yes. And at that time when Dan found it and he told me all about it and he was very surprised and I was shocked, and with that document what he did was he called up Commander Doyle. And he said to Commander Doyle—this is what has been relayed to me, now.

Mr. LATOURETTE. Sure.

Mr. GARO [continuing]. And the Commander said to him, what is it that you're bothering me about now? And he said, well, he said, that Chelsea police report. Yeah, there was no Chelsea police report. He said, yes, there is. As a matter of fact, I found the original Chelsea police report, and I have a copy of it. I would like to come over and show it to you and discuss it with you. I don't want to see you. Don't call me anymore. And that was the end of conversation.

Mr. LATOURETTE. Was that in 1989?

Mr. GARO. No, that happened in 1993.

Mr. LATOURETTE. 1993. OK. But at that time you had a copy of it.

Mr. GARO. I had a copy of it for 4 years.

Mr. LATOURETTE. And your client had been in prison for over 20 years.

Mr. GARO. That is correct.

Mr. LATOURETTE. And still an additional 4 years went by before he was released from prison.

Mr. GARO. That is correct.

Mr. LATOURETTE. Thank you very much. I don't have any other questions.

Mr. BARR [presiding]. Ms. Holmes Norton, did you have some questions for the panel?

Ms. HOLMES NORTON. No.

Mr. BARR. Mr. Shays, do you have some additional questions?

Mr. SHAYS. I do.

Mr. BARR. The gentleman from Connecticut is recognized for 5 minutes.

Mr. SHAYS. Thank you. I have a few, yes, sir.

I would like to go through this fairly quickly. I would like exhibit 11 to be put up. Exhibit 11 is the report of the Chelsea Police Department, Lieutenant Evans. There is a report of the city of Boston. And what's very interesting about it is this is a report of the murder of Teddy Deegan in Chelsea on March 12.

It's dated March 14, and it says, "From a reliable informant the following facts were obtained to the murder: Informant states that the following men"—and it goes through the list of men, and here it identifies Freddie as being Freddie Chiampi, and it goes on and on and on. But basically it confirms what was pretty much in the memo, the report from Thomas Evans. So they had an informant. The city of Boston had their informant.

Now is this a document that you were provided years ago.

[Exhibit 11 follows:]

Page # 1

Statement by Lieut.Thomas F.Evans Chelsea Police Department.

On March 12,1965 I received a call from the station that a man had been shot and was in the alley in the rear of the Lincoln National Bank.I received this call at 11:15P.M.

I arrived at the above location at approximately 11:30 P.M.In this alley at that time were Chief Burgin,Lieut.Fothergill,Sergt.Charles McHatton,Capt.Renfrew and Officer James O'Brien.There were about fifteen or twenty people standing about the sidewalks and street that were being kept away from the alley by other uniformed officers.

On eneering this alley a distance of thirty feet,I observed a man who I knew as Edward "Teddy" Deegan lying on his back with his feet in the direction of Fourth St.He was fully clothed with a suit and topcoat,white shirt but no tie.There were gloves on his hands.There was a 12"screwdriver with a black handle and red top on the ground about ten inches from his left hand.There was a fresh pool of blood by his left knee and blood appeared to be still oozing from the rear of his head.There were two metal clad doors ajacent to the body that lead into a office building at #375 Broadway.These doors are 4'8" X 6'3"in height.The alley is 203'long and 8'wide from the sidewalk on Fourth St.to approximately 105' into the alley where it then widens 9'6".There is a fire escape on the left side of the alley about 140' in from Fourth St.This escape is for the tenants at #387 Broadway.

Officer O'Brien told me that he was checking doors prior to making his 11 P.M.ring at Box #22(Broadway & Fourth Sts)and when he went into the above alley he observed a figure crouched over by the above mentioned doors on closer observation with his flash light he observed the blood.He then went to Box #22 and called for assistance O'Brien stated he had last tried these doors at 9 P.M.all was okay. At that time he had put the lights on in the alley.These lights are controlled by a switch that is located on the door casing on the last doorway on the left side of the alley.(Putting these lights on at dusk is the regular routine of the Officers that work route #12.) When O'Brien found the body the lights had been turned off and the door leading into the rear of 375 Broadway was open.

Lieut.Edward Fothergill gave me two complete metal jacket bullets with a right hand rifling twist,one smaller jacketed bullet with full metal jacket also four pieces of copper jacket and a piece of lead core that had been picked up in the alley. I later turned these over to Lieut.John F.Collins of State Police Firearms Identification.Lieut.Fothergill told me that they had to move Deegans bodyyfrom a crouched position to one lying flat on his back so that they could enter the open doorway and make search of the hallways of #375 Broadway.Nothing was found.

Shortly after I had arrived at the scene Attorney Alfred Farese accompanied by Anthony J.Stathopoules,he was allowed into the alley where he made identification of Deegan.He then was engaged in conversation with Chief Burgin and Capt. Renfrew.I was later informed by the Chief and Capt.that Farese had stated that he had received a telephone call from a former client that Deegan and Roy French were in trouble in Chelsea and had been arrested while doing a B & E.This client also told him that a policeman was to make arrangements to leave the door open.

EXHIBIT 11

As a result of having the above information given to me,I spoke to Farese and he repeated the story to me. I asked him if Stathopoulos was the former client of whom he spoke and he said no that he had

asked Stathopoulos to give him a ride to the Chelsea Police Station.He would not reveal the name of this party.

Dr.Meyer Kraft came to the scene and pronounced Deegan dead at 11:43 P.M. The Medical Examiners Office had been notified and Dr.Luongo came to the scene and viewed the body and removed same.

I had received information from Capt.Joseph Kozlowski that about 10 P.M.he had observed a red motor vehicle parked on Fourth St about 150' from the alley in question and there were three men in this car,two in front and one in the rear.He observed the first three digits of this plate as 404 but could see no other numbers as the plate had been bent over from right to left.As he went over to discuss the plate with the occupants the car pulled away from the curb and made a right turn on Broadway.

At approximately 12:30 A.M.on 3-13-65 with Capt.Renfrew, Det.Moore,Revere detectives and myself we went to the Ebb Tide on the Revere Beach Boulevard and made observations of a red,1963 Olds.Conv.Mass.Reg.404-795 that was registered to Joseph Martin of 19 Fleet St.No.End Boston.The plate on the rear of this vehicle was creased down the middle.We went into the cafe and told Wilfred Roy French that were were placing him under arrest for S.P.of a Felony-Murder and that were would be taking him to the Chelsea Police Station.I then requested Martin to bring his car to the station and he agreed to do so.Franis Imbuglia went along with Martin in Martin's car. On arriving at the station I had French taken up to the detective bureau and Martin and Imbuglia waited down stairs in the Seargeants room.With Capt.Renfrew I had Capt. Kozlowski view Martin's car that was parked in front of the station. He stated that the car looked like the one that he had seen earlier in the evening on Fourth St.but that he could not say it was the car.We then went into the Seargeants room to talk with Martin but both he and Imbuglia said they had nothing to say and that if it was not a pinch that they were going to leave. They then left the station.Capt.Kozlowski could not recognize these men.

I them went up to the detective bureau with Capt.Renfrew where I informed French of his rights.He said that he would have nothing to say until he spoke to his lawyer.At about 1:45 A.M. his Attorney,John Fitzgerald of Farese's office,arrived and had a conversation with French.French then gave us the information necessary for the booking card.In reply to a question of his occupation he stated that he was employed as a Maitre De at the Ebb Tide at a salary of $100.00 weekly.Asked as to what time he had gone to work on the evening of 3-12-65 he said that he had gone to work about 8 P.M. and had been there until we had taken him from there. At this point French refused to answer any more questions.I had Capt.Kozlowski look at French but he could not recognize him as being ~~being~~ in the car that he had observed earlier. I then observed what appeared to be bloodstains on the right sleeve of French's coat and also on his right shoe.It appeared that a attempt had been made to remove these stains by rubbing them. I had Capt.Renfrew view these objects.I then asked French how he had this blood on the coat and shoes.French said that while working at the Ebb Tide on 3-12-65 that there had been two different fights and that while breaking them up he had got blood on his clothes.A later check with one Joseph Errico of 37 Atwood St.Revere,a reserve police officer

of the Revere Police Department,reveals that Errico had been working on Friday and Saturday nights at the Ebb Tide for the past month.He goes to work at 9:15 P.M. until 1:30 A.M. He stated while working on 3-12-65 that some unknown fellow had been bothering a girl and that a other unknown party had punched this fellow cutting him about the eye and causing him to bleed profusely.States that because of the numbers of people in the Cafe that he could not say if French had left the place or not.He could not remember what time that this fight had occured.Also employed as a special police officer at this cafe is one Richard Currie of 39 Agawam St.Revere from whom we received no information.

French was allowed to sign a release waiver and leave the station with his attorney John Fitzgerald.

On the morning of 3-13-65,by arrangement,I had Attornies Farese,Fitzgerald and Anthony Stahopoulos come to the detective bureau where I again asked Farese to repeat his story of the previous evening relative to his exclient calling him to tell him of Deegan and French having been arrested by the Chelsea Police.He repeated the same story.I asked if this caller was at present a client of his and he said no.I asked for the name of his informant and he refused to name him.I asked if the name of the police officer who was alleged to have left the door open was known to him and he said no.

Stahopoulos refused to answer questions on advice of his attorney.

Attorney Fitzgerald informed me that he had received a telephone call from Deegan at 8:15 P.M.on 3-12-65 and that he could hear music in the background.I asked Fitzgeral the reason for the call and he told me that Deegan called him every night to let him know that he (Deegan) was okay.

I received information from Capt.Renfrew that a informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 P.M. on 3-12-65 and after a short conversation he had left the cafe with the following men; Joseph Barboza,Ronald Cassesso,Vincent Flemmi,Francis Imbuglia, Romeo Martin,Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a "Strongarm".They are said to have returned at about 11:P.M. and Martin was alleged to have said to French,"We nailed him".

Information received from a Mr.John T.Asten a tenant in apartment #8 at #387 Broadway. Asten states that at 9:30 P.M. on 3-12-65 he heard five sharp cracks and went out onto the fire escape which leads into the alley in question and that the lights were out in the alley and he could see or hear nothing.

I spoke with Vito Pagliarulo,age 55,of 98 Carroll St. Chelsea who is employed as a janitor at 375 Broadway and he informed me that he had left work on 3-12-65 at 3P.M. and he did not know if the rear door had been locked at this time or not.

Mr. GARO. I have never seen that document I think until Mr. Wilson showed it to me.

Mr. SHAYS. So even as we proceed in this case this is a document, and—is there a name identified, Mr. Wilson, with this document? Other than the city of Boston, we don't know who it is. This is December 12.

Mr. WILSON. If I could, this was a document that was provided to us by the FBI on Friday night of last week.

Mr. SHAYS. So the FBI had this document, and we have been provided it, and you have got it.

Then if you could look at exhibit 13. So we have the Chelsea Police Department and the Boston Police Department; and, Mr. Salvati, your name doesn't show up in this—in either one. And before—they knew it a few days before your trial, they knew it a few days after the murder that they had these informants.

Now this one is from the Department of Public Safety. Is that the State police?

[Exhibit 13 follows:]

Department of Public Safety

1010 Commonwealth Avenue, Boston 02215
March 15, 1965

VE BUREAU

o: Captain of Detectives Daniel I. Murphy
rom: Det. Lieut. Inspector Richard J. Cass

ubject: Homicide of Edward C. "Ted" Deegan

1. On Saturday, March 13, 1965, I went to the Chelsea Police Department to aid in the investigation re the death of Edward C. "Ted" Deegan, dob 1/2/30, of 17 Madison Street, Malden, in accordance with your instructions.

2. Officer James O'Brien, the routeman, stated that about 10:50 P.M. on Friday, March 12, 1965, while checking the doors on his route, he entered the alley in the rear of the Goldberg Building at 375 Broadway and found a body, later identified as Deegan, in a pool of blood in front of the open rear door of the building. He was apparently dead and was in a crouched position in front of the doorstoop. A screw driver was lying on the ground near the body. He notified the station. Dr. Kraft arrived at the scene and pronounced Deegan dead. The body was removed by the Medical Examiner, Dr. Luongo, to the Southern Mortuary. Officer O'Brien stated that at about 9:00 P.M. he had checked the alley and put the overhead light on before continuing his rounds. When he returned at about 10:59 P.M. the light was out and he entered the alley to make a check and discovered the body.

3. The Chelsea Police brought to the station one Anthony J. Stathopoulos, dob 9/22/34, medium complexion, 5'9", 165, brown hair and eyes of 17 Madison Street, Malden, and one Wilfred Roy French, dob 3/13/29, medium complexion, 6', 210, blue eyes, brown hair, of 31 Pleasant Street, Everett. Both subjects were released after questioning. Information was received by this officer that when French had been questioned there were spots on his trousers that appeared to be blood and an attempt had been made to wash it off. Lt. Evans of the Chelsea police stated he questioned French relative to the spots and French claimed that it was blood that came from a fellow who had a fight at the Ebbtide in Revere.

4. Israel Goldberg, owner of the building, was questioned and he said he left the building between 3 and 4 PM.

5. Vito Pagliarielo of 90 Carroll Street, Chelsea, custodian of the building, stated that he checked the rear door about 2:00 P.M. on Friday and it was locked. This door was a double door with slide locks on the top and bottom that had to be released by hand from the inside.

6. Attorneys John Fitzgerald and Alfred Farese were interviewed. Mr. Fitzgerald stated that he received a call from Deegan about 8:45 P.M. on Friday and that he received calls from Deegan every day.

7. Mr. Farese stated that about 10:15 P.M. on Friday he received a call from a client, whom he refused to identify, and the client stated that he heard Deegan had been in a gun fight with the police. Mr. Farese called the police station seeking to verify the information but the police knew nothing about it. Mr. Farese claimed that he called Stathopoulos who came over and rode him to the police station at about 11:05 PM. Upon their arrival, they were informed that Deegan was dead. They went to the scene of the crime and then returned to the police station where Stathopoulos was questioned by Lt. Evans and Capt. Renfrew and released.

8. During the investivation, information was received by this officer that Deegan, French and Stathopoulos had planned to break into the Beneficial Finance Company on the second floor of the Goldberg Building and that the rear door was to be left open for them.

9. During the eveing of Friday, March 12th, French was at the Ebbtide, 302 Boulevard, Revere, with Joseph Barboza aka Baron, Francis Imbuglia, Ronald Cassosa, Vincent "Jimmy" Flemmi, Romeo Martin, Nick Femia and a man known as "Freddy" who is a strong arm man. All the above men have criminal records. About 9:00 P.M., French received a phone call and the above group left the place with him.

10. About 9:30 P.M., Captain Joseph Kozlowski of the Chelsea Police was in the vicinity of Fourth Street about a half block from the scene of the crime and saw a red car with the motor running and three men sitting in it. Two men were in the front seat and one in the rear. The car was parked at the second meter from Broadway, on Fourt Street, between Broadway and Luther Place on the side near the Polish American Veterans Club. The Captain walked behind the car and noticed the rear number plate with the right half of the plate folded towards the center obstructing the last three digits. The first three numbers were 404---. He went to the drivers side of the car and rapped on the window notioning the driver to lower the window. The driver took off at a fast rate of speed and took a screeching turn to the right on Broadway. The Captain described the driver as Romeo Martin and the man in the back seat as stocky with dark hair and a bald spot in the center of the head.

11. Further information was received that about three weeks prior Deegan had pulled a gun on Barboza, aka Baron, at the Ebbtide and forced him to back down and that this was the cause of Deegan's death.

12. Unconfirmed information was received that Romeo Martin and Ronald Cassesa had entered the building and were waiting just inside the rear door. Stathopoulos was waiting on Fourth Street in a car and French and Deegan entered the alley. Deegan opened the rear door. He was shot twice in the back of the head and also in the body. The information at the time was that three guns were used. Lt. John Collins of Ballistics confirmed the report of three guns being used at a later time. Two men approached the car in which Stathopoulos was waiting and he took off.

13. A canvas of the neighborhood was made and Mrs. Grace Luciano of 12 Fourth Street, 2nd floor, and her daughter, Camille, both stated that about 10 P.M. or earlier they heard about 5 shots and they looked out the window on Division St., and saw two cars both racing their motors. One was a new black sedan and the other an old green sedan, make unknown. She saw a man running up the middle of Fourth St., toward Hawthorne about 5' 8", heavy build, dark hair, no hat, dark olive pants, brown waist coat. The account of the two cars was verified as a disabled car and a car that came to help him.

14. Information was also received that Martin's car had left the Ebbtide at 9:00 PM and had returned about an hour later and parked in a different place on its return.

Richard J. Cass
Detective Lieut. Inspector
Massachusetts State Police

Mr. GARO. State police.

Mr. SHAYS. And this is dated March 15. The murder occurred——

Mr. GARO. March 12.

Mr. SHAYS. So this is a pretty fresh document. It is not something they discovered a few years later.

I am looking at No. 9; and it says, on the second page, "During the evening of Friday, March 12, French was at the Ebb Tide"—and it goes on, and it basically mentions the same name, and really what—in this case, they seem to have gotten the report from the Chelsea Police Department. But the point is there is someone in the State police department that also was aware of the Chelsea report, because they mirror it almost perfectly.

Mr. GARO. Absolutely.

Mr. SHAYS. This is a document you got when?

Mr. GARO. This is a document that I received when the Suffolk County District Attorney's Office in October 1993 filed a brief in opposition to my motion for a new trial.

Mr. SHAYS. So just to reiterate, that was in 1993?

Mr. GARO. 1993.

Mr. SHAYS. But the report by Lieutenant Thomas Evans, Chelsea Police Department, wasn't dated, but it appears to be fairly current but—so we have the Chelsea Police Department, we can make an assumption it was done shortly after, if not right after——

Mr. GARO. The partner said that, Bill Moore said that.

Mr. SHAYS. And then we have the Boston Police Department talking about what informants it had, and then we have the Massachusettes Police Department—excuse me, State police on our document 13. And there it was dated March 15.

So, just a few days afterwards, this was made available to not just one person or two people, not just one department, but you had three different departments, two communities, plus the State police.

Mr. GARO. What you are having here, Congressman, that we never knew is that there were parallel investigations going on in the Deegan murder case shortly after it happened within March 12th to 15th, and none of us knew about this Cass report of the State police because in it they talk about a different motive.

If you were to look on page 3 of the Cass report, it says, on No. 11 at the top of the page, "Further information was received that about 3 weeks prior Deegan had pulled a gun on Barboza, aka Baron, at the Ebb Tide and forced him to back down and that this was the cause of Deegan's death."

Now Barboza had said that the motive for this was to get $7,500 from Peter Limone to kill Deegan. The State police at that time had another informant that was giving them information as to the real motive that Deegan was killed, and they sat on it.

Mr. SHAYS. But I would like to think that there is a fail-safe system that we have in, that somebody is going to step forward. It would seem to me that someone would want to think that someone else might show up and reveal what happened and then be made to look bad. So your concept of the conspiracy becomes almost inevitable. It seems like you have no other way to come to any conclusion.

Mr. GARO. That is correct, Congressman; and let me say this. You know, this is not easy for me to come here before Congress and to belittle the enforcement of the laws in the Commonwealth of Massachusettes. But if things are going to change you have to first find out what the evidence really was and to say how do we prevent this from ever happening.

Because it looks like, Congressman, you have hit the nail right on the head. Because what you're saying, there is a Chelsea police report, there is a State police report, there is a Boston Police Department report and god knows how many other reports that have been hidden or destroyed over the years that all say the same thing. Joe Salvati was innocent. He was never mentioned. You people knew who it was, and you all sat back and were happy enough that Joe Salvati could die in the electric chair. My God, what are we coming to?

Mr. SHAYS. Thank you.

Mr. BARR. All Members having concluded their questioning, the Chair now recognizes the counsel for 30 minutes.

Mr. WILSON. I won't take the full 30 minutes.

First of all, Mr. and Mrs. Salvati, thank you for being here and thank you for extending courtesies to myself and my colleagues when we have talked to you. It has meant a lot to us that you have spoken with us and spoken with us freely. You have made our jobs a lot easier by being willing to cooperate with us, and we appreciate that. It's something that we don't always get in this line of work, and we really do appreciate what you have done for us.

I will just take a few minutes right now, because there are some documents we should work through fairly quickly. Because we have submitted documents for the record and because there is a transcript of this, I want to get a few things down so we all understand what was going on right at the time of the murder, and I want to explain some of the initial documents that we have put in the record.

If you could please put up exhibit No. 7 on the screen. Exhibit No. 7 is described as an Airtel to the Director of the FBI. It's dated March 10, 1965. That would be 2 days before Teddy Deegan was murdered.

On the second page of the exhibit which you have in your book, in the first full paragraph, it says, "According to Patriarca, another reason that Flemmi came to Providence to contact him was to get the OK to kill Teddy Deegan of Boston who was with"—and there is a redacted name, and then it goes on. It says, "It was not clear to the informant whether he received permission to kill Deegan."

Now this is 2 days before Deegan was killed, and the document we have indicates that the FBI was in possession of information that Deegan was to be killed. Mr. Garo, is it fair to say you did not know about this document until December 2000?

[Exhibit 7 follows:]

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F [redacted]-2597pg.2

Boston Airtel to Director, 3/10/65 entitled: [redacted]

B, M

F [redacted] advised on 3/3/65 that [redacted] contacted Patriarca and stated he had brought down VINCENT FLEMMI and another individual (who was later identified as Joe Barboza from East Boston, Mass.) It appeared that [redacted], Boston hoodlum, was giving orders to FLEMMI to "hit this guy and that guy".

B

Raymond Patriarca appeared infuriated at [redacted] giving such orders without his clearance and made arrangements to meet FLEMMI and Barboza in a garage shortly thereafter. He pointed out that he did not want FLEMMI or Barboza contacting him at his place of business.

F [redacted]-2597pg.5

Angiulo told Patriarca that VINCENT FLEMMI was with Joe Barboza when he, Barboza, killed [redacted] in Revere, Mass. several months ago. It appeared that [redacted], Boston hoodlum, had ordered the "hit". Patriarca again became enraged that [redacted] had the audacity to order a "hit" without Patriarca's knowledge.

B

Patriarca told Angiulo that he explained to FLEMMI that he was to tell [redacted] that no more killings were to take place unless he, Patriarca, cleared him.

Jerry explained that he also had a talk with FLEMMI. He pointed out that Patriarca has a high regard for FLEMMI but that he, Patriarca, thought that FLEMMI did not use sufficient common sense when it came to killing people.

Angiulo gave FLEMMI a lecture on killing people, pointing out that he should not kill people because he had an argument with him at any time. If an argument does ensue, he should leave and get word to Raymond Patriarca who, in turn, will either "OK" or deny the "hit" on this individual, depending on the circumstances.

M [redacted]

EXHIBIT 7

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's. B

[redacted]

F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B [redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted] B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

Mr. GARO. December 19, the year 2000. That is correct, Mr. Wilson.

Mr. WILSON. Now, the next document—if we could go to exhibit 8, please. Exhibit 8 is also titled Boston's Airtel to Director and SACS—that's special agent in charge of the offices in Albany, Buffalo and Miami. So this is a document that was disseminated not only to the Director of the FBI but to the head of offices to Albany, Buffalo and Miami. The date is March 12, 1965. That's the date Teddy Deegan was murdered.

We don't know when this was tranmitted, but presumably, because Mr. Deegan was murdered late at night, this was the document that was transmitted before the Deegan murder on the same day of the murder. It says in the third paragraph, Flemmi stated that Deegan is an arrogant nasty sneak and should be killed.

So this is the second important document on the day of the murder in the FBI's possession.

Now, again, Mr. Garo, again you did not know about this information until——

[Exhibit 8 follows:]

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's.

B

[redacted]

F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B [redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted]

B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

000015

EXHIBIT 8

Mr. GARO. December 19 the year 2000.

Mr. WILSON. If we could move to exhibit 15, please.

Exhibit 15 is a memorandum to the Director of the FBI from the man in charge of the Boston FBI office. It's dated March 19, 1965, and this is the document that Congressman Barr was referring to earlier.

It states,

> The following are the developments during the current week:
>
> On 3/12/65, EDWARD "TEDDY" DEEGAN was found killed in an alleyway in Chelsea, Mass. in gangland fashion.
>
> Informants report that RONALD CASESSA, ROMEO MARTIN, VINCENT JAMES FLEMMI, and JOSEPH BARBOZA, prominent local hoodlums, were responsible for the killing."

Now this is another one of the documents that was released in December 2000, is that correct?

[Exhibit 15 follows:]

3/19/65

AIRTEL

TO : DIRECTOR, FBI [redacted] F

FROM: SAC, BOSTON [redacted] P

CRIMINAL INTELLIGENCE PROGRAM
BOSTON DIVISION

The following are the developments during the current week:

On 3/12/65, EDWARD "TEDDY" DEEGAN was found killed in an alleyway in Chelsea, Mass. in gangland fashion.

Informants report that RONALD CASESSA, ROMEO MARTIN, VINCENT JAMES FLEMMI, and JOSEPH BARBOZA, prominent local hoodlums, were responsible for the killing. They accomplished this by having ROY FRENCH, another Boston hoodlum, set DEEGAN up in a proposed "breaking & entering" in Chelsea, Mass. FRENCH apparently walked in behind DEEGAN when they were gaining entrance to the building and fired the first shot hitting DEEGAN in the back of the head. CASESSA and MARTIN immediately thereafter shot DEEGAN from the front.

ANTHONY STATHOPOULOS was also in on the burglary but had remained outside in the car.

3-Bureau
1-Boston

JFK:pos'b
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F [redacted] 1820

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EXHIBIT
15

[redacted] F

When FLEMMI and BARBOZA walked over to STATHOPOULOS's car, STATHOPOULOS thought it was the law and took off. FLEMMI and BARBOZA were going to kill STATHOPOULOS also. "OK."

Immediately thereafter, STATHOPOULOS proceeded to Atty. AL FARESE. FARESE called the Chelsea, Mass. PD before Chelsea knew of the killing and FARESE wanted to bail out ROY FRENCH and "TEDDY" DEEGAN. Shortly thereafter the Chelsea PD found the body of DEEGAN and immediately called Atty. FARESE's office, and Atty. JOHN FITZGERALD, FARESE's law partner, came to the Chelsea PD.

Efforts are now being made by the Chelsea PD to force STATHOPOULOS to furnish them the necessary information to prosecute the persons responsible.

It should be noted that this information was furnished to the Chelsea PD and it has been established by the Chelsea Police that ROY FRENCH, BARBOZA, FLEMMI, CASESSA, and MARTIN were all together at the Ebb Tide night club in Revere, Mass. and they all left at approximately 9 o'clock and returned 45 minutes later.

It should be noted that the killing took place at approximately 9:30 p.m., Friday, 3/12/65.

[redacted]

[redacted] B

Informant also advised that [redacted] had given the "OK" to JOE BARBOZA and "JIMMY" FLEMMI to kill [redacted] who was killed approximately one month ago.

Page 3 of serial 1870 is being deleted in its entirety for codes: F, B.

Mr. GARO. That is correct, Mr. Wilson.

Mr. BARR. Excuse me, if I could—this document says, the following are the developments during the current week. Were there weekly updates that were being furnished?

Mr. WILSON. It's our understanding from the documents that there were weekly updates that were going to the Director of the FBI. They were not voluminous. They were the highlights of what was happening, and we have other documents of this sort.

Mr. BARR. Thank you.

The gentleman from Connecticut.

Mr. SHAYS. So we have Chelsea, and we have the Boston Police Department, and we have the State police. This is from the FBI, basically saying the same thing that were in the other three documents.

Mr. WILSON. Yes. Although these are different in that these documents actually talk about the Deegan murder before it occurred. They actually had information that the Deegan murder was to occur.

The one thing I can say, having reviewed all the documents produced to us and we received, we made a document request for all documents related to the murders of Teddy Deegan and anything related to Teddy Deegan, and we got about a linear foot of documents from the FBI last Friday night. That would probably be 1,000 pages of documents. And in those 1,000 pages of documents there was nothing contemporaneous that mentioned Mr. Salvati's name, nothing. The other people were described in the different reports and seem to be accurately described.

Mr. SHAYS. Just one last question. When I see this blacked-out area, what is that? What did they black out?

Mr. WILSON. There are a number of conventions that the FBI used when they redacted documents. The most consistent redactions go to the names of the informants. The FBI never shared the names of informants or information about informants with anyone, including the Attorney General.

Mr. SHAYS. Is it possible they blocked out a signature of someone who made notes that they read it or anything like that?

Mr. WILSON. This we just don't know.

Mr. SHAYS. I would like to know if we have the ability to have counsel go to the FBI and see what was redacted. It would be amazing. We can only speculate. Sometimes when people read documents they check them off and put their initials next to them and so on.

Mr. WILSON. We have gone through three documents, one before the Deegan murder, one the day of the Deegan murder, one 7 days after the Deegan murder.

Now I would like to turn, if we could, to exhibit No. 24.

Now bear in mind that all the documents we've seen identify Vincent Flemmi as a participant in the Deegan murder, and these are the documents that we've just put up, the one before the murder where Vincent Flemmi went and asked permission to kill Deegan and afterwords where he was identified as in fact a person who participated in the Deegan murder.

Exhibit 24 is a write-up of an interview of Joseph Barboza. The interview took place on March 8, 1967. It was conducted by Dennis M. Condon and H. Paul Rico.

The important point that I think we need for the record here, that on the second page of this exhibit there is a section that was redacted so we don't know what it says, but then the one bit that's left in says, Baron—Baron is another name for Joseph Barboza—Baron knows what has happened in practically every murder that has been committed in this area. He said he would never provide information that would allow James Vincent Flemmi to fry but that he will consider furnishing information on these murders.

Now, the easy question we're asking, Mr. Garo, is, did you know anything about this statement ever until——

[Exhibit 24 follows:]

JOSEPH BARON, also known as JOE BARBOZA, was interviewed at the Massachusetts Correctional Institution, Walpole, Massachusetts.

BARON stated that he would not mind talking to the Agents if the Agents would not end up testifying against him for what he said. BARON was told that if he wanted to talk in confidence that "we would respect his confidence."

BARON advised that he has always tried to make a living outside of the law and that if anyone in law enforcement could prove that he was doing wrong, he is willing to pay the consequences. However, he said, when you find that a police officer that you know "fingered scores, acted as lookout when scores were being pulled, and divided up the proceeds of these scores" turns around and manufactures evidence and testimony against you, you have a feeling that maybe you, the criminal, have played by the wrong standards.

BARON said that he never wanted to physically hurt anyone in law enforcement but added that "If my life is ruined by this individual trying to benefit his own ambitions, the day I come out of jail could be the day this Lieutenant becomes nervous."

BARON said that he knows that INCEGNERI is friends with the "connected people" and that these people wanted to see him hurt. BARON advised that he has always tried to get along with these people and that, as a matter of fact, he used to see RAYMOND PATRIARCA and get an "OK" before he made most of his moves. Since they killed three of his friends, however, (THOMAS J. DE PRISCO, ARTHUR C. BRATSOS and JOSEPH W. AMICO) and stole $70,000 from him (This is in reference to the money allegedly in BRATSOS' possession when he was murdered), he had made statements that he was going to kill several of them. BARON said that after thinking the entire situation over, he realized that he could not possibly

On 3/8/67 at Walpole, Massachusetts File # [redacted]

by SA's DENNIS M. CONDON and H. PAUL RICO:pol'b 3 Date dictated

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

EXHIBIT 24

[redacted]

DMC:HPR:po'b

2

[redacted] BARON, knows what has happened in practically every murder that has been committed in this area. He said that he would never provide information that would allow JAMES VINCENT FIDDMI to "fry" but that he will consider furnishing information on these murders.

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000787

[redacted]

Mr. GARO. Never.

Mr. WILSON. When did you first see this statement?

Mr. GARO. I don't recall.

Mr. WILSON. Now, one thing we know from reviewing the document was that in 1965 when Mr. Deegan was murdered Vincent Flemmi was an FBI informant.

Mr. GARO. That's correct.

Mr. WILSON. His brother Steven was also an FBI informant.

Mr. GARO. That is correct.

Mr. WILSON. If you could provide an explanation to us in the context of all the things we have heard today, what this means, and specifically Mr. Barboza has told two FBI agents in 1967—that's before the Deegan trial, correct, the Deegan murder prosecution? Barboza has told two FBI agents that he will never provide information that would allow Vincent Flemmi to fry. Is it fair to say that all of the evidence that was in the possession of prosecutions at the time or investigators at the time indicated that Vincent Flemmi was at the crime scene?

Mr. GARO. From the very beginning when the Chelsea Police Department, Mr. Wilson, investigated the case that night with the information—if you remember me telling you that there was a number 404 on a license plate that had been turned over. And from the statements by Captain Kozlowski that he had come upon the scene and that he had seen the red car and that it had been a registration plate 404, and from the informants' statement that they had left the Ebb Tide that night and mentioned the people, the Chelsea Police Department from that very night knew who the killers were. They had a good notion as to who the killers were.

Mr. WILSON. And there was eyewitness identification—or at least eyewitness identification of a bald man.

Mr. GARO. Absolutely. That is why the ridiculous story about Joe Salvati—about him having to wear a wig to make him look bald is because Vincent Flemmi was bald. Isn't it interesting that Barboza would give the story to have Joe Salvati look like his partner? Doesn't that make a lot of sense?

Mr. WILSON. I will finish here, and I will ask for your opinion on this.

Mr. GARO. Surely.

Mr. WILSON. What I would like to know is that, in your opinion, do you think it was fair or appropriate for the FBI to put a witness on the stand in a murder trial to testify when he had told them in confidence that he would never provide information about somebody who they had information had been at the crime and had committed the crime?

Mr. GARO. In my opening statement you heard what I said, the truth be damned. This was never a search for the truth, Mr. Wilson. It has always been a search only for convictions and to help the propaganda of the FBI during that period of time to show that it was the ultimate crime-fighting force in the United States and in the world. And in order to keep that up they have concocted and perjured testimony to show that, what they were, that they were the FBI.

Mr. WILSON. Thank you very much, Mr. Garo. And again, Mr. and Mrs. Salvati, for all the courtesies you have extended to us, thank you very much.

Mr. GARO. Mr. Acting Chairman, may I make a statement at this time?

Mr. BARR. Yes, sir, Mr. Garo.

Mr. GARO. Thank you. What I'd like to say is this, that I wanted to thank everybody that's here. I'd like to thank the chairman, Mr. Burton. I'd like to thank the Congressmen who have gone out of their way to do an awful lot of work in this case.

Some time ago, I met Mr. James Wilson. He calls me up on the phone and said, Victor, I would like to talk to you. And I said sure. When he told me about the Deegan murder case, I said, I have been known to talk for a few minutes about that case; and I met his staff, Mr. Bowman and Mr. Schumann.

Then Mike Yeager from the Democratic side called me up, Mr. Rapallo, and I have never seen a group of people work so hard and so diligently for any type of organization in my life time. The dedication that they have shown here in putting together a very, very difficult story—folks, it is a very difficult story. I guess maybe I am said to be the master of the facts because I've been around it so long. But just to have people on your staff knowing that when they do their research they have done a damn good job, I am proud to be associated and to know them. And I say this in front of this committee and, Mr. Wilson, especially to you, thank you so much. We're here for you whenever you need us. We thank you for giving the attention to this case that it really needs.

Congressman Delahunt, thank you so much for the kind statements. Thank you for coming to my office for the muffins we enjoyed for over 5 hours.

And the final statement that I would like to make is this, there is a country for the people. It is a country where we have as our most prized possession freedom. It is an awesome responsibility to make sure that freedom stays where it belongs, with those that were innocent. The job that you are doing is God's work.

Because here you have seen in actuality pain, emotion and feelings. When you were reading the documents, they were only pages. I have lived with these people 26 years. And I say to you that a gentleman and a lady and four good young kids, I knew them then. It isn't right that their lives were taken away from them and stolen from them. So we thank you for giving us the opportunity here today to speak to our case. We thank you so much, and God bless all of you.

Mr. BARR. Thank you, Mr. Garo, Mr. Salvati, Mrs. Salvati. Thank you very much for being here today. We know it has been very difficult, and we look forward to being in further contact with you. I know I speak for the entire committee, those that are here and those that could not be with us, in wishing you godspeed.

Mr. SHAYS. I wonder if either one of them wanted to make a closing comment. This may be the last time you are before this committee.

Mr. GARO. Say that once more.

Mr. SHAYS. If either one wants to make a closing statement.

Mr. GARO. You mean Mr. or Mrs. Salvati.

Mr. SALVATI. My family and I would like to thank you for giving the opportunity to tell our story. I get very emotional when I speak about my family, but that's the way I am. Again, thank you very much.

Mr. SHAYS. Thank you.

Mrs. SALVATI. To add to that, my husband speaks from his heart. That's the kind of people we are. Thank you for the opportunity at least to hear the story, and I know all good would come out of this here. OK. Thank you.

Mr. BARR. Your faith is inspiring. Mr. Garo, we can't thank you all enough for what you have done. Thank you very much.

Mr. BURTON [presiding]. I don't know if anybody needs about a 5-minute break. We're ready for your next panel. Mr. Bailey, are you ready to go or do you need to take a break?

Mr. BAILEY. I am ready.

Mr. BURTON. We'll bring the next panel up. It's F. Lee Bailey and Joe Balliro.

Would you both please stand.

[Witnesses sworn.]

Mr. BURTON. I think we'll start with you, Mr. Bailey; and if you have an opening statement we will be glad to hear you say it.

STATEMENTS OF F. LEE BAILEY, ESQUIRE, ATTORNEY FOR JOSEPH BARBOZA; AND JOSEPH BALLIRO, SR., ESQUIRE, ATTORNEY FOR VINCENT FLEMMI AND HENRY TAMELEO

Mr. BAILEY. I do not have a prepared opening statement. Mr. Wilson suggested that a quick recap might help the committee.

I was admitted to practice in Massachusetts in 1960, have been trying cases in the military from 1954 and defended Joe Barboza on an unrelated crime in 1965, the year of the Deegan murder.

Later, I was contacted by a contractor named Frank Davis that said Barboza wanted to recant his testimony both in the Federal case against Cassesso, Imbuglia and Raymond Patriarca and in the Deegan murder case. He was afraid that he would go away for life for perjury in a capital case because that is the punishment in Massachusetts. But he had, surprisingly, been acquitted—surprising to him at least—in 1965 and thought that I might have some magic scheme that would enable him to vindicate the victims of his perjury and at the same time leave him with a whole skin.

I flew down to New Bedford by arrangement and was picked up by someone and went to a two-story wood frame home where I was confronted with more machine guns than I ever saw in military service. I spoke with Mr. Barboza and essentially learned that he now wanted to say what we in Boston had always known. That although Cassesso and French were in fact involved in the Deegan murder with him and Vincent Flemmi, that Tameleo and Mr. Salvati and Peter Limone and Louie Greco had nothing to do with it whatsoever; and Greco, in fact, was in Florida when the murder occurred.

And he wanted to say that his story about Patriarca, Tameleo and Cassesso was at least, in large measure, fabricated, and I asked him if he had any help in putting these false stories together, and he told me that he had quite a bit of help that came from two agents in the FBI. I did not name them in my affidavit,

but the agents he named to me were Paul Rico, then known as "the Spaniard" in Boston, and Dennis Condon who has been the subject with Mr. Rico of some fairly fiery testimony in the proceedings before Judge Wolf, where Stevie Flemmi, the brother of Vincent Flemmi, is defended by my colleague, Ken Fishman on a court appointment.

This, I believe, has been the genesis of smoking out most of this dirt from the FBI files, because some of them have testified extensively, and I think some of the questions you have may be answered in that record; for instance, who was the informant. You were asking a while ago—there are papers here that show and that it has been independently shown that it was Stevie Flemmi who told the FBI.

One of the things that puzzled me was how Barboza's testimony was able to switch. Flemmi, who had been seen in the back seat by a Chelsea police officer who couldn't identify him but knew he had a bald spot, "the Bear," Jimmy Flemmi, was a person about 5 foot 8½ inches tall, very burly and strong. He had a bald spot in his crown, which was prominent and everybody knew about it. And he said that in order to fit to those facts, because no one knew when that police report was going to come up, that he had to put someone else there since Flemmi was his partner and he wasn't going to rat him out, as he put it, and that he didn't like Salvati anyway, because Salvati had been rude to one of his shylock collectors and Salvati was about the right size. So he made up a story, with encouragement, that a wig had been obtained that simulated a bald spot, because Joe Salvati had and he knew he still has a full head of hair. That struck me as highly corroborative of what Barboza was saying.

However, I have long been an advocate of protecting one's self against chronic liars. He certainly was one, had been one all his life, and the condition I had made to the man paying the fee, Frank Davis of HiLo Construction, was that I wasn't going to go forward with the case unless Barboza would agree to take a polygraph, because recanting witnesses are never looked on with favor, but buttressing his testimony would at least make me more comfortable before starting to name names.

While that program was in progress, Barboza managed to get himself caught with a weapon in his car. He was clamped in jail, violated on probation, but did not give up his effort. I arranged for Charles H. Zimmerman, then the probable dean of all polygraph examiners in the United States, certainly in Massachusetts, much revered by the courts in years when we used polygraph, to test Barboza on the truthfulness of his statement and whether he was being paid any money under the table by anyone connected with the case, innocent or guilty. That test was scheduled for, I believe, July 30, 1970. I saw Barboza in the prison, and although I cautioned him, he would recklessly describe his crimes, and he had no hesitation at all about describing the most cold-blooded, ruthless killings—he claimed more than 20, largely in the McLain-McLaughlin gang wars of the fifties—as if he were eating a piece of apple pie. And cell mates were within earshot.

Mr. Harrington—who I hasten to interject is one of the best Federal judges on the bench, he was then a strike force lawyer—and

an assistant named Barns went to Walpole, and somehow the polygraph test went away. We later learned, of course, that the FBI said, fire Bailey and don't take the polygraph test or you're here forever. And I'm quite satisfied that happened, since I was terminated.

Unfortunately for Mr. Barboza, one of the killings that he boasted about in Santa Rosa, CA was within earshot of another inmate, who then went to the authorities, caused Barboza to be indicted in Santa Rosa, and I was summoned as a witness. And I said, I have, I'm afraid, attorney-client privilege. The judge out there ruled no; Barboza knew there were people not within the umbrella of the attorney-client privilege present when he talked about this, and you can be called and will be called as a witness. And I said, all right, but I want you to order me to answer any questions that relate to conversations, whether anyone was there or not.

It was agreed by the prosecutors that would happen.

When it was known that I was going to appear as a witness in the case and that he would face more than a cell mate on the prosecution side, Mr. Barboza began to negotiate, with considerable help from the Federal Government, and walked away with second degree murder, 5 to life, and was hustled off to Montana to some country club to serve his time.

In 1976, in January, Barboza was out, once again with Federal help, roaming the streets of San Francisco as I was engaged in defending Patty Hearst, and I believe in February of that year, was gunned down by someone with a machine gun. The curious twist to Mr. Barboza is that he was, at the end of it all, not a tough guy. When he first came to me to get me to defend him in the unrelated charges in 1965, which were felonies and of which he was acquitted by a jury, I took an immediate dislike to him. I was to defend him as a favor to a man named Howie Winters, who's still alive and was a gang member at the time, and Wimpy Bennett, who was simply murdered later on. And I told Barboza to take his hat off, and he exploded, because I didn't make Bennett take his hat off. And I frankly put my hand in my drawer, where I had a 38, because this man's reputation was fearsome. And I said, Wimpy Bennett is bald, he can keep his hat on; take yours off or get out. And he left the room and broke down in tears and came back in crying, saying if you don't defend me, I'll go to jail. That was the beginning of a relationship which later evolved into the meetings of 1970, and that is most of my knowledge from Barboza that I can disclose.

Mr. BURTON. I have a question, but we'll defer that till we hear from Mr. Balliro. Mr. Balliro.

Mr. BALLIRO. Mr. Chairman, I first of all want to thank you and members of the committee for the privilege of appearing here today. I suppose, almost as much as the Salvati family, I am just thrilled to see what this committee is attempting to do, because for some 30-odd years of the 50 years that I have been practicing law and defending people accused of crime, I've had to carry with me the knowledge that Joe Salvati, Henry Tameleo, who was my direct client, Louis Greco and Peter Limone, who also had a very young family at the time, were in jail, had suffered the almost expectation of being executed for crimes that I was satisfied from the get-go that they did not commit.

Now, during the course of the 50 years that I have been practicing law, many people have asked me how can you do that day after day, because all of my practice is on the criminal side of the court. And I've always told them that which I believe as much as I believe in anything in this world, that everybody is entitled to a defense, no matter how bad anybody else might think they be. And as a matter of fact, I feel so strongly about it, that I feel that our very form of government, our system of government depends upon due process and the right of everybody who's accused by the government of having committed a crime to get a fair trial.

During the course of my career, I've represented clergymen, politicians, lawyers, judges, the old, young, male, female, people of all kinds of lifestyles. And in all of those cases, except one kind of case, the government always has the burden of proof, and they've got to prove their case beyond a reasonable doubt, except when it comes to an organized crime figure. I've lectured at seminars throughout this country, and I've always told lawyers, especially young lawyers, don't ever walk into a courtroom defending someone who's been labeled as a part of organized crime and ever expect that those things that you learned in law school are going to hold true.

Now, I'm not at all defensive about the fact that I was the lead counsel in the Deegan murder case. And a young colleague in my office, Chester Paris, who was an excellent lawyer, I designated to represent Joe Salvati. And, by the way, Mr. Chairman, and members of the committee, all of the defendants paid for their own fees in that case. And much to the contrary of what the public may have an expectation or deception of believing, the fees were not very large. As a matter of fact, I have a daughter and a son in practice, and they accuse me, even today, of charging less money to represent people than they charge to represent people.

But the Congressman from Connecticut, Mr. Shays, asked earlier on today, how could you lose that case? Well, we lost it for a number of reasons, but I think the principal reason was expressed somewhat in the chairman's earlier remarks this morning—his opening remarks this morning, when he talked about what his feelings were toward the FBI back in those years of the 1950's and the 1960's and the 1970's, the tremendous amount of respect he had, and understandably so, because I myself had, other than for the fact that I knew things that perhaps others didn't about some of the agents of the FBI.

But, you know, the star witness in this case really wasn't Joseph Barboza. The star witness in this case was the FBI. And I don't mean that just figuratively. I mean it literally, because what the government did in that case, in addition to putting Joe Barboza on the stand, totally, completely uncorroborated, as far as his testimony was concerned—there was no other corroboration in the case—except the fact that they put on the stand Dennis Condon. There was no legitimate reason for putting Dennis Condon on the witness stand. The only reason he was put on the stand was to project up there on the board, so to speak, the image that everybody respected of the FBI at that time.

And I was reminded earlier today of some of my cross-examination, obviously, not very successful, but I think very significant, as

far as the work that this committee is starting to do. I was trying to undermine through my cross-examination of Dennis Condon the credibility of that which Joseph Barboza had testified to. And I sought to do that by pointing out that over the period of time that Barboza was in the custody of the government, preparing for trial, a whole raft of different law enforcement people had access to him. And in doing that, I was trying to convey to the jury the fact that his testimony had been shaped and molded. And the only thing that I could get Dennis Condon to agree to was how essential it was to have the purity of a witness' testimony.

He agreed with me in this case, knowing about all of these intels and all of these memorandums that we have no clue about, of course, at all, he agreed with me how essential it was to the administration of justice, the due process, that a person's witness' testimony be pure. And he did that as his testimony was being monitored by a whole sheave of law enforcement officers that had participated in the preparation and the prosecution of that case.

So, Congressman Shays, I'm not defensive, as counsel in that case. We never had a chance from the get-go, but that's what we were up against. That's what these defendants, these innocent defendants, were up against during the course of that trial. I'll be happy to answer any questions that the committee might have.

Mr. BURTON. I only have one question at the outset, and then I'll yield to Mr. Barr, and then we'll come back to Mr. Delahunt. And that is, when you met with Mr. Barboza when he was incarcerated——

Mr. BALLIRO. Mr. Flemmi.

Mr. BURTON. Beg your pardon?

Mr. BAILEY. Barboza.

Mr. BALLIRO. Oh, I'm sorry. Yes.

Mr. BURTON. When you, Mr. Bailey, met with Mr. Barboza when he was in prison—I think it was in prison—you said that within earshot, there were other inmates who overheard the conversation. Did he say anything about the Deegan murder to you? Did he say that he was involved in it or that—who the other members were that were involved in that murder?

Mr. BAILEY. Oh, yes. He was involved—Vincent Flemmi was involved. Nicky Femia, who was a Barboza sidekick, was involved. Chico Amico, his other sidekick, I do not believe was involved. Roy French was the trigger man, and Cassesso was involved. When it came to adding names, he dealt with the FBI this way: You let me put in a couple, and I'll put in a couple that you want.

Mr. BURTON. But when you talked to him, did he mention Salvati at all? Did he say, you know——

Mr. BAILEY. Yes.

Mr. BURTON. What did he say?

Mr. BAILEY. He said Salvati was innocent, had nothing to do with the case.

Mr. BURTON. So he flatly told you Salvati was innocent in that meeting, and you wanted him to take a polygraph about that issue as well as the others that you talked about?

Mr. BAILEY. He signed an affidavit, which although not this specific, was the first step. And I wrote a letter to Attorney General Quinn telling him what was up.

Mr. BURTON. Did you send the affidavit with the letter?

Mr. BAILEY. Oh, sure. Yes.

Mr. BURTON. So he got the letter from you saying that Salvati was innocent, plus the affidavit, and nothing was done?

Mr. BAILEY. Nothing was done. All of this was mentioned in my memorandum to Mr. Balliro in 1970 after I was fired.

Mr. BURTON. Thank you very much. Mr. Barr. You want me to go to Mr. Shays first? Mr. Shays.

Mr. SHAYS. I would like Mr. Delahunt to go, and then I'll——

Mr. BURTON. Mr. Delahunt, are you prepared? Mr. Delahunt.

Mr. DELAHUNT. First of all, let me welcome two gentlemen for whom I have great respect, that I consider friends, people whom I had dealings with, Mr. Chairman, during the course of my 20 years as an elected prosecutor in Massachusetts. These are people of great talent, great skill, and in my dealings with them, I can tell you now that their integrity was unimpeachable. It's good to see you both here, Lee and Joe. I can tell you this, too. They're very formidable adversaries, but I think that they both know that in their dealings with my office——

Mr. SHAYS. 'Fess up. They whipped your butt every time.

Mr. DELAHUNT. No. We had some wins. We had—in fact, the first case that was ever televised in Massachusetts, the case of the *Commonwealth* v. *Prendergast,* Mr. Balliro was the counsel for the defendant in that case. So we've made some history together, and, again, this is not just hyperbole or saying good things about good people. It's the truth, and their remarks today I think are very important, because, again, my experience has been as a prosecutor. But I always remember, and I think they both would verify that I had a group of prosecutors that were exceptionally talented. In some cases, their abilities far exceeded mine in a courtroom. But my only admonition was to remember that they had delegated to them the most single awesome power in a democracy, which was to deprive people of their liberty and that one thing I would never tolerate would be the abuse of that power. And I hope that's my legacy of 21 years.

I would pose it to either of you, it's interesting that with all the attention given to Mr. Barboza, in the end what did he really produce for the U.S. Government, if you know? I think Mr. Garo indicated earlier that he testified in three cases. Well, in one of them, it's now overwhelmingly clear that he put four innocent people in jail. If either one of you know, what did he contribute to public safety in Massachusetts and in New England by virtue of his involvement in the other two cases?

Mr. BALLIRO. Well, it's my view that not only did he not contribute anything toward public safety, but the use of his testimony, like the use of many other jailhouse informants or cooperating witnesses who are testifying solely for reward, does much to damage terribly the administration of criminal justice in this country.

Mr. DELAHUNT. What you're saying, then, is that in the end, when we find people who are innocent in jail because of a result of this kind of testimony, that in the end it really erodes the confidence of the American people and the integrity of the system? Isn't that really what we're talking about here?

Mr. BALLIRO. And in a very expensive way.

Mr. DELAHUNT. And in a very expensive way. It's my understanding in my conversation with Mr. Garo that on the other cases that he testified that resulted in convictions, what we're talking about were sentences of some 5 years, and who knows what the veracity, the credibility, of his testimony was in that case. But after all this, all this money, all this effort, Joe Barboza did absolutely nothing in terms of justice and in terms of protecting the people. It was an egregious mistake to recruit him as an informant to begin with.

Mr. Bailey, you said something that was very disturbing to me. It's clear to me that the position of the Federal Bureau of Investigation, reading from just newspaper reports, is that when they receive this information—and if you had an opportunity to review the exhibits, you see the correspondence back and forth from the special agent in charge in Boston and the Director of the FBI, who at that time was J. Edgar Hoover, as well as reports filed by Special Agent Rico and in some cases by Special Agent Condon, that they concluded that by simply disseminating the information, that was the end of their legal obligation.

Now, I don't know whether failing to produce that information or insist upon it being brought to the appropriate court of jurisdiction would violate any criminal statute. I find it offensive on a moral and ethical basis. But what you said earlier about Mr. Barboza's testimony being helped, were you suggesting that his testimony was manipulated, was agreed to, was suggested by Federal agents?

Mr. BAILEY. I'm quite certain of that. And before more FBI bashing, let me say I am a big fan of the FBI. Judge Webster and Judge Sessions are friends. But the FBI is like the little girl with the curl; when they're bad, they are horrid. In this case I believe that the testimony was furnished. When the FBI decided who they wanted to target, it just happened to be the right-hand man of Raymond Patriarca, the reputed right-hand man of Jerry Angiulo. They suggested those names. Barboza threw in Greco, because Greco beat him up once, and he threw in Salvati, because he had to replace Flemmi. They knew all about that. And one particular agent not only did it in this case but did it again with another——

Mr. DELAHUNT. You know, that's a very serious statement.

Mr. BAILEY. It is.

Mr. BURTON. Could the gentleman yield real quickly? You said they did it in another case?

Mr. BAILEY. Yes.

Mr. BURTON. Would you care to be a little bit more specific? I'll grant the gentleman the time.

Mr. BAILEY. Certainly. As these people were indicted, Mr. Balliro and I were engaged in defending what Congressman Delahunt will remember as the Great Plymouth Mail Robbery, then the largest in the history of the country. All these men were acquitted. The purported leader, John J. Kelley, whom I defended, was caught a year later, in a Brinks truck robbery, nailed cold. And he was told—and I talked with Mr. Kelley about this extensively. He was told, you are such a big fish, that to get a deal you're going to have to give us somebody bigger. And there are only two people we can think of, F. Lee Bailey and Raymond Patriarca. He chose Mr. Patriarca, was helped to make up a story about Mr. Patriarca or-

chestrating a homicide, testified falsely in Federal court and obtained a conviction. The manager of that witness as well was Paul Rico, who came to my office attempting to intimidate me after Kelley turned, and I threw him out.

Mr. BURTON. Any information you have about that case we'd like to have. Anything——

Mr. BAILEY. I can only tell you, because——

Mr. BURTON. We'll check with the FBI to get documentation on that as well.

Mr. BAILEY. You should. Yes.

Mr. BURTON. I'm sorry, Mr. Delahunt.

Mr. DELAHUNT. I thank the Chair. I just would note that this goes far beyond simply the withholding of exculpatory evidence, which is—what you're suggesting here is that in a capital case——

Mr. BAILEY. Well, I said, "now, Joe, could you have done it by yourself?" And he said no, he wouldn't have known how to arrange his facts so that he could testify falsely to them.

Mr. DELAHUNT. Well, again, in the Deegan case, this is suggestive of subornation of perjury, Mr. Bailey.

Mr. BAILEY. It is, the penalty of which is life.

Mr. DELAHUNT. And that particular statute does not have any statute of limitations, does it, Mr. Bailey?

Mr. BAILEY. It does not. And it suggested strongly to me of a conspiracy to cause murder to happen. If these men had not been saved, not by the judicial process in the United States, which endorsed the death sentences, not of Salvati and French but of the other four, had they not been saved by the U.S. Supreme Court's widespread—effective the *Furman* v. *Georgia* decision of striking down capital punishment, they would have been executed, and nobody would have come forward on——

Mr. DELAHUNT. Mr. Bailey, you seem to be convinced that one Stevie Flemmi was the informant in the reports of the FBI.

Mr. BAILEY. He is mentioned not by name but because we know that he was the owner of a certain property, and that's how he's described in the memo which I saw a little while ago. But please understand, the FBI had, we now know, a nest of ruthless, coldblooded psychopathic killers, two Flemmis, Barboza and Whitey Bulger. They left them on the streets, they protected them at all times. They were killing people left and right and committing all kinds of other crimes. And who gave them information in a given case is hard to say, but Vincent Flemmi has admitted that he was that person in the back seat with the bald spot.

Mr. DELAHUNT. Mr. Balliro, could I ask you just in terms of how do we remedy this situation? Let me just give you my own theory.

Mr. BURTON. Can I clarify?

Mr. DELAHUNT. Certainly.

Mr. BURTON. Mr. Balliro, I want to make sure we don't miss that point. You're saying your client was Mr. Flemmi. Did Mr. Flemmi admit to you that he was the fellow with the bald spot in the back seat?

Mr. BALLIRO. Oh, yes.

Mr. BURTON. OK. Well, I think that's very important that we make sure that's clear to everybody. I thank the gentleman.

Mr. BALLIRO. Not only did he admit to me that he was the fellow sitting in the back seat, but he also told me that Barboza had sent him a message explaining that he had substituted Salvati for him, and that Limone, Tameleo and Greco had nothing to do with it; but since they didn't give him, Barboza, the proper, what he called respect, he was very concerned about being respected by the people in the north end of Boston, all of whom were of Italian heritage, and he wasn't getting that respect, so he was going to get even.

Mr. DELAHUNT. I posed a question earlier, but I'd like to ask another question of Mr. Bailey. Can you identify the law enforcement agents that told Barboza, according to Barboza's conversation with you, that you're here forever if you continue to insist upon recanting your testimony?

Mr. BAILEY. No, because he didn't tell me that. It has since come out, and I don't have personal knowledge of that, but I do know this: Whenever Barboza was on the move doing anything, Rico and Condon would pop up as they did in Santa Rosa.

Mr. DELAHUNT. Mr. Balliro, in the State, some offices, including mine when I was the district attorney, adopted a policy of full discovery, an open file policy. Can you describe for members of the committee the discovery procedures in the Federal system and whether, in your opinion, there is difficulty securing exculpatory evidence?

Mr. BALLIRO. It's like pulling teeth. That's what it's comparable to. You know, they boast—most U.S. attorney's offices—about how much discovery they give to defense counsel in criminal cases, and they're prone to sending you banker boxes full of discovery, really without identifying what in all those thousands upon thousands of pages really is important, what's significant and what isn't significant. But when it comes down to the real nitty-gritty of what you need to effectively represent your client and to do a competent cross-examination, it's like pulling teeth. They fight it all the way.

Mr. DELAHUNT. Thank you. Just indulge me, Mr. Chairman, for one more question. You referenced earlier Stevie Flemmi and Whitey Bulger, and I know you were present earlier when I inquired of Mr. Garo about his problems with the commutation, securing the commutation, despite having in his possession documents that were clearly exculpatory. Now as I sit here and I reflect, if Stevie Flemmi, one could theorize, was the informant in this case, given his role and position in the criminal element in Massachusetts, it certainly wouldn't be to his advantage to have Limone and Greco and Tameleo out on the street, would it, Mr. Bailey?

Mr. BAILEY. I don't think Stevie was ever accepted as a member of the so-called Angiulo group. The two Flemmis——

Mr. DELAHUNT. Well, in fact, it was his testimony that did lead in the late 1980's, early 1990's, to the conviction of Gennaro Angiulo and others. Am I correct in stating that? He played a role in it. Not only did he play a role——

Mr. BAILEY. The Federal prosecution of Gennaro and Angiulo, yes.

Mr. DELAHUNT. Yes. But I guess my point is, if you will listen to me for one moment——

Mr. BAILEY. Yes.

Mr. DELAHUNT [continuing]. And just reflect on this premise, it was as if Stevie Flemmi and his associate, Mr. Bulger, were acquiring a monopoly in terms of organized crime in the greater Boston area. There was no competition.

Mr. BAILEY. Well, they had their own organization, but they had a very powerful partner, called the FBI.

Mr. DELAHUNT. I yield. Thank you, Mr. Chairman.

Mr. BURTON. Thank you. We'll come back, if you have more questions. Mr. LaTourette. Then we'll go to Mr. Shays. And Mr. Horn, you have questions, too? We'll get to all of you in just a minute. Mr. LaTourette.

Mr. LATOURETTE. Thank you, Mr. Chairman. Mr. Bailey, I come from Cleveland, OH, and my mom put together a scrapbook and this doesn't have anything to do with it, but I was born in the month of July 1954, the month Marilyn Sheppard was murdered, and your name is certainly emblazoned in a lot we've done, and there are some parallels. As a matter of fact, I just heard Sam Ray Sheppard on the radio the week before I came back and his continuing travails to clear his father, but it's a pleasure to be in your company.

Mr. Balliro, it's a pleasure to be in your company too. I don't want to exclude you, but you didn't have anything to do with Marilyn Sheppard.

I am concerned, Mr. Balliro, about an exhibit that's in our book, exhibit No. 35, which is an affidavit that I think you executed earlier this year in connection with the release of—dealing with representation you had. You're conversant with that affidavit and——

Mr. BALLIRO. Yes.

Mr. LATOURETTE. OK. And I think that the chairman was talking to you before about the fact that—whether or not you had a conversation with Vincent Flemmi about the murder of Teddy Deegan, and you did in fact have such a conversation. And in that conversation, as I understood not only your previous observations but the affidavit as well, he basically told you what had happened to Teddy Deegan.

[Exhibit 35 follows:]

(15)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S.

SUPERIOR COURT DEPARTMENT
TRIAL COURT DIVISION
CR. NO.: 32367, 69-70

COMMONWEALTH

V.

PETER LIMONE

AFFIDAVIT OF JOSEPH J. BALLIRO, SR., ESQUIRE

Introduction

The following affidavit is made with the understanding that it is to be used in support of the motion for a new trial on behalf of Peter Limone.

Affidavit

I, Joseph J. Balliro, Sr., Esquire, do state and aver the following:

1. I represented Henry Tameleo in the trial of the Commonwealth v. Peter Limone et. als., that concluded with a conviction on July 31, 1968;

2. As the result of a post-conviction investigation, I received a memorandum from F. Lee Bailey, Esquire who was representing Joseph Barboza who had been the critical witness in the case against Mr. Limone and others;

A copy of the "memo" is attached hereto and will speak for itself. It obviously exculpates Mr. Limone from being in any way responsible for the death of Mr. Deegan;

3. At no time have I represented Stephen Flemmi or Nicky Flemia;

4. I have no knowledge of any information that Freddy Chiampa or Frank Imbruglia have concerning the Deegan murder case and although I may have represented either or both of them some 35 or 40 years ago, I neither remember the dates or

EXHIBIT
35

circumstances and can find no file that reflects such representation;

5. I have represented both Joseph Barboza and Vincent "Jimmy" Flemmi some 35 or 40 years ago on matters unrelated to the Deegan murder case;

6. I never received any information from Mr. Barboza relative to the Deegan murder case;

7. Pursuant to an order of the, Hinckle, J., releasing me from the attorney-client privilege of my client, James "Vincent" Flemmi, the following is a summary of a conversation I had with Mr. Flemmi in the summer of 1967 concerning the Deegan murder case:

I visted with Mr. Flemmi for the purpose of determining what evidence he could furnish, if any, that would impeach the credibility of Joseph Barboza in the Deegan murder trial. I was representing Henry Tameleo, who was one of the defendants in that case. Mr. Flemmi told me that it would be impossible for him to come up front with any evidence against Barboza. He told me that Barboza had planned the killing and that he, Flemmi, had participated. Flemmi told me that when Barboza gave his account of the crime to the authorities, he substituted Joseph Salvati for Flemmi because Salvati had disrespected him. Flemmi told me that Barboza had sent him word that although Tameleo, Limone had nothing to do with arranging the Deegan murder, that Greico was not a participant and he was putting them in because they also had disrespected him.

Flemmi told me that he had done too many things with Barboza and was concerned that if Barboza thought that Flemmi tried to help my client, that he could involve Flemmi in some serious stuff.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 2ND DAY OF JANUARY, 2001.

Joseph J. Balliro, Sr., Esq.
99 Summer Street
Suite 1800
Boston, MA 02110
(617) 737-8442
B.B.O. No. 028000

Mr. BALLIRO. He told me it in the context of the attorney-client relationship. As a matter of fact, he started off by saying—I had gone up to see what information I could get from him that might undermine the credibility of Barboza——

Mr. LATOURETTE. Right.

Mr. BALLIRO [continuing]. In the upcoming trial. And he started off by saying that he was very concerned about giving me any information, which kind of stunned me, because I knew what his relationship was to other people in that whole group, and the expectation was that he would be very happy to be of help, if he could be of help. But he said he couldn't and that he was concerned about Barboza, because as close as he was to Barboza, he didn't trust Barboza for one moment. He felt that he might turn on him and might implicate him in the Deegan killing. And if so, he wanted me to represent him. I represented Jimmy on previous cases. As a matter of fact, I represented him on a case that he was in jail for at that time.

Mr. LATOURETTE. Right. But this conversation which I think I want to get to, this conversation took place, according to the affidavit, at least, in the summer of 1967?

Mr. BALLIRO. Correct.

Mr. LATOURETTE. The trial for the Deegan murder took place in 1968?

Mr. BALLIRO. Correct.

Mr. LATOURETTE. OK. So at the time that you were representing one of the codefendants, I guess, in the Deegan murder, you had information from another client that the client you were representing had nothing to do with the Deegan murder, and in fact, it was Vinny Flemmi and "the Animal" that had actually been the bad people. Is that right?

Mr. BALLIRO. Correct. It was a lot more complicated than that, because one of the co-counsels who represented Joe Salvati was a fellow who I had put into the case. He was in my office at the time.

Mr. LATOURETTE. Well, that was the next thing that I was going to ask you. Mr. Salvati's lawyer came from your firm as well?

Mr. BALLIRO. Correct.

Mr. LATOURETTE. And it's been—I haven't practiced law, obviously, since I've been here, but it seems to me that there was some rule that what was knowledge of——

Mr. BALLIRO. Conflicts.

Mr. LATOURETTE. Well, we'll get to conflict in a minute maybe, but what was the knowledge of one person within the firm was imputed to be the knowledge of the law firm, I guess. Is that——

Mr. BALLIRO. I think that's a fair statement, yeah.

Mr. LATOURETTE. OK. So at the time your associate was representing Mr. Salvati, your firm had institutional knowledge, at least, that Vincent Flemmi and Mr. Barboza were the murderers?

Mr. BALLIRO. We didn't set up Chinese walls in those days.

Mr. LATOURETTE. I'm not trying to cast stones here. I'm trying to just indicate that this is a pretty intense web that was weaved back in 1968, and I think that it's intense, because when your client was found guilty on July 31, 1968, you knew it was wrong. Right?

Mr. BALLIRO. Oh, absolutely.

Mr. LATOURETTE. And you didn't know it was wrong because they had just done a nice job of the prosecution. You knew it was wrong because you had another client who was the murderer?

Mr. BALLIRO. Sure.

Mr. LATOURETTE. And that applied to Mr. Salvati as well?

Mr. BALLIRO. Absolutely.

Mr. LATOURETTE. You know, we're going to deal with how the government handles informants and things of that nature, but—and I also understand that the fact that the attorney-client privilege is inviolate. But I guess I would solicit an opinion from you as to that's a pretty big pickle you've found yourself in.

Mr. BALLIRO. Sure.

Mr. LATOURETTE. And do you think that there is no ethical way out of—not just you, but——

Mr. BALLIRO. Well, there is now, and there is in Massachusetts anyway, because the Supreme judicial court in Massachusetts, effective January 1, 1998, opened the door for counsel to invade the attorney-client privilege if, among other things, it would result in preventing an unlawful incarceration. That's one of the phrases that's in the rule now. So you can do that today, and that's——

Mr. LATOURETTE. But that change only took place——

Mr. BALLIRO. Which led to my finally divulging the name of Flemmi. It says "may." It doesn't say "has to," and in an exercise of caution, I asked for a court order, and I did get that.

Mr. LATOURETTE. And as we look at changing that, what do you think about making it mandatory, the "shall"? If you have information as a lawyer, or I had information or Mr. Delahunt or Mr. Bailey, that a fellow is going to go to jail, face the death penalty—and thankfully the jury showed mercy and he only got—only, I say, life in prison, but he spent 33 years—do you think making it mandatory would have——

Mr. BALLIRO. Well, I think that—I'm a little hesitant about making it mandatory, because there are too many shades sometimes, you know, having to do with those kinds of revelations. But I do think that an acceptable alternative would be to have the attorney at least make an in camera presentation to a judicial officer and then let the judicial officer in the exercise of his discretion determine whether or not he should——

Mr. DELAHUNT. Would the gentleman yield?

Mr. LATOURETTE. The red light is on. If you want me to yield, Mr. Chairman, I'll yield.

Mr. BURTON. Well, we're being very lenient, because we don't want to break up the train of thought of those who are doing the questioning, but I'd just like to say, we don't have a Federal statute that deals with that. Do you think it would be advisable to have a Federal statute that's similar to the statute in Massachusetts that would allow a defense attorney to divulge that kind of information if there was somebody wrongfully convicted?

Mr. BALLIRO. I think it's extremely important, Mr. Chairman and, you know, this isn't the first time that I've had a client tell me about someone else's innocence in a case that I was representing, you know, somebody on, and it's not the first time that the person that's told me was the person who actually committed the offense that I was defending somebody else on.

Mr. BURTON. I think Mr. Delahunt and others on the Judiciary Committee, I'll be happy to cosponsor a bill like that. Would the——

Mr. DELAHUNT. Yeah. The question that other—again, the observation by Chairman Burton and your informing the committee about the change in Massachusetts rules, I think it's something that this committee, in conjunction with the Judiciary Committee and the full Congress, ought to give serious consideration, and any ideas that either one of you or any members of the bar, whether it be prosecutors or defense counsel. I think this particular case highlights the need to have some discretion. I concur, Joe, with you. I think making mandatory might cause some real problems, given the various degrees, if you will, of culpability and involvement, but I think it's an excellent suggestion, and I'd welcome working with the Chair and Mr. LaTourette on that.

Mr. BALLIRO. Whatever my committee in Massachusetts can do to be of help. I want you to know, Congressman, that we'd be very happy to set up a liaison relationship in that regard.

Mr. DELAHUNT. Thank you, Joe.

Mr. LATOURETTE. I thank you. I thank the Chairman.

Mr. BURTON. Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman. Gentlemen, it's very nice to have you both before this committee. You've sat very patiently listening to the first panel, and so we don't need to bring forward those exhibits. But just to quickly go over them again quickly without bringing them up, exhibit 11 was from Lieutenant Thomas F. Evans, Chelsea Police Department, in which it was fairly clear they had identified the perpetrators of the murder.

Exhibit 12 was the city of Boston Police Department of March 14, 1965, in which they basically had similar information. Then you had the Department of Public Safety, March 15th, Massachusetts State Police, exhibit 13, that confirmed what the first—what the Chelsea police had been told and what the police department in Boston had been told. None of this information, Mr. Balliro, was made available to you. Correct?

[Exhibits 11, 12 and 13 follow:]

Statement by Lieut.Thomas F.Evans Chelsea Police Department.

On March 12,1965 I received a call from the station that a man had been shot and was in the alley in the rear of the Lincoln National Bank.I received this call at 11:15P.M.

I arrived at the above location at approximately 11:30 P.M.In this alley at that time were Chief Burgin,Lieut.Fothergill,Sergt.Charles McHatton,Capt.Renfrew and Officer James O'Brien.There were about fifteen or twenty people standing about the sidewalks and street that were being kept away from the alley by other uniformed officers.

On eneering this alley a distance of thirty feet,I observed a man who I knew as Edward "Teddy" Deegan lying on his back with his feet in the direction of Fourth St.He was fully clothed with a suit and topcoat,white shirt but no tie.There were gloves on his hands.There was a 12"screwdriver with a black handle and red top on the ground about ten inches from his left hand.There was a fresh pool of blood by his left knee and blood appeared to be still oozing from the rear of his head.There were two metal clad doors ajacent to the body that lead into a office building at #375 Broadway.These doors are 4'8" X 6'3"in height.The alley is 203'long and 8'wide from the sidewalk on Fourth St.to approximately 105' into the alley where it then widens 9'6".There is a fire escape on the left side of the alley about 140' in from Fourth St.This escape is for the tenants at #387 Broadway.

Officer O'Brien told me that he was checking doors prior to making his 11 P.M.ring at Box #22(Broadway & Fourth Sts)and when he went into the above alley he observed a figure crouched over by the above mentioned doors on closer observation with his flash light he observed the blood.He then went to Box #22 and called for assistance O'Brien stated he had last tried these doors at 9 P.M.all was okay. At that time he had put the lights on in the alley.These lights are controlled by a switch that is located on the door casing on the last doorway on the left side of the alley.(Putting these lights on at dusk is the regular routine of the Officers that work route #12.) When O'Brien found the body the lights had been turned off and the door leading into the rear of 375 Broadway was open.

Lieut.Edward Fothergill gave me two complete metal jacket bullets with a right hand rifling twist,one smaller jacketed bullet with full metal jacket also four pieces of copper jacket and a piece of lead core that had been picked up in the alley. I later turned these over to Lieut.John F.Collins of State Police Firearms Identification.Lieut.Fothergill told me that they had to move Deegans bodyyfrom a crouched position to one lying flat on his back so that they could enter the open doorway and make search of the hallways of #375 Broadway.Nothing was found.

Shortly after I had arrived at the scene Attorney Alfred Farese accompanied by Anthony J.Stathopoules,he was allowed into the alley where he made identification of Deegan.He then was engaged in conversation with Chief Burgin and Capt. Renfrew.I was later informed by the Chief and Capt.that Farese had stated that he had received a telephone call from a former client that Deegan and Roy French were in trouble in Chelsea and had been arrested while doing a B & E.This client also told him that a policeman was to make arrangements to leave the door open.

EXHIBIT 11

As a result of having the above information given to me,I spoke to Farese and he repeated the story to me. I asked him if Stathopoulos was the former client of whom he spoke and he said no that he had

asked Stathopoulos to give him a ride to the Chelsea Police Station.He would not reveal the name of this party.

Dr.Meyer Kraft came to the scene and pronounced Deegan dead at 11:43 P.M. The Medical Examiners Office had been notified and Dr.Luongo came to the scene and viewed the body and removed same.

I had received information from Capt.Joseph Kozlowski that about 10 P.M.he had observed a red motor vehicle parked on Fourth St about 150' from the alley in question and there were three men in this car,two in front and one in the rear.He observed the first three digits of this plate as 404 but could see no other numbers as the plate had been bent over from right to left.As he went over to discuss the plate with the occupants the car pulled away from the curb and made a right turn on Broadway.

At approximately 12:30 A.M.on 3-13-65 with Capt.Renfrew, Det.Moore,Revere detectives and myself we went to the Ebb Tide on the Revere Beach Boulevard and made observations of a red,1963 Olds.Conv.Mass.Reg.404-795 that was registered to Joseph Martin of 19 Fleet St.No.End Boston.The plate on the rear of this vehicle was creased down the middle.We went into the cafe and told Wilfred Roy French that were were placing him under arrest for S.P.of a Felony-Murder and that were would be taking him to the Chelsea Police Station.I then requested Martin to bring his car to the station and he agreed to do so.Franis Imbuglia went along with Martin in Martin's car. On arriving at the station I had French taken up to the detective bureau and Martin and Imbuglia waited down stairs in the Seargeants room.With Capt.Renfrew I had Capt. Kozlowski view Martin's car that was parked in front of the station. He stated that the car looked like the one that he had seen earlier in the evening on Fourth St.but that he could not say it was the car.We then went into the Seargeants room to talk with Martin but both he and Imbuglia said they had nothing to say and that if it was not a pinch that they were going to leave. They then left the station.Capt.Kozlowski could not recognize these men.

I them went up to the detective bureau with Capt.Renfrew where I informed French of his rights.He said that he would have nothing to say until he spoke to his lawyer.At about 1:45 A.M. his Attorney,John Fitzgerald of Farese's office,arrived and had a conversation with French.French then gave us the information necessary for the booking card.In reply to a question of his occupation he stated that he was employed as a Maitre De at the Ebb Tide at a salary of $100.00 weekly.Asked as to what time he had gone to work on the evening of 3-12-65 he said that he had gone to work about 8 P.M. and had been there until we had taken him from there. At this point French refused to answer any more questions.I had Capt.Kozlowski look at French but he could not recognize him as being ~~being~~ in the car that he had observed earlier. I then observed what appeared to be bloodstains on the right sleeve of French's coat and also on his right shoe.It appeared that a attempt had been made to remove these stains by rubbing them. I had Capt.Renfrew view these objects.I then asked French how he had this blood on the coat and shoes.French said that while working at the Ebb Tide on 3-12-65 that there had been two different fights and that while breaking them up he had got blood on his clothes.A later check with one Joseph Errico of 37 Atwood St.Revere,a reserve police officer

of the Revere Police Department,reveals that Errico had been working on Friday and Saturday nights at the Ebb Tide for the past month.He goes to work at 9:15 P.M. until 1:30 A.M. He stated while working on 3-12-65 that some unknown fellow had been bothering a girl and that a other unknown party had punched this fellow cutting him about the eye and causing him to bleed profusely.States that because of the numbers of people in the Cafe that he could not say if French had left the place or not.He could not remember what time that this fight had occured.Also employed as a special police officer at this cafe is one Richard Currie of 39 Agawam St.Revere from whom we received no information.

French was allowed to sign a release waiver and leave the station with his attorney John Fitzgerald.

On the morning of 3-13-65,by arrangement,I had Attornies Farese,Fitzgerald and Anthony Stahopoulos come to the detective bureau where I again asked Farese to repeat his story of the previous evening relative to his exclient calling him to tell him of Deegan and French having been arrested by the Chelsea Police.He repeated the same story.I asked if this caller was at present a client of his and he said no.I asked for the name of his informant and he refused to name him.I asked if the name of the police officer who was alleged to have left the door open was known to him and he said no.

Stahopoulos refused to answer questions on advice of his attorney.

Attorney Fitzgerald informed me that he had received a telephone call from Deegan at 8:15 P.M.on 3-12-65 and that he could hear music in the background.I asked Fitzgeral the reason for the call and he told me that Deegan called him every night to let him know that he (Deegan) was okay.

I received information from Capt.Renfrew that a informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 P.M. on 3-12-65 and after a short conversation he had left the cafe with the following men; Joseph Barboza,Ronald Cassesso,Vincent Flemmi,Francis Imbuglia, Romeo Martin,Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a "Strongarm".They are said to have returned at about 11:P.M. and Martin was alleged to have said to French,"We nailed him".

Information received from a Mr.John T.Asten a tenant in apartment #8 at #387 Broadway. Asten states that at 9:30 P.M. on 3-12-65 he heard five sharp cracks and went out onto the fire escape which leads into the alley in question and that the lights were out in the alley and he could see or hear nothing.

I spoke with Vito Pagliarulo,age 55,of 98 Carroll St. Chelsea who is employed as a janitor at 375 Broadway and he informed me that he had left work on 3-12-65 at 3P.M. and he did not know if the rear door had been locked at this time or not.

EDMUND L. MCHAHARA
POLICE COMMISSIONER

City of Boston 2
Police Department

BUREAU OF INSPECTIONAL SERVICES
INTELLIGENCE DIVISION

Report of Information Received

BY TELEPHONE _____ CONTROL NUMBER _____

WRITTEN COMMUNICATION _____ TIME _____

IN PERSON _____ DATE March 14, 1965

SOURCE OF INFORMATION Informant

SUBJECT Murder Of Teddy Deegan in Chelsea on March 12th

LOCATION _____

DETAILS: From a reliable informant the following facts were obtaine
to the above murder: Informant states that the following men were
Joseph Barrent aka Barboza, Romeo Martin, Freddie Chiampi, Roy Fren
Ronnie Cassesse, Tony Stats. (Greek) Chico Amico, Informant stat
Roy French and Tony Strats. were suppose to lure Deegan to some-
on the pretext of doing a B&E and the other men were to be waiti
the area to kill him, Informant states that they were over-
lounge in Revere when they received the call from French that ev
was O K then they all left together. After the Killing Romeo Mar
upset because somebody he thought took the number of his car aft
killing. Romeo Martin was a former informant but since hanging
North End hasn't been to helpful. I then talked to Martin and tol
the Police were looking for him in the hope that he would give so

REMARKS _____

REFERRED TO _____

RECEIVED BY _____

000436

Informant states that the reason for the killing of Deegan was that Barren claims that he is with the Hughes brothers and McLaughlins and he felt he Deegan was a threat to his friends in Roxbury(Flemmi & Bennett).

Department of Public Safety

1010 Commonwealth Avenue, Boston 02215
March 15, 1965

VE BUREAU

o: Captain of Detectives Daniel I. Murphy
rom: Det. Lieut. Inspector Richard J. Cass

ubject: Homicide of Edward C. "Ted" Deegan

1. On Saturday, March 13, 1965, I went to the Chelsea Police Department to aid in the investigation re the death of Edward C. "Ted" Deegan, dob 1/2/30, of 17 Madison Street, Malden, in accordance with your instructions.

2. Officer James O'Brien, the routeman, stated that about 10:50 P.M. on Friday, March 12, 1965, while checking the doors on his route, he entered the alley in the rear of the Goldberg Building at 375 Broadway and found a body, later identified as Deegan, in a pool of blood in front of the open rear door of the building. He was apparently dead and was in a crouched position in front of the doorstoop. A screw driver was lying on the ground near the body. He notified the station. Dr. Kraft arrived at the scene and pronounced Deegan dead. The body was removed by the Medical Examiner, Dr. Luongo, to the Southern Mortuary. Officer O'Brien stated that at about 9:00 P.M. he had checked the alley and put the overhead light on before continuing his rounds. When he returned at about 10:59 P.M. the light was out and he entered the alley to make a check and discovered the body.

3. The Chelsea Police brought to the station one Anthony J. Stathopoulos, dob 9/22/34, medium complexion, 5'9", 165, brown hair and eyes of 17 Madison Street, Malden, and one Wilfred Roy French, dob 3/13/29, medium complexion, 6', 210, blue eyes, brown hair, of 31 Pleasant Street, Everett. Both subjects were released after questioning. Information was received by this officer that when French had been questioned there were spots on his trousers that appeared to be blood and an attempt had been made to wash it off. Lt. Evans of the Chelsea police stated he questioned French relative to the spots and French claimed that it was blood that came from a fellow who had a fight at the Ebbtide in Revere.

4. Israel Goldberg, owner of the building, was questioned and he said he left the building between 3 and 4 PM.

5. Vito Pagliarielo of 90 Carroll Street, Chelsea, custodian of the building, stated that he checked the rear door about 2:00 P.M. on Friday and it was locked. This door was a double door with slide locks on the top and bottom that had to be released by hand from the inside.

6. Attorneys John Fitzgerald and Alfred Farese were interviewed. Mr. Fitzgerald stated that he received a call from Deegan about 8:45 P.M. on Friday and that he received calls from Deegan every day.

7. Mr. Farese stated that about 10:15 P.M. on Friday he received a call from a client, whom he refused to identify, and the client stated that he heard Deegan had been in a gun fight with the police. Mr. Farese called the police station seeking to verify the information but the police knew nothing about it. Mr. Farese claimed that he called Stathopoulos who came over and rode him to the police station at about 11:05 PM. Upon their arrival, they were informed that Deegan was dead. They went to the scene of the crime and then returned to the police station where Stathopoulos was questioned by Lt. Evans and Capt. Renfrew and released.

8. During the investivation, information was received by this officer that Deegan, French and Stathopoulos had planned to break into the Beneficial Finance Company on the second floor of the Goldberg Building and that the rear door was to be left open for them.

9. During the eveing of Friday, March 12th, French was at the Ebbtide, 302 Boulevard, Revere, with Joseph Barboza aka Baron, Francis Imbuglia, Ronald Cassosa, Vincent "Jimmy" Flemmi, Romeo Martin, Nick Femia and a man known as "Freddy" who is a strong arm man. All the above men have criminal records. About 9:00 P.M., French received a phone call and the above group left the place with him.

10. About 9:30 P.M., Captain Joseph Kozlowski of the Chelsea Police was in the vicinity of Fourth Street about a half block from the scene of the crime and saw a red car with the motor running and three men sitting in it. Two men were in the front seat and one in the rear. The car was parked at the second meter from Broadway, on Fourt Street, between Broadway and Luther Place on the side near the Polish American Veterans Club. The Captain walked behind the car and noticed the rear number plate with the right half of the plate folded towards the center obstructing the last three digits. The first three numbers were 404---. He went to the drivers side of the car and rapped on the window notioning the driver to lower the window. The driver took off at a fast rate of speed and took a screeching turn to the right on Broadway. The Captain described the driver as Romeo Martin and the man in the back seat as stocky with dark hair and a bald spot in the center of the head.

11. Further information was received that about three weeks prior Deegan had pulled a gun on Barboza, aka Baron, at the Ebbtide and forced him to back down and that this was the cause of Deegan's death.

12. Unconfirmed information was received that Romeo Martin and Ronald Cassesa had entered the building and were waiting just inside the rear door. Stathopoulos was waiting on Fourth Street in a car and French and Deegan entered the alley. Deegan opened the rear door. He was shot twice in the back of the head and also in the body. The information at the time was that three guns were used. Lt. John Collins of Ballistics confirmed the report of three guns being used at a later time. Two men approached the car in which Stathopoulos was waiting and he took off.

13. A canvas of the neighborhood was made and Mrs. Grace Luciano of 12 Fourth Street, 2nd floor, and her daughter, Camille, both stated that about 10 P.M. or earlier they heard about 5 shots and they looked out the window on Division St., and saw two cars both racing their motors. One was a new black sedan and the other an old green sedan, make unknown. She saw a man running up the middle of Fourth St., toward Hawthorne about 5' 8", heavy build, dark hair, no hat, dark olive pants, brown waist coat. The account of the two cars was verified as a disabled car and a car that came to help him.

14. Information was also received that Martin's car had left the Ebbtide at 9:00 PM and had returned about an hour later and parked in a different place on its return.

Richard J. Cass
Detective Lieut. Inspector
Massachusetts State Police

Mr. BALLIRO. You know, one needs only to look at the transcript of the record of the trial in this case. If anything, a glimpse of all of that information had been furnished to defense counsel, it would have resulted in a flurry of discovery motions and days of cross-examination of Mr. Barboza and other witnesses that we would then put on the witness stand.

Mr. SHAYS. You would have had an absolute field day. Exhibit 15 was the Airtel to Director of the FBI from the special agent in charge, dated March 19th, which was actually dated after the murder, but described what they had been told would be the murder—what was going to take place, and in fact the murder did take place. And, again, your witness was not mentioned in any of these as well.

[Exhibit 15 follows:]

3/19/65

AIRTEL

TO : DIRECTOR, FBI [redacted] F

FROM: SAC, BOSTON [redacted] P

CRIMINAL INTELLIGENCE PROGRAM
BOSTON DIVISION

The following are the developments during the current week:

On 3/12/65, EDWARD "TEDDY" DEEGAN was found killed in an alleyway in Chelsea, Mass. in gangland fashion.

Informants report that RONALD CASESSA, ROMEO MARTIN, VINCENT JAMES FLEMMI, and JOSEPH BARBOZA, prominent local hoodlums, were responsible for the killing. They accomplished this by having ROY FRENCH, another Boston hoodlum, set DEEGAN up in a proposed "breaking & entering" in Chelsea, Mass. FRENCH apparently walked in behind DEEGAN when they were gaining entrance to the building and fired the first shot hitting DEEGAN in the back of the head. CASESSA and MARTIN immediately thereafter shot DEEGAN from the front.

ANTHONY STATHOPOULOS was also in on the burglary but had remained outside in the car.

3-Bureau
1-Boston

JFK:pos'b
(4)

SEARCHED ____
SERIALIZED 0
INDEXED ____
FILED 0

F [redacted] -1820

0000 4

EXHIBIT
15

[redacted] F

When FLEMMI and BARBOZA walked over to STATHOPOULOS's car, STATHOPOULOS thought it was the law and took off. FLEMMI and BARBOZA were going to kill STATHOPOULOS also.

Immediately thereafter, STATHOPOULOS proceeded to Atty. AL FARESE. FARESE called the Chelsea, Mass. PD before Chelsea knew of the killing and FARESE wanted to bail out ROY FRENCH and "TEDDY" DEEGAN. Shortly thereafter the Chelsea PD found the body of DEEGAN and immediately called Atty. FARESE's office, and Atty. JOHN FITZGERALD, FARESE's law partner, came to the Chelsea PD.

Efforts are now being made by the Chelsea PD to force STATHOPOULOS to furnish them the necessary information to prosecute the persons responsible.

It should be noted that this information was furnished to the Chelsea PD and it has been established by the Chelsea Police that ROY FRENCH, BARBOZA, FLEMMI, CASESSA, and MARTIN were all together at the Ebb Tide night club in Revere, Mass. and they all left at approximately 9 o'clock and returned 45 minutes later.

It should be noted that the killing took place at approximately 9:30 p.m., Friday, 3/12/65.

[redacted]

[redacted] B

Informant also advised that [redacted] had given the "OK" to JOE BARBOZA and "JIMMY" FLEMMI to kill [redacted] who was killed approximately one month ago.

Page 3 of serial 1870 is being deleted in its entirety for codes: F, B.

Mr. BALLIRO. Absolutely not.

Mr. SHAYS. Mr. Bailey, you had—I now would like to turn to exhibit 26. This is an affidavit that Joseph Barboza signed in front of a notary, and this was at your request. Is that true?

[Exhibit 26 follows:]

m: John Cavicchi Attorney at Law Fax: 617-567-4697 Voice: 617-567-4697

Exhibit

EXHIBIT-
ADMITS
PERJURY

A F F I D A V I T

Personally appeared before me Joseph Baron, also known as Joseph Barboza, and, being under oath, deposed and said as follows:

I, Joseph Baron, also known as Joseph Barboza, under oath, and free from duress or coercion directly or indirectly of any kind whatsoever say as follows:

1. That I am the same Joseph Baron (Barboza) who testified in the trial of Commonwealth v. French, et als--Nos. 31601, 32365 to 32370 inclusive.

2. That I wish to recant certain portions of my testimony during the course of the above-said trial insofar as my testimony concerned the involvement of Henry Tameleo, Peter J. Limone, Joseph L. Salvati and Lewis Grieco in the killing of Teddy Deegan.

3. That the testimony I now offer to give concerning the killing of Teddy Deegan and those individuals responsible for his death will be the whole truth known to me.

Joseph Baron

Then personally appeared before me the above-named Joseph Baron, also known as Joseph Barboza on 28th day of July, 1970 and swore that he had read the foregoing affidavit and that the facts therein stated are true.

Notary Public

My Commission Expires: Jan 21, 1974

000967

EXHIBIT
26

Mr. BAILEY. Yes. And the notary was my law partner.

Mr. SHAYS. Thank you. Would you read No. 1 and No. 2, "that I am the same"?

Mr. BAILEY. You mean Paragraphs 1 and 2?

Mr. SHAYS. Yes. Thank you.

Mr. BAILEY. OK. "That I am the same Joseph 'Baron' Barboza who testified in the trial of the Commonwealth v. French," with numbers.

No. 2, "That I wish to recant certain portions of my testimony during the course of the above-said trial insofar as my testimony concerned the involvement of Henry Tameleo, Peter J. Limone, Joseph L. Salvati and Lewis Grieco in the killing of Teddy Deegan."

Mr. SHAYS. So basically, he is acknowledging—and he was in fact the only witness in their—he was the witness against these individuals. Is that correct?

Mr. BAILEY. The men were sentenced to death on the sole basis of Barboza's testimony.

Mr. SHAYS. And he is saying that he did not testify accurately. Is that not true?

Mr. BAILEY. Yes, he certainly is.

Mr. SHAYS. OK. So you have this document, and walk me through again what you did with this document.

Mr. BAILEY. I believe I sent it to the attorney general.

Mr. SHAYS. OK. And the attorney general at the time was?

Mr. BAILEY. Robert Quinn.

Mr. SHAYS. Now, in the State of Massachusetts, the attorney general does criminal as well as civil? In the State of Connecticut it's only civil but——

Mr. BAILEY. He has a supervisory role and can take over most any case, as Senator Brooke did the strangling cases that were being handled by several jurisdictions.

Mr. SHAYS. And it's not like frankly you're a lightweight attorney. It's not like you aren't well known. It's not like this would have just passed through his desk and somehow slipped through. I mean, this came with your signature, and this was the affidavit. And in your letter, did you outline what was said in the affidavit? Do you remember?

Mr. BAILEY. I believe I said generally that Mr. Barboza was looking for a vehicle to make the truth known without being penalized too heavily.

Mr. SHAYS. OK. So the bottom line to it is, though, you got what kind of a response?

Mr. BAILEY. None.

Mr. SHAYS. By none, you got no thank you, or you didn't get a no thank you?

Mr. BAILEY. No. I got no response.

Mr. SHAYS. OK. I just need to know what you would do after that. If you got no response, is it kind of case closed or——

Mr. BAILEY. Well, bear in mind on the day this affidavit was signed, I believe according to other documents you have, Barboza was visited by the Federal prosecutors, and that ended my relationship with him.

Mr. SHAYS. OK.

Mr. BAILEY. And the lie detector test was canceled.

Mr. SHAYS. OK. So this relates to the lie detector——

Mr. BAILEY. Yes.

Mr. SHAYS. In other words, all of this is related to the same——

Mr. BAILEY. He was to take the test to verify the fact that he was now truthfully saying these four men had nothing to do with it and that he lied in the Federal case against Raymond Patriarca and others.

Mr. SHAYS. So you seem to not just imply, but you're saying quite strongly that the FBI, aware of this affidavit, was basically saying you shouldn't have any more relationship with Mr. Bailey?

Mr. BAILEY. Well, after their visit, I never did.

Mr. SHAYS. OK. What is the penalty in Massachusetts—I don't know if either of you qualify—for giving false testimony in a trial?

Mr. BAILEY. Well, there's a penalty for perjury, which I believe carries 5 years or more, but there's a special statute for perjury in a capital case, and life is the punishment, and was then.

Mr. SHAYS. So for me, the nonattorney, if Mr. Salvati was going to be sentenced potentially to capital punishment—and receive the death penalty, then if someone else gave false evidence, they could be subject to the same penalty?

Mr. BAILEY. Not the death penalty, but life.

Mr. SHAYS. Life. OK. What is the penalty for helping a witness give false testimony?

Mr. BAILEY. Well, perjury and suborning perjury are usually treated equally in the eyes of the law, and I would say that if I were the prosecutor, a good case could be made for the architects of perjured testimony to suffer the same penalty as the perjuring witness.

Mr. SHAYS. And what is the penalty for a law enforcement officer withholding evidence important to a case?

Mr. BAILEY. Unfortunately, to my knowledge, it is no greater than the average felon marching down the street. I believe there should be much stiffer penalties for those entrusted with great power and respect who choose to abuse that power, as was done here.

Mr. SHAYS. In the third panel, we have Mr. Paul Rico, retired FBI special agent. We also requested that Dennis Condon, retired FBI special agent, testify. Mr. Condon, I believe, will not be able to show up, and I believe——

Mr. BURTON. We will question him. He, on the advice of his physician because of health reasons, couldn't be here.

Mr. SHAYS. So we will be having Mr. Paul Rico after you testify. Would you describe to me—both of you gentlemen, would you describe to me what you think their involvement was in this case?

Mr. BAILEY. My only personal contact with Paul Rico was when he came to my office shortly after John Kelley had become a government witness and been incarcerated in the Barnstable County Jail. Prior to testifying in the Federal case, which he appeared as a witness who had organized an escape route for a murder requested by or ordered by Raymond Patriarca, and he later told me that story was one that he was told he would have to tell. Since he was unwilling to implicate me in my felonies, Patriarca was the only acceptable trade for his freedom, which he got. But I saw him many times after the trial was over.

The only other knowledge I have of Mr. Rico's activity was one of which I am highly suspicious, and that was in the attempt to convict your colleague, Alcee Hastings. He was up to his ears in that.

Mr. BALLIRO. May I say this, Congressman?

Mr. SHAYS. Yes.

Mr. BALLIRO. It's, to me, unconscionable, given what we know now, seeing these internal documents that were going up the line to the Justice Department to just before, during, and after the Deegan killing, many of them authored by Special Agent Rico. I mentioned the testimony of Agent Dennis Condon during the course of the Deegan trial. And to sit by and just let that happen, I don't know that there's any penalty for that, but I can't imagine anything worse for a law enforcement officer to do. Talk about obstructing justice, much less a perjury. This is fashioning the obstruction of justice with a determined purpose to frame people, and that's happened. They were framed.

Mr. SHAYS. Well, we won't have Mr. Condon here today to ask questions, but I do look forward to asking Mr. Rico a number of questions that are the result of our two panels. I thank you both for being here. At this time I have no more questions.

Mr. BURTON. Thank you, Mr. Shays. Do you have questions, Mr. Barr? We'll come to you in just a minute.

Mr. BARR. I think both of you gentlemen are aware of the Justice Task Force on this and related matters that was formed in January 1999. Are you all familiar with that?

Mr. BALLIRO. I have a peripheral awareness of it, Congressman, but——

Mr. BAILEY. I am aware of Mr. Fishman, who is partly responsible for smoking out this mess.

Mr. BARR. Mr. Bailey, has the task force contacted you and communicated with you to gather information?

Mr. BAILEY. They have not.

Mr. BARR. And they have not contacted you, Mr. Balliro?

Mr. BALLIRO. They have not.

Mr. BARR. Well, the Justice Task Force was formed in January 1999—2 years ago. And the investigation, its history and a brief synopsis of its work, is contained as an attachment to the Director Freeh statement that he furnished to us. Was that included, Mr. Chairman, in the earlier——

Mr. BURTON. In the record?

Mr. BARR [continuing]. Record?

Mr. BURTON. Yes. We included not only Director Freeh's letter but the contents of the attachment.

Mr. BARR. OK. There is a case that has risen out of the Justice Department's task force in this case involving John Connolly, Bulger, Whitey Bulger and Flemmi. Are either of you aware of the status of—I know there has not yet been a trial, but are you aware of the status of that case?

Mr. BALLIRO. It's in its very early stages, I would suggest to you. I know the counsel for John Connolly, Tracy Minor from Mince, Lever, and they've just begun to scratch the surface, both defense-wise and prosecution-wise. So it's going to be a long time before that case goes to trial.

Mr. BARR. Now, Mr. Bailey—I'm not sure which one of you is better qualified to do this, but could you just briefly describe—this fellow Bulger's name keeps surfacing in all of this. What role does he play in these goings-on? I know he's part of this case, in which an indictment and then a superseding indictment was brought by the Justice task force, but how does he fit into all this, if at all?

Mr. BALLIRO. Well, he was the handler, of course, for both Bulger and for Steve Flemmi, the handler in this——

Mr. BARR. Connolly?

Mr. BALLIRO. Connolly was—John Connolly was. My understanding from his remarks to the media at or about the time that he was indicted was that he didn't know what bad people they were, and as far as he knew, Steve Flemmi was just—well, maybe a bookmaker and perhaps a loan shark. So they were willing to give him a pass on those kinds of activities.

But I can tell you this, Mr. Congressman. I've lived in that area my entire life and got a pretty good street sense of everything that is going on. And I can tell you that every kid in south Boston, which was their area, understood very, very clearly what violent people both Flemmi and Bulger were. They terrorized that area. When they walked into a place of business, people actually quaked. John Connolly comes from that area. It's just unconceivable to me that he didn't know what every kid on the street in south Boston knew, much less all the rest of law enforcement, both State and local, in Massachusetts knew.

And, by the way, I've had many, many cases involving shylocking, and time and time again at sentencing I've heard prosecutors stand up and tell judges what a terrible, violent crime shylocking was. So for John Connolly, an FBI agent, to demean it and deprecate its importance or its lack of violence is just unconceivable to me.

Mr. BARR. And Bulger was an FBI informant for a fairly long period of time, too, wasn't he?

Mr. BAILEY. Until he became a fugitive, yes.

Mr. BARR. For over 20 years he was an informant?

Mr. BAILEY. So far as we can sort out, because Flemmi knows all about it, and Flemmi has made that known to the court as his defense in a racketeering case. In other words, he says I was set in motion by the government. You can't now turn on me; I have, in effect, immunity. And that is the defense he has raised. He has since been indicted for murders all over the country, and they're still digging up bodies as of this time to indict Flemmi.

Mr. BALLIRO. And, Mr. Congressman, may I just say this in addition, because I think this may be important to counsel as a source of information. Back in the early 1980's, between 1980 and 1985 when the Anguilos were prosecuted, there were—I don't want to exaggerate it—but carefully, I say, many, many, many hundreds of hours of wiretapping in two different locations in the north end of Boston conducted by agents of the Federal Bureau of Investigation, and you don't have to get into too many pages to start hearing Bulger's name and Flemmi's name being mentioned in connection with the most violent of offenses.

Now, apparently Agent Connolly, Agent Rico, agent whoever, didn't know what those wiretaps contained. Everybody in the world

knew it in 1985 when they were finally released. They had all been put by Judge Nelson, who handled that case, in my custody until the court proceeding, the actual trial took place. So we knew about it in between 1983, 1984 and 1985 when the trials began, but then the public knew, and those were open for anybody's examination.

Mr. BARR. I'm not personally yet familiar with this case that the Justice task force has brought, but according to the material furnished by Director Freeh yesterday, this brief synopsis indicates that the December 1999 indictment was returned against retired FBI Senior Special Agent John Connolly, Bulger and Flemmi. Do you all know what the nature of the charges against Connolly were or are?

Mr. BALLIRO. Included in them, I believe, are accessory to murder charges.

Mr. BAILEY. I think that was a——

Mr. BARR. So arising out of the dealings with these gentlemen as—or these men as informants?

Mr. BALLIRO. Well, they claim—Connolly claims, of course, that he didn't know anything about murders. I mean——

Mr. BAILEY. I believe, Congressman, that the first indictment affecting John Connolly was for obstruction and related offenses and that a new indictment was brought, dragging him in as being responsible in part for murder.

Mr. BALLIRO. What happens is the government keeps flipping people, and between the first indictment and the second indictment, they flipped a confidante of Bulger and Flemmi, a man by the name of Kevin Weeks, who now is a cooperating witness with the government. He was able to tell them about many of these murders, because he participated in things like hiding the bodies and burying the bodies and digging them up and reburying them. You know, like some movies that we've seen recently, this all happened, and they found those bodies. And the government has gone in, they're digging up places, and these bodies keep coming up now, all of which Kevin Weeks tells them exactly where they are, and that's why you're getting these—and I'm not sure the indictments are all finished either. I believe there may be superseding indictments in those cases.

Mr. BARR. Thank you very much. I appreciate both of you gentlemen sharing both your history in these cases, as well as your vast expertise on these type legal matters with us and look forward to continue to work with you as we try and fashion some additional safeguards to avoid these things happening in the future. Thank you.

Mr. BURTON. Thank you, Mr. Barr.

Mr. Delahunt, did you have one more question?

Mr. DELAHUNT. Yes, I do. I just wanted to make a note, too, that—I don't know whether it was Mr. Bailey or Mr. Balliro that indicated that Mr. Connolly was the so-called handler for both Bulger and—Flemmi.

Mr. BALLIRO. Steve Flemmi.

Mr. DELAHUNT. Steve Flemmi. Are you aware—obviously both had been informants prior to Mr. Connolly's coming to the Boston office of the FBI? Are you aware of—whom the FBI handler was for Mr. Bulger or Mr. Flemmi, Mr. Steven Flemmi? Maybe you——

Mr. BALLIRO. Well, whether he can be named as a handler or not, I don't know, but from the materials that I'm now reading just recently in late December that have been revealed, it appears that Special Agent Rico very well could be categorized as a handler, at least of Steven Flemmi.

Mr. DELAHUNT. So it's a——

Mr. BALLIRO. I don't know if there's anything about——

Mr. DELAHUNT. Right. I reviewed those too, and I reached the same conclusion. But I guess it's a fair statement to say that Steve Flemmi went from the supervision of Mr. Rico to the supervision of Mr. Connolly?

Mr. BALLIRO. It appears to be that way.

Mr. DELAHUNT. He was passed in that direction. Joe, if I can just ask this question, because I think when I listen to the questions of my colleagues here, particularly Mr. Shays, I think it's important to try to clarify how a homicide investigation, which is a State prosecution, is conducted in Massachusetts, specifically in the case of Deegan. Am I correct when I say usually it is the local police department, and sometimes there is assistance from the State police; and rarely, but sometimes, it does occur there is assistance from the FBI?

Mr. BALLIRO. This was highly unusual. It's a very rare case that the FBI, in my experience, has been participating so intimately in the preparation, investigation and prosecution of a criminal—of a State case of homicide. But they were all over this one.

Mr. DELAHUNT. So they were intimately involved in the trial preparation. They were witnesses. They were present when this case was being prosecuted?

Mr. BALLIRO. That's correct.

Mr. DELAHUNT. Thank you.

Mr. BURTON. Well, let me just thank both of you very much. You've been very, very helpful. We realize that you're very prominent attorneys. And Mr. Wilson, with whom you've worked, and I and the rest of the panel wants to thank you very much for being here, because I know that it took time out of your busy schedules, which in your income brackets is pretty expensive.

So we really appreciate you very much being here and giving us information. We would like for you if we have additional questions to respond to them in writing if you wouldn't mind.

Mr. BAILEY. Thank you very much.

Mr. BURTON. Thank you very much. We will now go to our third panel, which is Mr. Rico. Would you come forward, please?

[Witness sworn.]

Mr. BURTON. Do you have an opening statement, Mr. Rico?

STATEMENT OF H. PAUL RICO, RETIRED FBI SPECIAL AGENT

Mr. RICO. I have no opening statement.

Mr. BURTON. We will go directly to questions then.

You have heard the statement about the murder which took place which involved the conviction of Mr. Salvati. Were you aware that he was innocent?

Mr. RICO. I was aware that he was on trial and he was found guilty. That's all I know. I have heard what has transpired and I

believe that it's probably, justice has finally been done. I think he was not guilty.

Mr. BURTON. Were you aware——

Mr. RICO. I am saying that until I heard the facts, which is the first time I have heard the facts is today, that I was not convinced that he was innocent until today. I'm convinced he was innocent.

Mr. BURTON. Well, you were one of the FBI agents in the Boston office at the time. Were you not aware of any of the statements or documents that we have been able to uncover during our investigation?

Mr. RICO. I think I caused some of those documents to be written. I think I wrote some of those documents, and when I identified who I knew from an informant who committed this homicide, but as someone has said before, the information is a lot different than testimony.

Mr. BURTON. You knew—according to the record, you sent a memo to FBI Director Hoover, as I understand it, saying that you had been informed that Mr. Deegan was going to be hit or murdered?

Mr. RICO. That's probably true, yes.

Mr. BURTON. And you knew before the fact that was going to occur?

Mr. RICO. We have had several of those things happen in the past. I have been involved in warning some of the people that have been targeted in the past.

Mr. BURTON. Did you or anybody in the FBI let Mr. Deegan know that he was going to be hit?

Mr. RICO. It's possible because——

Mr. BURTON. Wait a minute.

Mr. RICO. I want to say to you that normally when we hear something like that we try to figure out how we can do something to be able to be of assistance, like make an anonymous phone call or call the local police department or something along that line. I don't know what happened in that case. Whether or not someone did notify him or not, I don't know.

Mr. BURTON. Did you know Mr. Barboza?

Mr. RICO. I came to know Mr. Barboza.

Mr. BURTON. Did you know him prior to the Deegan murder?

Mr. RICO. No.

Mr. BURTON. Did Mr. Condon know him prior to the Deegan murder?

Mr. RICO. No, I don't think he did.

Mr. BURTON. So he was not working with you and he was not an informant or anything?

Mr. RICO. That's right.

Mr. BURTON. How about Mr. Flemmi?

Mr. RICO. At one time I had Steven Flemmi as an informant. He has admitted that before Judge Wolf and all of the contacts were exposed between my contacts with him and those contacts that were written—were introduced before Judge Wolf.

Mr. BURTON. Did you know he was a killer?

Mr. RICO. No.

Mr. BURTON. Did you not know he was a killer?

Mr. RICO. I knew that he was involved in probably loan sharking and other activities but, no.

Mr. BURTON. Well, it's testified here by several witnesses, including the last two, that it was fairly well known on the north side of Boston that he was to be feared and that he was killing people, but you in the FBI didn't know about that?

Mr. RICO. Are we talking about Steven Flemmi or Vincent Flemmi.

Mr. BURTON. Vincent Flemmi, Jimmy Flemmi.

Mr. RICO. Oh, Vincent Flemmi. I think when I was in Boston I would have known that Vincent Flemmi had committed homicide.

Mr. BURTON. Did you have any dealings with him?

Mr. RICO. Not really, no.

Mr. BURTON. Did Mr. Condon have any dealings with him?

Mr. RICO. I think at one time he might have opened him up as an informant, I don't know. I don't personally know.

Mr. BURTON. But neither you nor Mr. Condon knew anything about his involvement in the Deegan murder prior to the murder?

Mr. RICO. I can only speak for myself, and it's possible that I had information that he might have been involved or going to be involved.

Mr. BURTON. Well, there was a memo from you to FBI Director Hoover that was 2 or 3 days prior to the killing that said that you had information that Mr. Deegan was going to be hit or killed?

Mr. RICO. Yeah.

Mr. BURTON. Did you not know who was going to be involved in that? You did not know Mr. Barboza or Mr. Flemmi was going to be involved?

Mr. RICO. Is that document before me?

Mr. BURTON. Where is that document, Counsel? He would like to look at that real quickly, the document that went to FBI Director Hoover informing him that there was—it's exhibit No. 7, in front there.

[Exhibit 7 follows:]

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F [redacted]-2597pg.2

Boston Airtel to Director, 3/10/65 entitled: [redacted]

B, M

F [redacted] advised on 3/3/65 that [redacted] contacted Patriarca and stated he had brought down VINCENT FLEMMI and another individual (who was later identified as Joe Barboza from East Boston, Mass.) It appeared that [redacted], Boston hoodlum, was giving orders to FLEMMI to "hit this guy and that guy".

B

Raymond Patriarca appeared infuriated at [redacted] giving such orders without his clearance and made arrangements to meet FLEMMI and Barboza in a garage shortly thereafter. He pointed out that he did not want FLEMMI or Barboza contacting him at his place of business.

F [redacted]-2597pg.5

Angiulo told Patriarca that VINCENT FLEMMI was with Joe Barboza when he, Barboza, killed [redacted] in Revere, Mass. several months ago. It appeared that [redacted], Boston hoodlum, had ordered the "hit". Patriarca again became enraged that [redacted] had the audacity to order a "hit" without Patriarca's knowledge.

B

Patriarca told Angiulo that he explained to FLEMMI that he was to tell [redacted] that no more killings were to take place unless he, Patriarca, cleared him.

Jerry explained that he also had a talk with FLEMMI. He pointed out that Patriarca has a high regard for FLEMMI but that he, Patriarca, thought that FLEMMI did not use sufficient common sense when it came to killing people.

Angiulo gave FLEMMI a lecture on killing people, pointing out that he should not kill people because he had an argument with him at any time. If an argument does ensue, he should leave and get word to Raymond Patriarca who, in turn, will either "OK" or deny the "hit" on this individual, depending on the circumstances.

M [redacted]

EXHIBIT 7

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's. B

[redacted] F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B [redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted] B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

Mr. RICO. Seven.

Mr. BURTON. Yes, sir. It's on the second page, the relevant part. I think it's right at the top, isn't it? "according"——

Mr. RICO. "according to"—this reads like it's a microphone, not an informant report.

Mr. BURTON. But it was sent by you to the FBI Director. And I guess while——

Mr. RICO. I don't see where, I don't see where I sent this. I can see what it says, but I don't see where I sent it.

Mr. BURTON. It's exhibit No. 7. It was from the head of the FBI office there in Boston.

Mr. RICO. Yeah, right.

Mr. BURTON. So that would not have been you at that time?

Mr. RICO. No, I have never been the head of the FBI office.

Mr. BURTON. Did you know that Mr. Deegan, was it not discussed in the FBI office that Mr. Deegan was going to be killed?

Mr. RICO. I believe it was discussed in a small group, probably the supervisor.

Mr. BURTON. So it was discussed?

Mr. RICO. Yes.

Mr. BURTON. I can't understand if it was discussed——

Mr. RICO. It probably was discussed as to who should notify the police or who should try to contact him.

Mr. BURTON. If you knew that there was going to be this hit on Mr. Deegan, would you not have discussed who the proposed assassins were going to be? You knew of Barboza and you knew of the others, Mr.——

Mr. RICO. Vincent Flemmi.

Mr. BURTON. Vincent Flemmi. You knew of them. Did you not know they were out planning the killing? If you knew and the FBI office up there knew enough to send this memo to the FBI Director, would you not have known who was going to be involved in this?

Mr. RICO. I'm not sure.

Mr. BURTON. Let me go to exhibit No. 10 real quickly and I'll yield to my colleagues. OK. Exhibit No. 10. It says,

> Informant advised that Jimmy Flemmi contacted him and told him that the previous evening Deegan was lured to a finance company in Chelsea and that the door of the finance company had been left open by an employee of the company and that when they got to the door Roy French, who was setting Deegan up, shot Deegan, and Joseph Romeo Martin and Ronnie Casessa came out of the door and one of them fired into Deegan's body. While Deegan was approaching the doorway, Flemmi and Joe Barboza walked over to a car driven by Tony Stats and they were going to kill Stats but Stats saw them coming and drove off before any shots were fired.
>
> Flemmi told informant that Ronnie Casessa and Romeo Martin wanted to prove to Raymond Patriarca that they were capable individuals and that is why they wanted to hit Deegan. Flemmi indicated that what they did was an awful sloppy job.

[Exhibit 10 follows:]

[redacted]

UNITED STATES GOVERNMENT

Memorandum

TO : SAC [redacted]

DATE: 3/15/65

FROM : SA H. PAULSRUD B, F

☒ CI ☐ SI

☐ PCI ☐ PSI

SUBJECT: [redacted]

Dates of Contact

3/13/65

Title and File #s on which contacted

EDWARD F. DEEGAN

[redacted] F, M B

Purpose and results of contact

☐ NEGATIVE

☐ POSITIVE

X

Informant advised that "JIMMY" FLEMMI contacted him and told him that the previous evening DEEGAN was lured to a finance company in Chelsea and that the door of the finance company had been left open by an employee of the company and that when they got to the door ROY FRENCH, who was setting DEEGAN up, shot DEEGAN, and JOSEPH ROMEO MARTIN and RONNIE CASESSA came out of the door and one of them fired into DEEGAN's body. While DEEGAN was approaching the doorway, he (FLEMMI) and JOE BARBOZA walked over towards a car driven by TONY "STATS" and they were going to kill "STATS" but "STATS" saw them coming and drove off before any shots were fired.

FLEMMI told informant that RONNIE CASESSA and ROMEO MARTIN wanted to prove to RAYMOND PATRIARCA they were capable individuals , and that is way they wanted to "hit" DEEGAN. FLEMMI indicated that they did an "awful sloppy job."

☐ Informant certified that he has furnished all information obtained by him since last contact.

Rating

Coverage 92's

F

Personal Data

[redacted] F, B

[redacted] (DEEGAN)

[redacted]

HPRspa'b

(5)

0000 2

[redacted] 2/6/24

FBI — F

Rippner

EXHIBIT 10

[redacted] F.B

This information has been disseminated by SA DONALD V. SHANNON to Capt. ROBERT RENFREW (NA) of the Chelsea, Mass. PD.

0000 3

Mr. RICO. All right.

Mr. BURTON. That was written by you?

Mr. RICO. Right, right.

Mr. BURTON. So you had firsthand knowledge about all of these individuals?

Mr. RICO. I did at that time, right. But I didn't know Barboza at that time. I'm talking about from the standpoint of——

Mr. BURTON. Did you have dealings with him after that?

Mr. RICO. Yes. Oh, yes.

Mr. BURTON. And you knew that he was involved in this murder?

Mr. RICO. Yes.

Mr. BURTON. And you used him as an informant?

Mr. RICO. No, I never had him as an informant.

Mr. BURTON. Who did?

Mr. RICO. I don't think anyone had him as an informant. We had him as a witness.

Would you like me to tell you how he became——

Mr. BURTON. Yes, while we're looking for exhibit No. 4, and then I'll yield to my colleagues. But go ahead.

[Exhibit 4 follows:]

U.S. Department of Justice

United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100
United States Courthouse, Suite 9200
1 Courthouse Way
Boston, Massachusetts 02210

December 19, 2000

John Cavicchi, Esquire
Attorney at Law
25 Barnes Avenue
East Boston, MA 02128

RE: Disclosure of FBI Documents Relating to the
March 12, 1965 Murder of Edward "Teddy" Deegan

Dear Mr. Cavicchi:

This letter and its enclosures are being sent in response to your letter to me dated 11/16/2000, in which you asked that I provide "any information" that would assist you in responding to a Court Order in the matter of the Commonwealth of Massachusetts v. Peter Limone, Superior Court Crim. No. 32367, 69-70, which is pending before the Honorable Margaret R. Hinkle. As you explain, this Order requires you to file a Non-Live Witness Statement listing police reports, affidavits, transcripts and any other documents that you intend to rely upon in support of your motion for a new trial filed on behalf of your client, Peter Limone. I understand the matter being heard relates to your client's conviction for the 1965 murder of Edward "Teddy" Deegan and involves your motion for a new trial in that case.

In response to your request, FBI employees assigned to the Justice Task Force (JTF) initiated a review of Boston FBI informant, intelligence and investigative files that contain information that dates back to the 1950s and 1960s. JTF's search first determined that around the time Deegan was murdered, Vincent James Flemmi was an FBI informant. According to the file maintained in support of efforts to develop Flemmi as an informant, focus on Flemmi's potential as a source began on about 3/9/1965. The first reported contact with Flemmi was by FBI Boston Special Agent (SA) H. Paul Rico on 4/5/1965. The informant file was officially opened and assigned to SA Rico on 4/15/1965 and reflects that Flemmi was contacted a total of five times as an informant, each time by SA Rico. The dates of contact were 4/5/1965, 5/10/1965, 6/4/1965, 7/22/1965 and 7/27/1965. Flemmi's file was closed on 9/15/1965 after Flemmi was charged with a crime, unrelated to the Deegan murder.

Vincent James Flemmi's informant file was found to contain two documents that relate to the Deegan murder, one of which is a summary of information known by the Boston FBI about Flemmi's criminal activities at the time he was opened as an informant. This summary includes information previously reported to the FBI by other sources. The JTF attempted to review these other source files and any other intelligence files where their information may have been filed. Efforts have also been made to locate any investigative files that relate to the Deegan murder.

Thus far, a total of five documents have been located that appear to be responsive to your request. These are: 1) 3/15/1965 Memorandum from Boston SA H. Paul Rico to the SAC, Boston, reporting a contact with a source on 3/10/1965. 2) 3/15/1965 Memorandum from Boston SA H. Paul Rico to the SAC, Boston, reporting a contact with the same source on 3/13/1965. 3) 3/19/1965 Airtel from SAC, Boston to Director, FBI, entitled "Criminal Intelligence Program, Boston Division" summarizing developments during that week. 4) 4/22/1965 Memorandum from a Boston "Correlator" to the SAC, Boston, entitled "Vincent James Flemmi, Aka (sic)" which summarizes information in FBI files known about Flemmi at the time he was opened as an informant. 5) 6/9/1965 Airtel from SAC, Boston, to Director, FBI, entitled "BS-9190-PC" which reports on the status of efforts to develop Vincent James Flemmi as an FBI informant. (These documents have been sequentially numbered 0000 1 thru 000026.)

Several impediments to the JTF's search for records were encountered. Since the Deegan murder occurred over 30 years ago, many files that could logically contain relevant information were routinely destroyed years ago. For example, the enclosed 4/22/1965 summary memorandum references many other source reports that contain the original record of this information. Efforts to locate these original records have been unsuccessful. As a result, this summary memorandum represents the only surviving record of its information. Simply stated, the raw source data that was originally reported appears to no longer exist. Efforts continue to locate copies of this data that may have been filed in intelligence files.

Only two informants have been found to have reported information relating to the Deegan murder after the murder occurred. Enclosures 1 and 2 report information from the same source and Enclosure 3 appears to report information from this source to FBI Headquarters. Each of the files for the informants whose information is contained in the enclosures appears to have been the subject of routine destruction. In this regard, however, I would note that a case file containing information from Joseph Baron (Barboza) was located on this date, and a review of that file will begin shortly.

You will note that the attachments have been subjected to a routine redaction process which removes information that is not relevant to your request or has otherwise been lawfully excluded. It should be noted that the JTF is not completely familiar with the issues before Judge Hinkle. In addition, the JTF has not completed its review of the many FBI files from the Deegan murder time frame. Therefore, it can not be stated with certainty at this time that the attached documents represent the only relevant material in FBI files. If either party to the Limone matter wishes to provide greater specificity as to the materials that would be relevant to that proceeding, the JTF will consider this information in its record search. Regardless of whether such a request is received, the JTF will promptly advise you if any additional relevant documents are discovered.

As you know, the JTF has also been in contact with Attorney Victor Garo who represents Joseph Salvati. Mr. Garo previously has brought issues regarding Salvati's conviction for the

Deegan murder before the Superior Court and is continuing his efforts to exonerate Salvati for this murder. These documents also appear to be relevant to concerns previously expressed to the JTF by Attorney Victor Garo on behalf of his client, Joseph Salvati, and, therefore, copies are being provided to him.

Let me conclude by stating that the JTF, the United States Attorney's Office, the Boston FBI Office and FBI Headquarters understand the potential significance of the enclosures to Mr. Limone and Mr. Salvati. These documents are being made available to you with the concurrence and encouragement of the Boston FBI and FBI Headquarters. Collectively, efforts will continue to locate other documents that may be responsive to your concerns. If you have questions concerning the enclosures, please do not hesitate to contact me at telephone number (617) 854-1500 (Justice Task Force, 18 Tremont Street, Suite 300, Boston, MA 021308), or (203) 821-3700 (United States Attorney's Office, 157 Church Street, 23rd Floor, New Haven, CT 06510).

Very truly yours,

DONALD K. STERN
United States Attorney

JOHN H. DURHAM
Special Attorney

cc: Assistant District Attorney Mark Lee w/ Enclosures
William Koski, Esquire w/ Enclosures
Victor Garo, Esquire w/ Enclosures

Donald K. Stern
United States Attorney

Charles Prouty
SAC FBI Boston

Mr. RICO. He was arrested and was held on $100,000 bail. And the organized crime people in New England told the bondsmen not to give him the bail money. So they told two of his associates if they can collect the money if they need a little money to finish it off, to come to a nightclub and they would make up the difference so that he could get bailed. When they showed up at the nightclub they waited until closing time, they counted out the money, it was $85,000 of money, money that they had collected. This is allegedly. And they killed Barboza's people that were collecting the money. The bodies were found over in south Boston and eventually—the Boston police went to the nightclub and found a mirror being repaired and they went behind the mirror and found where a shot had gone into the wall. They matched the bullet that had gone through the glass and into the wall and fallen down with the bullet in one of Barboza's associates. So that's why when we went to Barboza he was interested in trying to find a way to help us and probably hurt organized crime. That was his reason for becoming a witness.

Mr. BURTON. Because he wanted to hurt organized crime.

Mr. RICO. Well, he felt that that was his money, the $85,000 was his money. I thought he would be more concerned about the two people that were killed. But he was more concerned about the $85,000.

Mr. BURTON. It seems incredulous that anybody would think this guy was concerned about getting rid of organized crime when he was a major——

Mr. RICO. No, what he was concerned about——

Mr. BURTON. Was his money.

Mr. RICO. Is that he had been told that they were going to make up the difference, the bail money, that he was going to get bailed out.

Mr. BURTON. Let me make one more statement. Then I will yield to my colleague. The Justice Task Force search determined that around the time Deegan was murdered Vincent James Flemmi was an FBI informant. According to the file maintained in the FBI, efforts to develop Flemmi as an informant focus on Flemmi's potential as a source began about March 9, 1965. So you folks were working with him well before the murders?

Mr. RICO. I don't recall working with Vincent Flemmi at that time.

Mr. BURTON. Do you remember anybody talking about that, working with him before the murder? I mean how did they find out there was going to be a hit on Deegan and Flemmi did it and you guys had him as an informant if somebody in the FBI didn't know about it?

Mr. RICO. There's two brothers, Steven Flemmi and Vincent Flemmi.

Mr. BURTON. Yes, but Jimmy Flemmi was an informant before this?

Mr. RICO. Well, he wasn't my informant. He wasn't my informant. He might have been Dennis Condon's informant.

Mr. BURTON. But the point is you guys did talk; it wasn't that big of an operation that you didn't confide in each other?

Mr. RICO. No, that is true.

Mr. BURTON. But you didn't know Jimmy Flemmi was an informant?

Mr. RICO. Because that is a clerical matter whether a guy, you write him down as an informant or you don't write him down as an informant.

Mr. BURTON. Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. Mr. Rico, I am going to direct you to exhibit 6. It's entitled U.S. Government Memorandum and it's to SAC, and then there's a redaction and it's from Special Agent H. Paul Rico. The date is March 15, 1965.

[Exhibit 6 follows:]

FD-209 (Rev. 2-1-63)

UNITED STATES GOVERNMENT

Memorandum

TO : SAC [redacted]

DATE: 3/15/65

FROM : SA H. PAUL RICO B,F

☒ CI ☐ SI ☐ PCI ☐ PSI

SUBJECT: [redacted]

Dates of Contact
3/10/65

Titles and File #s on which contacted
EDWARD F. DEEGAN
[redacted] F,M B

Purpose and results of contact

☐ NEGATIVE
☒ POSITIVE

Informant advised that he had just heard from "JIMMY" FLEMMI that FLEMMI told the informant that RAYMOND PATRIARCA has put out the word that EDWARD "TEDDY" DEEGAN is to be "hit" and that a dry run has already been made and that a close associate of DEEGAN's has agreed to set him up.

FLEMMI told the informant that the informant, for the next few evenings, should have a provable alibi in case he is suspected of killing DEEGAN. FLEMMI indicated to the informant that PATRIARCA put the word out on DEEGAN because DEEGAN evidently pulled a gun and threatened some people in the Ebb Tide restaurant, Revere, Mass.

☒ Informant certified that he has furnished all information obtained by him since last contact.

Rating

Coverage
9 2's

Personal Data
[redacted] F,B
1- (DEEGAN)

F [redacted] 26623

HPRtpo'b
(5)

0000 1

EXHIBIT
6

Mr. RICO. Yeah, all right.

Mr. DELAHUNT. Do you see that, Mr. Rico?

Mr. RICO. Yes. And may I inquire a moment maybe of counsel and the Chair, but I can't understand why all of the material from the FBI has substantial redactions. I would again respectfully request the Chair and counsel to inquire of the FBI to determine whether this committee should receive, in my opinion, but could receive the original materials without redactions. It seems earlier in a question posed by Chairman Burton that there was some confusion on the part of Mr. Rico as to whether he was the author of an error, and this is very important obviously.

Mr. RICO. Right.

Mr. DELAHUNT. But I am just going to ask you just one question. I want you to read thoroughly the body of the report.

Mr. BURTON. Which exhibit?

Mr. DELAHUNT. This is for my colleagues exhibit 6. It is a so-called 209, and it is authored by the witness before us and it is to the Special Agent in Charge in Boston whose name was somehow redacted. For what reason I fail to comprehend. The date of the report is March 15, 1965. The date of the contact presumably with the informant is March 10, 1965, 2 days prior to the murder of Mr. Deegan. And I would ask Mr. Rico to read that, take a moment, reflect, because I'm just going to ask him several questions.

Mr. RICO. All right.

Mr. DELAHUNT. You have read it and you have had an opportunity to digest?

Mr. RICO. Yes.

Mr. DELAHUNT. The question I have for you is, and let me read the first sentence. "Informant advised that he had just heard from Jimmy Flemmi, that Flemmi told the informant that Raymond Patriarca had put the word out that Edward "Teddy" Deegan is going to be hit and that a dry run has already been made and that a close associate of Deegan's has agreed to set him up."

My question is who is that informant, Mr. Rico?

Mr. RICO. I can't tell.

Mr. DELAHUNT. You can't tell?

Mr. RICO. I mean, I don't know.

Mr. DELAHUNT. Well, you authored this report, is that correct?

Mr. RICO. Right, I did.

Mr. DELAHUNT. I would suggest that this is information that is significant. Would you agree with that?

Mr. RICO. Yes.

Mr. DELAHUNT. Is it reasonable to conclude that if you received this information, even albeit back in 1965, that this is something that would stick with you?

Mr. RICO. I would have known who it was in 1965, I'm sure, but I don't know who that is right now.

Mr. DELAHUNT. If I suggested Stevie Flemmi.

Mr. RICO. I don't think Stevie Flemmi would give me his brother as being——

Mr. DELAHUNT. You're sure of that, you're under——

Mr. RICO. I'm under oath and I am pretty confident that Steve would not give me his brother.

Mr. DELAHUNT. Mr. Chairman, could I request a recess of some 4 or 5 minutes.

Mr. BURTON. Yes, I think that all of the members of the committee and the guests here can discuss this real quickly. Can you come up here to the front? We will stand in recess for about 5 minutes.

[Recess.]

Mr. BURTON. Mr. Rico, we're now back in session and we want to make absolutely sure that you understand everything thoroughly. Do you understand that if you knowingly provide this committee with false testimony you may be violating Federal law, including 18 U.S.C. 1001, and do you also understand that you have a right to have a lawyer present here with you today?

Mr. RICO. Yes.

Mr. BURTON. You understand all that?

Mr. RICO. Yes, yes.

Mr. BURTON. And you prefer to go on answering questions with your testimony? You're subpoenaed here?

Mr. RICO. I have had advice of counsel and I'm not taking my counsel's advice. I am going to explain to you whatever you want to know.

Mr. BURTON. Let me make sure I understand. Your counsel has advised you what?

Mr. RICO. My counsel advised me to take the fifth amendment until you people agree to give me immunity. I have decided that I have been in law enforcement for all those years and I'm interested in answering any and all questions.

Mr. BURTON. Very well.

Mr. MEEHAN. Mr. Rico, have you consulted with your lawyer in terms of changing your mind and testifying? Have you consulted with your lawyer?

Mr. RICO. Since this hearing has begun?

Mr. MEEHAN. Since you decided to testify.

Mr. RICO. I am not going to get my lawyer to change his mind. His opinion was that I should not testify.

Mr. BURTON. And take the fifth?

Mr. RICO. And that I should take the fifth.

Mr. MEEHAN. But have you consulted with him?

Mr. RICO. No.

Mr. BURTON. But you consulted with him prior to that?

Mr. RICO. I used to have Jack Irwin.

Mr. BURTON. But you consulted him and he advised you to do that prior to you coming here today?

Mr. RICO. He advised me to take the fifth.

Mr. BURTON. And you have decided to testify?

Mr. RICO. Right.

Mr. BURTON. Very well.

Mr. RICO. And also I would like to say that in relation to the question that Mr. Delahunt had asked about whether Flemmi had provided information on that case, if Steven Flemmi had provided the information, I think that before Judge Wolf in Federal Court, Steven Flemmi had admitted that he was an informant, I took the stand and admitted he was an informant and we produced every FD 209 that I had during the period of time I was in contact with Steven Flemmi and I don't think this was in there. So that's one

of the bases for my answering you that I don't think Steven Flemmi would provide the information about Jimmy Flemmi.

Mr. DELAHUNT. But let me just revisit that.

Mr. RICO. All right.

Mr. BURTON. Go ahead.

Mr. DELAHUNT. Thank you, Mr. Chairman. You don't think but you're not certain?

Mr. RICO. Well, I don't have formal certitude, but I am pretty sure that this is not Steven Flemmi.

Mr. DELAHUNT. OK. If you look back on your career, I'm sure you developed a number of informants——

Mr. RICO. That's right.

Mr. DELAHUNT [continuing]. That would have information regarding activities of Mr. Deegan and others?

Mr. RICO. Right.

Mr. DELAHUNT. You have had some time, maybe 20 minutes, have you given any more thought to——

Mr. RICO. I don't know who that is. I really can't tell you right now. I don't know. I really don't know.

Mr. DELAHUNT. You really can't tell us?

Mr. RICO. No, I don't know.

Mr. DELAHUNT. Well, when you got the information, which would have been 2 days before the murder, and again I'm referring to that one page, Mr. Rico.

Mr. BURTON. This is exhibit No. 6.

Mr. DELAHUNT. This is exhibit No. 6.

Mr. BURTON. Excuse me, let me interrupt here, Mr. Delahunt. Exhibit No. 6, the date on the top is March 16 and the date of contact is March 10. It's down at the bottom. It says exhibit 6.

Mr. RICO. Right.

Mr. BURTON. Go ahead.

Mr. DELAHUNT. Obviously at that point in time you had information through this informant whose name you can't remember?

Mr. RICO. Right.

Mr. DELAHUNT. That Edward Deegan was going to be hit?

Mr. RICO. Right.

Mr. DELAHUNT. What did you do with that information at any time on the 10th.

Mr. RICO. I believe that the supervisor would have had the person handling Chelsea Police Department disseminate the information.

Mr. DELAHUNT. What did you do, Mr. Rico?

Mr. RICO. I would bring it to the attention of my supervisor and we would discuss how we could handle this without identifying the informant and provide the——

Mr. DELAHUNT. Let me go back a bit. You would discuss it. Did you discuss it with your supervisor?

Mr. RICO. I would think I did, yes.

Mr. DELAHUNT. Who was the supervisor?

Mr. RICO. I think it was Jack Kehoe.

Mr. DELAHUNT. Jack Kehoe. Is it the same Mr. Kehoe that after he left the FBI became the Commissioner of the Massachusetts State Police.

Mr. RICO. Yes, yes.

Mr. DELAHUNT. And what was his capacity in the FBI at that time as your supervisor?

Mr. RICO. That was his capacity. He was my supervisor.

Mr. DELAHUNT. Was he in charge of the Organized Crime Unit?

Mr. RICO. Yes.

Mr. DELAHUNT. What was the conversation you had with Supervisor Kehoe relative to this information?

Mr. RICO. It's a long time ago and I don't remember. I don't remember the conversation in any detail. I just know that this is the type of information that——

Mr. DELAHUNT. It was good information, wasn't it, Mr. Rico?

Mr. RICO. I think it was.

Mr. DELAHUNT. I think it was proven 2 days later that it was very good information?

Mr. RICO. Yeah, yeah. Unfortunately, right.

Mr. BURTON. Excuse me. If I could interrupt. The date of this memorandum is March 15, after Deegan was killed. But the date of the contact was March 10. So when you sent this memorandum it was after the fact, after Mr. Deegan had been killed. It seems to me that it would really ring a bell if you had the contact with your informant who in this memo was Jimmy Flemmi and then 2 days later he is killed and the memo is then sent on the 15th to your supervisor. It seems like that would all resonate, one, because you had an informant tell you someone is going to be killed. They're killed 2 days later and you're sending the memo 3 days after that and you can't remember?

Mr. RICO. Well, I don't know whether these dates are accurate or not. I don't know right now whether or not this is an actual correct reflection of what happened or not.

Mr. DELAHUNT. Mr. Rico, did you type up this memorandum?

Mr. RICO. No.

Mr. DELAHUNT. Did you dictate it?

Mr. RICO. I think I did.

Mr. DELAHUNT. Would that account for the date of March 15 that you dictated it or was that the day that whomever typed it would have memorialized it as we now see this copy?

Mr. RICO. I can't truthfully answer that. I have no way of knowing that.

Mr. DELAHUNT. You don't know?

Mr. RICO. No.

Mr. BURTON. Can we come back to you, Mr. Delahunt, and we'll go to Mr. Barr and come back to you in just a minute?

Mr. Barr.

Mr. BARR. Mr. Rico, the Department of Justice in January 1999 created a joint task force, a Justice Task Force. Are you aware of that?

Mr. RICO. Yes.

Mr. BARR. Have you spoken with them?

Mr. RICO. No.

Mr. BARR. Have they attempted to speak with you?

Mr. RICO. I'm not sure whether they have or not. I mean they may have contacted my attorney. I don't know.

Mr. BARR. Would he be obligated to tell you that?

Mr. RICO. My attorney? I would think so.

Mr. BARR. Has he?

Mr. RICO. I don't recall. I don't recall him specifically telling me that.

Mr. BARR. Have they sent any letters?

Mr. RICO. No, not that I'm aware of.

Mr. BARR. This fellow Barboza, did you ever meet him?

Mr. RICO. Yes, I did.

Mr. BARR. Did either you or Mr. Condon receive awards or letters of commendation for your work with him?

Mr. RICO. I don't know, I don't know.

Mr. BARR. You don't know?

Mr. RICO. No. It's possible, it's possible. I don't know.

Mr. BURTON. Would the gentleman yield real quickly? Did you ever receive any gifts or money or anything from Mr. Barboza, Mr. Flemmi or any of those people?

Mr. RICO. No, no.

Mr. BURTON. I thank the gentleman.

Mr. BARR. Did Mr. Condon receive an award or any commendation or his work on the Deegan case?

Mr. RICO. I don't know.

Mr. BARR. The communications that we have seen here for; example, exhibit 15, I think 7 and 8, but these are what are called Airtels between the FBI field offices and headquarters here in Washington, DC, and some of these, such as 15, indicate that Mr. Hoover himself was aware of this murder before it happened and who the suspects and likely perpetrators were after the fact. Were you also aware of this murder before it happened and who the apparent perpetrators were almost immediately following the murder?

[Exhibits 15, 7 and 8 follow:]

3/19/65

AIRTEL

TO : DIRECTOR, FBI [redacted] F

FROM: SAC, BOSTON [redacted] P

CRIMINAL INTELLIGENCE PROGRAM
BOSTON DIVISION

The following are the developments during the current week:

On 3/12/65, EDWARD "TEDDY" DEEGAN was found killed in an alleyway in Chelsea, Mass. in gangland fashion.

Informants report that RONALD CASESSA, ROMEO MARTIN, VINCENT JAMES FLEMMI, and JOSEPH BARBOZA, prominent local hoodlums, were responsible for the killing. They accomplished this by having ROY FRENCH, another Boston hoodlum, set DEEGAN up in a proposed "breaking & entering" in Chelsea, Mass. FRENCH apparently walked in behind DEEGAN when they were gaining entrance to the building and fired the first shot hitting DEEGAN in the back of the head. CASESSA and MARTIN immediately thereafter shot DEEGAN from the front.

ANTHONY STATHOPOULOS was also in on the burglary but had remained outside in the car.

3-Bureau
1-Boston

JFK:pos'b
(4)

SEARCHED ____
SERIALIZED 0
INDEXED ____
FILED 0

F [redacted] 1820

0000 4

EXHIBIT
15

[redacted] F

When FLEMMI and BARBOZA walked over to STATHOPOULOS's car, STATHOPOULOS thought it was the law and took off. FLEMMI and BARBOZA were going to kill STATHOPOULOS also. "OK."

Immediately thereafter, STATHOPOULOS proceeded to Atty. AL FARESE. FARESE called the Chelsea, Mass. PD before Chelsea knew of the killing and FARESE wanted to bail out ROY FRENCH and "TEDDY" DEEGAN. Shortly thereafter the Chelsea PD found the body of DEEGAN and immediately called Atty. FARESE's office, and Atty. JOHN FITZGERALD, FARESE's law partner, came to the Chelsea PD.

Efforts are now being made by the Chelsea PD to force STATHOPOULOS to furnish them the necessary information to prosecute the persons responsible.

It should be noted that this information was furnished to the Chelsea PD and it has been established by the Chelsea Police that ROY FRENCH, BARBOZA, FLEMMI, CASESSA, and MARTIN were all together at the Ebb Tide night club in Revere, Mass. and they all left at approximately 9 o'clock and returned 45 minutes later.

It should be noted that the killing took place at approximately 9:30 p.m., Friday, 3/12/65.

[redacted]

[redacted] B

Informant also advised that [redacted] had given the "OK" to JOE BARBOZA and "JIMMY" FLEMMI to kill [redacted] who was killed approximately one month ago.

Page 3 of serial 1870 is being deleted in its entirety for codes: F, B.

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F [redacted]-2597pg.2

Boston Airtel to Director, 3/10/65 entitled: [redacted]

B, M

F [redacted] advised on 3/3/65 that [redacted] contacted Patriarca and stated he had brought down VINCENT FLEMMI and another individual (who was later identified as Joe Barboza from East Boston, Mass.) It appeared that [redacted], Boston hoodlum, was giving orders to FLEMMI to "hit this guy and that guy".

B

Raymond Patriarca appeared infuriated at [redacted] giving such orders without his clearance and made arrangements to meet FLEMMI and Barboza in a garage shortly thereafter. He pointed out that he did not want FLEMMI or Barboza contacting him at his place of business.

F [redacted]-2597pg.5

Angiulo told Patriarca that VINCENT FLEMMI was with Joe Barboza when he, Barboza, killed [redacted] in Revere, Mass. several months ago. It appeared that [redacted], Boston hoodlum, had ordered the "hit". Patriarca again became enraged that [redacted] had the audacity to order a "hit" without Patriarca's knowledge.

B

Patriarca told Angiulo that he explained to FLEMMI that he was to tell [redacted] that no more killings were to take place unless he, Patriarca, cleared him.

Jerry explained that he also had a talk with FLEMMI. He pointed out that Patriarca has a high regard for FLEMMI but that he, Patriarca, thought that FLEMMI did not use sufficient common sense when it came to killing people.

Angiulo gave FLEMMI a lecture on killing people, pointing out that he should not kill people because he had an argument with him at any time. If an argument does ensue, he should leave and get word to Raymond Patriarca who, in turn, will either "OK" or deny the "hit" on this individual, depending on the circumstances.

M [redacted]

EXHIBIT 7

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's. B

[redacted]

F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B [redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted] B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's.

B

[redacted]

F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B

[redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted]

B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

000015

EXHIBIT 8

Mr. RICO. You say it's exhibit 15?

Mr. BARR. That's one of them.

Mr. RICO. Yeah.

Mr. BARR. No. 7 and No. 8 also.

Mr. BARR. They're the same ones we have looked at earlier today. Let me just ask you the question.

Mr. RICO. All right.

Mr. BARR. You were aware of the fact that Mr. Deegan was going to be murdered, correct?

Mr. RICO. Yes.

Mr. BARR. Did you take any steps to prevent that murder from occurring?

Mr. RICO. I believe the office did something to try to do something, whether they had called the local police or whether they tried to make an anonymous phone call to him, I don't know.

Mr. BARR. Is there any record of that?

Mr. RICO. I don't know, I don't know. But that's normal procedure, although we've had procedures where we've gone out and actually told people that they're going to get hit. I have done that.

Mr. BARR. But that didn't happen in this case?

Mr. RICO. Not in this case, no.

Mr. BARR. Some of these documents also indicate very clearly that FBI headquarters was aware of who the perpetrators of the murders were. Were you aware of that?

Mr. RICO. Aware that headquarters was aware or was I aware who the perpetrators were?

Mr. BARR. That headquarters was aware of that.

Mr. RICO. If I sent them the information, I suppose they would be aware of that, yes.

Mr. BURTON. Could I followup on that, please? Were you aware who the murderers were; who were the people who participated in the hit?

Mr. RICO. After it happened?

Mr. BURTON. Yes.

Mr. RICO. Well, I know that we had versions from informants and then we had the Joe Barboza version.

Mr. BURTON. Well, here before us on this March 19, exhibit 15 that we're talking about—can you help him find exhibit 15, please—it states very clearly to FBI Director Hoover, it states very clearly that the people who were involved in the killing are named. And what I can't understand is if this was known by the FBI office, you and the other people there, then why was Mr. Salvati tried and convicted and went to jail for 30 years and was convicted and supposed to be electrocuted? Why didn't somebody at the FBI say in every report that we had there was evidence that Mr. Salvati had nothing to do with this? I mean you had all these FBI agents, obviously they knew all this information. They went to J. Edgar Hoover at the Bureau's head office and yet this innocent man and some other people innocent of this crime went to jail for life and some of them died in prison.

Mr. RICO. Well, informant information is difficult to handle and it depends on a lot of different circumstances as to how to handle it. It's very easy if you just take whatever comes in and you immediately disseminate it.

Mr. BURTON. Let me just interrupt to say that Mr. Barboza was a known killer.

Mr. RICO. Oh, yes, right, he was.

Mr. BURTON. He was the only person who testified at the trial that put these people in jail for life and they were going to get the death penalty. The FBI had information, you had information that other people were involved in the killing and yet that never came out in the trial.

Mr. RICO. That was disseminated to the Chelsea Police Department.

Mr. BURTON. Wasn't there an FBI agent that testified there? Mr. Condon.

Mr. RICO. I didn't testify in the case and witnesses were sequestered. I never saw Mr. Salvati before today.

Mr. BURTON. You didn't know Mr. Salvati was innocent of that crime because of the information that you had in your office?

Mr. RICO. We come up with a witness that's going to provide information to local law enforcement. We turn the witness over to local law enforcement and let them handle the case. We don't have any jurisdiction.

Mr. BURTON. Was this memo turned over to the local police along with the informant, Mr. Barboza?

Mr. RICO. I can't tell you that the information was furnished to——

Mr. BURTON. This is exculpatory information. This could have kept Mr. Salvati out of jail. I think this alone would have created doubt in the mind of the jury that he would have gone to jail for 30 years.

Mr. RICO. Do you think we can send people away on informant information alone?

Mr. BURTON. You certainly sent him away on Barboza and he was a hitman?

Mr. RICO. That's not an informant. That's a witness.

Mr. BURTON. He's also a killer who didn't have much credibility.

Mr. RICO. I'm not one of his biggest boosters.

Mr. BURTON. I'm sorry. I took your time. Did you have more questions, Mr. Barr?

Mr. BARR. No.

Mr. BURTON. Let me go to Mr. Shays. Do you have questions? I was talking about the gentlelady.

Mrs. MORELLA. I do, but I will defer to Mr. Shays.

Mr. SHAYS. This is just the first round. And Mr. Rico, I have been watching you for the whole day. I have known about you for 20 years. You are a person who basically worked for the FBI and then worked, in my judgment, for organized crime when you worked for World Jai Alai. That is my view of you. My view of you is that you sent an innocent man to jail.

Mr. RICO. Your what?

Mr. SHAYS. My view is that you sent an innocent man to jail and you knew it. I'm just telling you what I believe. You can tell me anything you believe that you want to. I'll tell you what I believe. You have been a person on my radar screen for years. I never thought you would come before this committee. Now you have been here all day long. You have heard what the Chelsea police knew.

You heard what the Boston police knew, you heard what the State police knew. You heard what the FBI, and I'm assuming it was you, but frankly I don't even care, told Hoover, and I want to know how you think you fit into all of that.

Mr. RICO. I think we supplied the information that we had available to the local police department and I think that should be our way of disseminating the information.

Mr. SHAYS. Let me ask you this. What does it feel like to be 76 years old, to have served in the FBI and know that you were instrumental in sending an innocent man to jail and you knew it. What is it like? What do you feel? Tell me how do you feel. I asked what it was like for Mr. Salvati to be in jail. I asked what it was like for his wife to know her husband was in jail. I want to know what it's like for you.

Mr. RICO. I have faith in the jury system and I feel that the jury should be able to decide the innocence.

Mr. SHAYS. This is what's fascinating.

Mr. RICO. Why? You think you can make a decision as to who's innocent?

Mr. SHAYS. What's fascinating to me is that if I were you I would get down on bended knee in front of this family and ask for eternal pardon because even if you somehow didn't know about the report of the local police, of the Boston police, of the State police, of some documents in the FBI that are extraordinary since they come from your office, even if you didn't know that then, you know it now, and you don't seem to give a shit. Excuse me. You don't seem to care.

Mr. RICO. Is that on the record?

Mr. SHAYS. You know what? I'm happy to have what I said on the record. I just hope everything you say is on the record.

Mr. RICO. Sure, sure.

Mr. SHAYS. Because the one thing is you don't seem to care. I have been looking at you. You have no remorse about your involvement even if you think you weren't guilty. Where is your remorse?

Mr. RICO. I have been in position where I have taken people out of jail and to me——

Mr. SHAYS. You don't care. Tell me how you feel about Mr. Salvati and his wife. I would like to know.

Mr. RICO. How do I feel about what?

Mr. SHAYS. You hold on a second. Let me explain why I'm asking. You can shake your head. You can just wait. I wanted to know how a retired FBI agent feels about the facts that you learned today. Let's assume you didn't know anything about it.

Mr. RICO. I didn't.

Mr. SHAYS. OK.

Mr. RICO. I never——

Mr. SHAYS. I'll make that assumption for this moment in my question. I learned about it in the past few weeks. I know what it does to me. Why doesn't it affect you the same way? Why wouldn't you feel incredible remorse that you had a role to play, and you're saying it's ignorance but you had a role to play in the fact that an innocent man spent 30 years of his life in jail. Why no remorse?

Mr. RICO. I feel that we have a justice system and however it plays out it plays out. I don't think we convict everybody that is guilty and I don't think we let everyone go that is innocent.

Mr. SHAYS. You don't care. Does it bother you that this man was in jail for 30 years?

Mr. RICO. It would probably be a nice movie or something.

Mr. SHAYS. So you don't really care about this guy. I'm getting to learn a lot about you right now. You don't really care that he was in jail for 30 years. Do you care about his wife, that she visited him for 30 years?

Mr. RICO. I do not know everything that Joseph Salvati has done in his lifetime. I do not know that he is completely innocent of everything. I don't know.

Mr. SHAYS. What I didn't understand was that I thought that if you were a law enforcement officer and you had that training and you carried the badge of an FBI agent, I thought that you would care about the fact that you could be guilty of something he feels but if you weren't guilty of that crime then you're not guilty of that crime. And you're seeming to imply that somehow maybe there's something else in his past which is typical of what we heard about this case.

But I'm going to get right back. I'm not going to give up quite yet. I just still want to understand. Do you have any remorse that Mr. Salvati spent 30 years of his life in jail?

I can't hear your answer.

Mr. RICO. There isn't an answer.

Mr. SHAYS. You have no remorse. Do you have any remorse that his wife spent 30 years visiting him in prison even though he was innocent of the crime? I want a word. I want something we can put down on the transcript. I don't want "nods" or something. I want a word from you. Do you have any remorse that his wife had to visit him for 30 years in jail even though he was an innocent man and even though he was framed by someone who testified who was trained by the FBI, was the FBI's witness?

Mr. RICO. Joe Barboza was not trained by the FBI.

Mr. SHAYS. I'll retract that. I'll get to that in a second. Do you have any remorse about Marie?

Mr. RICO. Well, I feel sorry that anything like that ever happened to anybody.

Mr. SHAYS. So you don't feel sorry for the husband?

Mr. RICO. I feel sorry for anybody that went away——

Mr. SHAYS. Do you have any remorse?

Mr. RICO. Remorse for what?

Mr. SHAYS. For the fact that you played a role in this.

Mr. RICO. I believe the role I played was the role I should have played. I believe that we supplied a witness and we gave them to the local police and they're supposed to be able to handle the case from there on. That's it. I cannot——

Mr. SHAYS. So you don't really care much and you don't really have any remorse. Is that true?

Mr. RICO. Would you like tears or something?

Mr. SHAYS. Pardon me?

Mr. RICO. What do you want, tears?

Mr. SHAYS. No, I want to understand a little more about an FBI agent who served his country. I just want to know how you feel. It will teach me something about the FBI. You're going to be a rep-

resentative of the FBI. And so there's really no remorse and no tears; is that correct?

Mr. RICO. I believe the FBI handled it properly.

Mr. SHAYS. Why don't you tell me why you think they handled it properly?

Mr. RICO. Because they take whatever information they have that is pertinent and they furnish it to the local law enforcement agency that has the jurisdiction and let them handle it.

Mr. SHAYS. You just made a claim that I just don't believe is true. How did you disclose this to all the public—how do we know and tell me how you disclosed this to the courts and the public officials?

Mr. RICO. Not me, not me personally.

Mr. SHAYS. Let me ask you this. The witness on behalf of the FBI against this individual, you and your partner Mr. Condon, you were both partly responsible for having this witness, isn't that true?

Mr. RICO. For what?

Mr. SHAYS. Pardon me?

Mr. RICO. I'm responsible for what?

Mr. SHAYS. Aren't you responsible for the witness that testified against Mr.——

Mr. RICO. We supplied a witness, right.

Mr. SHAYS. You supplied a witness.

Mr. RICO. We supplied a witness.

Mr. SHAYS. And that witness didn't tell the truth, did he?

Mr. RICO. Well, it's easy to say now but it wasn't that easy then.

Mr. SHAYS. But the witness didn't say the truth, right, the witness you supplied did not tell the truth; isn't that correct? That's not a hard question to answer.

Mr. RICO. No, but it's easy to say that now. It's not that easy to say that when it was happening.

Mr. SHAYS. But you haven't answered the question. Answer the question first.

Mr. RICO. What question?

Mr. SHAYS. The question was simply that you have supplied a witness who did not tell the truth? Isn't that true.

Mr. RICO. We supplied the witness. And now that everything is said and done it appears that he didn't tell the whole truth.

Mr. BURTON. Mr. Shays, can we come back to you?

Mr. SHAYS. You sure can. I'm waiting.

Mr. BURTON. Mr. Clay, before I yield to you could I ask a question or two?

Mr. CLAY. Yes.

Mr. BURTON. The two attorneys we had up here, Mr. Bailey and Mr. Balliro, they testified that the FBI had taped a great many phone conversations by reputed members of organized crime in the Boston and north Boston area. Is that true?

Mr. RICO. I would imagine it would be true. If anyone knows about organized crime, it would be Joe Balliro.

Mr. BURTON. I am asking you, did the FBI tape any phone calls of organized crime figures up in the northern Boston area?

Mr. RICO. I was not in the Boston area at that time.

Mr. BURTON. You were not?

Mr. RICO. No. I was in Boston in 1970. I left in 1975.

Mr. BURTON. Well, I'm talking about back when——

Mr. RICO. You're talking about 1980, when they were involved in——

Mr. BURTON. I'm talking about back during the time that these crimes took place, when Mr. Deegan was killed, when Mr. Barboza was killing these people, when Mr. Flemmi was killing people. Were there any wiretaps that the FBI was conducting? Do you know of any wiretaps that were conducted?

Mr. RICO. You're talking about legal wiretaps?

Mr. BURTON. Legal wiretaps. You don't know?

Mr. RICO. You're asking the wrong agent.

Mr. BURTON. Do you know if there were any wiretaps by the agency out of that office? Do you know of any wiretaps out of that office by the FBI.

Mr. RICO. During which period of time? When I was there?

Mr. BURTON. No, during the time when Flemmi and Barboza were there and Deegan was killed, do you ever remember any wiretaps?

Mr. RICO. I don't know whether we had a wiretap at that time. I don't know. I have no idea. I wasn't involved in the wiretapping.

Mr. BURTON. You don't know if there were any wiretaps out of that office for organized crime up in that area? J. Edgar Hoover, nobody ever authorized wiretaps in that area? We'll find out if anybody authorized wiretaps.

Mr. RICO. I'm not trying to tell you if there wasn't any. I just don't know myself personally the timing of wiretaps.

Mr. BURTON. But you don't know if there were any wiretaps out of that office? Do you know if there were any? You don't have to be involved. Do you know if there were any?

Mr. RICO. I can't remember the timing. This is 35 years ago. I can't remember whether they had the wiretaps in 1963 or 1964 or when.

Mr. BURTON. This isn't the Stone Age we're talking about. They did have wiretaps back then.

And you don't recall the FBI ever using a wiretap to try to nab organize crime figures?

Mr. RICO. The FBI used some wiretaps for intelligence information during the period of time that I was in the Boston office.

Mr. BURTON. OK. Was it being done on any individuals out of the Boston office?

Mr. RICO. I would think that it's the timing. I cannot understand the timing. I cannot comprehend——

Mr. BURTON. Well——

Mr. RICO [continuing]. The timing of why it——

Mr. BURTON. Well, I think you do comprehend.

Mr. RICO. Well.

Mr. BURTON. And it was pretty well known, according to legal counsel we had and others, that wiretaps were taking place, because they were trying to nab organized crime figures, and Barboza and Flemmi were two of the biggest contract killers in that place, and yet you guys had him as a witness to put innocent people in jail, and you're saying you didn't know anything about it. You thought that Barboza was a legitimate witness at that time.

Mr. RICO. I'm not a big supporter of Joe Barboza, and I've never been a big supporter of Joe Barboza, but he was the instrument that we had. He was a stone killer, and he was put in a position where he decided he wanted to testify. So we let him testify.

Mr. BURTON. Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman. Mr. Rico, what an incredulous story. This is truly amazing just sitting here listening to some of the details and facts. Just to followup on Mr. Shays' questioning, first, did you know beforehand that Teddy Deegan had been targeted to be killed?

Mr. RICO. Evidently, I did.

Mr. CLAY. Evidently?

Mr. RICO. From the informant.

Mr. CLAY. You did know. And did you know also that Mr. Salvati was not involved in the murder itself?

Mr. RICO. I had never heard of Salvati being involved in this case, and so——

Mr. CLAY. That he——

Mr. RICO. Until he was indicted, right. I never heard of him.

Mr. CLAY. You had never heard of him?

Mr. RICO. I had never——

Mr. CLAY. But you also knew that he did not play a role in the murder; correct?

Mr. RICO. I can't say that.

Mr. CLAY. You cannot say that. Is this standard operating procedure for the FBI to withhold evidence from a court of law, to know that someone is going to trial and is going to face criminal incarceration and to withhold that evidence? Is that standard operating procedure?

Mr. RICO. Standard operating procedure is to take whatever information you have and supply it to the local police that have the authority in whatever manner is coming up.

Mr. CLAY. But think about the circumstances of Mr. Salvati going to trial, facing, I assume, murder charges and being convicted, and all the while, the local FBI office, you in particular, knowing that this man did not commit that crime. I mean, did that ever cross your mind that maybe we should intercede to ensure that justice prevails?

Mr. RICO. There is a time when you're involved in a case and you know what's happening, but there are many cases, many things happening, and I would say that thinking of Salvati on a day-to-day basis probably did not happen.

Mr. CLAY. Well, I'm going to stop there, Mr. Chairman, and if I can, can I yield the remainder of my time to Mr. Delahunt? Is that permissible?

Mr. BARR [presiding]. The gentleman from Massachusetts.

Mr. DELAHUNT. We thank you, Mr. Chairman. Let's talk about bugs for a minute, Mr. Rico.

Mr. RICO. Sure.

Mr. DELAHUNT. And let's use a timeframe of 1960 to 1970.

Mr. RICO. OK. That's when I was there.

Mr. DELAHUNT. Right. Are you familiar with a bug that was placed in the office of Raymond Patriarca, Jr.?

Mr. RICO. Absolutely not. I was familiar with a bug placed in Raymond Ellis Patriarca, Sr.

Mr. DELAHUNT. Senior. I thank you for correcting me.

Mr. RICO. Right.

Mr. DELAHUNT. Did you have anything to do with placing that bug there?

Mr. RICO. No.

Mr. DELAHUNT. No. Do you know who did?

Mr. RICO. No.

Mr. DELAHUNT. You don't know. But you knew that there was a bug?

Mr. RICO. Oh, yes. Oh, yes. I knew that.

Mr. DELAHUNT. Was that particular bug authorized by a court order?

Mr. RICO. I can't tell you that. I don't know. I don't know whether it was a court order or not. I can tell you when it was removed.

Mr. DELAHUNT. When was it removed?

Mr. RICO. Oh, God. A new attorney general came in, and they removed them all across the country. I don't remember who it was right now.

Mr. DELAHUNT. So a new attorney general could very well have made the decision that it was a black-bag job, it was an illegal wiretap?

Mr. RICO. I think that the new attorney general wanted nothing to do with these bugs.

Mr. DELAHUNT. These bugs. I'd request counsel to—if he could, to supply us with what available documents the FBI has regarding the Raymond Patriarca, Sr. bug and who was responsible for planting this bug within that office.

You know, in terms of the—you're right, and I think there's some misunderstanding relative to terms that we're using here today. Barboza was not an informant——

Mr. RICO. No.

Mr. DELAHUNT [continuing]. For you?

Mr. RICO. No.

Mr. DELAHUNT. But Barboza was—I think your words were, you supplied the witness, and the witness was Joseph Barboza.

Mr. RICO. Right.

Mr. DELAHUNT. Now——

Mr. BARR. Excuse me. The time of the gentleman from Massachusetts has expired. We'll come back to Mr. Delahunt in just a few minutes. The chair recognizes the gentlelady from Maryland for 5 minutes.

Mrs. MORELLA. Thank you, Mr. Chairman.

Mr. Rico, I've been looking at some of the evidence that has been put together in some of the booklets that we have, and I was noting that on exhibit 10, there is a memorandum from you, which describes the Deegan murder and identifies the killers. Were you satisfied that the informant provided accurate information to you? I'll give you a chance to look at that, sir. 65.

Mr. Chairman, don't count that on my time.

[Exhibit 10 follows:]

[redacted]

UNITED STATES GOVERNMENT

Memorandum

TO : SAC [redacted]

DATE: 3/15/65

FROM : SA H. PAULSRUD B, F

☒ CI ☐ SI

☐ PCI ☐ PSI

SUBJECT: [redacted]

Dates of Contact

3/13/65

Title and File #s on which contacted

EDWARD F. DEEGAN

[redacted] F, M B

Purpose and results of contact

☐ NEGATIVE

☐ POSITIVE

X

Informant advised that "JIMMY" FLEMMI contacted him and told him that the previous evening DEEGAN was lured to a finance company in Chelsea and that the door of the finance company had been left open by an employee of the company and that when they got to the door ROY FRENCH, who was setting DEEGAN up, shot DEEGAN, and JOSEPH ROMEO MARTIN and RONNIE CASESSA came out of the door and one of them fired into DEEGAN's body. While DEEGAN was approaching the doorway, he (FLEMMI) and JOE BARBOZA walked over towards a car driven by TONY "STATS" and they were going to kill "STATS" but "STATS" saw them coming and drove off before any shots were fired.

FLEMMI told informant that RONNIE CASESSA and ROMEO MARTIN wanted to prove to RAYMOND PATRIARCA they were capable individuals , and that is way they wanted to "hit" DEEGAN. FLEMMI indicated that they did an "awful sloppy job."

☐ Informant certified that he has furnished all information obtained by him since last contact.

Rating

Coverage 92's

F

Personal Data

[redacted] F, B

[redacted] (DEEGAN)

[redacted]

HPRspa'b

(5)

0000 2

[redacted] 2624

FBI — F

Rippner

EXHIBIT 10

[redacted] F.B

This information has been disseminated by SA DONALD V. SHANNON to Capt. ROBERT RENFREW (NA) of the Chelsea, Mass. PD.

0000 3

Mr. RICO. Yes. Yes. I consider that accurate.

Mrs. MORELLA. You do.

Mr. RICO. Right.

Mrs. MORELLA. You do not? You do consider that accurate?

Mr. RICO. I consider—it seems to be accurate information. Right.

Mrs. MORELLA. Do you believe that the informant correctly identified Deegan's killers?

Mr. RICO. The problem with being absolutely certain on the informant information is that the informant may be telling you exactly what he learned. You see, the informant advised that Jimmy Flemmi contacted him and told him, when you get into Jimmy Flemmi telling something to an informant, you're now a step away from having the certitude that you would have if the informant learned this from somebody else. Jimmy Flemmi, I would say, would not be that reliable an individual and has a propensity to put himself involved in crimes.

Mrs. MORELLA. But because of the information that you had received since October 1964 regarding Vincent Flemmi wanting to kill Deegan, was there any doubt in your mind that Flemmi was involved in Deegan's death?

Mr. RICO. I'm sorry. I don't understand.

Mrs. MORELLA. I just wondered was there any doubt in your mind that Flemmi was involved in Deegan's death because of the information you received after October 1964? I mean, did you have any doubt——

Mr. RICO. It seemed logical to be involved, yeah.

Mrs. MORELLA. OK. Right. So you really didn't have any doubts that Flemmi was involved.

Mr. RICO. Well, I always had some doubts when Flemmi was involved in anything.

Mrs. MORELLA. Remote. Few doubts. Did you have information at this time that Joe Salvati was involved in Deegan's murder?

Mr. RICO. I never received any information that Salvati was involved in the Deegan murder.

Mrs. MORELLA. Did you or anyone else in the FBI office question any of the individuals that were identified as participants in Deegan's murder?

Mr. RICO. I'm sorry. I'm not getting it.

Mrs. MORELLA. Now, did you or anyone else in the FBI office question any of the individuals that were identified as participants in Deegan's murder?

Mr. RICO. Let me see.

Mrs. MORELLA. Did you question any of the individuals that were identified as participants?

Mr. RICO. Only Joe Barboza.

Mrs. MORELLA. Page 2 of the memorandum you wrote, you wrote that this information was passed to Captain Robert Renfrew of the Chelsea Police Department.

Mr. RICO. Right.

Mrs. MORELLA. Did you did pass this information to Captain Renfrew?

Mr. RICO. No, Don Shannon did that.

Mrs. MORELLA. So he did that. Was Captain Renfrew given any additional information that was not included in this exhibit 10?

Mr. RICO. Was he given any additional information?

Mrs. MORELLA. Right, additional information that was not included.

Mr. RICO. I don't know. I don't know whether he was or not, because if Shannon gave it to him, he might have given him other information——

Mrs. MORELLA. The FBI office in Boston has recently claimed that your statement proves that the FBI shared this information with local law enforcement. Do you agree with this statement?

Mr. RICO. Yes. I think that pretty well covers it.

Mrs. MORELLA. Exhibit 11 is a Chelsea police report about the Deegan murder. On Page 3, the report identifies seven men who left the Ebb Tide Restaurant around 9 p.m. on the night of the murder and returned around 11 p.m. One of those identified, Romeo Martin, allegedly said to Roy French, "we nailed him." The report said, this information came from Captain Renfrew, who was also supposed to have received the information from the FBI. Have you seen that report before?

Mr. RICO. I haven't seen the report before, and I wouldn't know if he is still in the Chelsea Police Department or not.

Mrs. MORELLA. So did you mention anything about the Ebb Tide to Captain Renfrew?

Mr. RICO. I'm aware of the Ebb Tide. We used to—it was there when I was around, but I don't—can't tell you about Renfrew and the Ebb Tide.

Mrs. MORELLA. Did you talk to Captain Renfrew that Francis Imbuglia, Nicky Femia or Freddy were with the others the night of the murder?

Mr. RICO. I have seen Captain Renfrew on a number of occasions, but I don't recall having any discussion about this case with him.

Mrs. MORELLA. I wanted to kind of set up that list of questions, and I'll get back to you, Mr. Rico, but I do want to say from having been here at the beginning, that I wish we could give back 30 years of life to a happily married couple, and my heart goes out to them——

Mr. RICO. Sure.

Mrs. MORELLA [continuing]. For—they represent the old school virtues that I think I grew up with, too: that you make the best with what you've got and always remember family. Thank you. I yield back.

Mr. BARR. The gentleman from Massachusetts is recognized for 5 minutes.

Mr. DELAHUNT. Thank you, Mr. Chairman. I asked you earlier about the fact that you stated that Barboza was not your informant?

Mr. RICO. Right.

Mr. DELAHUNT. But that you did cultivate him as a witness?

Mr. RICO. Actually, that's true. We——

Mr. DELAHUNT. That's fine——

Mr. RICO. Comes from a period of time where he wants to be an informant. We don't want him as an informant. We want him as a witness.

Mr. DELAHUNT. Right. I understand that, and you were successful in convincing him to be a witness?

Mr. RICO. Right.

Mr. DELAHUNT. What induced him to become a witness?

Mr. RICO. The fact that they banged out two of his partners and stole $85,000. They had collected for his bail. He stopped by the Night Light for them to make up the difference, and they counted it out and killed them.

Mr. DELAHUNT. And that was the exclusive motive for his cooperation with law enforcement?

Mr. RICO. Well, I thought he was going to be angry because they killed his two friends, but——

Mr. DELAHUNT. But it was the money?

Mr. RICO. But he was angry, because it was his money——

Mr. DELAHUNT. It had nothing to do with the fact that he seemed to escape prosecution for a variety of crimes?

Mr. RICO. Well, he wasn't really being held on a very serious crime, because it was—the bail was $100,000, but I don't think——

Mr. DELAHUNT. Did he do——

Mr. RICO. I don't remember what the crime was.

Mr. DELAHUNT. But given his record, in fact, he—let me suggest this.

Mr. RICO. Yeah.

Mr. DELAHUNT. That at one point in time, the Suffolk County district attorney's office brought—before filed a charge, charging him with being a habitual offender.

Mr. RICO. Could have been, yeah.

Mr. DELAHUNT. Now, you know and I know, Mr. Rico, that that carries with it a substantial penalty.

Mr. RICO. Sure.

Mr. DELAHUNT. Did you ever have any conversations with Joe Barboza, relative to recommending that he not be prosecuted, or at least he serve no time for crimes that he had been charged with?

Mr. RICO. On that matter, Gary Byrne, as you know, is the district attorney of Suffolk County at that time.

Mr. DELAHUNT. Uh-huh.

Mr. RICO. Told me that I could tell him that whatever cooperation he gives will be brought to the attention of the proper authorities.

Mr. DELAHUNT. Right.

Mr. RICO. He says you can't tell him anything more or anything less. That's exactly what you can tell him, and that's what I told him.

Mr. DELAHUNT. And that's what you told him?

Mr. RICO. Yes.

Mr. DELAHUNT. Was Dennis Condon with you?

Mr. RICO. I am sure he was.

Mr. DELAHUNT. Because the practices of the FBI is such that there are always two agents working together.

Mr. RICO. Hopefully right.

Mr. DELAHUNT. In terms of interviewing witnesses.

Mr. RICO. Right.

Mr. DELAHUNT. Well, you did supply the witness to the appropriate authorities?

Mr. RICO. I didn't——

Mr. DELAHUNT. The Commonwealth of Massachusetts, Suffolk County district attorney's office?

Mr. RICO. Right. Right.

Mr. DELAHUNT. Did you supply the report that you and I discussed earlier that you filed as a result of a contact on March 10th? Did you provide that report to the appropriate authorities?

Mr. RICO. I think we did. I think we notified Chelsea. I think that was the appropriate authority at that time.

Mr. DELAHUNT. Well, let me go back to a question that I posed to Mr. Balliro earlier. While the Suffolk County district attorney's office was prosecuting the case, given the very high profile of that case, it was a headliner back in the mid 1960's, because it obviously had charged a number of individuals alleged to be major organized crime figures. You played, and Dennis Condon played, and State police played, and Chelsea Police played, and Boston Police played an active role in the investigation at preparation for trial?

Mr. RICO. No.

Mr. DELAHUNT. No?

Mr. RICO. We were not involved in the—to my knowledge, in the preparation of the trial or in the investigation. I had never been to the scene of the homicide. I had never——

Mr. DELAHUNT. When you say we, do you mean yourself and Dennis—Mr. Condon?

Mr. RICO. Right.

Mr. DELAHUNT. Are you aware that Mr. Condon testified at the trial?

Mr. RICO. Oh, yes. Yes.

Mr. DELAHUNT. And you're telling me and members of this committee that he wasn't involved in the preparation and the trial of the case? Why don't you take a moment and refresh your memory.

Mr. RICO. Well, it depends on what you're talking about preparation. I think that we made Barboza available at a time when they came to interview him, we would be there, but it wasn't as if we're directing the investigation——

Mr. DELAHUNT. But you heard——

Mr. RICO. It's a——

Mr. DELAHUNT. I——

Mr. RICO. And we're trying to be cooperative with him.

Mr. DELAHUNT. I understand it's their investigation, but let's be very candid. The FBI and the director of the FBI, Mr. Hoover, had a major interest in organized crime in New England?

Mr. RICO. Eventually, he did. Right.

Mr. DELAHUNT. And the people that were indicted, with the exception of Mr. Salvati, were alleged to be major organized crime figures. Is that a fair statement?

Mr. RICO. They were organized crime figures.

Mr. DELAHUNT. They were organized crime?

Mr. RICO. Right.

Mr. DELAHUNT. And you mean to tell myself and members of this committee that you followed this case from a distance, and you really weren't intimately involved in one of the cases that the Director of the FBI had prioritized?

Mr. DELAHUNT. And, Mr. Rico, you were a well-known agent. You were decorated. You spent your career with organized crime figures, developing information.

Mr. RICO. In a different way than Bear did, right.

Mr. DELAHUNT. Well, I'm going to ask that that statement be struck from the record and expunged, because the Bear isn't here.

Mr. RICO. Right.

Mr. DELAHUNT. I'm asking you the questions——

Mr. RICO. Right. OK.

Mr. DELAHUNT [continuing]. Mr. Rico, OK?

Mr. RICO. I am not——

Mr. BARR. Excuse me, Mr. Rico. Statements can't just be struck.

Mr. RICO. What's that?

Mr. BARR. I'm saying that statements just can't be struck from the record. Just because somebody isn't here who's name is mentioned. Your time is expired, and we'll now turn to the gentleman from Ohio. Mr. LaTourette is recognized for 5 minutes.

Mr. LATOURETTE. Thank you, Mr. Chairman. Mr. Rico, I want to pick up where my friend from Massachusetts left off, and that is, not only did—and Mr. Condon—Special Agent Condon testify, but also Special Agent Bolin testified at the trial of these defendants. Are you aware of that?

Mr. RICO. What trial?

Mr. LATOURETTE. The trial that brings us all together here, the Salvati trial, the trial involving the murder of Deegan. Did you know a Special Agent Bolin?

Mr. RICO. No.

Mr. LATOURETTE. Apparently——

Mr. RICO. I think I do.

Mr. LATOURETTE. Apparently he's credited with discrediting the alibi of one of the co-defendants in the case, and that letter, I think, after everyone is convicted on July 31st, a report goes up to headquarters, recommending commendations for you, Special Agent Condon, and Special Agent Bolin. Does any of that ring a bell to you?

Mr. RICO. Well, I can remember Special Agent Bolin now, but I didn't know what degree he was involved in the case.

Mr. LATOURETTE. OK. There came a time when you and Special Agent Condon went up to—is it Walpole prison?

Mr. RICO. Yes.

Mr. LATOURETTE. To interview Mr. Barboza?

Mr. RICO. Yes.

Mr. LATOURETTE. And that was before the trial of Mr. Salvati and the defendants in the Teddy Deegan murder, was it not?

Mr. RICO. Yes.

Mr. LATOURETTE. And during the course of that interview, you wrote a report back to your superiors, and in that report, you indicated that Mr. Barboza, as kind of a valuable witness, or could be, because he knows anything on any murder that's occurred in the minority east but he makes clear to you and your partner during the course of that interview that he's not going to give up Jimmy Vincent Flemmi. Do you remember that?

Mr. RICO. Yes.

Mr. LATOURETTE. OK. And the question I have to you is, then, that at the time that Mr. Salvati and his co-defendants go to trial, you have, as a result of your investigation, the information that you have received—and if not you personally, I assume that you just didn't gather information as a special agent and keep it to yourself. There would be dialog in Boston office, wouldn't there? You and Mr. Condon certainly talked, did you not, Special Agent Condon?

Mr. RICO. Yes.

Mr. LATOURETTE. OK. At the time these fellows went to trial, you had received confidential information from an informant that James Vincent Flemmi wanted to kill Deegan. Isn't that correct? Or said that he wanted to kill him. Right?

Mr. RICO. Yes. Yes.

Mr. LATOURETTE. OK. You also had information that Vincent Flemmi—or the claim was that Vincent Flemmi did, in fact, participate in the killing of Teddy Deegan.

Mr. RICO. Yes.

Mr. LATOURETTE. You also had information in your position or the office did that Joe Barboza participated in the homicide of Teddy Deegan?

Mr. RICO. Yes.

Mr. LATOURETTE. Prior to the trial. And then you also had information from this interview at Walpole Prison that Barboza would never give up Jimmy Flemmi.

Mr. RICO. Right.

Mr. LATOURETTE. OK. Given all that information—and I understand what you said that you handed it over to the local police and the prosecuting agencies and so on and so forth, but going back to Mr. Delahunt's question, or maybe it was Mr. Barr, certainly the FBI office in Boston is not just a casual observer of this—you know, it's not—while it's interesting that there's a trial going on and we'll get back to you, it was so interesting that the minute it's over on July 31st, a report goes to headquarters saying that all are convicted.

Given all of those things that were within your knowledge, I mean, did you have any qualms back in 1968 about putting Joe Barboza or knowing that Joe Barboza was going to be the sole and only testimony against Joe Salvati, and potentially put him on death row? Did that cause you any—I'm not talking today. I'm talking back in 1968.

Mr. RICO. I was not aware of all of the ramifications of the case itself.

Mr. LATOURETTE. Maybe not, but you were aware of all of the things I went through—the five or six things I just went through with you.

Mr. RICO. Right. Right.

Mr. LATOURETTE. And none of that caused you any concern or qualm about the witness that you supplied—not you personally, but your office, and you were the handler, that this was the only testimony against not only the other court defendants but Mr. Salvati, who we now know had nothing to do with it?

Mr. RICO. Uh-huh.

Mr. LATOURETTE. That he could go on death row on the basis of this testimony? As an experienced law enforcement officer, isn't that shaky, even by confidential informant standards?

Mr. RICO. Well, there isn't any good answer to that.

Mr. LATOURETTE. I don't think there is a good answer to that, because I think that the answer is that it was real shaky. The last thing I want to ask you is that I think I saw you sitting here during the course of the hearing today, and you're pretty much aware of the theory of this hearing, if you will, or the observations that people are making, and that is that the FBI office in Boston, MA was willing to sacrifice 33 years of a man's life, separate him for 33 years from his wife and his children, to protect a guy nicknamed "the Animal," a cold-blooded killer, so that the mob could be penetrated and brought down. And I just would like to have your observation as to the accuracy of that theory.

Mr. RICO. I don't think that the FBI was interested in saving Joe Barboza from anything. Joe Barboza was an instrument that you could use. If he was involved in a crime and it was something that could be prosecuted, that was fine, but there was no—we didn't think he was a knight in shining armor.

Mr. LATOURETTE. I know you don't but——

Mr. RICO. We did not think he should have been in the foreign service or anything. We just tried to use him——

Mr. LATOURETTE. Right.

Mr. RICO [continuing]. For obtaining information and evidence of crimes.

Mr. LATOURETTE. If Mr. Barr would just let me complete this thought. But when you say "weren't interested in protecting him from anything," the testimony before the panel is that the Witness Protection Program in the U.S. Government was established and begun for Mr. Barboza.

Mr. RICO. Well, the—also I'd like to clear up that Santa Rosa situation. We did go out there and testify that he had been a witness. That's all we testified to.

Mr. LATOURETTE. Thank you. Thank you, Mr. Barr.

Mr. BARR. The gentleman from Connecticut, Mr. Shays, is recognized for 5 minutes.

Mr. SHAYS. I don't understand a lot of things, Mr. Rico. I don't understand your lack of remorse. It just seems cold. It's kind of what I think in other people, not an FBI agent. But with Mr. Salvati, because of your star witness, your prized witness, he was found guilty of a crime he didn't commit, and you ended up deciding to go to California, you and Mr. Rico and Mr. Harrington and Mr. Condon. Why did all three of you go to California?

Mr. RICO. We were subpoenaed.

Mr. SHAYS. You all three were?

Mr. RICO. We were subpoenaed and the Attorney General of the United States authorized us to testify.

Mr. SHAYS. OK.

Mr. RICO. And that's what——

Mr. SHAYS. What was your testimony? Are you under oath telling us that you just went to say he was a witness, or were you here to say he was a good witness? Did you characterize him in any way at that hearing?

Mr. RICO. I think we indicated that he had been a witness in three separate trials back in Massachusetts, one of which everyone was found not guilty.

Mr. SHAYS. Right. And isn't it true that besides saying that he was a witness, you were also saying that he was a reliable witness?

Mr. RICO. No. No, no.

Mr. SHAYS. So you didn't, in any way in California, characterize the quality of his testimony?

Mr. RICO. My memory is that we just testified that he was a witness on three different cases back in Massachusetts.

Mr. SHAYS. Tell me what you thought of him as a witness.

Mr. RICO. As a witness?

Mr. SHAYS. Yeah.

Mr. RICO. Well, the case that we're interested in here, I was not——

Mr. SHAYS. Just in general. Just in general, tell me what you thought of Mr. Barboza as a witness.

Mr. RICO. I thought that he was convincing, that he was there at the scene of a crime. If he was a participant in the crime.

Mr. SHAYS. What would have convinced you that he would have told the truth? I mean, he was a notorious contract killer. That you knew. Correct? You knew he was a contract killer?

Mr. RICO. He testified to that.

Mr. SHAYS. And you knew that he was a—see, the thing is even though he—if he testifies to that, I don't know if you're willing to acknowledge he knew it. You knew he was a contract killer?

Mr. RICO. I don't know if I knew he was a contract killer before he testified. I knew he was a killer, but I knew he was a contract killer till after he testified.

Mr. SHAYS. Did you have any doubts that he was a contract killer?

Mr. RICO. Not after he testified, no. Convincing——

Mr. SHAYS. And what you're saying to us is that when you all—didn't you have conversations with Mr. Barboza before he testified?

Mr. RICO. Sure. Yes.

Mr. SHAYS. Of course. Of course you did.

Mr. RICO. Yes.

Mr. SHAYS. And you're not a naive FBI agent. That's the one thing I'll give you credit for.

Mr. RICO. I'm not a what?

Mr. SHAYS. You're not a naive FBI agent. You're a pretty wily guy and you knew a lot of stuff, so I'll give you credit for that and so did Mr. Condon. So in the course of your conversation, you were testifying to us that in all your conversations with Mr. Barboza, you did not know that he was a contract killer until he testified under oath?

Mr. RICO. Well, no. When he told us the contract that he was asked to execute for Raymond Patriarca, that's when I became aware.

Mr. SHAYS. So you knew before he testified that he was a contract killer?

Mr. RICO. Yes. Right.

Mr. SHAYS. But before you said you didn't know until he testified. And so I just want to see which story——

Mr. RICO. It was until——

Mr. SHAYS. No. Which story——

Mr. RICO. Came up.

Mr. SHAYS. I didn't say when the subject came up. I didn't do that. You're starting to say things that I didn't say. I asked you a question.

Mr. RICO. Right.

Mr. SHAYS. Of whether you knew he was a contract killer, and under oath. You said you didn't know until he testified. And now you're saying something different. Now you're saying you knew before, and the reason you're saying you knew something before is because I happened to ask you the question, and it conflicts with what you said earlier. The fact is, you had many conversations with this gentleman; correct?

Mr. RICO. I had some conversation with him. Yeah. Right.

Mr. SHAYS. More than two or three?

Mr. RICO. Right.

Mr. SHAYS. He was a witness that you turned against organized crime and be supportive of going after organized crime. He was one of the witnesses you turned. He was a crook, and now he was going after crooks. Isn't that true?

Mr. RICO. Yes.

Mr. SHAYS. OK. And the FBI took some pride in the fact that they had this witness who was now—we had successfully turned to go after organized crime, and the fact is, Mr. Rico, you knew he was a contract killer before he testified. Isn't that true?

Mr. RICO. From interviewing him, I knew, yes.

Mr. SHAYS. Yes. OK. Well, it's just good to have you say that. So I should believe that testimony, not the part when you answered the question and said you didn't know until after he testified. So OK.

Mr. RICO. After he agreed to testify?

Mr. SHAYS. Pardon me?

Mr. RICO. After he agreed to testify. After he agreed that—to testify, then——

Mr. SHAYS. So now you're——

Mr. RICO. The debriefing him comes out——

Mr. SHAYS. So you knew he was a contract killer, and you knew this contract killer was—had testified against Mr. Salvati; correct? You knew he testified and five other individuals. Isn't that correct?

Mr. RICO. Right.

Mr. SHAYS. OK. So you knew he had testified—you knew this contract killer was testifying against these six witnesses. What made you think he was telling the truth?

Mr. RICO. Because I think the—I thought that the fear of perjury——

Mr. SHAYS. Excuse me. You need to get close to the mic.

Mr. RICO. I would think that the fear of perjury would prevent him from lying.

Mr. SHAYS. Why would you think the fear of perjury would prevent him from lying?

Mr. RICO. I don't know. I had to think something. So that's what I thought.

Mr. SHAYS. No. I think that's an honest answer. I think your character is coming through. You think you had to say something. So in fact you really couldn't be certain he was telling the truth?

Mr. RICO. No. I don't think I could be certain that he's ever telling the truth.

Mr. SHAYS. Right. OK. But he was a witness, and you and Mr. Condon were involved in turning this witness around; correct? Turning him against the mob, whereas before he worked for the mob?

Mr. RICO. I don't think it was us as—that turned him. I think the fact that they killed his associates and took his money.

Mr. SHAYS. Right, but you——

Mr. RICO. Turned. But I happened to be there when——

Mr. SHAYS. Were you the FBI agents that basically were responsible for convincing Mr. Barboza that he would be better off testifying against organized crime?

Mr. RICO. All we're trying to convince a lot of people that, yes, and he was one of them.

Mr. SHAYS. I know that and he was one of them and you succeeded with him and failed with others. Isn't that true?

Mr. RICO. Well, we succeeded with some others too.

Mr. SHAYS. OK you succeeded with some others too. In the end, the answer to the question—the answer to the question is, yes, you succeeded——

Mr. RICO. Yes.

Mr. SHAYS [continuing]. In turning him around? OK. What made you feel comfortable that the testimony that he gave against these six individuals was accurate, given the fact that you had information that it was people other than these six? Or at least four of them weren't guilty. Given the fact you knew of information that never brought Mr. Salvati into this case and three others, what made you think that he was telling the truth?

Mr. RICO. I had no way of knowing he wasn't telling the truth, except informant information.

Mr. SHAYS. No. No, but——

Mr. RICO. And informant information, I don't know whether that's true.

Mr. SHAYS. So—but you acknowledge that you had informant information, not Mr. Barboza, but informant information that conflicted with what Mr. Barboza said on the trial——

Mr. RICO. I can tell you—I'm under oath and can tell you that I have known some informants that have supplied information that hasn't been true.

Mr. SHAYS. I understand that. I understand, but that's not what I asked. So you answered something you wanted to answer, but you didn't answer the question.

Mr. RICO. What's the question?

Mr. SHAYS. The question was that you had information from informants that conflicted with the testimony of Mr. Barboza?

Mr. RICO. Right. Right.

Mr. SHAYS. Why did you decide to go along with Mr. Barboza and not with the testimony from—excuse me, the information you had from your informants?

Mr. RICO. I was not handling the case. This was a local case that was being handled by the local authorities.

Mr. SHAYS. You're not testifying under oath, are you, Mr. Rico, that you had no conversations with Mr. Barboza about this case? So your testimony, you had no discussion with Mr. Barboza about this case?

Mr. RICO. About this case?

Mr. SHAYS. Yes.

Mr. RICO. I had conversations in the past about this case.

Mr. SHAYS. October. You had many conversations.

Mr. RICO. Right?

Mr. SHAYS. Isn't that true? So when you say you weren't involved in this case, you had conversations with Mr. Barboza about the case informing Mr. Salvati and five other witnesses. You had conversations. So you can't say you weren't involved in the case. How can you say that? This is your witness. So tell me how you can make that claim?

Mr. RICO. Because we indicate to the Boston Police Department that we have this witness, and they come and interview him.

Mr. SHAYS. No. But you also told me something more. You told me something more. You told me that you had a witness that had spoken to you about this case. Correct?

Mr. RICO. I have a witness that spoke——

Mr. SHAYS. Mr. Barboza talked to you about this case?

Mr. RICO. Yes.

Mr. SHAYS. Yes? Correct? And then you supplied this witness to the local authorities and the State authorities. Isn't that true?

Mr. RICO. We——

Mr. SHAYS. I want an answer to my question.

Mr. RICO. I didn't hear the whole question.

Mr. SHAYS. Well, I'll say it again.

Mr. RICO. All right. Say it again.

Mr. SHAYS. You spoke with Mr. Barboza about this case involving Mr. Salvati and five other witnesses. You had a number of conversations with Mr. Barboza about this case. You've already said that's correct. And I am asking you the question now, isn't it true that you then contacted local authorities and State authorities and said you had a witness who had information about this case?

Mr. RICO. Yes.

Mr. SHAYS. OK. What I want to know is why were you willing to supply only that part of the information and not the part to the State and local authorities about the informants you had?

Mr. RICO. I'm not sure we didn't say something about that also. We might have said something about that.

Mr. SHAYS. You might have said it. Is that your testimony that you did?

Mr. RICO. What?

Mr. SHAYS. Is your testimony that you did notify them about the informants who had a different story than the witness? You've got an informant and you've got a witness. What——

Mr. RICO. I have no—I actually have no clear recollection of telling the local authorities of that informant information——

Mr. SHAYS. Why not? Why didn't you tell them about what the informant said that conflicted with what your witness said?

Mr. BURTON [presiding]. Would the gentleman yield? Well, the thing is, he has, as you know, selective memory loss.

Mr. SHAYS. But——

Mr. BURTON. But he's continuing to say that, you know, he doesn't remember, that he can't remember——

Mr. SHAYS. No. But what he did say under oath is very clear. He said that he had information about what the informant said and he had information about what the witness said. He had both two different stories, and I want to know why you decided to give the local police, the State police information that your witness had and not provide information about what the informant had that you knew of. It conflicted——

Mr. RICO. Because the informant told me that 2 years—2–1/2 years before, this witness arrives on the scene.

Mr. SHAYS. So what?

Mr. RICO. So——

Mr. SHAYS. So I would believe their story more. You've already told me that your witness is a notorious criminal. You acknowledge the fact that he killed people. You acknowledged the fact that he was a hit person. He, in fact, even told you that. You told me that you couldn't be sure he—no. Hold on. You already told me you couldn't be sure he would tell the truth, and yet you decided to only supply some information to the authorities that were going to prosecute. And then you give this incredible lame comment that the informants told you 2 years earlier. To me, that's even more important. They told you 2 years earlier. Why didn't you give them that information 2 years earlier?

Mr. RICO. 2 years earlier we supplied that information to the Chelsea Police Department. They had jurisdiction over this case.

Mr. SHAYS. Well, the bottom line is, you have no remorse. You didn't provide information you should have. I think you should be prosecuted. I think you should be sent to jail. That's what I think. I'd like to ask a few more questions, if I might. I'll be happy to take my time.

Mr. BURTON. OK. You said a minute ago that you did supply this information to the Chelsea Police Department——

Mr. RICO. Right.

Mr. BURTON [continuing]. About the informant as well as the witness. Right?

Mr. RICO. Yes. It was supplied by Don Shannon to Robert Renfrew.

Mr. BURTON. So you're saying that the Chelsea Police had information that would have created doubt in a jury's mind about whether or not Mr. Salvati was guilty? I mean, if they had that information from the informant as well as the witness, obviously there would have been some conflicts there, and it would have created doubt. Why is it—can you explain to me and to the committee why is it that the Chelsea Police didn't use that in the trial? Why it wasn't brought up in the trial?

Mr. RICO. I don't know.

Mr. BURTON. Well, your partner, who was your partner, he was your partner. As I understand it, you two worked very closely together. Your partner testified as to the veracity of what Mr.—of what Barboza said at the trial. He testified that he thought he was

a credible witness. Now, you were his partner. You had to know that the informant said something else and Mr. Condon had to know that as well. So why in the world didn't they say that at the trial? Why didn't Mr. Condon, as an FBI agent—he's your partner. Come on. Don't tell me you didn't know—you didn't talk about this stuff. You had dinner together and everything else. Why didn't he just say, look, here's what Mr. Barboza is saying, but we have information contrary to that from an informant? This exculpatory evidence, why in the heck wasn't that brought up? Why did Mr. Condon not say that at the trial?

Mr. RICO. I don't know. I don't know if Mr. Condon said that at the trial or not. I don't know. I wasn't there at the trial.

Mr. BURTON. And you guys never talked about that? You weren't partners? I mean, you weren't together a lot?

Mr. RICO. I don't know what he said at the trial, but I have a transcript here, if I can find it. Do you think he testified——

Mr. BURTON. He did testify.

Mr. RICO [continuing]. That this is a credible witness?

Mr. BURTON. He testified at the trial and——

Mr. RICO. He testified he was a credible witness? What page is that on?

Mr. BURTON. Well, we'll get the exact language for you, Mr.——

Mr. RICO. Yeah. If you would. Sure. I appreciate that.

Mr. BURTON. We'll get that for you. We'll come back to that.

Mr. RICO. I know you wouldn't want to mislead me.

Mr. BURTON. No. I wouldn't mislead you. We'll come back to that. Who's next? Mr. Delahunt, do you have any questions?

Mr. DELAHUNT. Thank you, Mr. Chairman. Going back to the conversation you had with Jack Kehoe, is Jack Kehoe still alive?

Mr. RICO. The last I knew, he was. That's fairly recently.

Mr. DELAHUNT. OK. I would suggest that the committee, Mr. Chairman, should interview Mr. Kehoe, relative to the conversation he had with Mr. Rico.

Would it be fair to say that you would have disclosed the name of that informant to Mr. Kehoe?

Mr. RICO. It would be fair to say that Jack Kehoe would know the identity of the informant.

Mr. DELAHUNT. Thank you.

Mr. RICO. Without my disclosing it to him, because of this stuff that's blocked out here. He would recognize who it was.

Mr. DELAHUNT. So Jack Kehoe would. Would it be fair to infer, given the fact that you and Mr. Condon were partners—and, by the way, how long did you and Mr. Condon work together as partners?

Mr. RICO. Oh, probably 8 years to 10 years.

Mr. DELAHUNT. And you were close?

Mr. RICO. Yes.

Mr. DELAHUNT. And you still are?

Mr. RICO. Yes.

Mr. DELAHUNT. You're close personal friends?

Mr. RICO. Yes.

Mr. DELAHUNT. Is it a fair inference that Mr. Condon, if he read the report that was authored by you, would know the name of that informant?

Mr. RICO. I don't think so. I mean, I don't know the name. I can't tell you who it is. I don't know who it is. Right now I can't remember who that would be. I have——

Mr. DELAHUNT. As we were discussing earlier in terms of your role in cultivating in Barboza as a witness and discussing the Deegan murder, did you supply any information from any source about the murder?

Mr. RICO. Absolutely not.

Mr. DELAHUNT. Not at all? Before he was to testify, did either you or Mr. Condon, working with the assistant district attorney in charge of the case or with local law enforcement, review his testimony?

Mr. RICO. I don't recall doing that, and I don't know whether Dennis did. I don't think so.

Mr. DELAHUNT. So your memory is that you never participated——

Mr. RICO. I can't recall—I can't recall that.

Mr. DELAHUNT. Now, one of the problems that I have, Mr. Rico, is that when you develop a witness and as you said, you supply a witness, particularly a high profile thug like Joe Barboza, the key to having him as an effective witness is to establish his credibility. Is that a fair statement?

Mr. RICO. It sounds good.

Mr. DELAHUNT. I mean, use an agent, myself as a former prosecutor, particularly when you're dealing with somebody like a Barboza——

Mr. RICO. Right.

Mr. DELAHUNT [continuing]. Your biggest concern is, he's going to be impeached. They're going to get him on the stand and they're going to supply documents as to his convictions, review bad acts. You know the drill and I know the drill.

Mr. RICO. Right.

Mr. DELAHUNT. See, what I find difficult is to vet his credibility, is to establish his credibility, when you're the author, you, Paul Rico, are the author of a report that implicates neither Salvati nor Greco nor Limone nor Tameleo, why wouldn't you, because he's your witness, you cultivated him, you flipped him, why wouldn't you and Dennis, working with Jack Kehoe, because he was considered an FBI witness, and he ended up being responsible for the genesis of the Federal Witness Protection Program, why wouldn't you conduct an exhaustive and an intensive investigation to evaluate and assess his credibility?

Why wouldn't you go and have interviewed all of the players that were around in that point in time, determine whether Barboza was lying or telling the truth?

Mr. RICO. It's because in our interviews with him, we were discussing who might have done different crimes, mostly he had swayed a lot of hits in the Boston area, as you remember. And he was on the money on—from the standpoint of—from——

Mr. DELAHUNT. Let me——

Mr. RICO. What we knew and what he knew.

Mr. DELAHUNT. He was responsible or the prime witness who testified in three different cases?

Mr. RICO. Right.

Mr. DELAHUNT. Earlier you indicated on one case that everyone was found not guilty.

Mr. RICO. His——

Mr. DELAHUNT. Correct?

Mr. RICO. His first case.

Mr. DELAHUNT. Everyone found not guilty?

Mr. RICO. Right.

Mr. DELAHUNT. And on this case, he managed to put four innocent people in jail. How did he do on the third case, Mr. Rico?

Mr. RICO. Well, the first case was handled——

Mr. DELAHUNT. I'm asking about the third case.

Mr. RICO. Well, I just——

Mr. DELAHUNT. Did he ever——

Mr. RICO. This is the third case. This is the third case.

Mr. DELAHUNT. Well, I'm not asking you to go chronologically. The second—please, because——

Mr. RICO. He went State, Federal and State.

Mr. DELAHUNT. Right.

Mr. RICO. He got a not guilty on everything in State court.

Mr. DELAHUNT. OK.

Mr. RICO. Guilty in Federal court, and then this was the third case.

Mr. DELAHUNT. OK. He got a guilty—and the third case, of course, is—what we know now is a horrible injustice?

Mr. RICO. Right. Right.

Mr. DELAHUNT. And on the Federal case, what happened then?

Mr. RICO. Guilty.

Mr. DELAHUNT. Guilty. And what were the sentences that were meted out?

Mr. RICO. Small.

Mr. DELAHUNT. So in all this——

Mr. RICO. What?

Mr. DELAHUNT. With all the effort, the resources——

Mr. RICO. Yeah.

Mr. DELAHUNT [continuing]. And the time devoted to cultivating this witness.

Mr. RICO. Uh-huh.

Mr. DELAHUNT [continuing]. We get a couple of soft sentences in the Federal court. That's it. But you still haven't answered the question that I posed to you earlier. You had to know that guys like Bear and others that were there were going to attack his credibility, and if you supplied the witness——

Mr. RICO. Right.

Mr. DELAHUNT [continuing]. But you didn't supply the report that would have devastated his credibility, that's the problem.

Mr. RICO. Yeah.

Mr. DELAHUNT [continuing]. Isn't it, Mr. Rico?

Mr. RICO. That's probably true.

Mr. DELAHUNT. It's probably true.

Mr. RICO. Right.

Mr. BURTON. Then why didn't you supply it?

Mr. RICO. What?

Mr. BURTON. Why didn't you supply the report?

Mr. RICO. Why didn't I supply it?

Mr. BURTON. Yeah. Why wasn't the report supplied? I mean, you just admitted to Mr. Delahunt that if it had been supplied, it would have changed the whole outcome. Why wasn't it supplied? You guys had it. Why did you choose to keep that?

Mr. RICO. I assume that they must have had it. They must have had it. We had given it to Chelsea. Chelsea is the original crime scene——

Mr. BURTON. But you guys were involved in the case when you gave the information to the Chelsea Police. You knew what was going on. It was in the newspapers. You had to know. Why would you not make sure that kind of evidence was given to them? And your partner testified at the trial. We're getting that evidence right now—that information right now. But he testified you guys knew all this stuff and you didn't give it to him.

Mr. RICO. Has he given me the—what do you say that he indicated?

Mr. BURTON. We'll get that.

Mr. RICO. OK.

Mr. BURTON. We'll have that. Mrs. Morella.

Mrs. MORELLA. Thank you, Mr. Chairman. Back to that police report that was discussed. There's a report that we have, from the Boston Police Department on the Deegan murder. Did the FBI share any information on the Deegan murder with the Boston Police Department? I guess I could also expand that, too, and add, did you see any of the police reports from either the Boston Police Department or the Chelsea Police Department during the time of the Deegan murder?

Mr. RICO. I cannot tell you right now.

Mrs. MORELLA. Uh-huh.

Mr. RICO. Up.

Mrs. MORELLA. There's a report—city of Boston report on exhibit 12.

[Exhibit 12 follows:]

EDMUND L. MCHAHARA
POLICE COMMISSIONER

City of Boston 2
Police Department

BUREAU OF INSPECTIONAL SERVICES
INTELLIGENCE DIVISION

Report of Information Received

BY TELEPHONE _____ CONTROL NUMBER _____

WRITTEN COMMUNICATION _____ TIME _____

IN PERSON _____ DATE March 14, 1965

SOURCE OF INFORMATION Informant

SUBJECT Murder Of Teddy Deegan in Chelsea on March 12th

LOCATION _____

DETAILS: From a reliable informant the following facts were obtaine
to the above murder: Informant states that the following men were
Joseph Barrent aka Barboza, Romeo Martin, Freddie Chiampi, Roy Fre
Ronnie Cassesse, Tony Stats. (Greek) Chico Amico, Informant stat
Roy French and Tony Strats. were supposed to lure Deegan to some
on the pretext of doing a B&E and the other men were to be waiti
the area to kill him, Informant states that they were over
lounge in Revere when they received the call from French that ev
was O K then they all left together. After the Killing Romeo Mar
upset because somebody he thought took the number of his car aft
killing. Romeo Martin was a former informant but since hanging
North End hasn't been to helpful. I then talked to Martin and tol
the Police were looking for him in the hope that he would give s

REMARKS _____

REFERRED TO _____

RECEIVED BY _____

000436

Informant states that the reason for the killing of Deegan was that Barren claims that he is with the Hughes brothers and McLaughlins and he felt he Deegan was a threat to his friends in Roxbury(Flemmi & Bennett).

Mr. RICO. Exhibit 12.

Mrs. MORELLA. Roy French was questioned by the Chelsea Police the day after the murder. Besides French, do you know if any of the other individuals identified, either in your report or the Chelsea report, who were questioned about the Deegan murder? For instance, was Vincent Flemmi questioned?

Mr. RICO. I don't know. I have no knowledge of that.

Mrs. MORELLA. You don't remember, or you just don't know whether any of them were questioned?

Mr. RICO. I don't know whether—other people were questioned at that time.

Mrs. MORELLA. Was Vincent Flemmi ever questioned by anybody about the Deegan murder?

Mr. RICO. I don't know. I didn't question him.

Mrs. MORELLA. You don't know. Around the time of the Deegan murder, what evidence had you developed, either on your own or from other law enforcement agencies, regarding Joe Salvati's role in the Deegan——

Mr. RICO. I never received any mention that was derogatory on Joe Salvati ever.

Mrs. MORELLA. You never have?

Mr. RICO. I have no information on Joe Salvati. I don't think I ever heard the name before.

Mrs. MORELLA. You know, I understand that FBI Director Louis Freeh has issued a statement saying that there is a task force that is ongoing that is looking at this issue. It's called a Justice Task Force. It's now been in operation since, I think, early 1999.

Mr. RICO. Uh-huh.

Mrs. MORELLA. Mr. Rico, have they ever questioned you?

Mr. RICO. No.

Mrs. MORELLA. They have not questioned you at all about this?

Mr. RICO. No.

Mrs. MORELLA. Have you received any communication from them about it?

Mr. RICO. What?

Mrs. MORELLA. Have you gotten any communication?

Mr. RICO. No.

Mrs. MORELLA. From the FBI that they're interested at all? Don't you think——

Mr. RICO. I appeared before Judge Wolf in Federal court about a year and a half ago, and I think that's part of the whole system.

Mrs. MORELLA. Were you asked about the Deegan——

Mr. RICO. No. At that time I was asked about Flemmi, Steve Flemmi, not——

Mrs. MORELLA. Not Vince?

Mr. RICO. Not Vincent.

Mrs. MORELLA. Very interesting. I would guess you would expect that we'd be asking you some questions.

Mr. RICO. Fine.

Mrs. MORELLA. Maybe as a result of this hearing.

Mr. RICO. Sure.

Mrs. MORELLA. I think we certainly think they should. Well, Mr. Chairman, I'm going to yield back to you the remainder of my time.

Mr. BARR [presiding]. I thank the gentlelady. Mr. Shays, we'll conclude with 5 minutes from you.

Mr. SHAYS. I may just go slightly over, but I'll try to be as punctual as possible. Mr. Rico, when did you join the FBI?

Mr. RICO. What?

Mr. SHAYS. When did you join the FBI?

Mr. RICO. I think it was 1951, beginning of 1951.

Mr. SHAYS. And when did you retire?

Mr. RICO. 1975.

Mr. SHAYS. And when you—during that time that you were in the FBI, how long were you in the New England area?

Mr. RICO. I was there from the early 1950's to 1970.

Mr. SHAYS. Is that unusual for someone to be in one place basically for most of their time?

Mr. RICO. Not really, no. Well, it could be.

Mr. SHAYS. So the bottom line is you spent a good—maybe almost 20 years of your experience in the New England area?

Mr. RICO. That's right. That's right.

Mr. SHAYS. What did you do after you retired?

Mr. RICO. I went to work for World Jai Alai.

Mr. SHAYS. Did you know at the time that there were concerns that World Jai Alai was—well, let me ask you this. Who hired you?

Mr. RICO. I was hired by a head hunting group. Well, I was interviewed by a head hunting group, and eventually was hired by John Callahan.

Mr. SHAYS. Right. Now, did you have any information that John Callahan was involved in organized crime?

Mr. RICO. Not till late in—not till later.

Mr. SHAYS. Later. Explain later.

Mr. RICO. Later was later, several years later.

Mr. SHAYS. 2 years later, 1 year later.

Mr. RICO. It was shortly before he left the company.

Mr. SHAYS. And so how long was that after he had hired you?

Mr. RICO. After he hired me?

Mr. SHAYS. Yeah.

Mr. RICO. 3 or 4 years probably.

Mr. SHAYS. Why wouldn't you have known that he was involved in organized crime?

Mr. RICO. Why wouldn't I know?

Mr. SHAYS. Yeah, you work for FBI.

Mr. RICO. Because there was nothing in the files of the FBI indicating that John Callahan was in any way connected with organized crime.

Mr. SHAYS. So we have a retired FBI agent who is hired to work at World Jai Alai and hired by an organized crime figure. Did any of your colleagues question the advisability of you working for an organized crime figure?

Mr. RICO. I don't think anyone knew he was an organized crime figure until later.

Mr. SHAYS. The State officials knew.

Mr. RICO. What?

Mr. SHAYS. The State officials knew in Connecticut. They were rather surprised that you would choose to work for someone involved in organized crime.

Mr. RICO. The reason he left was because he was seen with organized crime people. And I reported it to the board of directors, and he was asked to resign.

Mr. SHAYS. You weren't the one who reported it.

Mr. RICO. I wasn't?

Mr. SHAYS. You were the one who discovered he was involved with organized crime? Your testimony before this committee is that no one knew in the organization that he was involved in organized crime until you told them?

Mr. RICO. No one in my company knew that until I told them.

Mr. SHAYS. That is your testimony under oath?

Mr. RICO. No one in my company knew.

Mr. SHAYS. What is the company——

Mr. RICO. Huh?

Mr. SHAYS. Tell me the company.

Mr. RICO. World Jai Alai.

Mr. SHAYS. Your testimony under oath is that nobody in World Jai Alai knew that he was involved in organized crime?

Mr. RICO. That I knew of, yeah.

Mr. SHAYS. Who is Roger Wheeler?

Mr. RICO. He is the person who eventually bought World Jai Alai.

Mr. SHAYS. And you worked for Roger Wheeler?

Mr. RICO. Yes.

Mr. SHAYS. What happened to Roger Wheeler?

Mr. RICO. Roger Wheeler was a homicide victim.

Mr. SHAYS. Who committed that crime? Who killed him?

Mr. RICO. I believe they have a witness that said he did it. I think his name is James Martorano.

Mr. SHAYS. John Vincent Martorano?

Mr. RICO. Martorano.

Mr. SHAYS. Have you ever heard of the individual?

Mr. RICO. Yes. He was with Callahan. It was like a St. Patrick's Day night. He was at the Playboy with John Callahan and two other people, Martorano was.

Mr. SHAYS. He was killed in a club, wasn't he, in Tulsa?

Mr. RICO. What?

Mr. SHAYS. He was killed in Arizona?

Mr. RICO. Oklahoma.

Mr. SHAYS. Oklahoma.

Let me just ask you another line of questions. In 1988 the Supreme Court of Rhode Island found that FBI Special Agent H. Paul Rico, you, suborned the perjury of John Kelley, the State's principal witness in the 1970 murder trial of Maurice Lerner. Apparently at your instigation, Mr. Rico, Kelley altered two facts directly dealing with the murder and the extent of the promises that you made in exchange for Kelley's testimony. When asked why he perjured himself, Kelley said my life was in the FBI's hands, and this is in brackets, Special Agent Rico, end of brackets, said I had no alternative.

Mr. Rico, why did you suborn the perjury of the State's main witness John Kelley in the gangland killing of Anthony Melei?

Mr. RICO. Anthony who?

Mr. SHAYS. Anthony Melei.

Mr. RICO. I don't know who that is.

Mr. SHAYS. Isn't it true that you were found, the Supreme Court of Rhode Island found you to have perjured—suborned the perjury of John Kelley? Weren't you cited in 1988?

Mr. RICO. I'm unaware of that.

Mr. SHAYS. You're unaware of any perjury, any order, any decision—I want you to be real careful about this because you did have a conversation with one of our staff. So I want you to think this through for a second. I just read you something that was pretty clear. I want you to tell me what your answer is to that.

Do you know who Maurice Lerner is?

Mr. RICO. Yes, oh yeah, Maurice Lerner.

Mr. SHAYS. Do you know who John Kelley is?

Mr. RICO. Yes.

Mr. SHAYS. You know who those two people are?

Mr. RICO. Yes.

Mr. SHAYS. Who are they?

Mr. RICO. John J. Kelley is an individual that's been involved in different forms of crime over a long period of time, including numerous bank robberies and armored car robberies on a national basis.

Mr. SHAYS. Right. And you have had contact with them, haven't you?

Mr. RICO. Yes.

Mr. SHAYS. And you had a circumstance where you spoke to him about the testimony he gave before the Supreme Court in Rhode Island—I mean, excuse me, before the court in Rhode Island, not the Supreme Court.

Mr. RICO. I had a conversation with John over that?

Mr. SHAYS. John Kelley.

Mr. RICO. I'm not trying to be evasive. I think that John J. Kelley——

Mr. SHAYS. John. If it's John J. Kelley, I know it's John Kelley.

Mr. RICO. It's the person that was tried in the Plymouth mail robbery. He became a government witness.

Mr. SHAYS. Could you put the mic a little closer to you, please?

Mr. RICO. He was a principal in the Plymouth mail robbery, was tried and F. Lee Bailey represented him and he was found not guilty. He later became involved in another robbery of a Brinks truck and he was awaiting trial on that matter when he decided that he would become a government witness. And he became a government witness. And once his testimony was over and his sentencing was over he decided to change his testimony.

Mr. SHAYS. He perjured himself, and he claims that you were the reason he perjured.

Mr. RICO. That's right. That's what he claimed. That's true.

Mr. SHAYS. You just seem——

Mr. RICO. Because I thought you were saying that I had been found guilty of perjury. I wasn't involved in being convicted. He alleged it, that I did this?

Mr. SHAYS. Right. And weren't you cited by the Supreme Court?

Mr. RICO. I don't know if I was. I don't think so.

Mr. SHAYS. What was the claim that he made? How had he perjured himself?

Mr. RICO. You ask him, Maurice Lerner. Maurice Lerner had a shooting gallery in his basement and he was, according to Jack Kelley, this guy was a very competent killer and Jack was very afraid of him and I think that after Jack Kelley got his legal problems squared away that he decided he would help Lerner and he changed his testimony and said that he had only testified the other way because I had insisted on it.

Mr. SHAYS. I am going to ask you two questions. Mr. Rico, why did you suborn the perjury of the State's main witness John Kelley in the gangland killing of Anthony Melei.

Mr. RICO. Why did I do that?

Mr. SHAYS. Yes.

Mr. RICO. I did not suborn perjury.

Mr. SHAYS. Did you also perjure yourself in that case by corroborating Kelley's false statements concerning promises you made to Kelley in exchange for his testimony?

Mr. RICO. I have always been able to say to everybody that was a witness or a potential witness the same thing, that we will bring whatever cooperation you bring to the attention of the proper authorities. There's nothing else that I have ever said concerning eliciting testimony.

Mr. SHAYS. Two points. Isn't it true that Mr. Kelley perjured himself?

Mr. RICO. I don't know that.

Mr. SHAYS. You don't know if Mr. Kelley perjured?

Mr. RICO. If he changed his testimony from the first time and changed it to something else the second time, he obviously was wrong in one of those instances.

Mr. SHAYS. Isn't it true that he claims you were the reason that he had given false testimony the first time?

Mr. RICO. That's probably true. That's probably what he said.

Mr. SHAYS. No, not probably. Isn't it true?

Mr. RICO. It's probably true.

Mr. SHAYS. Don't use the word "probably." Isn't it true that he said that you encouraged him to perjure himself and give false testimony?

Mr. RICO. Yes.

Mr. SHAYS. Well, you know I realize that he may be an unsavory character but why shouldn't I believe him more than you were willing to believe your star witness Joseph Barboza and send someone to jail for 30 years? Why should you be incredulous about my question?

Mr. RICO. No, no, no. He would be very interesting if you would talk to him.

Mr. SHAYS. This has been a fascinating day for me, Mr. Rico. I think the thing I'm most surprised about is that it's clear to me that the FBI became as corrupt as the people they went after and it's clear to me that you have the same insensitivity that I would imagine in someone who is a hard and fast criminal. No remorse whatsoever. Cold as can be. The fact that a man spent 30 years in jail, no big deal. No tears. No regret, and yet you were responsible for that man being in jail for 30 years. You have gotten just like the people you went after. What a legacy.

Mr. BARR. The Chair recognizes the counsel, Mr. Wilson.

Mr. WILSON. Mr. Rico, there are a number of questions that need to be answered but there's one that sticks out in my mind right now and it's this. We've learned that on many occasions you talked to Joe Barboza. He was a witness that you were handling, went into the Witness Protection Program. You worked with him after he was in the Witness Protection Program. When you asked him the question where was Vincent Flemmi on March 12, 1965, what did he tell you?

Mr. RICO. I don't think we ever asked him that question. We never asked him that question.

Mr. WILSON. The only reason I ask that is because it's the only question that you could not have failed to ask. It's inconceivable that you wouldn't ask that question. I'll tell you why it's inconceivable to me. In 1964 you learned that Vincent Flemmi wanted to kill Teddy Deegan. That was on October 19, 1964, you knew that Vincent Flemmi wanted to kill Teddy Deegan. On March 10 you learned from the informant that Deegan was going to be murdered. On March 13, 1965 you learned from an informant that Vincent Flemmi told people that the Deegan murder was committed by Joseph Barboza and himself. So in 1964 you knew Teddy Deegan was going to be killed and Vincent Flemmi wanted to kill him or at least you learned that Vincent Flemmi wanted to kill him. The following year you learned that Flemmi had said that he had killed him. A little bit later in April, April 5, 1965, you had your first reported contact with Vincent Flemmi trying to get information from him. We're told by the task force head that on April 15 you opened an informant file on Vincent Flemmi. You started working with Vincent Flemmi's brother in 1965 to obtain informant information. And then you finally start working with Barboza, with all this knowledge in the background of what Vincent Flemmi wanted to do with Teddy Deegan, and you had the perfect opportunity to ask Barboza where was Vincent Flemmi. I mean that's the only question that you would think you would want answered. You knew you testified that Vincent Flemmi was a killer, right?

Mr. RICO. Right.

Mr. WILSON. And here's the possibility that there's a murder to be solved and you have got information that Vincent Flemmi might be involved in the murder. Did you purposefully want to leave him on the streets?

Mr. RICO. No, no, no. I arrested Vincent Flemmi.

Mr. WILSON. Well, you had an opportunity to followup and at least ask the question of your principal witness about Vincent Flemmi. Where was Vincent Flemmi on the day that Teddy Deegan was killed? That's to me the one question that you would have had to ask him.

Mr. RICO. Yeah.

Mr. WILSON. And you didn't ask him that?

Mr. RICO. I don't remember asking him that, no.

Mr. WILSON. Now the most important document I think in this whole series of documents we have is exhibit No. 24 in our book and if you would turn to that, take a moment to look at it, please. It's a two-page document. We talked about it in a previous panel. It was prepared by yourself and your partner, Dennis Condon. It's dated March 8, 1967. Apparently it's information that was obtained at Walpole, which is a prison in Massachusetts. And on the second page——

[Exhibit 24 follows:]

JOSEPH BARON, also known as JOE BARBOZA, was interviewed at the Massachusetts Correctional Institution, Walpole, Massachusetts.

BARON stated that he would not mind talking to the Agents if the Agents would not end up testifying against him for what he said. BARON was told that if he wanted to talk in confidence that "we would respect his confidence."

BARON advised that he has always tried to make a living outside of the law and that if anyone in law enforcement could prove that he was doing wrong, he is willing to pay the consequences. However, he said, when you find that a police officer that you know "fingered scores, acted as lookout when scores were being pulled, and divided up the proceeds of these scores" turns around and manufactures evidence and testimony against you, you have a feeling that maybe you, the criminal, have played by the wrong standards.

BARON said that he never wanted to physically hurt anyone in law enforcement but added that "If my life is ruined by this individual trying to benefit his own ambitions, the day I come out of jail could be the day this Lieutenant becomes nervous."

BARON said that he knows that INCEGNERI is friends with the "connected people" and that these people wanted to see him hurt. BARON advised that he has always tried to get along with these people and that, as a matter of fact, he used to see RAYMOND PATRIARCA and get an "OK" before he made most of his moves. Since they killed three of his friends, however, (THOMAS J. DE PRISCO, ARTHUR C. BRATSOS and JOSEPH W. AMICO) and stole $70,000 from him (This is in reference to the money allegedly in BRATSOS' possession when he was murdered), he had made statements that he was going to kill several of them. BARON said that after thinking the entire situation over, he realized that he could not possibly

On 3/8/67 at Walpole, Massachusetts File # [redacted]

by SA's DENNIS M. CONDON and H. PAUL RICO:pol'b 3 Date dictated

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

EXHIBIT 24

[redacted]

DMC:HPR:po'b

2

[redacted] BARON, knows what has happened in practically every murder that has been committed in this area. He said that he would never provide information that would allow JAMES VINCENT FIDDMI to "fry" but that he will consider furnishing information on these murders.

[redacted]

Mr. RICO. I don't find it.

Mr. WILSON. Do you have exhibit 24?

Mr. RICO. I have 25, OK. Coming up. 24. OK. This has to be 24.

Mr. WILSON. It's a two-page document. It's a write-up of your interview and Mr. Condon's interview with Joe Barboza, and on the second page the FBI has redacted most of the information on the second page so we don't know what's there, but it does say, the one bit of text that's left on the page, Baron, now Baron was Barboza's other name, "Baron knows what has happened in practically every murder that has been committed in this area. He said that he would never provide information that would allow James Vincent Flemmi to fry but that he will consider furnishing information on these murders."

Now, given the fact that you had all the information about Vincent Flemmi wanting to kill Teddy Deegan and then after the fact having killed Teddy Deegan, given the fact that you had that information and given that Joe Barboza told you that he wasn't going to give you any information about Vincent Flemmi, did you have any concern that Barboza was going to protect Vincent Flemmi in the trial for the Deegan murder?

Mr. RICO. I probably had concern over it at that time.

Mr. WILSON. What did you do, what concrete steps did you do to express your concern.

Mr. RICO. Well, I think I indicated to John Doyle the possibility that this guy would not provide information on Jimmy Flemmi because he's his friend and I think that should be borne in mind when you interview this guy.

Mr. WILSON. But now he's your witness. You're the one taking the interviews here. Why didn't you ask him the question for your own peace of mind? This was a death penalty case. You apparently were his handler.

Mr. RICO. Well, he'd already said that he will not tell us, right?

Mr. WILSON. Pardon.

Mr. RICO. He already said that he would not give us anything that would be harmful to Jimmy Flemmi.

Mr. WILSON. So that was it; you wouldn't even followup and say I need to know, I need to know to move forward? Tell me what happened. Well, let me just ask you a couple of other related questions because a trial took place, and in hindsight, obviously hindsight is helpful but there was this extraordinary testimony about a guy wearing a wig to make him look bald. Did you know that Vincent Flemmi was bald?

Mr. RICO. Yes, yes.

Mr. WILSON. OK. What did you think about the testimony at trial?

Mr. RICO. I didn't hear that testimony until today. That's the only time I ever heard that testimony was today.

Mr. WILSON. It seems to us that it had to have been as far-fetched in 1967 and 1968.

Mr. RICO. I don't remember it happening at that time, you know.

Mr. WILSON. Your partner testified at the trial, Barboza was your witness. Weren't you following what he was saying. That would have ramifications for Federal trials. You were going to put

the guy on the stand in other trials. Didn't you need to know what he was saying in that trial?

Mr. RICO. No, that was the last trial.

Mr. WILSON. But he's still in the Witness Protection Program. Is that it? There was no possibility that he would ever be able to give up information again?

Mr. RICO. I think that was it. I didn't think he was going to give us information that we could use on anything else. He was cut loose.

Mr. WILSON. Did you ever debrief Barboza again? Did you ever talk to him about any other matter after?

Mr. RICO. Yeah, I did. I talked to him in Santa Rosa and he told me that somebody from Massachusetts had visited him, and I told him that person was really not a friend of his and he should be careful. And when he got out of jail he visited that person and when he walked out the front door he got hit with a shotgun. That was the end of Barboza.

Mr. WILSON. And that was in 1976, correct?

Mr. RICO. I don't remember the year. I just know that's what happened.

Mr. WILSON. Right. Now, one of the other things that's of some concern to us, and we'll just try to make sure we understand this fully, Vincent Flemmi was being used as an informant in 1965, correct?

Mr. RICO. I don't think I used him at all.

Mr. WILSON. I remember you said that before in answer to one of the Congressman's question. I think you said that you didn't know that Vincent Flemmi was an informant at all.

Mr. RICO. I don't think I had him as an informant. I had——

Mr. WILSON. The question is did you know he was an informant for the FBI?

Mr. RICO. Well, somebody could have opened him as an informant.

Mr. WILSON. But the question is did you know he was an informant for the FBI ever prior to today?

Mr. RICO. We're talking about somebody that most of the informants you have to certify their emotional stability and it would be difficult to certify James's emotional stability. So I don't know whether or not someone decided to open him. I don't think I did.

Mr. SHAYS. Could the gentleman yield for a second? I don't understand. You have to certify?

Mr. RICO. You want to make sure that whoever you have is emotionally stable. Not a nut.

Mr. SHAYS. You also want to make sure they tell the truth, too, right?

Mr. RICO. You want to make sure whether you can determine that they tell the truth.

Mr. SHAYS. I want to make sure I understand this. You care about a witness to make sure he's emotionally credible but you don't care about the other things that a witness might say?

Mr. RICO. Yes, of course you do.

Mr. SHAYS. Well, you didn't seem to—well, thank you.

Mr. WILSON. Well, I'm just a little concerned that we didn't get a clear answer to the question.

Mr. RICO. Well, do you have Vincent Flemmi as my informant?

Mr. WILSON. I don't, but that's not my question. My question is did you know that Vincent Flemmi was being used as an informant by anybody in the FBI?

Mr. RICO. At the present time I don't know whether he was being used as an informant. I doubt that he was being used as an informant.

Mr. WILSON. Did you know that anybody was considering using him as an informant?

Mr. RICO. If you work in organized crime the Bureau expects you to come up with sources and informants, so it's very possible that somebody could consider him. I don't know that.

Mr. WILSON. Well, that is the answer. You're saying you did not know that?

Mr. RICO. I can't recall that. OK.

Mr. WILSON. You did know, I believe you testified that Steven Flemmi was being considered as an informant.

Mr. RICO. I had him.

Mr. WILSON. Now one of the problems that we face here is when you interviewed Barboza and he said he wasn't going to give you any information that would—and I'm paraphrasing—but would lead his brother, would lead Vincent Flemmi to fry, at that time you have got knowledge that you've been using Steven Flemmi as an informant. It seems to me there is a terrible conflict there. If you had asked Barboza probing questions about Vincent Flemmi, which seems to me a fairly logical thing to have done, you would have put yourself into trouble with your informant Steve Flemmi. Did that ever occur to you?

Mr. RICO. That is a possibility.

Mr. WILSON. Well——

Mr. RICO. It wouldn't have prevented us from asking. We try not to be married to informants.

Mr. WILSON. But to try to put it as simply as possible, one of our concerns is that in order to keep your relationship with Steven Flemmi you're turning a blind eye to what Vincent Flemmi is doing.

Mr. RICO. No, no. I mentioned before I ended up arresting him, including with my partner Dennis.

Mr. WILSON. But not for the Deegan murder?

Mr. RICO. No.

Mr. WILSON. And you didn't ask any questions about Vincent Flemmi's possible participation in the Deegan murder, none at all?

Mr. RICO. Well, I think John, I think John Doyle was pretty much aware that Vincent Flemmi and Joseph Barboza were very close. And I think that was brought out in conversations between us, John Doyle, myself, Dennis, yeah.

Mr. WILSON. I guess this is a very important question that we've not asked yet. But in 1965, given that you knew there was a bald guy allegedly in the Deegan murder and that Barboza did commit the murder, did you suspect that that person was Vincent Flemmi? I'm asking whether you suspected that.

Mr. RICO. I can't answer that now. I can't answer that at the present time. I can't think of what I thought back then.

Mr. WILSON. Did——

Mr. RICO. Vincent was capable of doing anything though.

Mr. WILSON. Given what we now know, it's obvious to us but it would have been obvious to you in 1965 and 1966 and 1967. You told us you ultimately arrested Vincent Flemmi. But what you had in 1964 is information that Vincent Flemmi was going to kill Teddy Deegan and then you had informant information in fact that Vincent Flemmi was going to kill Teddy Deegan. In fact, you sent memos to the Director of the Federal Bureau of Investigation, your ultimate boss, that Vincent Flemmi is going to kill Teddy Deegan and then there is a bald guy that ends up helping to kill Teddy Deegan and you told us you don't know about the testimony but you just don't remember. That's your testimony, that you just don't remember?

Mr. RICO. That's right, I don't remember.

Mr. WILSON. What your suspicion was?

Mr. RICO. And I don't think I sent a communication. Oh, yes, I did. OK.

Mr. WILSON. There are a number of memoranda——

Mr. RICO. I see it.

Mr. WILSON [continuing]. That you authored here. Some went to the Director.

Mr. RICO. Right.

Mr. WILSON. Did you have any verbal conversations, any conversations with the Director of the FBI about the Deegan case?

Mr. RICO. No.

Mr. WILSON. Did you know the Director of the FBI?

Mr. RICO. I only knew who he was. I didn't know him.

Mr. WILSON. If you could give us a little sense of memoranda that were being prepared. Did you prepare more than one memorandum a week for the Director of the FBI?

Mr. RICO. I don't think so. I don't think so. I don't even think it was, I don't recall it being my responsibility.

Mr. WILSON. From our perspective, looking at the documents we've been provided, it doesn't appear to be something that you did frequently. Is that fair to say?

Mr. RICO. Right, I would think it would be fair to say.

Mr. WILSON. I think you have had a chance to look a little bit through the binder here. Do you know of any other memoranda that you prepared that discussed Vincent Flemmi, and let me put that in context, Vincent Flemmi in the Deegan case?

Mr. RICO. I would like to take a break.

Mr. WILSON. OK.

Mr. RICO. Which way is the nearest men's room?

Mr. BARR. We'll stand in recess for 5 minutes.

[Recess.]

Mr. BARR. I think Mr. Wilson has finished his questions. Mr. Delahunt, you had one other area of inquiry that you wanted to go into before we conclude?

Mr. DELAHUNT. Yes.

Mr. BARR. The gentleman from Massachusetts is recognized for 5 minutes.

Mr. DELAHUNT. Mr. Rico, you never inquired of or ever made any recommendation to the Massachusetts Parole Board on any matter relating to a commutation for either Mr. Salvati or anyone else who

was convicted as a result in the Deegan murder case; is that correct?

Mr. RICO. That is correct.

Mr. DELAHUNT. You indicated that Steve Flemmi was your informant and you ran him as an informant until you left the Bureau?

Mr. RICO. I don't know the date. No, I think—no, I think that I ran him until he was indicted on—I think he was indicted on the bombing of John Fitzgerald's car, and I closed him then.

Mr. DELAHUNT. Let me ask you this. You closed him then but you introduced him to John Connolly, is that correct?

Mr. RICO. That is not correct.

Mr. DELAHUNT. That is not correct?

Mr. RICO. Right.

Mr. DELAHUNT. Did you participate in any way in encouraging, either directly or indirectly through Dennis Condon, Steven Flemmi to cooperate again with the FBI?

Mr. RICO. I think Dennis was the ultimate agent on with Stevie Flemmi. And I think when Stevie Flemmi was no longer under indictment I think Dennis may have handled him for a period of time.

Mr. DELAHUNT. OK. You're familiar that Frank Salemme—you're familiar with Frank Salemme?

Mr. RICO. Yes.

Mr. DELAHUNT. You know Frank Salemme was arrested in New York City?

Mr. RICO. Yes.

Mr. DELAHUNT. By John Connolly.

Mr. RICO. Yes.

Mr. DELAHUNT. Are you aware of the details of how Mr. Connolly developed that information?

Mr. RICO. I believe that Dennis Condon sent a photograph of Frankie Salemme to New York City through John Connolly because he thought he was there and that the New York agents weren't paying much attention to it.

Mr. DELAHUNT. But Steve Flemmi never provided any information relative to the whereabouts of Frank Salemme in New York City.

Mr. RICO. I think Frank—excuse me, I think Steve Flemmi was a fugitive at the same time so that he wasn't available to provide anyone with information.

Mr. DELAHUNT. So it was simply a coincidence?

Mr. RICO. Lucky is what I think.

Mr. DELAHUNT. You know, just for a minute touching on the Wheeler case, and we all have coincidences in our lives, but the witness you referred to, John Martorano, who has admitted killing Wheeler——

Mr. RICO. Right.

Mr. DELAHUNT [continuing]. Has testified under oath that he was instructed or contracted for the hit by Steve Flemmi and Whitey Bulger.

Mr. RICO. I understand that.

Mr. DELAHUNT. It's a coincidence that you were the handler for Steve Flemmi and that Steve Flemmi ordered the hit on Mr.

Wheeler, who was the CEO of a company that you were employed by.

Mr. RICO. Right.

Mr. DELAHUNT. That's just a coincidence.

Mr. RICO. You want to tie me into Bulger. I can tie myself into Bulger for you.

Mr. DELAHUNT. Go ahead.

Mr. RICO. Bulger.

Mr. DELAHUNT. Mr. Rico, I think I need full disclosure here because somebody will, I'm sure, discover that years and years ago I went to Saint Agatha's Parochial School with John Martorano.

Mr. RICO. I knew that.

Mr. DELAHUNT. I figured you did know that. So I really wanted to be forthcoming. And you should also know that John Martorano and I served mass together for Cardinal Cushing back in the eighth grade. So there are coincidences in life.

Mr. RICO. OK.

Mr. DELAHUNT. If you want to proceed, Mr. Rico.

Mr. RICO. The last time that Jimmy Bulger was arrested I arrested him. I arrested him for two bank robberies and he pled guilty to three bank robberies. And that's my Bulger experience.

Mr. DELAHUNT. Well, thank you for that information. We'll just conclude with a—to elicit a response from you to a statement that was made by your counsel that appeared in the Boston Herald dated January 10 of this year. "Rico cannot be blamed for men—referring to the innocent individuals that were convicted in the Deegan case." Those are my parentheses. That's not part of the quotation. It goes on. The former agent's attorney said yesterday orders laid down by then FBI Director J. Edgar Hoover kept information in the murder of Edward Deegan locked away in FBI files all these years, Cagney said. He was bound by the hierarchy, Cagney said. All that went to Rico supervisor—all that, rather, went to Rico supervisors and he can't release that without permission of his supervisors.

Is that your position as well?

Mr. RICO. I don't know where that came from. I hear what you're saying but it doesn't sound—I'm sorry, I have got a cold. But it doesn't sound like Cagney and it doesn't sound plausible to me.

Mr. DELAHUNT. Thank you.

Mr. DELAHUNT. I yield back.

Mr. BARR. I thank the gentleman. That concludes this hearing. Thank you, Mr. Rico.

Mr. RICO. Thank you. Am I dismissed?

Mr. BARR. Yes, sir.

Mr. RICO. Thank you.

[Whereupon, at 5:34 p.m., the committee was adjourned.]

[Exhibits used for the hearing record follow:]

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<Red Flag>

United States District Court,
D. Massachusetts.

UNITED STATES of America
v.
Francis P. SALEMME, et al.
United States of America
v.
John Martorano

Nos. Cr. 94-10287-MLW, Cr. 97-10009-MLW.

Sept. 15, 1999.
Clerical Corrections,
December 23, 1999.

Defendant, a longstanding FBI informant, filed a motion to dismiss an indictment charging him with multiple charges of racketeering and extortion, among other crimes based on an alleged agreement that he would not be prosecuted. Defendant, and a codefendant filed motions to suppress electronic surveillance evidence. The District Court, **Wolf,** J., held that: (1) defendant did not have either an express immunity agreement or an agreement implied in fact that he would not be prosecuted so as to be entitled to dismissal of charges; (2) defendant had an enforceable agreement that precluded the use and derivative use against him of any intercepted evidence; (3) hearing was necessary to determine whether case would be dismissed because defendant's due process rights were violated because intercepted evidence was presented to the grand juries that indicted defendant in violation of promises of confidentiality; (4) suppression of electronic surveillance evidence against codefendant was required for failure to make the full and complete statement concerning necessity required by statute; and (5) codefendant lacked standing to maintain seek suppression of

In doing so, the court has performed as juries are generally instructed with regard to determining credibility and finding the facts. *See, e.g., First Circuit Pattern Jury Instructions--Criminal* §§ 1.05, 1.06 (West 1998). The court has considered both the direct and circumstantial evidence. *Id.* § 1.05. In view of the substantial evidence that members of the FBI engaged in improper, if not illegal, conduct and thus had a motive to tailor, by omission or distortion, the written records that they reasonably expected would never be seen by others with the knowledge necessary to dispute their accuracy or completeness, at times circumstantial evidence has been particularly important in resolving issues of credibility and in finding the facts.

In judging the believability of witnesses, the court has applied the conventional criteria. *Id.* § 1.06. These include, importantly, the manner of the witness while testifying; whether the witness had a bias, prejudice, or other motive to lie; the consistency of the witness's testimony with his or her prior statements and other evidence; and the reasonableness of the witness's testimony when considered in the light of the credible other evidence. *Id.*

The court has also recognized that witnesses at times testify honestly and accurately about some matters, but not all matters. *Id.* Thus, in certain instances, the court has credited some but not all of a witness's testimony. For example, the court is persuaded that **Flemmi** testified truthfully in claiming that he was regularly tipped-off by the FBI regarding investigations and impending indictments. He was not, however, always candid in identifying the source of the information he received. Rather, he at times attributed information received from Connolly to other agents of the FBI in an evident effort to protect Connolly and to strengthen his own claim to an enforceable promise of immunity from prosecution.

Applying the foregoing principles, the court finds the following facts have been proven by a preponderance of the credible evidence. [FN27]

> FN27. Citations to the record are included for virtually all of the facts found. However, since this matter has required making many credibility determinations and drawing reasonable inferences from a great volume of evidence, it is not feasible to cite all of the evidence which the court has considered and assessed. The citations to the record that are included are intended to be helpful, but do not describe completely the evidence on which the court has relied in drawing inferences and finding facts.

176** 2. *Rico and* ***Flemmi

In the early 1960's, **Flemmi** began exchanging information with the FBI. Ex. 31, ¶ 3. In November 1965, FBI Special Agent H. Paul Rico

UNITED STATES GOVERNMENT

Memorandum

TO : SAC [redacted] F

DATE 10/19/64

☒ CI ☐ SI

☐ PCI ☐ PSI

FROM : SA H. PAUL RICO

SUBJECT: [redacted] b

Dates of Contact
10/18/64

Titles and File #s on which contacted
[redacted]

Purpose and results of contact

☐ NEGATIVE
☒ POSITIVE

Informant advised he got a telephone call from JAMES FLEMMI the previous evening and FLEMMI told him that he had been with EDWARD "TEDDY" DEEGAN and an individual referred to as "TONY" at the West End Social Club Saturday morning. Informant said that ANTHONY SACRIMONE's name came up in the conversation and that DEEGAN had said something concerning SACRIMONE, but FLEMMI could not recall what it was.

FLEMMI said that he definitely knows that DEEGAN, later that morning, murdered ANTHONY SACRIMONE and he was very concerned about leaving his prints in the car; that DEEGAN is going to lay low for a couple of weeks until he finds out what, if anything, the police have on him to tie him in to this murder.

FLEMMI told the informant that DEEGAN has been knocking him (the informant) in indicating to the Italian element that the informant was going to "hit" someone from the

☒ Informant certified that he has furnished all information obtained by him since last contact.	Rating	Coverage 92's
Personal Data [redacted] F	F	[redacted]

1- (Everett PD)
[redacted]
HPR:pob
(5)

ex 0

EXHIBIT 2

000747

[redacted] F

[redacted] -270

Coliseum Restaurant. FLEMMI told the informant this obviously was just an attempt to get the Italian element interested in eliminating the informant.

FLEMMI advised that DEEGAN owes FLEMMI's brother, STEVIE, some money, and that he told him once to get the money up. He has not gotten the money up, and FLEMMI wants to kill DEEGAN and wanted the informant to go with him on the "hit."

BM [redacted]

The information concerning DEEGAN perpetrating this killing was disseminated telephonically to Det. HENRY DOHERTY of the Everett, Mass. PD on 10/18/64.

Det. DOHERTY recontacted this office on 10/19/64 and advised that he believes the information concerning DEEGAN is correct but that they have been unable to come up with any fingerprints in the car that are identifiable and DEEGAN has taken off from his usual haunts.

FD-36

F B I

Date: 10/20/64

Transmit the following in _____
(Type in plain text or code)

Via AIRTEL _____
(Priority)

TO : DIRECTOR, FBI [redacted] F

FROM : SAC, BOSTON [redacted]

SUBJECT: [redacted] B.M

ReBosAirtel 10/15/64.

B.F

3 - Bureau
7 - Boston
[redacted] F
JFK:ner
(10)

FBI/DOJ

Rico
Shannon
Kenfer

Approved: _____ Sent ___ M Per 000749
Special Agent in Charge

F [redacted] - 2447

EXHIBIT
3

F.G.7

[redacted] F

m.B

PETER LIMONE stated that JIMMY FLEMMI is an individual whom they can't control. JIMMY came to his club recently and LIMONE asked him to leave because of the heat that was on FLEMMI at the time. FLEMMI denied any heat being on him from the police, but LIMONE insisted that he leave his, LIMONE's, club. [redacted] B.M

JIMMY also inquired about EDWARD DEEGAN, close associate of HAROLD HANNON, who was recently murdered. LIMONE told FLEMMI that DEEGAN does not come to the club. Immediately after FLEMMI left, he called DEEGAN and told him that FLEMMI was looking for him, allegedly for a $300.00 loan which DEEGAN owes FLEMMI. DEEGAN denied any such loan. Therefore, they were of the opinion that FLEMMI was out to kill DEEGAN.

m.B

7.B.M

U.S. Department of Justice

United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100
United States Courthouse, Suite 9200
1 Courthouse Way
Boston, Massachusetts 02210

December 19, 2000

John Cavicchi, Esquire
Attorney at Law
25 Barnes Avenue
East Boston, MA 02128

RE: Disclosure of FBI Documents Relating to the
March 12, 1965 Murder of Edward "Teddy" Deegan

Dear Mr. Cavicchi:

This letter and its enclosures are being sent in response to your letter to me dated 11/16/2000, in which you asked that I provide "any information" that would assist you in responding to a Court Order in the matter of the Commonwealth of Massachusetts v. Peter Limone, Superior Court Crim. No. 32367, 69-70, which is pending before the Honorable Margaret R. Hinkle. As you explain, this Order requires you to file a Non-Live Witness Statement listing police reports, affidavits, transcripts and any other documents that you intend to rely upon in support of your motion for a new trial filed on behalf of your client, Peter Limone. I understand the matter being heard relates to your client's conviction for the 1965 murder of Edward "Teddy" Deegan and involves your motion for a new trial in that case.

In response to your request, FBI employees assigned to the Justice Task Force (JTF) initiated a review of Boston FBI informant, intelligence and investigative files that contain information that dates back to the 1950s and 1960s. JTF's search first determined that around the time Deegan was murdered, Vincent James Flemmi was an FBI informant. According to the file maintained in support of efforts to develop Flemmi as an informant, focus on Flemmi's potential as a source began on about 3/9/1965. The first reported contact with Flemmi was by FBI Boston Special Agent (SA) H. Paul Rico on 4/5/1965. The informant file was officially opened and assigned to SA Rico on 4/15/1965 and reflects that Flemmi was contacted a total of five times as an informant, each time by SA Rico. The dates of contact were 4/5/1965, 5/10/1965, 6/4/1965, 7/22/1965 and 7/27/1965. Flemmi's file was closed on 9/15/1965 after Flemmi was charged with a crime, unrelated to the Deegan murder.

Vincent James Flemmi's informant file was found to contain two documents that relate to the Deegan murder, one of which is a summary of information known by the Boston FBI about Flemmi's criminal activities at the time he was opened as an informant. This summary includes information previously reported to the FBI by other sources. The JTF attempted to review these other source files and any other intelligence files where their information may have been filed. Efforts have also been made to locate any investigative files that relate to the Deegan murder.

Thus far, a total of five documents have been located that appear to be responsive to your request. These are: 1) 3/15/1965 Memorandum from Boston SA H. Paul Rico to the SAC, Boston, reporting a contact with a source on 3/10/1965. 2) 3/15/1965 Memorandum from Boston SA H. Paul Rico to the SAC, Boston, reporting a contact with the same source on 3/13/1965. 3) 3/19/1965 Airtel from SAC, Boston to Director, FBI, entitled "Criminal Intelligence Program, Boston Division" summarizing developments during that week. 4) 4/22/1965 Memorandum from a Boston "Correlator" to the SAC, Boston, entitled "Vincent James Flemmi, Aka (sic)" which summarizes information in FBI files known about Flemmi at the time he was opened as an informant. 5) 6/9/1965 Airtel from SAC, Boston, to Director, FBI, entitled "BS-9190-PC" which reports on the status of efforts to develop Vincent James Flemmi as an FBI informant. (These documents have been sequentially numbered 0000 1 thru 000026.)

Several impediments to the JTF's search for records were encountered. Since the Deegan murder occurred over 30 years ago, many files that could logically contain relevant information were routinely destroyed years ago. For example, the enclosed 4/22/1965 summary memorandum references many other source reports that contain the original record of this information. Efforts to locate these original records have been unsuccessful. As a result, this summary memorandum represents the only surviving record of its information. Simply stated, the raw source data that was originally reported appears to no longer exist. Efforts continue to locate copies of this data that may have been filed in intelligence files.

Only two informants have been found to have reported information relating to the Deegan murder after the murder occurred. Enclosures 1 and 2 report information from the same source and Enclosure 3 appears to report information from this source to FBI Headquarters. Each of the files for the informants whose information is contained in the enclosures appears to have been the subject of routine destruction. In this regard, however, I would note that a case file containing information from Joseph Baron (Barboza) was located on this date, and a review of that file will begin shortly.

You will note that the attachments have been subjected to a routine redaction process which removes information that is not relevant to your request or has otherwise been lawfully excluded. It should be noted that the JTF is not completely familiar with the issues before Judge Hinkle. In addition, the JTF has not completed its review of the many FBI files from the Deegan murder time frame. Therefore, it can not be stated with certainty at this time that the attached documents represent the only relevant material in FBI files. If either party to the Limone matter wishes to provide greater specificity as to the materials that would be relevant to that proceeding, the JTF will consider this information in its record search. Regardless of whether such a request is received, the JTF will promptly advise you if any additional relevant documents are discovered.

As you know, the JTF has also been in contact with Attorney Victor Garo who represents Joseph Salvati. Mr. Garo previously has brought issues regarding Salvati's conviction for the

Deegan murder before the Superior Court and is continuing his efforts to exonerate Salvati for this murder. These documents also appear to be relevant to concerns previously expressed to the JTF by Attorney Victor Garo on behalf of his client, Joseph Salvati, and, therefore, copies are being provided to him.

Let me conclude by stating that the JTF, the United States Attorney's Office, the Boston FBI Office and FBI Headquarters understand the potential significance of the enclosures to Mr. Limone and Mr. Salvati. These documents are being made available to you with the concurrence and encouragement of the Boston FBI and FBI Headquarters. Collectively, efforts will continue to locate other documents that may be responsive to your concerns. If you have questions concerning the enclosures, please do not hesitate to contact me at telephone number (617) 854-1500 (Justice Task Force, 18 Tremont Street, Suite 300, Boston, MA 021308), or (203) 821-3700 (United States Attorney's Office, 157 Church Street, 23rd Floor, New Haven, CT 06510).

Very truly yours,

DONALD K. STERN
United States Attorney

JOHN H. DURHAM
Special Attorney

cc: Assistant District Attorney Mark Lee w/ Enclosures
William Koski, Esquire w/ Enclosures
Victor Garo, Esquire w/ Enclosures

Donald K. Stern
United States Attorney

Charles Prouty
SAC FBI Boston

DIRECTOR, FBI 3/9/65

SAC, BOSTON [redacted]

VINCENT JAMES FLEMMI, aka
"Jimmy" Flemmi
[redacted]

Rebulet dated 9/10/63 and Boslet to Bureau dated 10/3/63 entitled, "TOP ECHELON CRIMINAL INFORMANT."

VINCENT JAMES FLEMMI, aka "JIMMY" FLEMMI, is being designated as a target in this program.

VINCENT JAMES FLEMMI is presently operating an after-hours drinking establishment and a blackjack game upstairs over Walsh's TV store, Dudley Street, Boston, according to [redacted] FLEMMI also is believed to be involved in the murders of the following individuals:

[redacted]

In addition, he and [redacted] were tried for the murder of a fellow inmate at the Massachusetts Correctional Institution, Walpole, Mass. He was acquitted of this crime.

VINCENT FLEMMI, according to [redacted] has been visiting RAYMOND L. S. PATRIARCA on a fairly frequent basis in the past two months.

It is known, through [redacted], that FLEMMI, although he now has a lucrative business, has lost considerable money gambling and his only hope of bailing out is to continue to operate this illegal after-hours establishment and card game. He therefore should be susceptible to pressure.

2-Bureau
2-Boston [redacted]
HPR: [redacted]

EXHIBIT 5
000752A

FD-209 (Rev. 2-1-63)

UNITED STATES GOVERNMENT

Memorandum

TO : SAC [redacted]

DATE: 3/15/65

FROM : SA H. PAUL RICO B,F

☒ CI ☐ SI ☐ PCI ☐ PSI

SUBJECT: [redacted]

Dates of Contact
3/10/65

Titles and File #s on which contacted
EDWARD F. DEEGAN
[redacted] F,M B

Purpose and results of contact

☐ NEGATIVE
☒ POSITIVE

Informant advised that he had just heard from "JIMMY" FLEMMI that FLEMMI told the informant that RAYMOND PATRIARCA has put out the word that EDWARD "TEDDY" DEEGAN is to be "hit" and that a dry run has already been made and that a close associate of DEEGAN's has agreed to set him up.

FLEMMI told the informant that the informant, for the next few evenings, should have a provable alibi in case he is suspected of killing DEEGAN. FLEMMI indicated to the informant that PATRIARCA put the word out on DEEGAN because DEEGAN evidently pulled a gun and threatened some people in the Ebb Tide restaurant, Revere, Mass.

☒ Informant certified that he has furnished all information obtained by him since last contact.

Rating

Coverage
9 2's

Personal Data
[redacted] F,B
1- (DEEGAN)

F [redacted] 26623

HPRtpo'b
(5)

0000 1

EXHIBIT 6

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F [redacted]-2597pg.2

Boston Airtel to Director, 3/10/65 entitled: [redacted]

B, M

F [redacted] advised on 3/3/65 that [redacted] contacted Patriarca and stated he had brought down VINCENT FLEMMI and another individual (who was later identified as Joe Barboza from East Boston, Mass.) It appeared that [redacted], Boston hoodlum, was giving orders to FLEMMI to "hit this guy and that guy".

B

Raymond Patriarca appeared infuriated at [redacted] giving such orders without his clearance and made arrangements to meet FLEMMI and Barboza in a garage shortly thereafter. He pointed out that he did not want FLEMMI or Barboza contacting him at his place of business.

F [redacted]-2597pg.5

Angiulo told Patriarca that VINCENT FLEMMI was with Joe Barboza when he, Barboza, killed [redacted] in Revere, Mass. several months ago. It appeared that [redacted], Boston hoodlum, had ordered the "hit". Patriarca again became enraged that [redacted] had the audacity to order a "hit" without Patriarca's knowledge.

B

Patriarca told Angiulo that he explained to FLEMMI that he was to tell [redacted] that no more killings were to take place unless he, Patriarca, cleared him.

Jerry explained that he also had a talk with FLEMMI. He pointed out that Patriarca has a high regard for FLEMMI but that he, Patriarca, thought that FLEMMI did not use sufficient common sense when it came to killing people.

Angiulo gave FLEMMI a lecture on killing people, pointing out that he should not kill people because he had an argument with him at any time. If an argument does ensue, he should leave and get word to Raymond Patriarca who, in turn, will either "OK" or deny the "hit" on this individual, depending on the circumstances.

M [redacted]

EXHIBIT 7

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's. B

[redacted]

F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B [redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted] B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F

[redacted] (Cont'd)

M [redacted]

According to Patriarca, another reason that FLEMMI came to Providence to contact him was to get the "OK" to kill Eddie Deegan of Boston who was "with [redacted] It was not clear to the informant whether he received permission to kill Deegan; however, the story that FLEMMI had concerning the activities of Deegan in connection with his, Deegan's, killing of [redacted] was not the same as Jerry Angiulo's.

B

[redacted]

F/B

Boston's Airtel to Director and SACS Albany, Buffalo, Miami 3/12/65 captioned: [redacted]

B

[redacted] advised on 3/9/65 that JAMES FLEMMI and Joseph Barboza contacted Patriarca, and they explained that they are having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" [redacted] who is friendly with [redacted]

B

FLEMMI stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

M [redacted]

000015

EXHIBIT 8

FD-36

F B I

Date: 3/12/65

Transmit the following in _____
(Type in plaintext or code)

Via AIRTEL REGISTERED MAIL
(Priority)

TO : DIRECTOR, FBI [redacted]
SACS ALBANY
BUFFALO
MIAMI

FROM: SAC, BOSTON [redacted] (P)

F

[redacted]

M.B

Rebosairtel, 3/10/65.

M.B

EXHIBIT
9

3-Bureau (RM)
2-Albany (RM)
2-Buffalo (RM)
2-Miami (RM)
1-Norfolk (Info)(RM)
2-Richmond ([redacted]
8-Boston ([redacted]
(1-

F.H.B

JPK:pob
(20)

P [redacted]

SAC
ASAC

000759

7. M. B

00076

[redacted]

JAMES FLEMMI and JOSEPH BARBOZA contacted PATRIARCA, and they explained that they are having a problem with TEDDY DEEGAN and desired to get the "OK" to kill him.

They told PATRIARCA that DEEGAN is looking for an excuse to "whack" BOBBY DONATI who is friendly with RICO SACRIMONE.

It should be noted that DEEGAN was the individual who killed RICO SACRIMONE's brother several months ago. Recently, DEEGAN, while intoxicated, walked in to the Ebb Tide Night Club, Revere, Mass., in which night club TAMELEO has an interest. He was accompanied by three or four individuals and created quite a disturbance with SACRIMONE and DONATI who were in the night club at the time.

At approximately 4:00 a.m., after DONATI returned home, a girl knocked at his door. He looked out the window, observed the girl but also observed a car with three or four individuals in it, and one of them was DEEGAN. He felt that DEEGAN was going to kill him that night, so he did not come out of the house.

FLEMMI stated that DEEGAN is an arrogant, nasty sneak and should be killed.

PATRIARCA instructed them to obtain more information relative to DEEGAN and then to contact JERRY ANGIULO at Boston who would furnish them a decision.

B.M

[redacted]

UNITED STATES GOVERNMENT

Memorandum

TO : SAC [redacted]

DATE: 3/15/65

FROM : SA H. PAULSRUD B, F

☒ CI ☐ SI

☐ PCI ☐ PSI

SUBJECT: [redacted]

Dates of Contact

3/13/65

Title and File #s on which contacted

EDWARD F. DEEGAN

[redacted] F, M B

Purpose and results of contact

☐ NEGATIVE

☐ POSITIVE

X

Informant advised that "JIMMY" FLEMMI contacted him and told him that the previous evening DEEGAN was lured to a finance company in Chelsea and that the door of the finance company had been left open by an employee of the company and that when they got to the door ROY FRENCH, who was setting DEEGAN up, shot DEEGAN, and JOSEPH ROMEO MARTIN and RONNIE CASESSA came out of the door and one of them fired into DEEGAN's body. While DEEGAN was approaching the doorway, he (FLEMMI) and JOE BARBOZA walked over towards a car driven by TONY "STATS" and they were going to kill "STATS" but "STATS" saw them coming and drove off before any shots were fired.

FLEMMI told informant that RONNIE CASESSA and ROMEO MARTIN wanted to prove to RAYMOND PATRIARCA they were capable individuals , and that is way they wanted to "hit" DEEGAN. FLEMMI indicated that they did an "awful sloppy job."

☐ Informant certified that he has furnished all information obtained by him since last contact.

Rating

Coverage 92's

F

Personal Data

[redacted] F, B

[redacted] (DEEGAN)

[redacted]

HPRspa'b

(5)

0000 2

[redacted] 2/6/24

FBI — F

Rippner

EXHIBIT

10

[redacted] F.B

This information has been disseminated by SA DONALD V. SHANNON to Capt. ROBERT RENFREW (NA) of the Chelsea, Mass. PD.

0000 3

Page # 1

Statement by Lieut.Thomas F.Evans Chelsea Police Department.

On March 12,1965 I received a call from the station that a man had been shot and was in the alley in the rear of the Lincoln National Bank.I received this call at 11:15P.M.

I arrived at the above location at approximately 11:30 P.M.In this alley at that time were Chief Burgin,Lieut.Fothergill,Sergt.Charles McHatton,Capt.Renfrew and Officer James O'Brien.There were about fifteen or twenty people standing about the sidewalks and street that were being kept away from the alley by other uniformed officers.

On eneering this alley a distance of thirty feet,I observed a man who I knew as Edward "Teddy" Deegan lying on his back with his feet in the direction of Fourth St.He was fully clothed with a suit and topcoat,white shirt but no tie.There were gloves on his hands.There was a 12"screwdriver with a black handle and red top on the ground about ten inches from his left hand.There was a fresh pool of blood by his left knee and blood appeared to be still oozing from the rear of his head.There were two metal clad doors ajacent to the body that lead into a office building at #375 Broadway.These doors are 4'8" X 6'3"in height.The alley is 203'long and 8'wide from the sidewalk on Fourth St.to approximately 105' into the alley where it then widens 9'6".There is a fire escape on the left side of the alley about 140' in from Fourth St.This escape is for the tenants at #387 Broadway.

Officer O'Brien told me that he was checking doors prior to making his 11 P.M.ring at Box #22(Broadway & Fourth Sts)and when he went into the above alley he observed a figure crouched over by the above mentioned doors on closer observation with his flash light he observed the blood.He then went to Box #22 and called for assistance O'Brien stated he had last tried these doors at 9 P.M.all was okay. At that time he had put the lights on in the alley.These lights are controlled by a switch that is located on the door casing on the last doorway on the left side of the alley.(Putting these lights on at dusk is the regular routine of the Officers that work route #12.) When O'Brien found the body the lights had been turned off and the door leading into the rear of 375 Broadway was open.

Lieut.Edward Fothergill gave me two complete metal jacket bullets with a right hand rifling twist,one smaller jacketed bullet with full metal jacket also four pieces of copper jacket and a piece of lead core that had been picked up in the alley. I later turned these over to Lieut.John F.Collins of State Police Firearms Identification.Lieut.Fothergill told me that they had to move Deegans bodyyfrom a crouched position to one lying flat on his back so that they could enter the open doorway and make search of the hallways of #375 Broadway.Nothing was found.

Shortly after I had arrived at the scene Attorney Alfred Farese accompanied by Anthony J.Stathopoules,he was allowed into the alley where he made identification of Deegan.He then was engaged in conversation with Chief Burgin and Capt. Renfrew.I was later informed by the Chief and Capt.that Farese had stated that he had received a telephone call from a former client that Deegan and Roy French were in trouble in Chelsea and had been arrested while doing a B & E.This client also told him that a policeman was to make arrangements to leave the door open.

EXHIBIT 11

As a result of having the above information given to me,I spoke to Farese and he repeated the story to me. I asked him if Stathopoulos was the former client of whom he spoke and he said no that he had

asked Stathopoulos to give him a ride to the Chelsea Police Station.He would not reveal the name of this party.

Dr.Meyer Kraft came to the scene and pronounced Deegan dead at 11:43 P.M. The Medical Examiners Office had been notified and Dr.Luongo came to the scene and viewed the body and removed same.

I had received information from Capt.Joseph Kozlowski that about 10 P.M.he had observed a red motor vehicle parked on Fourth St about 150' from the alley in question and there were three men in this car,two in front and one in the rear.He observed the first three digits of this plate as 404 but could see no other numbers as the plate had been bent over from right to left.As he went over to discuss the plate with the occupants the car pulled away from the curb and made a right turn on Broadway.

At approximately 12:30 A.M.on 3-13-65 with Capt.Renfrew, Det.Moore,Revere detectives and myself we went to the Ebb Tide on the Revere Beach Boulevard and made observations of a red,1963 Olds.Conv.Mass.Reg.404-795 that was registered to Joseph Martin of 19 Fleet St.No.End Boston.The plate on the rear of this vehicle was creased down the middle.We went into the cafe and told Wilfred Roy French that were were placing him under arrest for S.P.of a Felony-Murder and that were would be taking him to the Chelsea Police Station.I then requested Martin to bring his car to the station and he agreed to do so.Franis Imbuglia went along with Martin in Martin's car. On arriving at the station I had French taken up to the detective bureau and Martin and Imbuglia waited down stairs in the Seargeants room.With Capt.Renfrew I had Capt. Kozlowski view Martin's car that was parked in front of the station. He stated that the car looked like the one that he had seen earlier in the evening on Fourth St.but that he could not say it was the car.We then went into the Seargeants room to talk with Martin but both he and Imbuglia said they had nothing to say and that if it was not a pinch that they were going to leave. They then left the station.Capt.Kozlowski could not recognize these men.

I them went up to the detective bureau with Capt.Renfrew where I informed French of his rights.He said that he would have nothing to say until he spoke to his lawyer.At about 1:45 A.M. his Attorney,John Fitzgerald of Farese's office,arrived and had a conversation with French.French then gave us the information necessary for the booking card.In reply to a question of his occupation he stated that he was employed as a Maitre De at the Ebb Tide at a salary of $100.00 weekly.Asked as to what time he had gone to work on the evening of 3-12-65 he said that he had gone to work about 8 P.M. and had been there until we had taken him from there. At this point French refused to answer any more questions.I had Capt.Kozlowski look at French but he could not recognize him as being ~~being~~ in the car that he had observed earlier. I then observed what appeared to be bloodstains on the right sleeve of French's coat and also on his right shoe.It appeared that a attempt had been made to remove these stains by rubbing them. I had Capt.Renfrew view these objects.I then asked French how he had this blood on the coat and shoes.French said that while working at the Ebb Tide on 3-12-65 that there had been two different fights and that while breaking them up he had got blood on his clothes.A later check with one Joseph Errico of 37 Atwood St.Revere,a reserve police officer

of the Revere Police Department,reveals that Errico had been working on Friday and Saturday nights at the Ebb Tide for the past month.He goes to work at 9:15 P.M. until 1:30 A.M. He stated while working on 3-12-65 that some unknown fellow had been bothering a girl and that a other unknown party had punched this fellow cutting him about the eye and causing him to bleed profusely.States that because of the numbers of people in the Cafe that he could not say if French had left the place or not.He could not remember what time that this fight had occured.Also employed as a special police officer at this cafe is one Richard Currie of 39 Agawam St.Revere from whom we received no information.

French was allowed to sign a release waiver and leave the station with his attorney John Fitzgerald.

On the morning of 3-13-65,by arrangement,I had Attornies Farese,Fitzgerald and Anthony Stahopoulos come to the detective bureau where I again asked Farese to repeat his story of the previous evening relative to his exclient calling him to tell him of Deegan and French having been arrested by the Chelsea Police.He repeated the same story.I asked if this caller was at present a client of his and he said no.I asked for the name of his informant and he refused to name him.I asked if the name of the police officer who was alleged to have left the door open was known to him and he said no.

Stahopoulos refused to answer questions on advice of his attorney.

Attorney Fitzgerald informed me that he had received a telephone call from Deegan at 8:15 P.M.on 3-12-65 and that he could hear music in the background.I asked Fitzgeral the reason for the call and he told me that Deegan called him every night to let him know that he (Deegan) was okay.

I received information from Capt.Renfrew that a informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 P.M. on 3-12-65 and after a short conversation he had left the cafe with the following men; Joseph Barboza,Ronald Cassesso,Vincent Flemmi,Francis Imbuglia, Romeo Martin,Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a "Strongarm".They are said to have returned at about 11:P.M. and Martin was alleged to have said to French,"We nailed him".

Information received from a Mr.John T.Asten a tenant in apartment #8 at #387 Broadway. Asten states that at 9:30 P.M. on 3-12-65 he heard five sharp cracks and went out onto the fire escape which leads into the alley in question and that the lights were out in the alley and he could see or hear nothing.

I spoke with Vito Pagliarulo,age 55,of 98 Carroll St. Chelsea who is employed as a janitor at 375 Broadway and he informed me that he had left work on 3-12-65 at 3P.M. and he did not know if the rear door had been locked at this time or not.

EDMUND L. MCHAHARA
POLICE COMMISSIONER

City of Boston 2
Police Department

BUREAU OF INSPECTIONAL SERVICES
INTELLIGENCE DIVISION

Report of Information Received

BY TELEPHONE _____ CONTROL NUMBER _____

WRITTEN COMMUNICATION _____ TIME _____

IN PERSON _____ DATE March 14, 1965

SOURCE OF INFORMATION Informant

SUBJECT Murder Of Teddy Deegan in Chelsea on March 12th

LOCATION _____

DETAILS: From a reliable informant the following facts were obtaine
to the above murder: Informant states that the following men were
Joseph Barrent aka Barboza, Romeo Martin, Freddie Chiampi, Roy Fren
Ronnie Cassesse, Tony Stats. (Greek) Chico Amico, Informant stat
Roy French and Tony Strats. were suppose to lure Deegan to some-
on the pretext of doing a B&E and the other men were to be waiti
the area to kill him, Informant states that they were over-
lounge in Revere when they received the call from French that ev
was O K then they all left together. After the Killing Romeo Mar
upset because somebody he thought took the number of his car aft
killing. Romeo Martin was a former informant but since hanging
North End hasn't been to helpful. I then talked to Martin and tol
the Police were looking for him in the hope that he would give so

REMARKS _____

REFERRED TO _____

RECEIVED BY _____

000436

Informant states that the reason for the killing of Deegan was that Barren claims that he is with the Hughes brothers and McLaughlins and he felt he Deegan was a threat to his friends in Roxbury(Flemmi & Bennett).

Department of Public Safety

1010 Commonwealth Avenue, Boston 02215
March 15, 1965

VE BUREAU

o: Captain of Detectives Daniel I. Murphy
rom: Det. Lieut. Inspector Richard J. Cass

ubject: Homicide of Edward C. "Ted" Deegan

1. On Saturday, March 13, 1965, I went to the Chelsea Police Department to aid in the investigation re the death of Edward C. "Ted" Deegan, dob 1/2/30, of 17 Madison Street, Malden, in accordance with your instructions.

2. Officer James O'Brien, the routeman, stated that about 10:50 P.M. on Friday, March 12, 1965, while checking the doors on his route, he entered the alley in the rear of the Goldberg Building at 375 Broadway and found a body, later identified as Deegan, in a pool of blood in front of the open rear door of the building. He was apparently dead and was in a crouched position in front of the doorstoop. A screw driver was lying on the ground near the body. He notified the station. Dr. Kraft arrived at the scene and pronounced Deegan dead. The body was removed by the Medical Examiner, Dr. Luongo, to the Southern Mortuary. Officer O'Brien stated that at about 9:00 P.M. he had checked the alley and put the overhead light on before continuing his rounds. When he returned at about 10:59 P.M. the light was out and he entered the alley to make a check and discovered the body.

3. The Chelsea Police brought to the station one Anthony J. Stathopoulos, dob 9/22/34, medium complexion, 5'9", 165, brown hair and eyes of 17 Madison Street, Malden, and one Wilfred Roy French, dob 3/13/29, medium complexion, 6', 210, blue eyes, brown hair, of 31 Pleasant Street, Everett. Both subjects were released after questioning. Information was received by this officer that when French had been questioned there were spots on his trousers that appeared to be blood and an attempt had been made to wash it off. Lt. Evans of the Chelsea police stated he questioned French relative to the spots and French claimed that it was blood that came from a fellow who had a fight at the Ebbtide in Revere.

4. Israel Goldberg, owner of the building, was questioned and he said he left the building between 3 and 4 PM.

5. Vito Pagliarielo of 90 Carroll Street, Chelsea, custodian of the building, stated that he checked the rear door about 2:00 P.M. on Friday and it was locked. This door was a double door with slide locks on the top and bottom that had to be released by hand from the inside.

6. Attorneys John Fitzgerald and Alfred Farese were interviewed. Mr. Fitzgerald stated that he received a call from Deegan about 8:45 P.M. on Friday and that he received calls from Deegan every day.

7. Mr. Farese stated that about 10:15 P.M. on Friday he received a call from a client, whom he refused to identify, and the client stated that he heard Deegan had been in a gun fight with the police. Mr. Farese called the police station seeking to verify the information but the police knew nothing about it. Mr. Farese claimed that he called Stathopoulos who came over and rode him to the police station at about 11:05 PM. Upon their arrival, they were informed that Deegan was dead. They went to the scene of the crime and then returned to the police station where Stathopoulos was questioned by Lt. Evans and Capt. Renfrew and released.

8. During the investivation, information was received by this officer that Deegan, French and Stathopoulos had planned to break into the Beneficial Finance Company on the second floor of the Goldberg Building and that the rear door was to be left open for them.

9. During the eveing of Friday, March 12th, French was at the Ebbtide, 302 Boulevard, Revere, with Joseph Barboza aka Baron, Francis Imbuglia, Ronald Cassesa, Vincent "Jimmy" Flemmi, Romeo Martin, Nick Femia and a man known as "Freddy" who is a strong arm man. All the above men have criminal records. About 9:00 P.M., French received a phone call and the above group left the place with him.

10. About 9:30 P.M., Captain Joseph Kozlowski of the Chelsea Police was in the vicinity of Fourth Street about a half block from the scene of the crime and saw a red car with the motor running and three men sitting in it. Two men were in the front seat and one in the rear. The car was parked at the second meter from Broadway, on Fourt Street, between Broadway and Luther Place on the side near the Polish American Veterans Club. The Captain walked behind the car and noticed the rear number plate with the right half of the plate folded towards the center obstructing the last three digits. The first three numbers were 404---. He went to the drivers side of the car and rapped on the window notioning the driver to lower the window. The driver took off at a fast rate of speed and took a screeching turn to the right on Broadway. The Captain described the driver as Romeo Martin and the man in the back seat as stocky with dark hair and a bald spot in the center of the head.

11. Further information was received that about three weeks prior Deegan had pulled a gun on Barboza, aka Baron, at the Ebbtide and forced him to back down and that this was the cause of Deegan's death.

12. Unconfirmed information was received that Romeo Martin and Ronald Cassesa had entered the building and were waiting just inside the rear door. Stathopoulos was waiting on Fourth Street in a car and French and Deegan entered the alley. Deegan opened the rear door. He was shot twice in the back of the head and also in the body. The information at the time was that three guns were used. Lt. John Collins of Ballistics confirmed the report of three guns being used at a later time. Two men approached the car in which Stathopoulos was waiting and he took off.

13. A canvas of the neighborhood was made and Mrs. Grace Luciano of 12 Fourth Street, 2nd floor, and her daughter, Camille, both stated that about 10 P.M. or earlier they heard about 5 shots and they looked out the window on Division St., and saw two cars both racing their motors. One was a new black sedan and the other an old green sedan, make unknown. She saw a man running up the middle of Fourth St., toward Hawthorne about 5' 8", heavy build, dark hair, no hat, dark olive pants, brown waist coat. The account of the two cars was verified as a disabled car and a car that came to help him.

14. Information was also received that Martin's car had left the Ebbtide at 9:00 PM and had returned about an hour later and parked in a different place on its return.

Richard J. Cass
Detective Lieut. Inspector
Massachusetts State Police

Feb 14 '01 17:23 P.01

FBI

Date: 3/16/65

Transmit the following in _____ (Type in plaintext or code)

Via Airtel _____ (Priority)

To: SAC, Boston [redacted] F

From: Director, FBI [redacted] F

RAYMOND L. S. PATRIARCA, aka.
AR

Re Boston airtel 3/12/65.

At the earliest possible time that dissemination can be made with full security to [redacted], you should advise appropriate authorities of the identities of the possible perpetrators of the murders of Sacrimone and Deegan. Advise the Bureau when this has been done. B

[redacted] F

SEARCHED ____ INDEXED ____
SERIALIZED ____ FILED ____
MAR 17 1965

[redacted] P

Sent Via _____ M Per _____

EXHIBIT
14

3/19/65

AIRTEL

TO : DIRECTOR, FBI [redacted] F

FROM: SAC, BOSTON [redacted] P

CRIMINAL INTELLIGENCE PROGRAM
BOSTON DIVISION

The following are the developments during the current week:

On 3/12/65, EDWARD "TEDDY" DEEGAN was found killed in an alleyway in Chelsea, Mass. in gangland fashion.

Informants report that RONALD CASESSA, ROMEO MARTIN, VINCENT JAMES FLEMMI, and JOSEPH BARBOZA, prominent local hoodlums, were responsible for the killing. They accomplished this by having ROY FRENCH, another Boston hoodlum, set DEEGAN up in a proposed "breaking & entering" in Chelsea, Mass. FRENCH apparently walked in behind DEEGAN when they were gaining entrance to the building and fired the first shot hitting DEEGAN in the back of the head. CASESSA and MARTIN immediately thereafter shot DEEGAN from the front.

ANTHONY STATHOPOULOS was also in on the burglary but had remained outside in the car.

3-Bureau
1-Boston

JFK:pos'b
(4)

SEARCHED ____
SERIALIZED 0
INDEXED ____
FILED 0

F [redacted] -1820

0000 4

EXHIBIT
15

[redacted] F

When FLEMMI and BARBOZA walked over to STATHOPOULOS's car, STATHOPOULOS thought it was the law and took off. FLEMMI and BARBOZA were going to kill STATHOPOULOS also. "OK."

Immediately thereafter, STATHOPOULOS proceeded to Atty. AL FARESE. FARESE called the Chelsea, Mass. PD before Chelsea knew of the killing and FARESE wanted to bail out ROY FRENCH and "TEDDY" DEEGAN. Shortly thereafter the Chelsea PD found the body of DEEGAN and immediately called Atty. FARESE's office, and Atty. JOHN FITZGERALD, FARESE's law partner, came to the Chelsea PD.

Efforts are now being made by the Chelsea PD to force STATHOPOULOS to furnish them the necessary information to prosecute the persons responsible.

It should be noted that this information was furnished to the Chelsea PD and it has been established by the Chelsea Police that ROY FRENCH, BARBOZA, FLEMMI, CASESSA, and MARTIN were all together at the Ebb Tide night club in Revere, Mass. and they all left at approximately 9 o'clock and returned 45 minutes later.

It should be noted that the killing took place at approximately 9:30 p.m., Friday, 3/12/65.

[redacted]

[redacted] B

Informant also advised that [redacted] had given the "OK" to JOE BARBOZA and "JIMMY" FLEMMI to kill [redacted] who was killed approximately one month ago.

Page 3 of serial 1870 is being deleted in its entirety for codes: F, B.

FD-209 (Rev. 2-1-63)
OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27
5010-104

UNITED STATES GOVERNMENT

Memorandum

TO : SAC BOSTON [redacted]

DATE: 4/6/65

FROM : SA [redacted]

☐ CI ☐ SI
☒ PCI ☐ PSI

SUBJECT: [redacted]

Dates of Contact: 3/23/65	
Titles and File #s on which contacted	
[redacted]	91-1689
CRIMINAL INTELLIGENCE	94-536
CONTROL FILE FOR TOP HOODLUMS	[redacted]
[redacted]	88-3042
RAYMOND L. S. PATRIARCA, AR	92-118
COSA NOSTRA	92-605

Purpose and results of contact

☐ NEGATIVE
☒ POSITIVE

On 3/23/65, PCI advised that JOE BARBOSA who is from East Boston and an ex-fighter, was very friendly with ROMEO MARTIN, RONNIE CASSESSI and [redacted] PCI stated that BARBOSA was supposed "to have hit" FRANCIONE from Revere and EATON. He stated that BARBOSA reportedly killed EATON with a Magnum gun. PCI stated that BARBOSA was in prison with BENJAMIN who was murdered after he left prison and beheaded.

He stated that BARBOSA is a Portuguese kid who would otherwise be accepted into the Cosa Nostra except for his nationality. He stated that BARBOSA claims that he had shot TEDDY DEEGAN with a .45 caliber gun.

PCI related that BARBOSA indicated that ROY FRENCH was with DEEGAN and another individual when DEEGAN was shot by BARBOSA and two other individuals, one of whom informant believed was ROMEO MARTIN.

☐ Informant certified that he has furnished all information obtained by him since last contact.	Reliability: Very good	Coverage: Criminal
Personal Data		

1 - [redacted]
1 - 91-1689
1 - 94-536
1 - [redacted]

1 - 88-3042
1 - 92-118
1 - 92-605

RFB:rss

SEARCHED ____ INDEXED ____
SERIALIZED ____ FILED ____
APR 7 1965
FBI — BOSTON

EXHIBIT
16

000768

[redacted]

Informant stated that he had heard BARBOSA indicate that one of the guys with DEEGAN whom they had planned to kill along with DEEGAN ran off when the law showed up and fled.

PCI stated that rumors have it that ROY FRENCH actually set up DEEGAN to be killed.

PCI stated that he had heard that JOE BARBOSA was extremely friendly with JIMMY FLEMMA from Dudley Street. He stated that BARBOSA had tried to reach JIMMY FLEMMA a short time ago and wanted to know if FLEMMA had gone to Providence to see RAYMOND (PATRIARCA).

PCI subsequently determined from a source that JIMMY FLEMMA had gone to Providence, R.I. earlier on the day that BARBOSA had tried to contact FLEMMA.

PCI stated that JIMMY FLEMMA had gone to Providence just before TEDDY DEEGAN was slain in Chelsea.

M B

UNITED STATES GOVERNMENT

Memorandum

TO : SAC, BOSTON [redacted] F

DATE: April 22, 1965

FROM : [redacted], Correlator

ATTN: SA H. PAUL RICO

SUBJECT: VINCENT JAMES FLEMMI, Aka.

AKA: "Jimmy" Flemmi, "Jimmy" Flemma, James Flemmi, James Vincent Flemmi, Jim Flemmi, Jimmie Flemmi, Vincent Flemmi, Vincent J. Flemmi, Vincent John Flemmi, Vincent M. Flemmi, Vincent Michael Flemmi, James J. Romano, James Flemi, Jimmy Flemi, Fred Napolitano, Fred C. Napolitano

DOB'S: 9/5/32 (not verified, Boston, Mass. 9/5/33, 9/5/34, 9/5/35, Boston, Massachusetts and Roxbury, Mass.

FBI#: 738391 B

This correlation memo consists of a review of all references included on the attached FD-160, in accordance with the instructions of the SAC, Boston.

The following references were reviewed and found to be identical with captioned subject.

[redacted] F

H [redacted]

D.M [redacted]

EXHIBIT 17

SEARCHED ____ INDEXED ____
SERIALIZED ____ FILED ____
APR 22 1965
FBI — BOSTON

0000 7

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

SUBJECT: VINCENT JAMES FLEMMI, Aka.

[redacted]781 pg.2 F

[redacted] memo to SAC, Boston dated 10/6/64 captioned: [redacted]

B,M

On 9/28/64, [redacted] stated that while he was operating in the Boston area, he was most closely associated with [redacted]. He stated that [redacted]s primary operation in a loan shark business and that he employed both JIMMY and STEVE FLEMI as his enforcers. [redacted]

M

[redacted]-816 F

Boston airtel to Director, FBI dated 10/23/64 captioned [redacted]

M,B

B

[redacted] advised that Peter Limone had mentioned to Raymond Patriarca that Jimmy FLEMMI is the type of individual who is difficult to control and when FLEMMI visited his club, the West End Veterans Club recently Limone asked FLEMMI to leave because of the heat that was on FLEMMI at that time. FLEMMI denied that any heat was on him and at that time FLEMMI inquired about Edward Deegan, close associate of [redacted]. Limone told FLEMMI that Deegan does not visit the club and immediately after FLEMMI departed Limone telephonically contacted Deegan and told him that FLEMMI was looking for him allegedly for a $300 loan which FLEMMI claimed Deegan owed to him. Deegan denied that he owed such a loan and Limone and Deegan were of the opinion that FLEMMI was out to kill Deegan.

B

F [redacted]-797

Boston airtel to Director, FBI dated 10/19/64 captioned [redacted]

M,B

B

[redacted] advised that he received a telephone call from JAMES FLEMMI, on 10/18/64, who told him that he had been with Edward "Teddy" Deegan and Tony (LNU) at the West End Social Club during the early morning hours of 10/17/64. Informant stated the name of [redacted] was mentioned in a conversation but FLEMMI stated he could not recall what was said. FLEMMI stated that he definitely knows that Deegan, after leaving the West End Social Club, murdered [redacted] and he was concerned about leaving his fingerprints in the car in which [redacted] was murdered.

B

B

SUBJECT: VINCENT JAMES FLEMMI, Aka.

F, M

[redacted] (Cont'd)

Deegan told FLEMMI that he intends to remain in hiding for a few weeks in order to avoid being questioned by police.

FLEMMI told the informant that Deegan told him that [redacted] was going to hit one of the members of the Boston Italian group at the Coliseum Restaurant. FLEMMI told informant that his was obviously an attempt to get the Italian element in Boston interested in eliminating [redacted] B

FLEMMI told informant that he wants to kill Deegan. Information relating to Deegan's participating in the killing of [redacted] was furnished to the Everett, Mass., Police Department on 10/18/64. [redacted] mentioned as [redacted] B

[redacted] F, M, B

Boston airtel to Director, FBI 10/15/64 captioned: [redacted]

M [redacted]

told the informant that [redacted] had offered to help FLEMMI and his brother to "whack out" an individual with whom the FLEMMI'S were having trouble at [redacted] Cafe in [redacted] provided the FLEMMI'S would first join him in "hitting" [redacted] B

[redacted] F, B

Memo of H. Paul Rico to SAC, Boston 10/8/64 and captioned: [redacted]

M [redacted]

-3-

SUBJECT: VINCENT JAMES FLEMMI, AKA.

F

[redacted] (Cont'd)

M [redacted]

Informant advised 10/5/64, that he is friendly with the FLEMMI's, but VINCENT FLEMMI is an extremely dangerous individual. For example, he said that approximately Monday night, 9/28/64, VINCENT FLEMMI came into [redacted] bar room and immediately engaged [redacted] in a fight. During the fight FLEMMI took something out of his pocket and threw it into [redacted] eyes and then knocked him unconscious. [redacted] has not regained his sight since this episode and is under a doctor's care. Informant also advised that he suspects that FLEMMI had committed several murders, but he did not wish to discuss them.

B

Informant advised that [redacted]

M [redacted] and "JIMMY" FLEMMI wanted to be considered the "best hit men" in the area.

Informant advised also that he has had no unfavorable reaction over [redacted] arrest from either FLEMMI or from Romeo Martin.

B

[redacted] B.F

Memo of H. Paul Rico 10/8/64 to SAC, Boston entitled: [redacted]

M [redacted]

Informant advised he again met with [redacted] at approximately noontime on 10/6/64, and [redacted]

M

At this time [redacted] offered to help VINCENT FLEMMI and his brother "wheck out" an individual that the FLEMMI's were having trouble with in [redacted] Cafe in [redacted] if the FLEMMI's would first join him in "wheeking out [redacted]

B

000010

SUBJECT: VINCENT JAMES FLEMMI, Aka.

[redacted] F

Taken from 1A Exhibit Volume.

This is a double photo of subject, VINCENT J. FLEMMI, consisting of a front view and a side view of subject and the following information appears on the back of this photo:

FBI#:	738391 B		
MBI#:	140628		
DATE OF PHOTO:	1956		
NAME:	VINCENT J. FLEMMI		
ADD:	20 Glenarm St., Dorchester		
DOB:	9/5/35	PLACE:	Boston
HEIGHT:	5' 9"	WEIGHT:	200
HAIR:	Brown	EYES:	Hazel
COMPLEXION:	Light		
BUILD:	Stocky		
OCCUPATION:	Laborer		

[redacted] F, B [redacted]

B

M [redacted]

[redacted] F, B M [redacted]

DIRECTOR, FBI [redacted] 6/9/65

SAC, BOSTON [redacted] F

BS 919-PC

[redacted]

Rebulet to Boston dated 6/4/65.

The following are the efforts to effect the development of the above-captioned target:

F [redacted]

M [redacted]

M [redacted]

On 5/10/65, BS 919-PC was contacted on [redacted]

F Informant advised that on the evening of 5/3/65 he left his home at approximately 10:30 p.m. He was going to meet with JOSEPH BARBOZA. As he approached his car two individuals stepped out of the bushes and fired at him with a shotgun. Informant said that he turned around as he fell and both of them were running with handkerchiefs to their faces.

2-Bureau
1-Boston
HPR:pob
(3)

000024

EXHIBIT
18

B.F. [redacted]

It is known through other informants and sources of this office that this individual has been in contact with RAYMOND L. S. PATRIARCA and other members of La Cosa Nostra in this area, and potentially could be an excellent informant.

Concerning the informant's emotional stability, the Agent handling the informant believes, from information obtained from other informants and sources, that HS 919-PC has murdered [redacted], [redacted], [redacted], [redacted], EDWARD "TEDDY" DEEGAN, and [redacted], as well as a fellow inmate at the Massachusetts Correctional Institution, Walpole, Mass., and, from all indications, he is going to continue to commit murder.

R

Some of the information provided by the informant has been corroborated by other sources and informants of this office. Although the informant will be difficult to contact once he is released from the hospital because he feels that [redacted] will try to kill him, the informant's potential outweighs the risk involved.

R

MAY 1962 EDITION
GSA GEN. REG. NO. 27
UNITED STATES GOVERNMENT

Memorandum

TO : SAC, BOSTON Attn: SA D. V. Shannon DATE: June 14, 1965

FROM : Helen Hatch, Correlator

SUBJECT: JOSEPH BARBOZA, JR., Aka.
Joseph Barboza, Joe Barron,
Joe Barbosa, Joe Barboza,
Joe Barbozza

ADD: 216 Revere Beach Parkway,
Apt. 24, Revere, Mass.

This correlation memo consists of a review of all the references indicated on the attached FD-160, in accordance with the instructions of SAC, Boston.

The following references were reviewed and determined to be identical with the captioned individual.

F. 711. B

000776

F

SERIALIZED FILED
JUN 14 1965
FBI — BOSTON

(See Serial 85 p.13 of
Index cards consolidated
6/14/65 HH)

Shannon

Rico
3/20/67

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

EXHIBIT
19

Pages 2 through 4 of serial 1 are being deleted in their entirety for code: F, B, M.

SUBJECT: JOSEPH BARBOZA, Aka.

M.B

[redacted] 2597 p.2

F.M.B

On 3/4/65, UNMAN contacted Patriarca and stated he had brought down Vincent Flemmi and another individual (who was later identified as JOE BARBOZA from East Boston, Mass.) It appeared that Frank Smith, Boston hoodlum, was giving orders to Vincent Flemmi to "hit this guy and that guy."

SUBJECT: JOSEPH BARBOZA, Aka.

[redacted]2597 p.2 (Cont'd) F

Raymond Patriarca appeared infuriated at Frank Smith giving such orders without his clearance and made arrangements to meet Flemmi and BARBOZA in a garage shortly thereafter. He pointed out that he did not want FLEMMI or BARBOZA contacting him at his place of business.

p.5 B

Gennaro J. Angiulo contacted Patriarca [redacted] Angiulo told Patriarca that Vincent Flemmi was with JOE BARBOZA when he, BARBOZA, killed Jackie Francione in Revere, Mass. several months ago. It appeared that Frank Smith, Boston hoodlum, had ordered the "hit". Patriarca again became enraged that Smith had the audacity to order a "hit" without Raymond's knowledge.

[redacted]2600 p.3

F.M

[redacted]

[redacted]3/9/65 that James Flemmi and JOSEPH BARBOZA contacted Patriarca, and they explained that they were having a problem with Teddy Deegan and desired to get the "OK" to kill him.

They told Patriarca that Deegan is looking for an excuse to "whack" Bobby Donati who is friendly with Rico Sacrimone.

It is noted that Deegan was the individual who killed Rico Sacrimone's brother several months ago. Flemmi stated that Deegan is an arrogant, nasty sneak and should be killed.

Patriarca instructed them to obtain more information relative to Deegan and then to contact Jerry Angiulo at Boston who would furnish them a decision.

F.M

SUBJECT: JOSEPH BARBOZA, Aka.

F.M.B

A lengthy discussion took place wherein Joe Lombardo was very perturbed because Cassessa and JOSEPH BARBOZA were associating with the Flemmi brothers; and further, that information had been put out to the effect that BARBOZA was with Flemmi when they killed Edward Deegan.

M.F.B

SUBJECT: JOSEPH BARBOZA, Aka.

F.M.B

SUBJECT: JOSEPH BARBOZA, Aks.

F.B.M

[redacted]76 p.2

Memo of SA Donald V. Shannon [redacted]
captioned: [redacted]

B

[redacted] 3/10/65 he had learned that Frankie Smith, JOE BARBOZZA, Ronny Cassessa and Jimmy Flemmi had been down to see Raymond Patriarca [redacted] He said also that Cassessa and Jimmy Flemmi together with BARBOZZA had been to see Patriarca [redacted]

F.B.M

000782

[redacted]

SUBJECT: JOSEPH BARBOZA, Aka.

b.7n

F

[redacted]-16 pg.2

Memo of [redacted]
captioned: [redacted]

b.7n

He stated that BARBOSA is a Portuguese kid who would otherwise be accepted into the Cosa Nostra except for his nationality. He stated that BARBOSA claims that he had shot Teddy Deegan with a .45 caliber gun.

PCI related that BARBOSA indicated that Roy French was with Deegan and another individual when Deegan was shot by BARBOSA and two other individuals, one of whom informant believed was Romeo Martin.

[redacted] BARBOSA indicate that one of the guys with Deegan whom they had planned to kill along with Deegan ran off when the law showed up and fled.

PCI stated that he had heard that JOE BARBOSA was extremely friendly with Jimmy Flemmi from Dudley Street. He stated that BARBOSA had tried to reach Jimmy Flemmi a short time ago and wanted to know if Flemmi had gone to Providence to see Raymond (Patriarca).

[redacted] Jimmy Flemmi had gone to Providence, R. I., earlier on the day that BARBOSA had tried to contact Flemmi.

000783

[redacted]

SUBJECT: JOSEPH BARBOZA, Aka.

β

[redacted]-17 pg.2

Memo of [redacted]
captioned: [redacted]

B.M

PCI stated that Jimmy Flemmi is quite boastful about going to Providence and meeting with Raymond Patriarca and has heard that he has mentioned about seeing "The Boss" when talking with JOE BARBOSA and Ronnie Cassessi.

[redacted]18 pg.1,2

May 3, 1965.

B.F.M

PCI indicated that JOSEPH BARBOZA had remarked that Flemmi was a very close friend of his and appeared to be quite upset over the Flemmi shooting.

000784

Sent By: Anthony Cardinale Esq.; 617 345 0900; Apr-27-01 14:25; Page 1/1

EXHIBIT 20 1/9/98

DIRECTOR, FBI 11/3/65

SAC, BOSTON [redacted]

[redacted]

STEPHEN JOSEPH FLEMMI, FBI [redacted] being designated as a target in this program.

It was ascertained through contact with the now deceased [redacted] that STEVIE FLEMMI was actively involved in the gangland war that continues in the Boston area between what remains of the MC LAUGHLIN gang and members of the East Boston gang by JOSEPH BARBOZA, the Dearborn Square group led by STEVIE FLEMMI, TOMMY CALLAHAN's gang led by top hoodlum THOMAS CALLAHAN, and the Somerville gang now led by HOWARD WINTERS.

Although the LCN in this area has not actively taken part in this gang war, there is every possibility that they may move into the picture in the near future and since FLEMMI is in contact with the leaders of the different groups that are against the remaining MC LAUGHLIN faction, and that all these groups are very aware of the possibility of LCN moving in to support the MC LAUGHLIN group, it is felt that FLEMMI will be in a position to furnish information on LCN members in this area.

FLEMMI, when contacted on 11/1/65, advised in the "strictest confidence" that he believes that LARRY RAIONE, LCN member in this area, will eventually show his hand and openly support STEVIE HUGHES, the recognized leader of the remaining MC LAUGHLIN group. FLEMMI advised that he [redacted]

[redacted]

TPkspo'b
(3)

EXHIBIT 20

-13

[redacted]

[redacted]

that LARRY BAIONE and STEVIE HUGHES were very close to each other when both were incarcerated at Massachusetts State Prison and that BAIONE, in his opinion, is an extremely treacherous and dangerous individual and that he believes that BAIONE would act against PATRIARCA's instructions if he thought such acts would benefit him.

FLEMMI further advised that he believes that the murder of JAMES J. "BUDDY" MC LEAN was perpetrated by STEVIE HUGHES and that he believes the getaway car used was driven by MAXIE SHACKELFORD.

Informant advised that he based this on the fact that HUGHES is the only one in the group that has the courage to go in to the Winter Hill section of Somerville, Mass., where the murder took place and that the getaway car would have to be driven by either MAXIE SHACKELFORD or FRANCIS X. "GAGA" MURRAY and that MURRAY was home the day after the murder, and if MURRAY had been involved in the murder he would have taken off out of this area.

FLEMMI advised that he realizes that he is the prime target for an execution by the MC LAUGHLIN group and that he, therefore, does not live at home. He advised that when contacts are necessary that he can be called at the Mount Pleasant Realty, GArrison 7-8760, or evenings at AVenue 2-8269 or 963-4869. He said a message could be left to have him "Call JACK from South Boston," and he will then contact the Agent telephonically at the FBI office where a meet can be arranged.

This individual appears to be emotionally stable and if he survives the gang war he would be a very influential individual in the Boston criminal element.

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<Red Flag>

United States District Court,
D. Massachusetts.

UNITED STATES of America
v.
Francis P. SALEMME, et al.
United States of America
v.
John Martorano

Nos. Cr. 94-10287-MLW, Cr. 97-10009-MLW.

Sept. 15, 1999.
Clerical Corrections,
December 23, 1999.

Defendant, a longstanding FBI informant, filed a motion to dismiss an indictment charging him with multiple charges of racketeering and extortion, among other crimes based on an alleged agreement that he would not be prosecuted. Defendant, and a codefendant filed motions to suppress electronic surveillance evidence. The District Court, **Wolf,** J., held that: (1) defendant did not have either an express immunity agreement or an agreement implied in fact that he would not be prosecuted so as to be entitled to dismissal of charges; (2) defendant had an enforceable agreement that precluded the use and derivative use against him of any intercepted evidence; (3) hearing was necessary to determine whether case would be dismissed because defendant's due process rights were violated because intercepted evidence was presented to the grand juries that indicted defendant in violation of promises of confidentiality; (4) suppression of electronic surveillance evidence against codefendant was required for failure to make the full and complete statement concerning necessity required by statute; and (5) codefendant lacked standing to maintain seek suppression of

Droney, the statements **Flemmi** had made to Rico relating to that matter. As far as Rico was concerned, the promise of confidentiality made to **Flemmi** or any other informant would endure even if Rico learned that the informant had broken the law. Rico Jan. 14, 1998 Tr. at 159.

While FBI agents have long routinely promised sources confidentiality, Rico did not rely on this assurance alone to cultivate informants. Rico characterized his approach to developing informants as "unique." Rico Jan. 13, 1998 Tr. at 119- 20. This case demonstrates that while his methods were unorthodox, they were not singular. In any event, as Rico testified, he "did not always conform 100%" to what the FBI policies and procedures required. Rico Jan. 14, 1998 Tr. at 143.

Using his personal style, Rico sought to realize **Flemmi's** potential as a source by not treating him like a criminal who should be used with caution to obtain valuable information. Rather, Rico created a sense that he and **Flemmi** were allies in a common cause, primarily a war against the LCN. This is a sense that Rico's successors as **Flemmi's** "handlers" successfully sought to perpetuate and strengthen. Morris Apr. 22, 1998 Tr. at 15. Significantly, by word and deed, and with increasing clarity over time, Rico promised **Flemmi** more than confidentiality. **Flemmi** Aug. 20, 1998 Tr. at 22-26, Aug. 25, 1998 Tr. at 22- 23, Aug. 24, 1998 Tr. at 88-89, 140-43. Rico promised **Flemmi** "protection," *id.,* and he honored that promise. **Flemmi** was receptive to the alliance with the FBI that Rico proposed. The arrangement offered him an opportunity to ***178** use the FBI to disable his enemies, enhance his safety, and, with the competition diminished and the protection of the FBI, make his own criminal activities more profitable. **Flemmi** Aug. 25, 1998 Tr. at 25-34.

From 1965 to 1967, Rico found his relationship with **Flemmi** to be productive. In that period **Flemmi** provided information which Rico regarded as reliable and valuable. Rico Jan. 13, 1998 Tr. at 58; Exs. 214, 215, 222, 245. For example, **Flemmi** reported that Stevie Hughes "had been marked for a hit." Exs. 26, 218, 222. Soon after, Hughes was murdered. Ex. 26.

More importantly, **Flemmi** proved to be able to give Rico what he most wanted-- reliable information concerning the leaders of the LCN in New England. **Flemmi** regularly gave Rico information regarding Raymond L.S. Patriarca, the Boss of the New England Family of the LCN, and Baione. *See, e.g.,* Exs. 245, 214. **Flemmi** reported, among other things, that Edward "Wimpy" Bennett had told Patriarca that he would remain neutral in a violent feud between the Patriarca Family and Barboza's crew. Ex. 245. As reflected in a 209 rated "Excellent" by Rico, on February 2, 1967, **Flemmi** reported on a meeting that he had with Baione at which they agreed to settle any disagreements they might have peacefully, and at which Baione made statements indicating

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<Red Flag>

United States District Court,
D. Massachusetts.

UNITED STATES of America
v.
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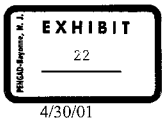

Ex. 21.

Thus, viewed as a potential member of the LCN, **Flemmi** became a Top Echelon informant. Rico was his "handler." Rico's partner, Dennis Condon, was designated **Flemmi's** alternate agent--the person **Flemmi** was to contact if he could not reach Rico. Ex. 220; Condon May 5, 1998 Tr. at 31. **Flemmi,** however, was never told that he was either open or closed administratively as an informant in the files of the FBI. **Flemmi** Aug. 20, 1998 Tr. at 32-33; Morris Apr. 28, 1998 Tr. at 23, Apr. 30, 1998 Tr. at 72; Quinn Aug. 19, 1998 Tr. at 112-13. Nor did **Flemmi** know that the FBI was documenting some of the information that he was providing. **Flemmi** Aug. 27, 1998 Tr. at 56; Morris Apr. 21, 1998 Tr. at 34.

***180 Flemmi** quickly validated his perceived potential to provide valuable information concerning the highest levels of the LCN. Within weeks of becoming a Top Echelon informant, he reported on a recent meeting that he and Salemme had with Patriarca in which Patriarca indicated an interest in making **Flemmi** a member of the LCN. Ex. 215.

For the next two years, **Flemmi** provided Rico with a steady flow of information concerning the hierarchy of the LCN in which Rico was very interested. Rico Jan. 13, 1998 Tr. at 70. **Flemmi's** information included, among other things, reports concerning Patriarca, Baione, Gennaro Angiulo, a leader of the LCN in Boston, and Salemme, which Rico regularly rated either very good or excellent. *Id.* at 67-70. *See also* Exs. 23, 24, 217, 219, 221. **Flemmi** also provided Rico with other valuable information, including intelligence on a threat to the life of the Middlesex County District Attorney Garrett Byrne. Rico Jan. 14, 1998 Tr. at 68; Ex. 27.

In addition, **Flemmi** was able to provide Rico with certain information and assistance that Rico especially prized. In 1966 and 1967, Rico and Condon were actively attempting to persuade Barboza to become a government witness in connection with an investigation they were conducting, with state officials, of the 1965 murder of Teddy Deegan and other matters. Rico Jan. 9, 1998 Tr. at 72, Jan. 13, 1998 Tr. at 80. They then properly perceived that Barboza had the potential to provide powerful testimony against leading members of the LCN. Rico Jan. 9, 1998 Tr. at 72-73. Rico and Condon were seeking information to use to persuade Barboza to become a witness. Rico Jan. 10, 1998 Tr. at 80. **Flemmi** provided Rico with such information and through his unwitting brother, Jimmy **Flemmi,** also provided a valuable means for Rico to communicate information to Barboza that he hoped would cause Barboza to be receptive to Rico's effort to recruit him. *Id.* at 79-83. For example, **Flemmi** told Rico about Patriarca's plans to kill some of Barboza's associates and used his brother to convey that information to Barboza. Ex. 245. Thus, **Flemmi** materially assisted the FBI's successful effort to develop Barboza as a witness. *Id.*

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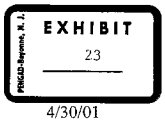
Clerical Corrections,
December 23, 1999.

Defendant, a longstanding FBI informant, filed a motion to dismiss an indictment charging him with multiple charges of racketeering and extortion, among other crimes based on an alleged agreement that he would not be prosecuted. Defendant, and a codefendant filed motions to suppress electronic surveillance evidence. The District Court, **Wolf,** J., held that: (1) defendant did not have either an express immunity agreement or an agreement implied in fact that he would not be prosecuted so as to be entitled to dismissal of charges; (2) defendant had an enforceable agreement that precluded the use and derivative use against him of any intercepted evidence; (3) hearing was necessary to determine whether case would be dismissed because defendant's due process rights were violated because intercepted evidence was presented to the grand juries that indicted defendant in violation of promises of confidentiality; (4) suppression of electronic surveillance evidence against codefendant was required for failure to make the full and complete statement concerning necessity required by statute; and (5) codefendant lacked standing to maintain seek suppression of



that Baione was responsible for the recent murder of Wimpy Bennett. Ex. 214. Beginning with the Third Superceding Indictment (the "3SI") in this case, **Flemmi** and Salemme have been charged with murdering Wimpy Bennett as part of their alleged pattern of racketeering activity. *See* 3SI, Racketeering Act ("RA") 21. [FN28]

FN28. As the parties have been informed orally, the court has tentatively decided to grant the motions to dismiss Racketeering Acts 21- 24, which relate to the alleged murders of Wimpy Bennett, his two brothers, and Richard Grasso, that were first alleged in the Third Superceding Indictment, because the government improperly used the grand jury to strengthen the previously alleged RICO charges against **Flemmi** and Salemme. *See, e.g.,* United States v. Beasley, 550 F.2d 261, 266 (5th Cir.1977); United States v. Gibbons, 607 F.2d 1320, 1328 (10th Cir.1979); In re Santiago, 533 F.2d 727, 730 (1st Cir.1976).

Flemmi's report that Baione made statements indicating that he was responsible for Wimpy Bennett's murder may be an early instance of a pattern of false statements placed in **Flemmi's** informant file to divert attention from his crimes and/or FBI misconduct. For example, as discussed in § II.14, *infra,* in 1982, Morris caused Connolly to tell **Flemmi** and **Bulger** that Brian Halloran was providing the FBI information that implicated them in the murder of Roger Wheeler. Halloran was murdered soon after. Morris believed **Bulger** and **Flemmi** were responsible. When Halloran was murdered, Connolly prepared a 209 stating that **Flemmi** had reported that "the wise guys in Charlestown" had heard that Halloran was cooperating with the Massachusetts State Police and, therefore, had a motive to murder him. Ex. 225. Similarly, shortly before John Callahan, another associate of **Bulger** and **Flemmi** implicated in the Wheeler investigation, was murdered in Miami in 1983, Connolly prepared a 209 stating that **Flemmi** had reported that Callahan was trying to avoid a "very bad" Cuban group. Ex. 226. As explained *infra,* **Flemmi** and **Bulger** remain suspects in the still open Wheeler, Halloran, and Callahan murder investigations.

In any event, on February 8, 1967, six days after **Flemmi** provided information indicating that Baione was responsible for Bennett's death, Rico designated **Flemmi** a Top Echelon informant. Ex. 21. In doing so, Rico vouched for **Flemmi's** reliability, stating that:

> Informant has furnished information that has proven through investigation or through other sources to be true, and there is no information provided by the informant that has proven to be false.

Id.

With regard to **Flemmi's** past activities, Rico wrote:

> ***179** Through informants of this office, it has been established that this individual enjoys a reputation of being a very capable individual

JOSEPH BARON, also known as JOE BARBOZA, was interviewed at the Massachusetts Correctional Institution, Walpole, Massachusetts.

BARON stated that he would not mind talking to the Agents if the Agents would not end up testifying against him for what he said. BARON was told that if he wanted to talk in confidence that "we would respect his confidence."

BARON advised that he has always tried to make a living outside of the law and that if anyone in law enforcement could prove that he was doing wrong, he is willing to pay the consequences. However, he said, when you find that a police officer that you know "fingered scores, acted as lookout when scores were being pulled, and divided up the proceeds of these scores" turns around and manufactures evidence and testimony against you, you have a feeling that maybe you, the criminal, have played by the wrong standards.

BARON said that he never wanted to physically hurt anyone in law enforcement but added that "If my life is ruined by this individual trying to benefit his own ambitions, the day I come out of jail could be the day this Lieutenant becomes nervous."

BARON said that he knows that INCEGNERI is friends with the "connected people" and that these people wanted to see him hurt. BARON advised that he has always tried to get along with these people and that, as a matter of fact, he used to see RAYMOND PATRIARCA and get an "OK" before he made most of his moves. Since they killed three of his friends, however, (THOMAS J. DE PRISCO, ARTHUR C. BRATSOS and JOSEPH W. AMICO) and stole $70,000 from him (This is in reference to the money allegedly in BRATSOS' possession when he was murdered), he had made statements that he was going to kill several of them. BARON said that after thinking the entire situation over, he realized that he could not possibly

On 3/8/67 at Walpole, Massachusetts File # [redacted]

by SA's DENNIS M. CONDON and H. PAUL RICO:pol'b 3 Date dictated

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

EXHIBIT 24

[redacted]

DMC:HPR:po'b

2

[redacted] BARON, knows what has happened in practically every murder that has been committed in this area. He said that he would never provide information that would allow JAMES VINCENT FIDDMI to "fry" but that he will consider furnishing information on these murders.

4

000787

[redacted]

DIRECTOR, FBI [redacted] 3/28/67

SAC, BOSTON [redacted]

INTERVIEW PROGRAM
CRIMINAL INTELLIGENCE MATTERS

Rebosairtel to Bureau, 3/10/67, and Bostel to Bureau, 3/21/67.

The following interview with JOSEPH BARRON, aka Joseph Barboza, was a follow up to interview conducted on 3/8/67, as set forth in rebosairtel.

[redacted]

INTERVIEW OF JOSEPH BARRON

JOSEPH BARRON, aka JOSEPH BARBOZA, was interviewed at the Federal Building, Boston, Mass., on 3/21/67, by SA's H. PAUL RICO and DENNIS M. CONDON [redacted] It also should be noted that he conferred with his Counsel, JOHN FITZGERALD, at approximately 12:15 p.m., at which time he received some advice from his counsel and then returned to continue his interview with the Agents.

BARRON said that he would talk to the Agents in confidence and that he would not testify to any information that he was furnishing at this time.

2-Bureau
4-Boston [redacted]

HPR:DMC:po'b
(6)

SEARCHED
SERIALIZED
INDEXED
FILED

[redacted]

000788

EXHIBIT
25

[redacted] f

BARRON stated that since he last talked to the Agents (He was interviewed on 3/8/67 at the Massachusetts Correctional Institution, Walpole, Mass.), he had come to the conclusion that the Agents and him have a common enemy in the "Italian organization." He said he realizes that this "organization" is going to try to kill him regardless of when he is released from jail, and he believes that this "organization" can reach out into local law enforcement agencies and obtain practically any information in their possession, and he would like to help the FBI in their efforts to obtain evidence against the "Italian organization."

m

BARRON said that he hopes that GARRETT BYRNE, District Attorney of Suffolk County, Boston, will appreciate his (BARRON's) assistance in obtaining this testimony and give him (BARRON) a break on the two cases that he has presently pending in Suffolk County.

m

BARRON advised that he had also discussed the last interview with the Agents with JAMES VINCENT FLEMMI and that he had told FLEMMI that he was considering having FABIANO cooperate with the FBI, and that FLEMMI indicated that he thought that that was an excellent idea.

 [redacted]

[redacted] F

It was pointed out to BARRON that he could be making a very serious mistake in talking to any other inmate concerning his interview with Agents of the FBI.

M

BARRON advised that in connection with the murder of EDWARD DEEGAN, DEEGAN had been causing some problems for a lot of people and had been "out of order" at the Ebb Tide night club in Revere, Mass., on a number of occasions. DEEGAN was also looking for some kind of an excuse to kill BOBBY DONATI who was friendly with RICO SACRAMONE. DEEGAN was killed in Chelsea, Mass., around March of 1965. He said ANTHONY STATHAPOULOS was with DEEGAN and remained in an automobile. One of the individuals in the group that killed DEEGAN went towards STATHAPOULOS carrying a 375 magnum and wearing a bullet-proof vest, but STATHAPOULOS was able to take off and get out of the area.

[redacted]

[redacted]

Pages 5 through 6 of serial 8 are being deleted in their entirety for code: F, M.

[redacted] F

In further discussions of gangland murders, he made the comment that EDWARD DEEGAN had killed ANTHONY SACRAMONE of Everett, Mass., and that this was a senseless murder that DEEGAN had perpetrated just to make himself look like a big man.

[redacted]

[redacted] F

m

BARRON was asked if he did not feel that since the "Italian organization" was doing everything in their power to hurt him, didn't he feel that he could help justice be done by testifying. BARRON stated, "If I ever testified, you people would have to find me an island and make a fortress out of it."

BARRON said that he would be willing to furnish information to the Agents, but under no circumstances could he bring himself to testify. [redacted] m

B

On 3/23/67, [redacted] "MIKEY" FLEMMI and JOHNNY MATORANO have been up to visit VINCENT JIMMY FLEMMI in Walpole on 3/22/67, and that FLEMMI told them how JOE BARBOZA had been interviewed by the FBI at the U. S. Attorney's office and that he, BARRON, was going to get [redacted] to testify against the individuals involved in the murders of [redacted] JIMMY would probably tell other individuals about this plan and that if RAYMOND PATRIARCA hears of this, he will believe that they are part of the conspiracy to hurt members of his organization. [redacted]

[redacted]

[redacted]

This office is aware of the distinct possibility that BARRON, in order to save himself from a long prison sentence, may try to intimidate FABIANO into testifying to something that he may not be a witness to. It is planned to interview FABIANO and ascertain from him what his testimony can be in connection with the murders at the Nite Lite and if FABIANO cannot testify as BARRON indicates, BARRON will be again contacted and be given the opportunity for himself to testify in his dealings with known LCN members.

[redacted]

m: John Cavicchi Attorney at Law Fax: 617-567-4697 Voice: 617-567-4697

Exhibit

EXHIBIT-
ADMITS
PERJURY

A F F I D A V I T

Personally appeared before me Joseph Baron, also known as Joseph Barboza, and, being under oath, deposed and said as follows:

I, Joseph Baron, also known as Joseph Barboza, under oath, and free from duress or coercion directly or indirectly of any kind whatsoever say as follows:

1. That I am the same Joseph Baron (Barboza) who testified in the trial of Commonwealth v. French, et als--Nos. 31601, 32365 to 32370 inclusive.

2. That I wish to recant certain portions of my testimony during the course of the above-said trial insofar as my testimony concerned the involvement of Henry Tameleo, Peter J. Limone, Joseph L. Salvati and Lewis Grieco in the killing of Teddy Deegan.

3. That the testimony I now offer to give concerning the killing of Teddy Deegan and those individuals responsible for his death will be the whole truth known to me.

Joseph Baron

Then personally appeared before me the above-named Joseph Baron, also known as Joseph Barboza on 28th day of July, 1970 and swore that he had read the foregoing affidavit and that the facts therein stated are true.

Notary Public

My Commission Expires: Jan 21, 1974

000967

EXHIBIT
26

BAILEY, ALCH, GILLIS & DANIELS
ATTORNEYS AT LAW
ONE CENTER PLAZA · BOSTON, MASSACHUSETTS 02108
AREA CODE 617 523 8625

F. LEE BAILEY
GERALD ALCH
COLIN W. GILLIS
RAYMOND J. DANIELS
DANA P. SMITH
EDWARD DANGEL, III

BERNARD J. O'BRIEN
OF COUNSEL
WILLIAM G. MANNING
ADMINISTRATOR

August 27, 1970

MEMO TO: JOE BALLIRO

FROM: LEE BAILEY

This is a status report of the present situation with respect to Joe Baron and his proposed recantation of testimony given before the Superior Court in Commonwealth v. French. Although I have necessarily excluded a few matters as confidential between Mr. Baron and myself, he has authorized me to inform you as to the matters described below.

As you recall, when I met with Baron at his request in New Bedford, he stated that he had felt for some time that he should make a direct effort to right the injustice which his testimony had caused. He indicated that he had been assured all along that (especially in the murder cases) a conviction was unlikely, and after the conviction occurred he was told to expect that due to trial errors the Supreme Court would reverse the cases, and of course there would never be a re-trial; therefore, no permanent harm would be done to anyone whereas the government would have accomplished its primary objection: much publicity about prosecuting organized crime. After he learned that the Supreme Court affirmed the convictions and discussed this fact with many friends, he became persuaded that these men might be executed for something they hadn't done and therefore took steps on his own to make his feelings known to the victims of his testimony. His arrest in New Bedford following my agreement to represent him was of course an unanticipated and unfortunate intervening factor, and has prevented me from going over exhaustively with Baron all of the events that led up to his trial testimony and caused it to seem credible. Nonetheless, after

many hours of conversation with him at Walpole I am convinced that I have most of the details of what actually took place. It appears that the reports you have described given to three different police officers in three different departments by persons other than Baron correctly describe the Deegan killing and the attempt on the life of Stathopoulos. It appears that Mr. French did in fact shoot Deegan, that Mr. Cassesso was present with Baron in the car and conspired to kill Stathopoulos but was not involved in the Deegan killing, and that Salvati and Greco were not present at all. Further, Tamelio and Lemone had nothing to do with arranging Deegan's murder nor had they any reason to believe that it was going to occur. The person sitting in the rear of the automobile which the Chelsea Police Captain saw was in fact bald and was Vincent Felemi. Romeo Martin in fact shot Deegan but the role ascribed to Greco as the third assailant of Deegan in fact involved another man whose last name begins with "C" as you had earlier suggested to me. All of this information will be verified by polygraph test within the next few days, but I believe that an additional affidavit from Baron naming the actual participants together with a statement by Cassesso, who has never testified, would be helpful in corroboration.

I have had no response to my letter to the Attorney General asking for help in writing the injustice that Baron has caused. I am sorry that I am unable to permit you to question Baron at this time, and I am writing this letter in part so that you will be able to explain to the families of your clients what my position is and why I cannot permit interrogation now. Although my sympathies are of course primarily and directly with the victims of your affair, I must either give Baron full representation or none at all and I cannot ask him to put in the hands of hostile counsel testimony which could result in very severe penalties to him.

If the law enforcement authorities are interested in correcting the wrongful convictions which were obtained in the Superior Court, they have the power to do so and they certainly by this time have every reason to believe that a terrible mistake has been made. I will do everything I can consistent with Baron's legal rights to aid in attaining this result. I am very hopeful that before much more time goes by someone in authority will recognize the serious res-

ponsibilities to be faced and confer with me about some reasonable and practical means of setting these clients free. Until that time there is not very much that I can do directly except to try to prevent Baron's continued incarceration. I must be frank in saying that because of his past experience he has some feeling that he can trade his own freedom (as he did before) for the conviction (even if wrongful) of people whom the law is out to get. The present effort of the authorities to violate his probation and keep him in prison for another five years may well - at least for the time being - operate to prevent the truth from coming out. When Baron becomes convinced that trading freedom for fiction is beyond the control or influence of those with whom he collaborated, I think he will testify to the true facts even though there may be some personal risk involved.

Should it at some time in the future become feasible for you to interview Baron - even in limited fashion - I will advise you at once.

Sincerely,

F. LEE BAILEY (pw)

FLB/pw

K 41

My name is FRANCIS LEE BAILEY, JR., of 66 Earldor Circle, Marshfield, Massachusetts, 02050. I am a member of the Massachusetts Bar, having been admitted by the Supreme Judicial Court on November 16, 1960, and have been actively trying criminal cases since 1954 (military service).

In about 1965 I represented Joseph Barboza, a/k/a Joseph Baron, in Suffolk Superior Court before then Superior Court Justice Francis Quirico and a jury, upon the trial of an indictment charging multiple felonies wherein a verdict was returned acquitting the defendant of all charges except a breach of peace, of which he was convicted. In about July of 1970 I was contacted by a party whose name was Frank (I am unable to recall his last name), who represented that he was a contractor from Rhode Island, who had been in recent communication, through intermediaries, with Joseph Barboza, and that Barboza wished to set the record straight as to certain perjured testimony he had given in State and Federal courts with respect to certain defendants including, but not limited to, Raymond Patriarca, Peter Limone, Henry Tameleo and Louie Greco. The gentleman named Frank stated that Mr. Barboza wisned to have the services of experienced counsel in determining how and in what manner to accomplish his desired purpose and that he, Frank, would be willing to pay a reasonable fee if I would agree to advise and assist Mr. Barboza. As a result of that representation a meeting was scheduled in New Bedford, Massachusetts. I flew myself to the New Bedford airport and was met by a gentleman whose identity I did not and do not know. He took me to a two story, wood frame house in a section of New Bedford, with which I am not familiar. This meeting was, to the best of my recollection, in July, 1970. When I arrived at the house I was led to the second floor and confronted by six or more males, armed with automatic and semi-automatic weapons. I recognized Joseph Barboza as the man I had

LAW OFFICES
F. LEE BAILEY

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represented years before, and as the same Joseph Barboza who had testified for the Commonwealth in the case of Commonwealth vs. French. I spoke with Mr. Barboza for the better part of two hours.

He told me that he had agreed to be a Commonwealth witness, because as he was attempting to raise $50,000 to bail himself on a charge of illegally carrying a firearm, the funds were stolen by people whom he believed to be connected with "the North End". As a result of his anger over this event, he agreed to give testimony for the Federal Government and the Commonwealth, the latter in connection with the murder of Teddy Deegan. He stated of the people against whom he had testified, Roy French and Ronnie Cassesso were in fact involved, French directly and Cassesso indirectly. He told me that Henry Tameleo and Peter Limone were not involved, but that he implicated them because he was led to understand by various authorities that in order to escape punishment on charges pending against him, he would have to implicate someone of "importance". He told me that the story he had told to Judge Forte and the jury in the trial of Commonwealth vs. French was in very large measure a fabrication, and that he had in that story implicated Louis Greco because of a personal grudge arising from a disagreement between himself and Greco. He further said that he did not expect a conviction to result from his testimony and, indeed, that the authorities had generally assured him that a conviction was unlikely, but the mere fact of bringing such prominent people to public trial would accomplish its own purpose. He told me that he knew that Louie Greco was in Florida at the time of the murder, and expected that fact to be so clearly shown by the evidence that his entire testimony would be cast in doubt and an acquittal - probably of all defendants - would surely result. He stated that he wished to somehow cause at least those defendants who were in no way involved with the Deegan murder to be freed from prison. He

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ONE CENTER PLAZA

that the death sentence imposed by the trial jury would be R.43 carried out, but was quite fearful that if he admitted to perjury in a capital case he could and would be sentenced, himself, to life in prison. He stated that he wished me to explore some method of bringing the truth before the Superior Court without causing him, Barboza, to be imprisoned for his mendacity. He stated that because he had become a Government witness he would not expect to live more than a day if he were committed to the general population in Walpole, as he feared. He authorized me to advise counsel for some of the defendants as to his intent, and as to what he hoped to accomplish, and further authorized me to publish his revised version of the Deegan murder (in which he had admitted personal involvement), so long as he would not wind up in jail as a consequence. I agreed to undertake to accomplish his purposes in accordance with the conditions imposed by him, and was paid a retainer by the contractor named Frank.

Subsequently, Barboza was arrested in New Bedford for possessing a firearm unlawfully in an automobile. I represented him in connection with that matter, and when his probation was revoked and he was committed to Walpole, I brought a habeas corpus petition before Justice Roy in the Superior Court seeking his release. Subsequently, he told me that he had been informed by persons in authority, whom he did not name, that Federal agents would arrange for his release provided he discharge me and terminate his efforts to recant his trial testimony. Prior to this time, Barboza had agreed to take a polygraph test to be conducted either by Charles Zimmerman, of Boston, or by any qualified examiner upon whom attorneys for the Commonwealth, the United States, and I might agree. The purpose of this test was to demonstrate number one, the truth of his most recent account of the events surrounding the Deegan murder, including the total exculpation of Louie Greco, number two, the fact that he had not been paid or promised any remuneration in any form, by any

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F. LEE BAILEY
ONE CENTER PLAZA
BOSTON, MASS. 02108

R44

that as to some defendants, not including Greco, he had conspired with authorities to falsely implicate them. Subsequent to his incarceration he informed me that he had been told that if he submitted to such a test he would spend the rest of his years behind bars.

I spent considerable time with Mr. Barboza in connection with this matter, and visited with him on a number of occasions in the summer of 1970 as the records at Walpole will show. I had gotten to know him rather well during the original trial before Judge Quirico which he had expected to result in a conviction. In the course of numerous discussions with Mr. Barboza he undertook to explain to me how he had justified the execution of more than twenty people, principally in connection with the so-called McLain-McLaughlin gang war in the early and middle sixties. Based upon all of my experience with Mr. Barboza and my observations of him commencing with the interview at the house in New Bedford (the first time I had seen him since the trial of Commonwealth vs. French), I am satisfied that he was telling the truth as best he knew it, when he described the falsity of his trial testimony. I further believe that his surprise at the conviction of Louie Greco was genuine. At no time in any of the conversations which were held, up to and including his termination of my services, did he say anything inconsistent with his original story to me limiting criminal liability for the Deegan murder to himself, French, Cassesso, and one other whose name I will omit unless ordered by the Court to reveal it.

FRANCIS LEE BAILEY, JR.

COMMONWEALTH OF MASSACHUSETTS:
: SS
SUFFOLK COUNTY :

On this 7th day of October, 1978, before me personally appeared the above named FRANCIS LEE BAILEY, JR., who first being duly sworn deposed and stated that he has read the foregoing Affidavit, by him subscribed, that he knows the contents thereof to be true to the best of his knowledge, except as to those matters therein stated to be upon information and belief, and as to those matters, he believes them to be true.

Notary Public

My commission expires:

OFFICES
F. BAILEY
NEW PLAZA
WARE, OHIO
723-1980

Exhibit 5

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CR. NO.: 32368-70

COMMONWEALTH

V.

JOSEPH SALVATI

AFFIDAVIT OF ATTORNEY JOSEPH J. BALLIRO IN SUPPORT OF MOTION FOR NEW TRIAL OF JOSEPH SALVATI

The following affidavit is made with the understanding that it is to be used in support of a motion for a new trial for one Joseph Salvati, who has been imprisoned for over twenty-five (25) years after a conviction for allegedly participating in a first degree murder of one Edward Deegan on March 12, 1965.

1. I represented a co-defendant, Henry Tameleo, in the trial of the Commonwealth of Massachusetts against Joseph Salvati, and others, that concluded with a conviction on July 31, 1968.

2. With respect to the overall conduct of the trial I served in the role that is generally referred to as lead counsel.

3. Joseph Salvati was represented at the trial by Attorney Chester Paris, who at that time was a young but competent trial lawyer, and associated with me in practice at my office.

4. Without intending to over simplify what was obviously a very serious case, it can nonetheless be fairly stated that a conviction had to depend upon the credibility of one Joseph Barboza, a self-admitted participant in the murder of Mr. Deegan - and also an individual who the Commonwealth had castigated as a notorious killer. Without Barboza's testimony the case could not

have gone to the jury - and if the jury were to disbelieve Mr. Barboza as to the identity of any one of the participants there simply was no other evidence on which to base a conviction.

5. From the outset of the preparation for the defense of Joseph Salvati, it was the strong belief of all the defense lawyers that Mr. Salvati was not only innocent, but that Joseph Barboza had substituted Mr. Salvati as a participant for some other individual, who had actually participated, and who Mr. Barboza was seeking to protect. At the time of the trial I did not know who that other person was.

6. Every effort was made before and during the trial to seek out and present evidence that would undermine the credibility of Mr. Barboza, with a notable lack of success, other than to rely on the very notoriety that carried with it the downside of confirming that he was someone who was in position to know who his co-conspirators were.

7. I have recently (within the past three weeks) been furnished a three page police report that purports to be a statement by Thomas F. Evans of the Chelsea Police Department. I knew Lieutenant Evans as the result of having participated in the defense of many individuals where he was either the arresting or investigating officer. I was well aware that Lieutenant Evans, together with many other police officers participated in the investigation of Mr. Deegans murder and worked closely with investigations from the District Attorney's Office who were assisting to prepare the case for trial.

8. I knew Captain Renfrew of the Chelsea Police Department, who according to the Lieutenant Evans statement received the informant information, and had been defense counsel on many cases in which Captain Renfrew had been the investigating or prosecuting officer. I was aware, at the time of the Deegan trial that Captain Renfrew was working closely with the Suffolk County District Attorney's Office in preparing this case for trial.

9. I have carefully reviewed the three page police report authored by Lieutenant Thomas F. Evans and can categorically state that I was not aware of the existence of that report or its contents until the last few weeks; nor, am I aware that any other counsel, including Chester Paris who represented Joseph Salvati had any awareness of the report or its contents.

10. There was no aspect of the preparation of and the in-court defense of Mr. Salvati that I was not intimately aware of, including the search for exculpatory evidence as well as seeking to obtain any evidence that would undermine the credibility of Joseph Barboza. The credibility of Mr. Barboza was a common denominator to all of the defendants.

11. The failure of the Commonwealth to provide the defendants with the report of Lieutenant Evans seriously undercut the ability of the attorneys to conduct a proper investigation and prepare an adequate defense. It would be crucial to the defense of Mr. Salvati to establish that at the time Mr. Barboza left the Ebb Tide with cohorts and later returned with the same

men - that Joseph Salvati was not among those men.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 2ND DAY OF AUGUST, 1993.

Joseph J. Balliro, Esquire

6

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CRIMINAL NO(s). 32368, 32369, 32370

COMMONWEALTH]
V.]
JOSEPH SALVATI]

AFFIDAVIT

I, James M. McDonough, depose and state:

1. Since 1953 I have been an attorney in Massachusetts.

2. Between 1964 and 1979, I was a Legal Assistant in the Suffolk County District Attorney's Office.

3. During 1967 and 1968, I was assigned to assist the Assistant District Attorney (Jack Zalkind) in the prosecution of the defendant, Salvati.

4. In such capacity I had access to police reports and in general all documents connected to the case that were in the files of the prosecutor.

5. I was aware of and saw a report that had been authored by a Lieutenant Thomas Evans of the Chelsea Police Department about the Deegan murder.

PERGAD-Bayonne, N. J.
EXHIBIT
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6. I have read a copy of the foregoing report, that is presently in the prosecutor's file, and to the best of my memory and belief the copy of the report is the same copy that was in the prosecutor's file during prosecution of the defendant's case.

Signed under the pains and penalties of perjury,

James M. McDonough

Date: 10/12/93

0065w/39-40

Apr-23-2001 01:03pm From- 6172483983 T-911 P.002 F-210

United States Attorney
District of Massachusetts

1003 J.W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

April 3, 1996

Honorable Ralph C. Martin, II
Suffolk County District Attorney
New Courthouse
One Pemberton Square
Boston, MA 02108

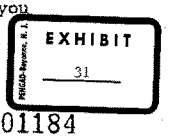
Dear Mr. Martin,

Recently, an Assistant U.S. Attorney assigned to the Organized Crime Strike Force (Brian T. Kelly) debriefed a cooperating witness regarding various matters under investigation by this office. The cooperating witness (Anthony Ciulla) disclosed certain information to A.U.S.A. Kelly that we believe should be brought to your attention.

The information concerns Joseph Salvati, who was one of six men convicted in 1968 for the 1965 murder of Teddy Deegan. As you know, the principal prosecution witness at trial was Joseph Barboza, a mob enforcer who admitted his own role in the murder and who was friendly with Ciulla (Ciulla was his driver). It is our understanding that Salvati claims Barboza "framed" him for two reasons: 1) in order to protect Barboza's friend, Vincent ("The Bear") Flemmi, and 2) in retaliation for Salvati's failure to repay a loanshark debt.

Ciulla has no personal knowledge of the murder. He was not involved in any way. However, Ciulla claims that Barboza discussed the Deegan murder in Ciulla's presence on several occasions (at least three times) prior to Barboza's decision to cooperate with the authorities. Ciulla believes Salvati is innocent because Barboza never mentioned Salvati when Barboza described the Deegan murder. According to Ciulla, Barboza did mention the other individuals convicted in the case (Henry Tameleo, Louis Grieco, Peter J. Limone, etc.) as well as Vincent ("The Bear") Flemmi.

We are obviously not in a position to assess the significance of this information in the context of the case against Joseph Salvati. We are simply passing it along to you for your consideration.



If you have any questions, please do not hesitate to call.

Very truly yours,

DONALD K. STERN
United States Attorney

By:

JAMES D. HERBERT
Assistant U.S. Attorney
Chief, Organized Crime Strike
Force Unit

cc Elizabeth A. Keeley, Esq.
Chief Trial Counsel

Exhibit 2

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY, ss

SUPERIOR COURT
DOCKET NOS.
32368, 32369, 32370

COMMONWEALTH
V.
JOSEPH L. SALVATI

AFFIDAVIT

I, William Moore, hereby swear and affirm that each of the following facts are true and accurate to the best of my knowledge and belief:

1. In 1965, I was a detective in the Chelsea Police Department.
2. Lt. Thomas Evans was my partner in 1965.
3. In 1965, it was my duty to investigate crimes committed in the City of Chelsea.
4. Lt. Evans and I investigated the shooting death of Edward Deegan on the night of March 12, 1965.
5. As a result of our investigation, Lt. Evans and I prepared a police report. That police report is attached as an exhibit to the Motion for a New Trial.
6. On the night of the shooting, Lt. Evans and I received information from Captain Renfrew of the Chelsea Police Department that an informant of his had contacted him and told him that Roy French had received a phone call at the Ebb Tide at 9 p.m. on March 12, 1965. After a short conversation, Roy French left the cafe with Joseph Barboza, Ronald Cassesso, Vincent Flemmi, Francis Imbuglia, Romeo Martin, Nicky Femia, and a man by the name of Freddie. The informant further stated that they returned at about 11 p.m. Lt. Evans and I added this information into our police report.
7. Lt. Evans received additional information from Captain Joseph Kozlowski that at around 10 p.m. on March 12, 1965, he had observed a red motor vehicle, with its rear license plate bent from right to left, parked on Fourth Street in Chelsea about 150 feet from the alley

where Deegan was found shot. Captain Kozlowski observed the first three digits, which were 404. He further observed three men in the car, two in the front, and one in the rear. He could not identify the people in the car, but he did observe, as the car sped away, that the person in the back seat had a bald spot.

8. As a result of the information that we received, Lt. Evans, myself and others went to the Ebb Tide around 12:30 a.m. on March 13, 1965. We found a red car with a plate bent from right to left, with the first three digits being 404.

9. Lt. Evans and I, along with others, entered the Ebb Tide and saw three men named by the informant, i.e., Romeo Martin, Roy French and Francis Imbuglia. We observed that Roy French had what appeared to be blood stains on his coat and on his shoes. We brought these three men back to the Chelsea Police station for questioning.

10. Considering the information provided to Lt. Evans and myself by Captain Kozlowski, the information received from Captain Renfrew's informant, which was corroborated by our observations and based upon our prior knowledge and observations of Mr. Barboza, we had good reason to suspect that Vincent Flemmi must have been the man with a bald spot in the back seat of the red car. Furthermore, since the informant had seen Vincent Flemmi leave the Ebb Tide and return several hours later with Barboza, we had good reason to suspect that both Barboza and Flemmi were involved, especially since we knew the close relationship between Barboza and Flemmi.

11. Both Joseph Barboza and Vincent Flemmi were known to me, as I had surveilled them together on a number of occasions.

12. I know that Vincent Flemmi was bald in 1965.

13. I had knowledge, as did others in law enforcement, that Joseph Barboza and Vincent Flemmi were business associates.

14. Because of the reputations of Joseph Barboza and Vincent Flemmi, Lt. Evans and I followed both of them on many occasions. Each time we observed that Flemmi did the driving for Barboza and that they almost always travelled together.

25. I was never asked to be a witness at trial.

26. I was struck by an automobile while in a Chelsea police car. As a result, I received severe injuries, which required me to leave the Chelsea Police Department on a disability on March 13, 1968.

Signed under the pains and penalties of perjury.

William Moore

William Moore

Then personally appeared the above-named William Moore and acknowledged the foregoing to be his free act and deed before me

Paul M. Dunman

Notary Public

My commission expires March 7, 1997

Apr-23-2001 01:10pm From- 6177483963 T-317 P.005/006 F-213

Memorandum

Subject	Date
Information provided by John Martorano	February 10, 2000

To
Fred Wyshak
Assistant United States Attorney

From
Daniel M. Doherty
Special Agent

On July 12, 1999, September 14, 1999 and January 28, 2000, S/A Daniel M. Doherty debriefed John Martorano regarding statements made to Martorano circa 1966, by Joseph "the Animal" BARBOZA. Martorano advised that he was a close associate to BARBOZA in the mid 1960's. Martorano stated that subsequent to the murder of Edward "Teddy" DEEGAN (03/12/1965), that BARBOZA admitted to Martorano that he, BARBOZA had killed DEEGAN. On a separate occasion, independent of the above conversation, James "the Bear" FLEMMI, told Martorano that he, FLEMMI, killed DEEGAN.

Martorano also stated, that either just prior to or immediately after the time period that BARBOZA began cooperating with law enforcement, that he, BARBOZA, told Martorano to mind his own business and not to intervene, because "They" (the LCN) screwed me and now I'm going to screw as many of them as possible. BARBOZA further stated, that he was not interested in guilt or innocence. BARBOZA again reiterated to Martorano that Martorano should just stay out of it. BARBOZA told Martorano that Martorano was a friend and that he, BARBOZA, would not bother Martorano.

EXHIBIT
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TOTAL P.01

c John Cavicchi Attorney at Law Fax: 617-567-4697 Voice 617-567-4697

August 30, 2000

John Cavicchi
Attorney at Law
25 Barnes Avenue
East Boston, MA 02128

Dear John:

Thanks for the papers to refresh my memory. In fact; my **Affidavit** was right on the money with the exception of Joseph Salvati. Also; it appears that you were present in a legal capacity as "notary public" and I never made the connection after all these years, but for the fact that I just had examined the "affidavit" of Louie Greco for the first-time, also.

For the record, I have no memory of Joseph Salvati being a part of my involvement with the shooting death of "Teddy Deegan." He in no way aided me directly or indirectly in the "shooting death of "Teddy Deegan". **I did not get any money for shooting "Deegan"...**

Relevant to the issue of a **conflict of interest**, I have no record of hiring Attorney Joseph Balliro, prior to my trial nor subsequent to my trial. If, he delegated my legal rights to an independent appellate lawyer, it had to be free of charge as I was indigent at that time. Furthermore; I signed no release to that effect and no "effective" appeal issues were raised on my behalf, specifically, in conjunction with the **newly discovered evidence** obtained from the United States Department of Justice dated **"4/6/65"**, compiled by the FBI that were mailed to me at MCI-Norfolk from the **FBI Office** in Boston during November **1998...30 years after my conviction?...**Brady v Maryland, (1963), Com v Tucceri, 412 Mass 401 and 589 NE 2d 1216, 1217 at 1224; **on undisclosed evidence & absent evidence** by JUSTICE WILKINS, see also the latest USSC decision in Williams v Taylor, 120 S.Ct. (2000)...counsel "failed" to obtain mitigating **evidence**.

My testimony at trial is the truth to the best of my vision on March 12, 1965, during the tremendous abnormal strain to survive "Barboza-Baron's plot to kill "Deegan & Stathopoulos" because of the belief that they were responsible for the **savage killing** of Anthony Sacramone. **I do not know of any money contract to kill "Deegan".**

I never saw Louie Greco's **"affidavit"**, but, note "1" states what I have previously repeated as a matter of **fact**, that, was never developed at trial and was a major **GROUNDS** for **ineffective trial counsel**...to truly defeat the testimony of Tony Stathopoulos...also note "12" affirms what was an obvious **fact** to everyone that had ever met personally with Louie Greco or had seen Louie Greco from some viewing distance and was told that, that is Louie Greco walking with a **LIMP**. His name should be cleared, his family has a legal interest for it to be cleared...there is enough **evidence** to support that any stride of walking or slowly running or hurriedly walking, was an **impossibility to perform** by Louie Greco; without: **LIMPING**. . .with the polygraph **evidence** and other type of **scientific proof**...such as **"evidence accumulated by the Florida attorney"..."not presented at trial."** Louie may have been convicted for **Fitzgerald's** testimony... **after the fact.** NOT THE TRUTH...

EXHIBIT 34

BEFORE:

Wilfred Roy French

God Bless and best regards to your client...

Wilfred Roy French

001073

11:20 AM

(15)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S.

SUPERIOR COURT DEPARTMENT
TRIAL COURT DIVISION
CR. NO.: 32367, 69-70

COMMONWEALTH

V.

PETER LIMONE

AFFIDAVIT OF JOSEPH J. BALLIRO, SR., ESQUIRE

Introduction

The following affidavit is made with the understanding that it is to be used in support of the motion for a new trial on behalf of Peter Limone.

Affidavit

I, Joseph J. Balliro, Sr., Esquire, do state and aver the following:

1. I represented Henry Tameleo in the trial of the Commonwealth v. Peter Limone et. als., that concluded with a conviction on July 31, 1968;

2. As the result of a post-conviction investigation, I received a memorandum from F. Lee Bailey, Esquire who was representing Joseph Barboza who had been the critical witness in the case against Mr. Limone and others;

A copy of the "memo" is attached hereto and will speak for itself. It obviously exculpates Mr. Limone from being in any way responsible for the death of Mr. Deegan;

3. At no time have I represented Stephen Flemmi or Nicky Flemia;

4. I have no knowledge of any information that Freddy Chiampa or Frank Imbruglia have concerning the Deegan murder case and although I may have represented either or both of them some 35 or 40 years ago, I neither remember the dates or

EXHIBIT
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circumstances and can find no file that reflects such representation;

5. I have represented both Joseph Barboza and Vincent "Jimmy" Flemmi some 35 or 40 years ago on matters unrelated to the Deegan murder case;

6. I never received any information from Mr. Barboza relative to the Deegan murder case;

7. Pursuant to an order of the, Hinckle, J., releasing me from the attorney-client privilege of my client, James "Vincent" Flemmi, the following is a summary of a conversation I had with Mr. Flemmi in the summer of 1967 concerning the Deegan murder case:

I visted with Mr. Flemmi for the purpose of determining what evidence he could furnish, if any, that would impeach the credibility of Joseph Barboza in the Deegan murder trial. I was representing Henry Tameleo, who was one of the defendants in that case. Mr. Flemmi told me that it would be impossible for him to come up front with any evidence against Barboza. He told me that Barboza had planned the killing and that he, Flemmi, had participated. Flemmi told me that when Barboza gave his account of the crime to the authorities, he substituted Joseph Salvati for Flemmi because Salvati had disrespected him. Flemmi told me that Barboza had sent him word that although Tameleo, Limone had nothing to do with arranging the Deegan murder, that Greico was not a participant and he was putting them in because they also had disrespected him.

Flemmi told me that he had done too many things with Barboza and was concerned that if Barboza thought that Flemmi tried to help my client, that he could involve Flemmi in some serious stuff.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 2ND DAY OF JANUARY, 2001.

Joseph J. Balliro, Sr., Esq.
99 Summer Street
Suite 1800
Boston, MA 02110
(617) 737-8442
B.B.O. No. 028000

17A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
NO. 32368

COMMONWEALTH

v.

JOSEPH SALVATI

NOLLE PROSEQUI

Now comes the Commonwealth in the above-captioned matter and respectfully states that it will not prosecute Indictment No. 32368 any further.

As grounds therefor, the Commonwealth respectfully states as follows:

(1) There exists newly discovered evidence – various FBI documents disclosed to the Commonwealth and the defendant for the first time on December 19, 2000 – which significantly undermines (a) the credibility of the Commonwealth's principal witness at the defendant's first trial, Joseph Barboza, and (b) the Commonwealth's theory of the defendant's role in the murder of Edward Deegan, as presented at the defendant's first trial.

(2) Joseph Barboza was shot and killed on February 11, 1976.

(3) The Commonwealth has conducted a comprehensive review of the facts and circumstances surrounding the arrest, trial, and conviction of the defendant for his alleged role in the murder of Edward Deegan, including the impact of the contents of the newly discovered FBI documents.

(4) In addition, the Commonwealth has carefully and thoroughly evaluated the nature, quality, and sufficiency of the alleged evidence against the defendant.

(5) As a result of that review and evaluation, the Commonwealth has concluded that it does not now have a good faith basis – legally or ethically – to proceed with any further prosecution of the defendant.

Respectfully Submitted
For the Commonwealth,

RALPH C. MARTIN, II
DISTRICT ATTORNEY

By: _____
MARK LEE
Assistant District Attorney
Homicide Unit

By: David E. Meier
DAVID E. MEIER
Chief of Homicide
One Bulfinch Place
Boston, MA 02114
(617) 619-4240

Dated: January 30, 2001

SUBJECT: VINCENT JAMES FLEMMI, Aka.

[redacted] F.B

Boston letter to Director, FBI 1/8/65 captioned: [redacted]

This letter refers to Boston Radiogram to Director coded 12/28/64 stating [redacted] was found stabbed to death on 12/28/64 in an automobile registered to his sister-in-law in the South End section of Boston.

Informants have reported he was murdered by JAMES FLEMMI as he was saying unkind things about FLEMMI's group; that he was murdered by old associates, Edward Goss and John Murray, for refusing them money; and that he may have been murdered for being suspected of being involved in the shooting of Edward Mc Laughlin.

B.F.M

000020

19

EXHIBIT 37

Exhibit 8 (3)

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CHALK A

COMPARISON BETWEEN JOSEPH SALVATI AND VINCENT FLEMMI

JOSEPH SALVATI	VINCENT FLEMMI
1. Joe Salvati was not bald in 1965 (i.e. he had a full head of black hair).	1. Vincent Flemmi was bald in 1965.
2. Joe Salvati was not known as: a) Barboza's associate. b) Barboza's driver. c) a man that hung with Barboza. d) a mobster. e) a veteran of the Boston gangwars of the 1960's. f) a man of violence. g) a gun carrier. h) a man known to shoot people. i) a criminal. j) a man with a major criminal record (i.e. he had one conviction for breaking and entering and possession of burglarious instruments in 1955).	2. Vincent Flemmi was known as: a) Barboza's close associate. b) Barboza's driver. c) a man that hung with Barboza. d) a mobster. e) a veteran of the Boston gangwars of the 1960's. f) a man of violence. g) a gun carrier. h) a man known to shoot people. i) a criminal. j) a man with a major criminal record (i.e. he had over forty convictions).
3. Joe Salvati was not suspected by the police in 1965 for the Deegan murder.	3. Vincent Flemmi was suspected by the police in 1965 on the very night of the Deegan murder.

EXHIBIT 38

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WILLIAM HIGGINS

James Featherstone, Deputy Chief
Organized Crime & Racketeering Section

August 28, 1970

Walter T. Barnes and Edward P. Harrington
Special Attorneys, Boston Field Office
Organized Crime & Racketeering Section

Interview with Joseph Baron

On August 28, 1970 at approximately 11:00 A. M., Arthur Isberg, Massachusetts Commissioner of Corrections, telephonically advised Walter Barnes that Joseph Baron had requested in writing to speak to Barnes and Special Agent Dennis Condon. Isberg told Barnes to contact Fred Butterworth at Walpole for the exact wording of the request. Edward Harrington called Butterworth at Walpole and Butterworth read Baron's written request, a copy of which is attached to this memorandum. Harrington advised Butterworth that Barnes and Harrington would leave immediately for Walpole.

Barnes and Harrington conferred with Joseph Baron at Walpole Correctional Institution from approximately 1:00 P. M. until 2:15 P. M. Baron requested Barnes and Harrington to relocate his wife and family from California in light of the fact that their whereabouts had become public knowledge, having been disclosed by his counsel, F. Lee Bailey, at a prior court proceeding. Barnes and Harrington did not make any response to this request. Baron also requested that his probation revocation warrant be withdrawn. Barnes and Harrington advised Baron that they had no control over the Massachusetts Parole Board and that they could make no promises in this regard.

During the course of the conversation, Baron made the following statements:

Baron stated that it was his original intention to inveigle members of the underworld into giving him money on the pretext that he would recant his testimony given in previous trials and that, when he received the money, he would leave the area without recanting;

Baron also stated that his counsel, F. Lee Bailey, "made him sign the affidavit" and that "they" have sent his wife money in return for his signing the affidavits; that Bailey acknowledged

EXHIBIT
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to him that the affidavits themselves were not sufficient to warrant the granting of a new trial, but that it would be necessary for Baron to testify as a witness, which Baron does not desire to do.

Baron also advised that his testimony in the Deegan case was truthful and that he had signed the affidavits only for money; that he is not going to take the lie-detector test on August 31, 1970, for he feels that once he has taken the test Bailey will have no further use for him and that his life will be in danger; that he will tell Bailey that he had spoken with Barnes and Harrington merely to tell them that, if they were going to pressure him by initiating criminal charges, he would open up a "Pandora's box." He stated that this statement would be merely a pretext so that Bailey will not distrust him on account of his seeing them.

Baron stated that if he took the lie-detector test it would prove that he told the truth during the Deegan trial, but that he will not take this test until he is out of custody and beyond the control of Bailey.

Baron stated that two of his trips from California to Boston were made at the instigation of the underworld and that he was paid for these trips through the books of Hi-Lo Construction Company of Providence, Rhode Island, an officer of which, Frank Davis, Baron met on several occasions in this connection.

Barnes and Harrington told Baron that they would and could make no promises to him but that they would merely pass the results of their conversation onto District Attorney Garrett Byrne, which was done by Harrington at approximately 3:30 P. M. on August 28, 1970.

Enclosure

000374

FD-36 (Rev. 5-22-64)

F B I

Date: July 31, 1968

Transmit the following in _____ (Type in plaintext or code)

Via TELETYPE IMMEDIATE (Priority)

TO: DIRECTOR [redacted]

FROM: BOSTON [redacted]

CRIMINAL INTELLIGENCE PROGRAM, BOSTON DIVISION.

ALL SUBJECTS IN DEEGAN GANGLAND MURDER FOUND GUILTY THIS DATE, SUFFOLK COUNTY SUPERIOR COURT, BOSTON, MASS.

ROY FRENCH FOUND GUILTY OF MURDER, FIRST DEGREE AND SENTENCED TO LIFE. JOSEPH SALVATI FOUND GUILTY OF ACCESSORY BEFORE THE FACT AND SENTENCED TO LIFE. BOTH THESE SENTENCES WERE BASED ON JURY RECOMMENDATION FOR LENIENCY.

LOUIS GRIECO FOUND GUILTY MURDER, FIRST DEGREE AND SENTENCED TO DEATH PENALTY. HENRY TAMELEO, RONALD CASSESSO AND PETER JOSEPH LIMONE, ALL LCN MEMBERS, FOUND GUILTY OF ACCESSORY BEFORE THE FACT AND ALL SENTENCED TO DEATH PENALTY.

ALL SIX SUBJECTS FOUND GUILTY OF CONSPIRACY TO MURDER EDWARD DEEGAN AND SENTENCED TO TWO YEARS IN HOUSE OF CORRECTION. ALL FOUND GUILTY OF CONSPIRACY TO MURDER ANTHONY J. STATHOPOULOS AND SENTENCED ONE YEAR IN HOUSE OF CORRECTION.

TAMELEO, LIMONE AND CASSESSO ALL PROMINENT MEMBERS OF LCN IN PATRIARCA FAMILY. TAMELEO WAS CAPOREGIME OF PATRIARCA IN

Approved: _____ Special Agent in Charge

Sent 4:03 P M Per _____

[redacted] 3267

000943

EXHIBIT 40

FD-36 (Rev. 5-22-64)

F B I

Date:

Transmit the following in _____
(Type in plaintext or code)

Via _____ _____
(Priority)

[redacted] F

2.

PROVIDENCE, R.I. AREA.

GARRETT H. BYRNE, DISTRICT ATTORNEY, SUFFOLK COUNTY, STATED PROSECUTION WAS DIRECT RESULT OF FBI INVESTIGATION AND PARTICULARLY NOTED DEVELOPMENT OF PRINCIPAL GOVERNMENT WITNESSES JOSEPH BARON, AKA BARBOZA, AND ROBERT GLAVIN. BYRNE WAS EXTREMELY PRAISEWORTHY OF COOPERATION BETWEEN FBI AND HIS OFFICE.

SAS H. PAUL RICO AND DENNIS M. CONDON WERE INSTRUMENTAL IN DEVELOPMENT OF BARON AND GLAVIN.

SA CONDON TESTIFIED INSTANT CASE, AS DID SA WILLIAM T. BOLAND. SA BOLAND, WHO HAD INTERVIEWED WIFE OF GRIECO, WAS ABLE TO CONTRADICT ALIBI TESTIMONY OF MRS. GRIECO AT TIME OF TRIAL. BYRNE STATED TESTIMONY OF SAS IN THIS TRIAL WAS MOST EFFECTIVE.

NOTED THAT BYRNE COOPERATED WITH THIS OFFICE IN CONNECTION WITH FEDERAL TRIAL OF RAYMOND L. S. PATRIARCA, ET AL, WHO WAS CONVICTED USDC, BOSTON.

RECOMMENDED LETTER OF COMMENDATION BE FORWARDED GARRETT H. BYRNE, DISTRICT ATTORNEY, SUFFOLK COUNTY, ROOM SIX TWO SIX, ~~NEWXENGLANDXEXECUTIVEXXXXX~~

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

000944

FD-36 (Rev. 3-22-56)

FBI

Date:

Transmit the following in _____ (Type in plaintext or code)

Via _____ (Priority)

[redacted]

3.

NEW COURTHOUSE BUILDING, FIVE FIVE PEMBERTON SQUARE, BOSTON, MASS., ZERO TWO ONE ZERO EIGHT, AND STAFF FOR THEIR SUCCESSFUL PROSECUTION OF THIS CASE.

ALSO RECOMMENDED THAT LETTERS OF COMMENDATION BE FORWARDED SAS RICO, CONDON AND BOLAND. SAS RICO AND CONDON WERE RESPONSIBLE FOR THE DEVELOPMENT OF GOVERNMENT WITNESSES BARBOZA AND GLAVIN. SA CONDON ALSO TESTIFIED IN AN EXCELLENT MANNER IN THIS CASE. SA BOLAND ALSO TESTIFIED IN AN EXCELLENT MANNER. BOLAND'S TESTIMONY REFUTED THE ALIBI OF GRECO AS FURNISHED BY HIS WIFE. SA BOLAND HAD INTERVIEWED GRECO'S WIFE AND SHE TESTIFIED IN A THE CASE, CONTRARY TO THE FACTS AS FURNISHED BY HER TO BOLAND. HIS TESTIMONY WAS DEVASTATING TO THE DEFENSE OF GRECO. BOTH AGENTS TESTIFIED REFLECTING GREAT CREDIT ON FBI.

JFK:CAK
(1)

Approved: _____ Special Agent in Charge

Sent _____ M Per _____

000945

THE FBI'S HANDLING OF CONFIDENTIAL INFORMANTS IN BOSTON: WILL THE JUSTICE DEPARTMENT COMPLY WITH CONGRESSIONAL SUBPOENAS?

THURSDAY, DECEMBER 13, 2001

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

The committee met, pursuant to notice, at 10:26 a.m., in room 2157, Rayburn House Office Building, Hon. Dan Burton (chairman of the committee) presiding.

Present: Representatives Burton, Delahunt, Waxman, Tierney, Frank, Kucinich, Cummings, Clay, Norton, Duncan, Shays, LaTourette, Morella, Horn, and Gilman.

Staff present: Kevin Binger, staff director; Daniel R. Moll, deputy staff director; James C. Wilson, chief counsel; David A. Kass, deputy chief counsel; Mark Corallo, director of communications; Thomas Bowman, senior counsel; Chad Bungard, Pablo Carrillo, Matt Rupp, and James J. Schumann, counsels; S. Elizabeth Clay and Gil Macklin, professional staff members; Michael Ayers and Susie Schulte, staff assistants; Robert A. Briggs, chief clerk; Robin Butler, office manager; Elizabeth Crane and Michael Layman, legislative assistants; Elizabeth Frigola, deputy communications director; Joshua E. Gillespie, deputy chief clerk; Nicholas Mutton, assistant to chief counsel; Leneal Scott, computer systems manager; Corinne Zaccagnini, systems administrator; Michael Yeager, minority deputy chief counsel; Ellen Rayner, minority chief clerk; and Jean Gosa and Earley Green, minority assistant clerks.

Mr. BURTON. OK, I think we'll get started here in just about 2 or 3 minutes. We understand there are some other people that want to be here, and we'll wait for them.

OK, I think we'll go ahead and start. I have a prepared statement here, but I'm not going to read it today. I'll put it in the record, because I want to speak extemporaneously about this issue, because I feel very strongly about it. A lot of the media is not here, but I'm sure they will hear about this very quickly.

The Congress has the right of oversight over the executive branch of the United States of America. This committee has oversight responsibility over the entire Government of the United States. Every single branch of the executive branch in one way or another comes under the purview of this committee as far as oversight is concerned.

Now, for the past 4½ years or 5 years, we have investigated the Clinton administration. And my colleagues on my right here have been concerned because I was so partisan. Well, today I think they're going to find that it was because I really believed what we were trying to get to the bottom of.

President Bush, I think, is doing an outstanding job in the war effort. And I think the American people share that view. I think about 85 percent approve of his handling of the war. And I think everybody's giving him a lot of latitude on the economy, because he's trying his best, and I believe rightfully, to get the economy moving with an economic stimulus package.

But where I disagree with the President, and I believe most of my colleagues on both sides of the aisle would disagree with the President, is his use of executive privilege that we just received notification of today. Now, I've met with the White House chief counsel, Mr. Gonzales, I talked to him this morning. And I've met with the Attorney General.

And the Congress of the United States has the right and the obligation to oversee the executive branch, the White House and the Justice Department. The President has the right in certain cases to claim executive privilege. But it's a real stretch for him to claim executive privilege on the issues that are before us today. I think it's wrong and I believe the Congress will think it's wrong.

Now, the reason we asked for information from the Justice Department in the past was because we were concerned about campaign finance scandals, and we were concerned about espionage, we were concerned about all kinds of things. We were ultimately able to get most of those things from the Reno Justice Department and from the White House.

This White House has issued an Executive order that pretty much blocks us from getting any information on previous executive branch personnel, including the President of the United States. We are chagrined by that, because in the past, we've been able to get those documents so we could fulfill our oversight responsibilities.

As far as the Justice Department is concerned, we have in the past had difficulties getting things like the La Bella and Freeh memo from the Reno Justice Department, but ultimately we did get those. Today we are here to talk to the Justice Department about Joseph Salvati. Joseph Salvati was put in prison when J. Edgar Hoover was the FBI Director. And we have reason to believe, very strong evidence, that leads us to believe that even J. Edgar Hoover knew that Mr. Salvati was innocent of the charges brought against him.

But he was put in jail and they were going to give him the death sentence, the death penalty, but they didn't. They gave him life in prison. He spent 30 years in prison. Time after time, the FBI tried to keep him from getting out of prison. Finally, he was released on parole, and then documents were revealed which showed he was innocent. He was innocent. A man spent his whole life, his children grew up, and his wife grew older, and she had to learn a new trade, she didn't even drive a car, she had to go out to the prison with friends. And it was just a tragic thing. And she waited on him for 30 years.

And so we wanted to get documents from the Justice Department to show what happened. We have some documents, which pretty conclusively show that the FBI was involved in this cover-up, that they were working with the underworld figures who were informants, to pacify them and to help them so that they could get other Mafia individuals. So they threw Salvati and some others to the wolves. But Salvati in particular was a case that was very, very wrong.

So we've asked the Justice Department for documents for Mr. Salvati. And today, they're hiding behind campaign finance scandals and things that happened in the previous administration, or administrations. They're not going to give us the documents on Mr. Salvati which might help us get compensation for him for the 30 some years he spent in prison for something he didn't do. And the White House has issued this Executive order and they're blocking us.

Now, I don't intend, as the chairman of this committee, to let this stand. I talked to the President's counsel this morning about this, and I am prepared to hold a whole series of hearings based upon the use of executive privilege in the past and whether or not the President is rightfully using executive privilege now. I don't believe he is, and I don't believe anybody who's followed these cases believes he's right, either.

Now, bear in mind that I think he's doing an outstanding job as President of the United States. But this is not a monarchy. This is an equal branch Government. We have the judicial, the executive and the legislative. And the legislative branch has oversight responsibilities to make sure there's no corruption in the executive branch. There's been many corruption scandals in the past. There's been Teapot Dome, there's been Watergate, there's been a whole host of scandals in the past. We even had scandals that we looked at in the last administration.

But at least we could look at those. And the doors are being closed to the Congress of the United States by the executive branch as far as the White House is concerned, and now they're closing that door as far as the Justice Department is concerned. And it's wrong. It's wrong.

You're hearing this from a Republican Congressman who supported President Bush and still who supports him in his efforts in the economy, as far as the economy and the war is concerned. I supported Reagan, I supported Bush and George W. Bush. And I don't know if George W. Bush knows the gravity of this or not. He's probably taking the advice of his legal counsel and the Attorney General and the people over at the Justice Department, some of whom we have here today.

But this is wrong. And I want all of those involved to know that we may not be able to get standing in court, because we probably have to go to the leadership to get the whole House involved in a suit to get this edict by the President reversed. We might not even get it done then. But what I can do is, I can hold hearing after hearing after hearing. And these television cameras, you see one here today, there's going to be a whole raft of them in here before it's over with.

Because the American people need to know that while we appreciate what the President of the United States is doing in the war and as far as the economy is concerned, we believe that the Congress of the United States has a justifiable position and right to oversee the executive branch of this Government. And if this President and if his legal staff continues to try to block us from getting access to records at the White House or at the Justice Department to which we are entitled, then they're going to have to deal with this committee day in and day out for the next year as long as I'm chairman.

And I realize the political realities of my position. I'm sure that a lot of my colleagues on the Republican side are going to say, "hey, why are you doing this?" I'm doing this not because I'm a Republican or because I might have been a Democrat. I'm doing it because it's right. The Congress of the United States has the right of oversight over the executive branch. And when any President, Democrat or Republican, tries to block that right, then we have the obligation to take them to task.

With that, I yield to Mr. Waxman.

[The prepared statement of Hon. Dan Burton follows:]

Opening Statement
Chairman Dan Burton
Committee on Government Reform
"The FBI's Handling of Confidential Informants in Boston:
Will the Justice Department Comply with Congressional Subpoenas"
December 13, 2001

Good Morning.

Today we are here because, once again, we have been unable to get the Justice Department to produce documents that we need to conduct oversight.

One of the most important things we do here in Congress is conduct oversight of the executive branch. When allegations of waste, fraud or abuse arise, it is our responsibility to investigate and gather documents and hold hearings to bring out the truth. As Chairman of this Committee, I take that responsibility very seriously.

Whenever these investigations arise, there is always a certain amount of tension between the executive branch and the legislative branch. Executive agencies are reluctant to turn over internal documents to Congressional Committees. If there's one thing I've learned in my five years as Chairman of this Committee, it's that you can't conduct a thorough investigation if you don't get the documents.

The investigation that brings us here today is a very serious one. It involves the FBI's handling of organized crime cases in Boston. There are very serious allegations of corruption involving FBI officials that go back thirty years. The FBI was actively cultivating Mob informants to use against organized crime figures in New England. Along the way, it appears that they broke just about every rule in the book. They have been accused of encouraging informants to commit perjury, tipping off their mafia informants to criminal investigations, turning a blind eye while their informants committed dozens of murders -- the list goes on and on. A senior FBI official in Boston at that time has been indicted.

This summer we held a hearing. A man named Joe Salvati testified. He was put in prison for 30 years by one of the FBI's most prized informants -- Joe "The Animal" Barboza. He was convicted of a murder he didn't commit because Joe Barboza lied on the witness stand. The most troubling part of this whole story is that the FBI knew their informant was lying, and they didn't do anything to stop it. They knew that an innocent man was going to go to prison for life -- he could have gotten the death penalty -- and they let it happen. If it hadn't been for the dedicated efforts of Joe Salvati's lawyer -- Victor Garo -- over three decades, this might have never come to light. Joe Salvati might have died in prison. Victor is in the audience today, and I salute him once again. And that's just the tip of the iceberg in this scandal.

But it isn't just Joe Salvati's thirty wasted years in prison that makes me so mad. The FBI knew who Barboza was protecting. His name was Jimmy Flemmi. The FBI knew Barboza was protecting him, but they wanted him as a snitch. More important, they wanted his brother to be an informant. Well who was this guy who was so important that the FBI threw Joe Salvati, his wife and four kids into hell? This is what FBI Director J. Edgar Hoover was told about Jimmy Flemmi:

"Concerning informant's emotional stability, the Agent handling informant believes, from information obtained from other informants and sources, that [Jimmy Flemmi] has murdered REDACTED, REDACTED, REDACTED, REDACTED, Edward "Teddy" Deegan, and REDACTED, as well as a fellow inmate at the Massachusetts Correctional Institution, Walpole, Mass., and from all indications, he is going to continue to commit murder."

That's seven people Flemmi killed, and Salvati got to do his time. The FBI, as high as Director Hoover, also knew that Flemmi had killed another government informant by stabbing him 50 times, and the FBI was aware, from an illegal bug they had placed, that "all [Flemmi] wants to do now is kill people . . . and he feels he can now be the top hit man in the area and he intends to be." And it gets worse. Jimmy Flemmi was the brother of the FBI's crown jewel informant, Stevie Flemmi. After a thiry-year career as an FBI informant, Stevie Flemmi is

finally in prison. But he is only there after he and his sidekick Whitey Bulger committed dozens of murders. All this while being protected by FBI agents and Justice Department prosecutors. And this is the type of activity that the Administration is trying to cover up? So far, they have not made it easy to conduct this investigation, and now we have executive privilege and more secret documents. I just don't get it. It isn't right.

We've set out to get to the bottom of it. And this has been a bipartisan investigation -- Democrats and Republicans working together. Many members of the Massachusetts delegation have worked hand in hand with us. People are shocked at what was allowed to happen, and Members from both sides of the aisle are determined to get to the bottom of it.

To do that, we have to review documents from the Justice Department. We need to review memoranda on decisions affecting people like Joe Barboza and Whitey Bulger and Jimmy "The Bear" Flemmi. We've issued document requests. We've issued subpoenas. The Justice Department has refused to provide us with those documents.

We've tried to be reasonable. We've confined our requests to information from investigations that have long since been closed. Yet, the Justice Department has decided to withhold these documents without asking -- not even once -- why we need these documents. It seems like the Justice Department is more interested in creating a new policy of secrecy than in accomodating our need to get to the bottom of the Boston mess.

What we've been told is that this Justice Department will not provide any deliberative memoranda from any criminal investigation to any Congressional Committee -- ever. It doesn't matter if the case has been closed for twenty years. This new policy is utterly unprecedented. And if this new policy stands, it will be virtually impossible for any Congressional Committee to conduct meaningful oversight of the Department. It will be impossible for us to do our job.

Justice Department officials have told us that prior to the Clinton Administration, these kinds of documents were never provided to Congress. That's flat out wrong. They've been provided to Congress during virtually every Administration dating back to the Harding Administration and the Teapot Dome scandal:

- During the 1970s, deliberative documents were provided to the Judiciary and Commerce Committees during their investigation of white collar crime in the oil industry.

- During the 1980s, these types of documents were provided to the Judiciary Committee during their investigation into DOJ's handling of the Rita Lavelle situation.

- During the 1990s, these types of documents were provided to the House Science Committee during their investigation of the Rockwell Corporation's activities at Rocky Flats.

- During our own investigation of the Campaign Finance Investigation, documents like the Freeh and LaBella memos were provided to this Committee.

Now, I'm not advocating that documents like these ought to be turned over to Congress every day. Congress should act with restraint. Where we are able, we should try to recognize the concerns of the Justice Department and try to accommodate them. But when credible allegations of serious corruption arise, and when Congress might need to pass new laws or overhaul old laws, we have an obligation. I can't imagine any more serious allegations than what was going on in Boston during the '60s and '70s and '80s and 90s. Innocent men were being imprisoned. Murders were being committed. Justice was being obstructed. All with the knowledge of government officials. The American people have a right to know what happened and who knew.

So I called this morning's hearing to get some answers, on the record, to these questions that we have:

- Will the Justice Department comply with our subpoenas?

- Have they located documents regarding these organized crime cases in Boston, and what do they show?
- Is the Justice Department going to step back from this inflexible policy that they've adopted and work with us?

I can't tell you how profoundly disappointed I am at what we've been told this morning. We've been informed that the President is going to claim executive privilege over these documents. I just can't understand it. Why do they want to keep these documents secret? What's the public interest in covering up all of the terrible things that happened and who knew about them? Now, in Boston, people are going to wonder whether they are protecting current and former law enforcement officials. On top of that, I am concerned that this is not a valid claim of executive privilege. I was critical that President Clinton invoked executive privilege 14 times, many times in improper situations. Yet even President Clinton never invoked executive privilege over these kinds of records.

We've been told that all of these tragic events in Boston are under investigation by the Justice Department. We've been told that Congress should stay away and let them do their jobs. Well, how thorough a job are they doing?

At our hearing this summer, we subpoenaed one of the FBI agents -- Paul Rico. He testified. He was right in the middle of all these activities. Paul Rico worked hand in hand with Joe "the Animal" Barboza and Steve "the Rifleman" Flemmi and Whitey Bulger. Mr. Rico was utterly unrepentant for having helped put an innocent man -- a father of four -- in prison for 30 years. We asked Mr. Rico if the Justice Department had even tried to question him. They hadn't.

We've obtained hundreds of candid letters that Barboza wrote while he was in prison. The Justice Department has never even looked at them -- never even knew they existed. We have talked to numerous important witnesses and found out that the Justice Department hadn't even bothered to contact them. How thorough is this investigation? I think we have some legitimate questions, and we deserve answers.

I'll wrap up at this point because I want to get to our witness. Let me just say that I'm very disappointed that we haven't received the cooperation we deserve. I'm genuinely disappointed that the President has decided to claim executive privilege over these memos. And I have no intention of letting this matter drop.

I now yield to Mr. Waxman for his opening statement.

Subpoena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To United States Department of Justice Serve: Attorney General John Ashcroft

You are hereby commanded to produce the things identified on the attached schedule before the full Committee on Government Reform of the House of Representatives of the United States, of which the Hon. Dan Burton is chairman, by producing such things in Room 2157 of the Rayburn Building, in the city of Washington, on September 11, 2001, at the hour of 5:00 PM

To Danleigh Halfast or US Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 6th day of September, ~~19~~2001

Dan Burton
Chairman.

Attest:

Jeff Hunter
Clerk.

Subpoena for U.S. Department of Justice

Serve: Attorney General John Ashcroft

Tenth Street & Constitution Avenue, N.W.

Washington, D.C. 20530

before the Committee on the

Government Reform

Served To Faith Burton

By: Danleigh Hayes

by hand delivery

9/6/01 1:00 PM

Danleigh Hayes

House of Representatives

GPO: 1993 51-015 (reac)

SCHEDULE A

Subpoena Duces Tecum
Government Reform Committee
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

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

The Committee hereby subpoenas certain records. Please provide logs which indicate each record's Bates number, author, description, and source file. If you have any questions, please contact Chief Counsel James C. Wilson at (202) 225-5074.

Definitions and Instructions

(1) For the purposes of this subpoena, the word "record" or "records" shall include, but shall not be limited to, any and all originals and identical copies of any item whether written, typed, printed, recorded, redacted or unredacted, transcribed, punched, taped, filmed, graphically portrayed, video or audio taped, however produced or reproduced, and includes, but is not limited to, any writing, reproduction, transcription, photograph, or video or audio recording, produced or stored in any fashion, including any and all activity reports, agendas, analyses, announcements, appointment books, briefing materials, bulletins, cables, calendars, card files, computer disks, cover sheets or routing cover sheets, drawings, computer entries, computer printouts, computer tapes, external and internal correspondence, diagrams, diaries, documents, electronic mail (e-mail), facsimiles, journal entries, letters, manuals, memoranda, messages, minutes, notes, notices, opinions, statements or charts of organization, plans, press releases, recordings, reports, Rolodexes, statements of procedure and policy, studies, summaries, talking points, tapes, telephone bills, telephone logs, telephone message slips, records or evidence of incoming and outgoing telephone calls, telegrams, telexes, transcripts, or any other machine readable material of any sort whether prepared by current or former employees, agents, consultants or by any non-employee without limitation. "Record" or "records" shall also include all other records, documents, data and information of a like and similar nature not listed above.

(2) For purposes of this subpoena, the terms "refer" or "relate" and "concerning" as to any given subject means anything that constitutes, contains, embodies, identifies, mentions, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

(3) This subpoena calls for the production of records, documents and compilations of data

and information that are currently in your possession, care, custody or control, including, but not limited to, all records which you have in your physical possession as well as any records to which you have access, any records which were formerly in your possession, or which you have put in storage or anyone has put in storage on your behalf. Unless a time period is specifically identified, the request includes all documents to the present.

(4) The conjunctions "or" and "and" are to be read interchangeably in the manner that gives this subpoena the broadest reading.

(5) No records, documents, data or information called for by this subpoena shall be destroyed, modified, redacted, removed or otherwise made inaccessible to the Committee.

(6) If you have knowledge that any subpoenaed record, document, data or information has been destroyed, discarded or lost, identify the subpoenaed records, documents data or information and provide an explanation of the destruction, discarding, loss, deposit or disposal.

(7) When invoking a privilege as to any responsive record, document, data or information as a ground for withholding such record, document, data or information, list each record, document, compilation of data or information by data, type, addressee, author (and if different, the preparer and signatory), general subject matter, and indicated or known circulation. Also, indicate the privilege asserted with respect to each record, document, compilation of data or information in sufficient detail to ascertain the validity of the claim of privilege.

(8) This subpoena is continuing in nature. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date shall be provided immediately upon location or discovery subsequent thereto.

Subpoenaed Items

Please produce to the Committee the following records.

1. All records related to decisions either to prosecute, or refrain from prosecuting, Stephen Flemmi, including, but not limited to, records relating to decisions to prosecute, or refrain from prosecuting Flemmi for the bombing assualt on attorney John Fitzgerald. Please exclude all records drafted in anticipation of, or subsequent to, the 1995 indictment of Stephen Flemmi.

2. All records related to decisions either to prosecute, or refrain from prosecuting, James J. "Whitey" Bulger. Please exclude all records drafted in anticipation of, or subsequent to, the 1995 indictment of James J. "Whitey" Bulger.

3. All records related to decisions either to prosecute, or refrain from prosecuting, Joseph Barboza.

4. All records related to decisions either to prosecute, or refrain from prosecuting, Vincent J. "Jimmy the Bear" Flemmi.

5. All records related to decisions either to prosecute, or refrain from prosecuting, Raymond L. S. Patriarca.

6. All records related to decisions either to prosecute, or refrain from prosecuting, Gennaro Angiulo.

7. All records related to decisions either to prosecute, or refrain from prosecuting, Theodore J. Sharliss, a.k.a. James Chalmas.

8. All records related to decisions either to prosecute, or refrain from prosecuting, Joseph "J.R." Russo.

9. All records related to decisions either to prosecute, or refrain from prosecuting, H. Paul Rico. Please exclude all records prepared by the Justice Department Task Force led by John Durham.

10. All records related to decisions either to prosecute, or refrain from prosecuting, John Connolly, Jr. Please exclude all records prepared by the Justice Department Task Force led by John Durham.

11. All records related to decisions either to prosecute, or refrain from prosecuting, John Morris.

12. All records related to decisions to prosecute Francis P. Salemme for the bombing assault on attorney John Fitzgerald.

13. All records related to decisions to prosecute, or to refrain from prosecuting, Robert Daddeico.

14. Any report or memorandum by Robert Conrad recommending the appointment of a special counsel to investigate campaign fundraising matters, and all memoranda drafted in response to Mr. Conrad's memorandum, including any replies or rebuttals by Mr. Conrad.

15. All declination memoranda relating to Mark E. Middleton.

Mr. WAXMAN. Thank you very much, Mr. Chairman, for yielding to me. I want to commend you on holding this hearing, and I want to tell you that your determination is one that's shared by others on this committee as well. Because what you're fighting for is a matter of principle.

This hearing addresses a fundamental issue in our democracy, the accountability of the executive branch to Congress, and to the American people. I agree with Chairman Burton, the Justice Department's new policy not to turn over any deliberative documents to Congress that relate in any way to criminal cases, even closed criminal cases, goes too far.

Over the past 5 years, Chairman Burton often complained of stonewalling by the Clinton administration. I have to say that compared to this administration, the Clinton administration was an open book. The sheer volume of information provided to this committee, over 1.2 million pages, dwarfs what the Bush administration has supplied.

Moreover, we received details of discussions between President Clinton and his closest advisors, internal e-mails from the Office of the Vice President, documents describing contacts between the administration and campaign contributors and confidential communications from the White House counsel's office.

In the pardon controversy, after he left office, President Clinton allowed his lawyers and most senior advisors to testify before our committee, and he allowed the committee staff to review raw notes of his conversations with a foreign head of state. My staff has prepared a report detailing the extent of the information produced by the Clinton administration, and I ask unanimous consent that it be introduced into the record.

Mr. SHAYS [assuming Chair]. Without objection, so ordered.

[The information referred to follows:]

Congressional Oversight of the Clinton Administration

Minority Staff
Committee on Government Reform
U.S. House of Representatives

President Clinton, Vice President Gore, and their Administration were subjected to extensive congressional oversight. The Clinton Administration produced well over 1.2 million pages of documents to the House Government Reform Committee alone. The information provided to Congress included details of discussions between President Clinton and his closest advisors, internal e-mails from the Office of the Vice President, FBI interview notes, and documents describing every detail of contacts between the Administration and outside parties, including campaign contributors.

Number of Documents Provided to Congress. There is no comprehensive estimate of the number of documents provided by the Clinton Administration to Congress, but the total amount of documents is enormous. The General Accounting Office examined White House efforts to provide documents to Congress over an 18-month period from October 1996 to March 1998. GAO found that during this period alone, White House staff spent over 55,000 hours responding to over 300 congressional requests, producing hundreds of thousands of pages of documents and hundreds of video and audio tapes to Congress.[1]

The House Government Reform Committee conducted some of the most extensive investigations of the Clinton Administration. In total, the Committee received well over 1.2 million pages of documents from the Clinton Administration between January 1997 and January 2001.

Types of Information Provided to Congress. In the course of responding to congressional requests for information, the Clinton Administration produced a wide variety of documents and other information to Congress, including exceptionally sensitive materials. Examples of the types of information provided by the White House to the House Government Reform Committee are described below.

- **Discussions Between the President and His Advisors**. President Clinton waived executive privilege to allow his advisors to testify before the Committee about their discussions with him regarding the exercise of the presidential pardon power.[2] Attorney General Janet Reno informed the Committee about her discussions with the President during the confrontation at

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[1]Minority Staff, House Committee on Government Reform and Oversight, *The Cost of Congressional Campaign Finance Investigations to the U.S. Taxpayer*, 3 (Oct. 7, 1998) (available at http://www.house.gov/reform/min/pdf/cfCostRepNew.pdf).

[2]Letter from David E. Kendall to Rep. Dan Burton (Feb. 27, 2001).

Waco.[3] Senior presidential advisors spent hundreds of hours in depositions before Committee staff. These advisors included White House Chief of Staff Erskine Bowles,[4] White House Chief of Staff Mack McLarty,[5] and Senior Advisor and Deputy White House Counsel Bruce Lindsey.[6]

- **Internal White House E-Mails**. The White House spent over $12 million to reconstruct internal White House e-mails for Committee review.[7] Thousands of pages of White House e-mails were provided to the Committee, including e-mails between the Vice President and his staff.[8]

- **Confidential Communications from the White House Counsel's Office**. The White House Counsel's Office turned over to the Committee many documents containing sensitive legal advice or communications. In a private-sector context, these documents would be covered by the attorney-client privilege and the work-product privilege. For example, during its campaign finance investigation, the Committee received notes taken by White House counsel reflecting attorney-client communications,[9] while during its investigation into the White House e-mail system, the Committee received a memorandum containing legal advice from the Vice President's counsel to the Vice President.[10]

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[3]*See* Interview of Attorney General Janet Reno, House Committee on Government Reform, 86-89 (Oct. 5, 2000).

[4]*See* Deposition of Erskine Bowles, House Committee on Government Reform and Oversight (May 5, 1998).

[5]*See* Deposition of Thomas F. McLarty, House Committee on Government Reform and Oversight (Sept. 5, 1997).

[6]*See* Deposition of Bruce Lindsey, House Committee on Government Reform and Oversight (Sept. 8, 1997, Apr. 29, 1998).

[7]Letter from Phillip D. Larsen, Special Assistant to the President and Director of the Office of Administration, to Rep. Ernest J. Istook, Jr. (Aug. 1, 2001).

[8]*See, e.g.,* E-Mail from Joel Velasco to Vice President Gore (Feb. 22, 1998) (E 8701); E-Mail from Holly D. Carver to Vice President Gore (May 15, 1995) (E 8812).

[9]*See* untitled handwritten notes (undated) (EOP 055620-055635).

[10]*See* Memorandum from Todd Campbell to the Vice President (Nov. 2, 1993) (E 5795-5801).

- **DOJ and FBI Investigative and Prosecutorial Materials**. The Clinton Administration provided the Committee with over 2,000 pages of FBI "302s," which are summaries of FBI interviews during criminal investigations.[11] The Administration also provided the Committee with unprecedented access to "prosecution memos" written by FBI Director Louis Freeh and campaign finance task force head Charles G. La Bella, allowing the Committee to review the memos in late 1998 and providing written copies in May 2000.[12]

- **Role of Political Supporters and Campaign Contributors in Influencing Policy**. Many Committee investigations of the Clinton Administration examined whether political supporters or campaign contributors influenced federal policies. During these investigations, the Clinton Administration routinely provided the Committee with information about its contacts with outside interests, as well as documents detailing internal deliberations affecting these outside interests. For example, the Administration produced all documents sought by the Committee when the Committee investigated whether campaign contributions influenced the Administration's decision to deny an Indian tribe's application for a dog track in Hudson, Wisconsin. The documents provided to the Committee included telephone records,[13] internal memoranda discussing the issue,[14] and even preliminary drafts of the final decision.[15]

- **Information Relating to Task Forces and Commissions**. Based on a request from a Republican congressman, the Clinton Administration provided the General Accounting Office (GAO) with the names of the private individuals who worked for or consulted with President

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[11] *See, e.g.*, FBI FD-302s for Johnny Chung (FBI 001-133), John Huang (DOJ-H 0001 through 0282, FBI-HUANG-S-0001 through 0028), and Charlie Trie (FBI-TRIE 001 through 153).

[12] House Committee on Government Reform, *Janet Reno's Stewardship of the Justice Department: A Failure to Serve the Ends of Justice*, 106th Cong., 2d Sess., v. 2, 2018-19 (Dec. 13, 2000) (H. Rept. 106-1027).

[13] *See, e.g.*, House Committee on Government Reform, *Investigation of Political Fundraising Improprieties and Possible Violations of Law*, 105th Cong., 2d Sess., v. 3, 3306-07 (Nov. 5, 1998) (H. Rept. 105-829) (Exhibit 21).

[14] *See, e.g.*, Memorandum from Office of the Area Director to Assistant Secretary - Indian Affairs (date partially illegible, 1994) (EOP 064500 to 064504); Memorandum from Indian Gaming Management Staff to Director, Indian Gaming Management Staff (June 8, 1995) (03195-03210).

[15] *See, e.g.*, House Committee on Government Reform, *The Department of the Interior's Denial of the Wisconsin Chippewa's Casino Applications*, 105th Cong., 2d Sess., v. 3, 459-62 (Jan. 21, 22, 28, 29, 1998) (H. Rept. 105-92) (Exhibit 4 to Deposition of Heather Sibbison).

Clinton's health care task force.[16] Based on a similar request, the Clinton Administration provided GAO with communications between the White House China Trade Relations Working Group and parties outside the executive branch.[17] The Clinton Administration also directly provided the Committee with extensive information about the activities and operation of the Commission on United States-Pacific Trade and Investment Policy.[18]

- **White House Contacts with Private Individuals**. The Clinton Administration complied with Committee requests for extensive information about White House contacts with private individuals. For example, the White House provided records identifying persons who attended White House movies,[19] were invited to private dinners at the White House,[20] attended lunch in the White House mess,[21] or sat in the President's Box at the Kennedy Center.[22]

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[16]*See* White House Press Release (Mar. 26, 1993).

[17]Letter from Robert P. Murphy, General Counsel, General Accounting Office, to Rep. Frank Wolf (May 22, 2000).

[18]*See, e.g.,* Letter from Susan G. Esserman, General Counsel, Office of the U.S. Trade Representative, to Rep. Dan Burton (May 23, 1997)

[19]*See* document titled "RSVP List" (undated) (EOP 025922-025926).

[20]*See* document titled "Private Dinner - Wednesday, June 16, 1993 - 7:30 PM" (undated) (EOP 037768-037785).

[21]*See* document titled "Lunch at the WH Mess" (undated) (EOP 047623).

[22]*See* Memorandum from Eric Sildon, Democratic National Committee, to Debi Schiff and Donald Dunn, the White House (Sept. 15, 1995) (EOP 017931).

Mr. WAXMAN. The Bush administration is taking a completely different approach. The Bush administration appears to believe it is entitled to operate outside the public eye and outside the view of elected representatives in Congress. They enthusiastically embrace secrecy, and they've operated as if they had no reason to be accountable to the public or to the Congress.

The fact of the matter is, and the chairman so eloquently expressed this, that our system is one of checks and balances. The Congress, through its oversight responsibility, provides an important check to abuse of power. That is why the Constitution gave us this specific obligation to look at the actions of the executive branch.

President Bush unilaterally issued an Executive order that changed the disclosure requirements in the Presidential Records Act of 1987. His order drastically restricted public access to important Presidential records. Congressman Dingell and I, along with the General Accounting Office, have been trying since April to find out how Vice President Cheney's Energy Task Force operated.

There have been news reports that the Task Force met privately with major campaign contributors to discuss energy policy, while environmental and consumer organizations were denied similar access. One of those contributors, of course, is Kenneth Lay, the CEO of Enron. But the White House has refused to turn over the relevant information to us or the General Accounting Office. Compare that with the Clinton administration making available to the General Accounting Office all the information about the Clinton Health Care Task Force, chaired by Mrs. Clinton.

The Bush administration has adopted positions in international negotiations over the framework convention on tobacco control that would weaken the treaty and benefit the tobacco companies that have been major contributors to the Bush campaign. In fact, I obtained information that indicates U.S. negotiators supported 10 of the 11 weakening changes sought by Philip Morris. I have written to the President and other executive branch agencies to learn the basis for these positions, but the administration has refused to provide most of the relevant information.

This hearing today focuses on another troubling example of an administration loath to face scrutiny. There have been well publicized allegations that FBI agents in the Boston office of the FBI willfully ignored crimes committed by confidential informants and cooperating witnesses who gave them information on organized crime in New England. These allegations have been substantiated. Judge Mark Wolf, a U.S. District Judge in Boston, conducted extensive evidentiary hearings in 1998. He found instances of extensive misconduct and criminal conduct in that office. A former special agent, John Connelly, is now under indictment.

Yet despite this record, the Attorney General is refusing to turn over key materials relating to these allegations. These materials include documents that relate to closed cases that this committee is clearly entitled to receive.

I believe the administration needs to be more forthcoming with this committee and the Congress. An imperial Presidency or an imperial Justice Department conflicts with the fundamental democratic principles of our Nation.

I thank the chairman again for this hearing and yield back the balance of my time.

[The prepared statement of Hon. Henry A. Waxman follows:]

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Statement of Rep. Henry Waxman
Hearing on Justice Department Subpoena Compliance
December 13, 2001

I am pleased that we are holding this important hearing today. It addresses a fundamental issue in our democracy: the accountability of the executive branch to Congress and the American people.

Let me begin by saying that I have often disagreed with Chairman Burton when it comes to this Committee's investigations and its criticisms of the Justice Department. In fact, I and other Democrats on this Committee strongly opposed his efforts to hold Attorney General Reno in contempt for refusing to turn over the Freeh and La Bella memos more than three years ago. I remember hearing both Mr. Freeh and Mr. La Bella testify how release of those memos would devastate the Justice Department's ongoing campaign finance investigation. For that reason, I thought it would be unwise for our Committee to enforce the subpoena.

But today, I find myself in an unusual position. I agree with Chairman Burton. The Justice Department's new policy not to turn over any deliberative documents to Congress that relate in any way to criminal cases -- even closed criminal cases -- goes too far.

Over the past five years, Chairman Burton often complained of stonewalling by the Clinton Administration. I don't want to re-live those battles, but I have to say that compared to this Administration, the Clinton Administration was an open book. The sheer volume of information provided to this Committee -- over 1.2 million pages -- dwarfs what the Bush Administration has supplied. Moreover, we received details of discussions between President Clinton and his closest advisors, internal e-mails from the Office of the Vice President, documents describing contacts between the Administration and campaign contributors, and confidential communications from the White House Counsel's office. In the pardon controversy after he left office, President Clinton allowed his lawyers and most senior advisors to testify before our Committee, and he allowed the Committee staff to review raw notes of his conversations with a foreign head of state.

-over-

My staff has prepared a report detailing the extent of the information produced by the Clinton Administration. I ask unanimous consent that it be introduced into the record of this hearing.

The Bush Administration is taking a completely different approach.
The Bush Administration appears to believe it is entitled to operate outside the public eye and outside the view of its elected representatives in Congress. For example –

- President Bush unilaterally issued an Executive Order that changed the disclosure requirements in the Presidential Records Act of 1987. His Order drastically restricts public access to important Presidential records.

- Congressman Dingell and I -- along with the General Accounting Office -- have been trying since April to find out how Vice President Cheney's energy task force operated. There have been news reports that the task force met privately with major campaign contributors to discuss energy policy, while environmental and consumer organizations were denied similar access. One of those contributors, of course, is Kenneth Lay, the CEO of Enron. But the White House has refused to turn over the relevant information to us or the General Accounting Office.

- The Bush Administration has adopted positions in the international negotiations over the Framework Convention on Tobacco Control that would weaken the treaty and benefit tobacco companies that have been major contributors to the Bush campaign. In fact, I obtained information that indicates that U.S. negotiators supported 10 of the 11 weakening changes sought by Philip Morris. I have written to the President and other executive branch agencies to learn the basis for these positions, but the Administration has refused to provide most of the relevant information.

This hearing today focuses on another troubling example of an Administration loath to face scrutiny. There have been well publicized allegations that FBI agents in the Boston office of the FBI willfully ignored crimes committed by confidential informants and cooperating witnesses who gave them information on organized crime in New England. These allegations have been substantiated. Judge Mark Wolf, a United States District Judge in Boston, conducted extensive evidentiary hearings in 1998. He found instances of extensive misconduct and criminal conduct in that office. A former special agent, John Connelly, is now under indictment.

Yet despite this record, the Attorney General is refusing to turn over key materials relating to these allegations. These materials include documents that relate to closed cases that this Committee is clearly entitled to receive.

I believe the Administration needs to be more forthcoming with this Committee and the Congress. An Imperial Presidency -- or an Imperial Justice Department -- conflicts with the fundamental democratic principles of our nation.

Mr. BURTON [resuming Chair]. Thank you, Mr. Waxman.

We will go to Mr. Gilman in just a second. I want to get a couple of formal things done.

I ask unanimous consent that all Members' and witnesses' written and opening statements be included in the record. Without objection, so ordered.

I ask unanimous consent that all articles, exhibits and extraneous or tabular material referred to be included in the record. Without objection, so ordered.

I also ask unanimous consent that questioning in the matter under consideration proceed under clause 2(j)(2) of House rule 11, and committee rule 14, in which the chairman and ranking minority member allocate time to committee counsel as they deem appropriate for extended questioning, not to exceed 60 minutes, divided equally between the majority and the minority. And without objection, so ordered.

I also ask unanimous consent that our good friends, Representatives Frank, Delahunt and Meehan, who are not members of the committee, be permitted to participate in today's hearing. Without objection, so ordered.

I will now yield to Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman.

I want to thank you for conducting this hearing on a matter of importance not only for this committee but for the future of congressional relations with the Justice Department. We want to make sure those relations are going to be in good stead.

The Justice Department has recently indicated that it will no longer comply with congressional requests for deliberative documents pertaining to criminal investigations, whether open or closed. Such a move signals a troubling and arguably unconstitutional shift in policy between the executive and legislative branches of our Government.

Although it's possible to understand that matters of national security may be grounds for limiting congressional access to Federal criminal investigation documents, I cannot understand Justice blocking congressional oversight entirely. It's particularly troubling that the Justice Department is restricting this committee's access to documents that would be germane to the case of the FBI's handling of confidential informants in the Boston organized crime investigation.

At the initial hearing on this issue on May 3rd, we heard some very strong testimony of Mr. Joseph Salvati, who had been wrongly accused and imprisoned for murder for nearly three decades. At that hearing, questions were raised about the FBI's knowledge of Mr. Salvati's innocence. Therefore, it would seem particularly irresponsible for Justice to deny this committee access to relevant documents in that matter.

Accordingly, we will welcome the comments of the representatives of Justice who are before the committee today, and we look forward to their clarification of this new policy.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Benjamin A. Gilman follows:]

REP. BENJAMIN A. GILMAN
FBI COMPLIANCE HEARING STATEMENT
12-13-01

I WANT TO THANK CHAIRMAN BURTON FOR HOLDING THIS HEARING ON A MATTER OF GRAVE IMPORTANCE NOT ONLY FOR THIS COMMITTEE BUT ALSO FOR THE FUTURE OF CONGRESSIONAL RELATIONS WITH THE JUSTICE DEPARTMENT.

THE JUSTICE DEPARTMENT HAS RECENTLY INDICATED THAT IT WILL NO LONGER COMPLY WITH CONGRESSIONAL REQUESTS FOR DELIBERATIVE DOCUMENTS PERTAINING TO CRIMINAL INVESTIGATIONS, WHETHER OPEN OR CLOSED. SUCH A MOVE SIGNALS A TROUBLING AND ARGUABLY UNCONSTITUTIONAL SHIFT IN POLICY BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES OF OUR NATION'S GOVERNMENT.

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ALTHOUGH IT IS POSSIBLE TO UNDERSTAND THAT MATTERS OF NATIONAL SECURITY ~~WOULD~~ MAY BE GROUNDS FOR LIMITING SOME CONGRESSIONAL ACCESS TO FEDERAL CRIMINAL INVESTIGATION DOCUMENTS, I CAN ~~FIND NO REASON FOR~~ NOT UNDERSTAND THE JUSTICE DEPARTMENT ~~TO~~ BLOCKING CONGRESSIONAL OVERSIGHT ENTIRELY.

IT IS PARTICULARLY TROUBLING THAT THE JUSTICE DEPARTMENT IS RESTRICTING THIS COMMITTEE'S ACCESS TO DOCUMENTS GERMANE TO THE CASE OF THE FBI'S HANDLING OF CONFIDENTIAL INFORMANTS IN THE BOSTON ORGANIZED CRIME INVESTIGATION. AT THE INITIAL HEARING ON THIS ISSUE ON MAY 3RD WE HEARD THE EMOTIONAL TESTIMONY OF MR. JOSEPH SALVATI WHO HAD BEEN WRONGLY ACCUSED AND IMPRISONED FOR MURDER FOR NEARLY THREE DECADES. AT THAT HEARING, QUESTIONS WERE RAISED

3

ABOUT THE FBI'S KNOWLEDGE OF MR. SALVATI'S INNOCENCE. THEREFORE IT WOULD SEEM PARTICULARLY IRRESPONSIBLE FOR THE JUSTICE DEPARTMENT TO DENY THIS COMMITTEE ACCESS TO RELEVANT DOCUMENTS ON THIS MATTER.

ACCORDINGLY, I WELCOME THE COMMENTS OF THE REPRESENTATIVES FROM THE JUSTICE DEPARTMENT WHO SIT BEFORE THIS COMMITTEE TODAY AND LOOK FORWARD TO THEIR CLARIFICATION OF THIS POLICY.

Mr. BURTON. Thank you, Mr. Gilman.

Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman. I want to thank you, Mr. Chairman, for holding this hearing today. I think we were all moved and deeply troubled by the testimony that we heard during our May hearing concerning the FBI's controversial handling of the organized crime investigations in Boston, and the case of, in particular, Joseph Salvati. I appreciate the opportunity to hear today from the Department of Justice about why it continues to obstruct efforts to bring about more information on this situation.

As others have mentioned here, the genius of our political system lies in its checks and balances. As members of this committee, we have a responsibility to perform an oversight role of other branches of Government. As a Member of Congress from the Commonwealth of Massachusetts, I feel particularly responsible to see that the FBI cooperates with efforts to ensure that the victims of potentially grossly improper relationships between FBI agents and members of Boston's organized crime see justice done.

For this reason, I'm concerned about the Justice Department's decision not to turn over any internal deliberative documents pertaining to criminal investigation, even if such documents are responsive to committee subpoenas. This has a direct impact on information subpoenaed by the committee, related to the FBI's use of informants in New England's organized crime investigations.

The FBI has claimed that the committee's ability to subpoena documents may lead to a chilling effect where agents are unable to act freely for fear of their decisionmaking documents being subpoenaed. I'm more concerned about the effect of unchecked secrecy on the FBI's behavior. For almost 40 years, FBI agents in Boston are said to have recruited members of organized crime to act as Bureau informants. At the same time, it can be argued that these agents may well have been recruited themselves by organized crime.

Instead of upholding the law or protecting the innocent, these agents are alleged to have protected their informants. The most disturbing aspect of these cases, of course, is that the FBI and other branches of law enforcement knew that some of the men they helped send to prison were innocent of crimes for which they were found guilty. Evidence also indicates that FBI Director J. Edgar Hoover may well have known himself that innocent men were being convicted on the basis of perjured testimony.

As a result of these actions, the FBI's credibility has been seriously damaged and more importantly, the lives of countless individuals were ruined. Men innocent of the crimes for which they were convicted were sent to jail for decades. Joseph Salvati, from whom we heard in May, was sentenced to the electric chair. Thankfully, he has survived, but others were not as fortunate. Two of them died in prison.

If we're going to get to the bottom of these cases and prevent other similar situations from occurring in the future, we must ensure that the committee has access to the documents it needs. I hope we can get some of these satisfactory answers from the Justice Department witnesses today.

I look forward to Mr. Horowitz' testimony and I hope particularly that he'll elaborate on some of the points where the Justice Depart-

ment argues that this committee's legitimate oversight role doesn't extend to the Justice Department's exercise of prosecutorial discretion in individual cases. I want to know how is that so, when in fact it appears that it may well be a policy, not just a decision on an individual case, but a policy by the Department to engage in this kind of behavior.

I think that's something this committee should obviously look into. It's not just in New England and Boston, we have cases that we're hearing about now across the country, where there's been evidence that has been testified to improperly, the DNA evidence situations from many people incarcerated over a long period of time.

I think we ought to take this investigation with the chairman to the whole range of issues of people that have been unjustly imprisoned for what appears to be very wrongful conduct on the part of law enforcement agencies under the Federal purview. Those people are every bit as deserving as the people we focus on today for some attention.

If these are deliberative documents, Mr. Horowitz, I'd like you to define for us what you think your definition of deliberative documents are and why they fit the nature of privileged in the deliberative process here. I think that we are supposed to, according to the case law, as most of us read it, analyze this as a case by case basis, because it's a qualified privilege, not an absolute privilege.

When we balance, the fact is that the relevance and availability of the evidence, the role of the executive branch and the possibility of future timidity by Government employees against what has happened here, I think that it clearly comes down to that this evidence, this information ought to be reported to this committee and given to them so that we can make some policy decisions going forward about this range of cases and what has happened.

Last, you've contended that the release of the Boston FBI documents would undermine an active criminal investigation. Presumably, the investigations that are going on are closed in a lot of these instances right now. There's no argument, I think, that can be made as to why documents shouldn't be released with respect to closed criminal cases.

So if you would address those matters for this committee, I think we could get on with our work on dealing with the particulars of the cases mentioned here today, and that range of cases across the country where the behavior of the FBI in dealing with informants, on tainted evidence, on testimony in court about DNA evidence that resulted in people being incarcerated improperly is something we can continue to do and maybe make some policy decisions and legislative changes here, so that American citizens are less likely to find that to be a subject of those procedures as we go forward.

Mr. Chairman, I yield back the balance of my time.

Mr. BURTON. Thank you, Mr. Tierney.

Mrs. Morella.

Mrs. MORELLA. Thank you, Mr. Chairman. I want to thank you, Chairman Burton, and Ranking Member Waxman, for holding this hearing today.

Today's hearing on whether Congress can ever review deliberative documents prepared during an investigation by the executive branch I think is of utmost importance. The Justice Department's

proposed new policy that Congress would never be able to review deliberative documents is a radical change in policy. Up to this point, Congress has always been permitted access to deliberative documents and 3 years ago, then-Senator Ashcroft admonished Attorney General Reno for refusing to turn over deliberative documents in regard to a certain investigation and accused her of stonewalling.

Now it seems that Attorney General Ashcroft and the administration feel that allowing Congress to review deliberative documents is bad policy. I look forward to the testimony today from the Justice Department so that they can explain why the previous policy is now such a threat. Why does the Department feel that Congress should have basically no oversight in situations involving an act of corruption by a high Justice Department official or a high White House official?

This new policy also seems puzzling given Attorney General Ashcroft's remarks upon confirmation last winter when he said, "I will confront injustice by leading a professional Justice Department that is free from politics, that is uncompromisingly fair, a Department defined by integrity and dedicated to upholding the rule of law. The Justice Department will vigorously enforce the law guaranteeing rights for the advancement of all Americans."

I wonder if Mr. Salvati or his family feel that this new policy is "uncompromisingly fair," or would advance the rights of all Americans. I look forward to the testimony and I yield back the balance of my time, Mr. Chairman.

[The prepared statement of Hon. Constance A. Morella follows:]

Ignatius Morella 12.13.01

Morella Opening Remarks

I would like to thank Chairman Burton and Ranking Member Waxman for holding this hearing today. Today's hearing, on whether Congress can ever review deliberative documents prepared during an investigation by the Executive Branch, is of the utmost importance. The Justice Department's proposed new policy that Congress would *never* be able to review deliberative documents is a radical change in policy. Up to this point, Congress has always been permitted access to deliberative documents and 3 years ago, then Senator Ashcroft admonished Attorney General Reno for refusing to turn over deliberative documents in regards to a certain investigation and accused her of "stonewalling".

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I yield back the balance of my time.

Mr. BURTON. Thank you, Mrs. Morella.

Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman, for holding this very important hearing. The grossest imaginable miscarriage of justice consigned Joseph Salvati to a prison cell for 30 years for a crime he did not commit. Law enforcement officials from the Federal Bureau of Investigation, FBI headquarters to local police department, knew he was innocent. The man was innocent.

But these governments hid exculpatory evidence to protect informants in so-called bigger cases. Today we are still trying to uncover some of that hidden evidence concealed for so long by a prosecutory system now claiming the need for almost total immunity from public scrutiny. If any case rebutted that claim, it is Mr. Salvati's, an innocent man sent to prison for 30 years by his own Government for a crime they knew he never committed.

We want, and more importantly, need to know how that could happen in the United States of America. But unfortunately, the Government that facilitated this injustice fights to cover it up. The protection of confidential informants by law enforcement in what can amount to a non-judicial street immunity and an official license to commit further crimes is a national practice and a national outrage. Only thorough and timely oversight can address that corruption that plagues the use of informants. To do that oversight we need access to the documents supporting prosecutory decisions.

No entire class or category of document can be arbitrarily declared beyond congressional reach. Conceding total exclusion of so-called pre-decisional material produced by the Department of Justice, the Department of Defense or any agency, fatally undermines congressional oversight authority and cannot be allowed to stand, no matter which political party constitutes the majority of Congress and no matter which political party is in charge of the White House.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Christopher Shays follows:]

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INDEPENDENT

SUBCOMMITTEE ON NATIONAL SECURITY, VETERANS AFFAIRS,
AND INTERNATIONAL RELATIONS
Christopher Shays, Connecticut
Chairman
Room B-372 Rayburn Building
Washington, D.C. 20515
Tel: 202 225-2548
Fax: 202 225-2382
GROC.NS@mail.house.gov
http://www.house.gov/reform/ns/

Statement of Rep. Christopher Shays
December 13, 2001

The grossest imaginable miscarriage of justice consigned Joseph Salvati to a prison cell for thirty years for a crime he did not commit. Law enforcement officials from Federal Bureau of Investigation (FBI) headquarters to the local police department knew he was innocent, but hid exculpatory evidence to protect informants in "bigger" cases.

Today, we are still trying to uncover some of that hidden evidence, concealed for so long by a prosecutorial system now claiming the need for almost total immunity from public scrutiny. If any case rebutted that claim, it is Mr. Salvati's.

The protection of confidential informants by law enforcement, in what can amount to non-judicial street immunity and an official license to commit further crimes, is a national practice and a national problem. Only thorough and timely oversight can address the corruption that plagues the use of informants. To do that oversight, we need access to the documents supporting prosecutorial decisions.

No entire class or category of document can be arbitrarily declared beyond congressional reach. Conceding total exclusion of so-called "pre-decisional" material produced by the Department of Justice, the Department of Defense, or any agency fatally undermines congressional oversight authority.

Mr. BURTON. Thank you, Mr. Shays.

Mr. Horn.

Mr. HORN. Thank you, Mr. Chairman.

This has to be one of the major hearings we have. And I want to put on the record that there's a new Attorney General, there's a new Director of the FBI, and it needs to clean house in the Boston area of FBI agents that did not be a person that would be of honor. We need to clean that house.

It's like the little boy outside the stadium, hey, say you didn't do it, Joe. Well, if Joe did it, let's clean house. All of us that grew up in the 1930's, 1940's, 1950's, we looked to the FBI as a great service. When Mr. Hoover was brought over by Attorney General Stone to clean house after the first World War, he cleaned house. On the other hand, Mr. Hoover didn't tangle with the Mafia. He tangled with cars, bank robberies, all the rest.

And now we need to make sure that people that are in jail should not be in jail or prison, and that they must be let out and there ought to be compensation for them if they've got 10, 20, 30, and we saw the person for 30 years. It's wrong and a country that prepares itself and thinks that we are good laws, good regulations and we expect that of the Department of Justice, the Federal Bureau of Investigation, and I would hope people come forth within the FBI to make sure we don't have to go through this again.

Mr. BURTON. Thank you, Mr. Horn.

Mr. LaTourette.

Mr. LATOURETTE. Thank you, Mr. Chairman.

Mr. Chairman, I have to admit to being behind the curve. I came down this morning thinking we were going to receive information and evidence from the Department of Justice relative to the prosecution of Joseph Salvati. I was looking forward very much to that hearing, because of the fact that the previous hearing that this committee had held horrified me that our Government could participate in the type of activity that led to his incarceration and some of the other activities.

After that hearing, my friend and colleague Mr. Delahunt was kind enough to give me a book called Black Sabbath that I read from cover to cover. I was further horrified, and that made me all the more anxious to receive the information we were expected to receive today. When I say I'm behind the curve, it's because ever since the terrorist attacks of September 11th, we all are equipped with these Blackberries. It was on my Blackberry as I walked from my office that I read the wire story that indicated that the President had issued this Executive order.

I've had the pleasure of serving on this committee for 7 years. I was here when Chairman Clinger was here, and I've served every year that you've been the chairman, Chairman Burton. And I can remember vividly the frustration that many of us on this side of the aisle felt when we would make document requests, when we would ask for stuff from the previous administration, when we were met with silence.

I know that one of our colleagues who isn't here, Mr. Souder, his favorite opening statement was to put up a chart about all the people that had fled the country and escaped the committee's jurisdiction. It seems to me that the new administration has avoided that

problem of people leaving the jurisdiction or not answering things because they're now covered by a blanket of claim of executive privilege.

It really is beyond me how this is a legitimate exercise of executive privilege. It is beyond me that the Justice Department and the administration would not want those who participated in what is nothing less than a conspiracy to deprive a man of his freedom for 30 years, wouldn't want that to be known by a co-equal branch of the Government and then by the American public, so that this thing could be sorted out.

It causes me a great deal of difficulty as a Republican, because we're being asked by the same administration and Justice Department to look at, in light of what's happened in this country as a result of terrorist activities, of restricting perhaps some individual liberties and enhancing police powers. That combination of enhanced police powers then saying, well, we're going to enhance police powers but we're not going to tell you anything about it after we've done it I think is the most obnoxious form of doing business that I can think of.

I really hope, as a supporter of the President, that the President revisits this and the Attorney General revisits this. And that you guys give to the U.S. Congress the documents that I think we're entitled to, so we can do our job just like you're expected to do yours. Thank you.

Mr. BURTON. Thank you, Mr. LaTourette.

Judge Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman.

First, I want to commend you for calling this hearing and say that I agree with everything you said in your opening statement. I hope that you do continue to call hearings on this. I intend to speak about this in special orders from the floor of the House over C–SPAN and hope that will call even more attention to it. Because I think this is one of the greatest miscarriages of justice that has ever occurred in this Nation, to keep a man in prison for more than 30 years when the FBI knew all along that he was innocent of the charges.

Just last week in the Washington Post, Joseph Califano, who was former top assistant to President Johnson and a former Secretary of Health and Human Services under President Carter, wrote that in all of our concerns about terrorism, he said we are "missing an even more troubling danger, the extraordinary increase in Federal police personnel and power." That brought to my mind a cover story that was written in 1993 in Forbes Magazine about the Justice Department. And Forbes Magazine, as all of us know, is a very conservative, pro-business magazine. But it's certainly not any radical, left-wing magazine.

But they reported that the Justice Department had more than quadrupled in size and budget since 1980. And they said that they had U.S. attorneys falling all over themselves trying to come up with cases to prosecute. The article said too often in Federal law enforcement, the name of the game is publicity, not reduction in the amount of crime. It was a stinging indictment of the Justice Department.

But the arrogance of the Federal bureaucracy seems to grow with each passing year, so that now we've ended up with a government of, by and for the bureaucrats, instead of one that's of, by and for the people. This is another example of that increasing arrogance and abuse of power, I think, that we are seeing far too often within the Federal Government.

I remember, I don't usually see the publications of the ACLU, but in 1996, I received a notice that I had received a zero rating from the ACLU. I spent 7½ years as a criminal court judge in Tennessee trying felony criminal cases, the murders, rapes, armed robberies, more serious criminal cases. I am certainly no great civil libertarian and I've always been considered very pro-law enforcement.

But I agree with Secretary Califano, and I am becoming very concerned about the arrogance that we're seeing within the FBI and within the Justice Department. I hope, Mr. Chairman, that you and this committee stay on top of this. Because if it gets any more out of control, we're going to be in serious trouble in this Nation.

I yield back the balance of my time.

Mr. BURTON. Thank you, Mr. Duncan. You may rest assured that there will be numerous hearings on this. I'm sure the gentleman before us today will get to know us quite well.

Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman, for the invitation extended to participate in these hearings. Let me preface my remarks by saying, if you and the committee make a decision to go to the floor of the House in terms of enforcing the subpoena that you will have my support, and I'm sure that Mr. Frank would be so inclined, also. I would encourage our leadership to support any move along those lines.

Let me thank you, by the way, for your perseverance, your persistence and even your courage. These days, when a Member of Congress speaks out on something unpopular, he takes or she takes the risk of being called some rather ugly names, really for questioning the exercise of the department's authority. I want to commend you, Mr. Chairman, for not being intimidated.

The use of executive privilege to shield officials from embarrassing revelations is nothing new. Every administration has done it. You pointed out instances where the Clinton administration was guilty of it. Doesn't make any difference whether it's Republican or Democratic.

But I'm unaware of any previous claim of privilege that is as sweeping as this particular claim. That is that the Justice Department would curtail even in closed cases, cases that have been in the archives for some time, access to all deliberative documents pertaining to criminal investigations. To me it's just unimaginable that the Department should take that position.

Others have used the term arrogant. In my opinion, that is mild at best in its description. There's no doubt that the courts in a long line of decisions have recognized the so-called deliberative process privilege of which at least until this point in time, the Department seems to have relied. But the privilege has never been absolute, never been absolute. It can be overcome, according to those deci-

sions, when the public's need for information outweighs the Government's need to withhold it.

I want to read this, this is from a 1997 case. "I would suggest it's a leading case on the subject. When there is reason to believe the documents sought may shed light on Government misconduct, the privilege is routinely denied on the grounds that shielding internal Government deliberations in this context does not serve the public's interest in honest, effective government."

Now, the Department seeks to free itself from the burden of making its case by asserting this blanket privilege. I would infer that on the one hand, there's a lack of confidence in its ability to withstand scrutiny. And by the way, it wasn't this Department of Justice where these instances occurred. But even that, on the other hand, it's the arrogant assumption that in light of recent events, Congress will not have the nerve to hold them to account.

Well, I think they ran into the wrong chairman and the wrong committee and hopefully the wrong Congress. Because everybody supports, obviously, the administration's efforts to address what happened in the aftermath of September 11th. But we can't prevail in our fight against terrorism and tyranny by scrapping the checks and balances that preserve us from tyranny here at home. We should never give carte blanche to executive agencies to make their own rules without congressional oversight, particularly when these agencies have a well documented history of abusing the formidable powers entrusted to them. Particularly when we just conferred upon them within the last 3 months additional broad powers.

Now, it's been said many times over, and it will be I'm sure a mantra that will be repeated again and again, that the FBI's mishandling of confidential informants in Boston is among the most infamous and cynical episodes in the modern history of law enforcement in this country. But what we see now are repeated attempts which really exacerbate that reality to cover up its wrongdoing by withholding documents and information subpoenaed by Congress. It should be noted that the court, Judge Wolf, had the same exact problem in those criminal proceedings that are currently being prosecuted in the Federal District Court of Boston.

I know you're frustrated, Mr. Chairman, but just imagine Judge Wolf, what his frustration was. Again and again and again, he expresses his frustration with the Department of Justice. And again I have a quote I want to issue from his decision. This is Judge Wolf, "I issued general orders that had the effect of requiring the production of FBI documents memorializing Brian Halloran's claim that Bulger and Flemmi"—those were the FBI's prize informants—"were responsible for the murder of Roger Wheeler."

"When found by special agent Stanley Moody, the documents were given to Barry Mawn, the special agent in charge of the FBI in Boston to review, because Moody said in an affidavit that contained information that was obviously highly singular and sensitive. They were not, however, produced in discovery in this case in time for the key witnesses, those were the FBI officials, Rico and Morris, to be questioned about them. They were not produced in time for the court and the lawyers involved in that particular case to have them available to them. Rather, they were belatedly disclosed after repeated inquiries by the court."

"Similarly important FBI documents concerning a murder victim, John McIntyre, were also improperly withheld by agents of the Boston FBI until it was too late to question relevant witnesses concerning them." That's the end of the applicable extract from Judge Wolf's decision.

And Mr. Chairman, you ought to be aware that myself and my colleagues that serve on the Judiciary Committee, Mr. Frank and Mr. Meehan, sent a letter to the Attorney General expressing, just expressing shock and outrage, that in the case of John McIntyre, the position of the Department of Justice was, in a suit brought by the family, that they didn't bring it in a timely fashion, because they should have known, they should have known that their son was murdered pursuant to information provided by FBI agents to Flemmi and Bulger.

Now, Judge Wolf goes on to note, by the way, in that same decision, "despite my published judicial findings of misconduct, Mawn has been promoted to Assistant Director of the FBI." The judge concluded that these experiences were not isolated occurrences, "of a long pattern of the FBI ignoring the Government's constitutional and statutory duties to be candid with the courts."

He quoted with approval the comments of two Senate Republicans that the confirmation hearings of Bob Mueller regarding, "a culture of concealment at the FBI," and "a management culture so arrogant that ignoring the rules and covering up is the order of the day." These are quotes by those two referenced members of the Senate Judiciary Committee.

One can just imagine where we would be today without Judge Wolf. We wouldn't be here. And nobody would know that Joe Salvati spent 30 plus years of his life in jail for a crime that he didn't commit. Nor would we be aware of the absolutely egregious misconduct of FBI agents in the Boston office. You know, I guess I shouldn't be surprised that the Department of Justice wants to set its own rules. Recently, there was, several years ago, legislation passed called the McDade Act. They're up here lobbying all the time trying to erode it, so they can write their own rules.

Well, you know, thank you, Mr. Chairman, for this hearing and thank you for your refusal to accede to intimidation. I yield back.

[The prepared statement of Hon. William D. Delahunt follows:]

U.S. House of Representatives
Committee on Government Reform

Opening Statement of the Honorable William D. Delahunt of Massachusetts

The FBI's Handling of Confidential Informants in Boston:
Will the Justice Department Comply with Congressional Subpoenas?

Thursday, December 13, 2001

Thank you, Mr. Chairman. I want to thank you for inviting me to participate in this hearing, and for your sustained attention to this issue.

These days a Member of Congress is likely to be called some pretty bad names merely for questioning the Administration's exercise of authority, and I commend you for refusing to be intimidated.

The use of executive privilege to shield officials from embarrassing revelations is nothing new. Every modern administration has engaged in the practice. But I am unaware of any previous claim of privilege that was as sweeping as this one.

Should the Justice Department succeed in curtailing access to all deliberative documents pertaining to criminal investigations—whether open or closed—it would deprive Congress and the public of their chief source of unfiltered information as to how government decisions are arrived at.

The courts have recognized the so-called "deliberative process" privilege on which the Department relies. But this privilege has never been absolute. It can be overcome when the public's need for the information outweighs the government's need to withhold it. To quote the leading case on the subject,

> When there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government.[1]

The Department now seeks to free itself from the burden of making its case by asserting a blanket privilege. This suggests, on the one hand, a sad lack of confidence in their ability to withstand scrutiny; and on the other hand, the arrogant assumption that in light of recent events, Congress will not have the nerve to hold them to account.

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[1] *In re: Sealed Case,* 121 F.3d 729, 737 (D.C. Cir. 1997) (*quoting Texas Puerto Rico, Inc. v. Dep't of Consumer Affairs,* 60 F.3d 867, 885 (1st Cir. 1995)).

We all support the Administration's efforts to address the current emergency. But we cannot prevail in our fight against foreign tyranny by scrapping the checks and balances that preserve us from tyranny here at home.

We cannot give *carte blanche* to executive agencies to make their own rules without congressional oversight—particularly when those agencies have a history of abusing the formidable powers entrusted to them.

The FBI's mishandling of confidential informants in Boston is among the most infamous and cynical episodes in the modern history of law enforcement. And the agency's repeated attempts to cover up its wrongdoing by withholding documents and information subpoenaed by Congress and the courts have only compounded the initial offense.

Mr. Chairman, if you are frustrated by the FBI's lack of compliance with this committee's requests, imagine the frustration of Judge Wolf, who throughout the course of the Federal proceedings has repeatedly chastised the FBI for flouting his orders to produce documents needed for *his* inquiry. In a recent decision he writes, and I quote:

> I issued general orders that had the effect of requiring the production of FBI documents memorializing Brian Halloran's claim that Bulger and Flemmi [the FBI's prize informants] were responsible for the murder of Roger Wheeler. When found by Special Agent Stanley Moody, the documents were given to Barry Mawn, the Special Agent in Charge of the FBI in Boston, to review, because, Moody said in an affidavit, they contained information that 'was obviously highly singular and sensitive.' They were not, however, produced in discovery in this case in time for the key witnesses, [senior FBI officials] Rico and Morris, to be questioned about them. Rather, they were belatedly disclosed after repeated inquiries by the court. Similarly, important FBI documents concerning [murder victim] John McIntyre were also improperly withheld by agents of the Boston FBI until it was too late to question relevant witnesses concerning them."[2]

Judge Wolf goes on to note that "despite my published judicial findings of misconduct, Mawn has been promoted to Assistant Director of the Federal Bureau of Investigation."

The judge concluded that these experiences were not isolated occurrences, but part of "a long pattern of the FBI: ignoring the government's constitutional and statutory duties to be candid with the courts. . ."[3] He quoted with approval the comments of two Republican members of the Senate Judiciary Committee at the confirmation hearings of Director

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[2] *U.S. v. Flemmi*, No. CR 94-10287-MLW, 2001 WL 1180914 at *5 (D. Mass. Aug. 30, 2001) (mem.).

[3] *Id.* at *4.

Mueller, regarding "a culture of concealment at the FBI," and "a management culture so arrogant that ignoring the rules and covering up is the order of the day."[4]

Without Judge Wolf's power to subpoena these documents and his determination to get at the truth, we still would not know the full extent of FBI misconduct in these cases. Given the resistance this committee is now encountering with regard to its own subpoenas, it seems clear that the "culture of concealment" is alive and well.

Mr. Chairman, I am not surprised that the Justice Department wants to set its own rules. As we have seen with their repeated efforts to weaken or overturn the McDade-Murtha law, they will go to any lengths to resist efforts to hold them accountable.

Unfortunately, we have seen what happens when they are left to their own devices. We have seen what happens to innocent citizens like Joseph Salvati. We have seen what happens to public confidence in the justice system.

This situation cannot be allowed to continue, Mr. Chairman, and I look forward to continuing to work with you to put a stop to it.

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[4] *Id.* (*quoting* reported statements of Senator Arlen Specter and Senator Charles Grassley).

Mr. BURTON. Thank you very much.

Mr. Frank.

Mr. FRANK. Mr. Chairman, I want to begin by apologizing to you. Very seriously, like many others, you and I differ on some things. I did think that, in the past, I had a question about whether there was too much partisanship in some of your approaches. And by the intellectual integrity you are displaying today, I think you've made it clear that was not a basis for what you were doing. And I admire enormously your commitment to honesty and to the separation of powers properly understood.

I from time to time during the previous administration differed with the administration. And I understand that there are people in any administration who regard it as absolutely impermissible that Members of Congress of their own party are to disagree with them. The general view of most people in the administration, when it comes to the House of Representatives, is that the only place there should be checks and balances is in the Members' bank accounts. And any expression of independence by the Members is taken as somehow disloyalty.

And you are showing today a commitment to fundamental principle that is rare in this city, and I want to acknowledge it. I want to also stress the importance for what we are talking about. We rely on the FBI. We gave the FBI significantly increased law enforcement powers and self defense. The problem is that there are fears that those powers will not be wielded with the sensitivity, the individual rights, that is necessary.

I was struck, in the President's Executive order, by this phrase: The Founders' fundamental purposes in establishing the separation of powers in the Constitution was to protect individual liberty. I would note, by the way, that in that regard, the most important separation of powers is the one between the judicial and executive branches. I hope that the people who wrote this Executive order will remember that when we talk about who tried whom, that the relevance of the separation of powers to protecting individual liberty means that you separate the executive and judicial branches in individual adjudications. You don't just use the separation of powers to keep Congress from being annoying.

My colleague from Massachusetts made reference to this McIntyre case, and I would ask, Mr. Chairman, if you would put this letter that Mr. Meehan, Mr. Delahunt and I sent into the record.

Mr. BURTON. Without objection.

[The information referred to follows:]

Dec-12-01 09:02pm From-US Rep Bill Delahunt 2022255658 T-439 P.02/03 F-491

Congress of the United States
House of Representatives
Washington, DC 20515

November 6, 2001

The Honorable John Ashcroft
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear General,

As Members of the House from Massachusetts who sit on the Judiciary Committee, we were very disappointed by the Department's posture in the lawsuit brought against the United States government by the family of John McIntyre.

As you know, the family is seeking damages on the grounds that John McIntyre was murdered by James Bulger and Stephen Flemmi during the time when they were FBI informants working closely with the Boston office of the Bureau. In fact, the Justice Department agrees with the family that Bulger and Flemmi were the murderers. And of course the Justice Department has been forced by Judge Mark Wolf to acknowledge the extremely close relationship that existed over a period of years between the Bureau and these two men.

Apparently, faced with this extremely unfortunate -- and embarrassing -- set of facts, the Justice Department has resorted to the kinds of procedural tactics that give the legal profession a bad name. In the name of the United States government, your department has sought to dismiss the suit, not by any reference to the merits nor by any challenge to the underlying facts, but by arguing that the suit comes too late -- thus penalizing the family on the grounds that they had information about the murder of their relative which they did not in fact have, and which the government indeed helped keep from them.

The fact that family members expressed their view that Mr. McIntyre was dead several years ago is legally irrelevant. That belief formed no basis for a lawsuit, and indeed, had such a lawsuit been filed at the time, the department would surely have sought its dismissal.

In fact, the suit is a timely one based on the point at which the information relevant to the suit did become available to the family. Thus, we have the Justice Department whose collaboration with Bulger and Flemmi may have contributed to this murder invoking its own secrecy about that collaboration to thwart an effort by the victim's family to receive justice in federal court. It is hard to think of a response that would be less faithful to the commitment to justice that we expect of the people's government.

The Honorable John Ashcroft
Page 2

In the recent debate over the anti-terrorism bill, we and others expressed the view that we were supportive of the department's request for greater law enforcement powers but believed that we should at the same time enact some safeguards to prevent abuse of those powers. And one of the sets of events that led many of us to stress that latter point was the FBI's entanglement with Bulger and Flemmi. The response the department is making in this effort by relatives of one of Bulger and Flemmi's victims to seek some redress in court can only confirm the fears of many that the FBI -- and, sadly, the Justice Department which should be supervising it -- still fails to understand the importance of this point.

As Members of the legislative branch of the United States government on whose behalf you are fighting the McIntyre family, we urge you strongly to reverse this position and allow this matter to be discussed and ultimately resolved on its merits, not by the invocation of an inappropriate procedural rule.

Rep. Barney Frank Rep. Martin Meehan Rep. William Delahunt

Mr. FRANK. And I should note how much I appreciate the fact that you have found a place for refugees from a somewhat somnolent Judiciary Committee in this regard by exercising your legitimate jurisdiction in this important case, and accommodating those of us in the Judiciary Committee who were homeless on this particular issue.

But what happened, as Mr. Delahunt said, is very clear. First, the FBI withholds documents that would give evidence about a murder that was committed by informants working for the FBI. Then when the information is finally forced out by a courageous judge, Mark Wolf, a Republican appointee, both as a member of the Justice Department and as a judge, when he courageously forces this into the public eye, and the family of the murdered man says, wait a minute, the FBI, the Federal Government, may have been complicit in the murder of our relative, we're going to sue them, the FBI, having withheld the information, now says, oh, we're sorry, it's too late for you to sue, because you should have sued earlier, during the period when the FBI was withholding the information which would have been the basis for the lawsuit.

It is just appalling that they would do this. And it's equally appalling that the current administration would somehow feel the need to cover up the mistakes of previous administrations. I don't know what bureaucratic reflex drives people to do this. I've seen it, I saw the Clinton administration defending the errors of the Bush and Reagan administration. Now we see the Bush administration defending the errors of the Clinton administration. There's no legitimate purpose here.

And I would just finally close with this. I invite the Justice Department, the FBI and others, I read the Executive order which the FBI prepared so the President can send them the instruction that they wanted him to give them, and I do believe the President's kind of busy right now, and I would hope that if we were in a situation in which more attention could have been given, I would have hoped that something this sweeping would not have been issued. The FBI successfully lobbied to get this kind of blanket exemption for itself.

But I would invite you, give us the evidence that previous efforts by the Congress to do oversight somehow interfered with your function. Give us the evidence that crimes went unprosecuted and evil went unchecked because the Members of Congress thought in a responsible way to exercise oversight. I can't think of any. And I must tell you, Mr. Chairman, that I believe if there were such cases, we'd be confronting them now.

So it's precisely because this is a time when enhanced law enforcement is so important that responsible law enforcement is equally important. Just one other point, and I appreciate your indulgence.

One of the problems civil libertarians have is, and I would just say to my colleague from Tennessee, I'll be glad to make sure he gets more ACLU publications, if he's having trouble reaching them, we'll get him on the mailing list. They'll have to be e-mailed, of course, since they can't be mailed.

But one of the problems civil libertarians have is, they have a counter-intuitive point to make. When people decline to testify

using their self-incrimination privilege, legally you are to draw no inference from that. But practically, anybody with a brain does draw inferences from it. It is overwhelming human instinct to say, hey, if she had something to say in order to defend, she probably would have said it. It is very rare that you look at the privilege of self-incrimination being invoked and don't assume that people have got something to hide.

Now, legally, we have to abide by the privilege of self-incrimination in any kind of a prosecution. But as a practical matter, no, very few of us accept the notion that people refuse to testify just because they are defending some abstract principle in every case. So the blanket refusal to share these documents, the absolute insistence on not sharing this information in my mind creates a very strong presumption that the FBI and the Justice Department know that these mistakes were made by their predecessors.

And the refusal to let us work together so that we can prevent these kinds of mistakes being made in the future is very troubling.

Mr. Chairman, I again want to express my appreciation and my admiration for the role you're playing in this regard.

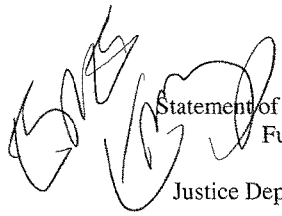
Mr. BURTON. Thank you, Mr. Frank.

Mr. Cummings, did you have a comment?

Mr. CUMMINGS. I don't have anything, Mr. Chairman. I have a statement that I'll submit for the record.

Mr. BURTON. OK, we'll accept that for the record, without objection.

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



Statement of the Honorable Elijah Cummings
Full Committee Hearing
entitled,
Justice Department Subpoena Compliance
December 13, 2001

Thank you, Mr. Chairman,

Justice is elusive for a variety reasons, many of which are out of our control. What we have here today, however, is a subject close to my heart because it is something we ***can*** change. Today's hearing will focus on a new Justice Department policy not to comply with congressional demands for internal, deliberative Justice Department documents related to criminal investigations. In particular, the hearing will highlight an outstanding subpoena for documents related to the Committee's investigation of misconduct in the Boston office of the Federal Bureau of Investigation.

Mr. Chairman, the Justice Department should provide this Committee with the Boston FBI documents. Unlike subpoena requests during the 106th Congress, it is my understanding that the release of these documents would not undermine an active criminal investigation and the documents only relate to closed criminal cases.

It is ironic that then-Senator Ashcroft, responding to a similar reluctance by the Justice Department to deliver documents to Congress, said "I think the House simply has to say, either our subpoenas are respected, or they are challenged on appropriate grounds. And if they are not...***contempt*** is the appropriate citation." Yet it is John Ashcroft himself, now Attorney General, who is stonewalling this body through his refusal to provide relevant deliberative documents, this time with respect to the FBI's handling of confidential informants in Boston.

Mr. Chairman, it is highly probable that the FBI mishandled confidential informants in Boston as we heard earlier this year at May 3 hearing. I want to reiterate what I said at that hearing. I am not condemning all law enforcement officers. There are honorable and hard working law enforcement officers, FBI agents, and Justice Department personnel who are doing their jobs to ensure our safety. But when there are reports of corruption, then we lose faith. During this time of crisis, faith in the Justice Department and FBI is very important.

I strongly urge the Justice Department to comply with congressional subpoenas as they relate to this closed FBI Boston case.

Thank you.

Mr. BURTON. Let me just say, in opening, before we go to you, Mr. Horowitz, because I know you probably have an opening statement, and I hope all of your compatriots here from the Justice Department and the White House have paid particular attention. We have liberals, moderates and conservatives on both sides of the aisle here, and everyone is in agreement. You guys are making a big mistake, because we might even be able to go to the floor and take this thing to court. I just don't understand it.

And with that, Mr. Horowitz, do you have an opening statement? Oh, excuse me, we'd like for you to be sworn in first. Will you please stand?

[Witnesses sworn.]

Mr. BURTON. Are you going to have anybody else testifying with you from the Justice Department?

Mr. HOROWITZ. Mr. Whelan is here from our Office of Legal Counsel, in case there are particular questions.

Mr. BURTON. Yes, and anyone else who may be participating in the testimony, would you please stand and be sworn?

[Witnesses sworn.]

Mr. BURTON. OK, you may start, Mr. Horowitz.

STATEMENT OF MICHAEL E. HOROWITZ, CHIEF OF STAFF, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY EDWARD WHELAN, PRINCIPAL DEPUTY, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. HOROWITZ. Thank you, Mr. Chairman. I appreciate the opportunity to be here before the committee to present the Department's views concerning the President's invocation of executive privilege.

Let me stress at the outset that the Department fully understands that the committee's in these documents is based upon its concern about the integrity of the Department's actions in prosecuting or declining to prosecute particular individuals. We all want to be sure that such decisions are based upon the evidence and the law, free from political and other improper influences. Indeed, it is for that very reason, to protect the integrity of Federal prosecutive decisions, that the Attorney General, supported by the President, has declined to produce the internal deliberative memoranda you seek.

The Department has long recognized the interests of the Congress in gathering information about how statutes are applied and how funds are spent, and Congress has articulated an interest in obtaining information about specific cases in order to make informed decisions about legislative and policy issues. That is why the Department has promptly responded on numerous occasions to this committee's requests for briefings about prosecutive decisions by the Department, including several of the matters referenced in the committee's subpoenas.

During those briefings, senior Department officials have advised the committee of the reasons why a particular determination was made by the ultimate decisionmaker at the Department, whether that decisionmaker was the Attorney General, an Assistant Attorney General or some other supervisory official. Since January 22,

2001, the Department has literally conducted dozens of briefings for this committee about a variety of topics and has produced thousands of pages of documents specifically concerning the FBI matter and the handling of confidential informants in Boston.

The Department appreciates the acknowledgement in the chairman's September 6, 2001 letter to the Attorney General which said, "For the most part, the Justice Department has been very cooperative and responsive to the committee's requests for information."

What the Department has not provided to the committee is a small group of documents, namely, internal deliberative memoranda, which outline the specific advice to the decisionmakers by the line attorneys who handle the cases. We have also declined to provide memoranda that reveal confidential advice to the Attorney General or other high ranking Department officials on particular criminal matters.

Consistent with longstanding Department policy, we have declined these committee requests because the disclosure of those deliberations would undermine the integrity of the core executive branch decisionmaking function at issue. That is why the President has determined that an invocation of executive privilege is necessary and proper.

It is important to emphasize what is at stake. The power to investigate and prosecute for violation of Federal criminal law is a uniquely executive branch power. We recognize the importance of public confidence in those decisions. The fairness of our system depends in large part on ensuring that these important decisions are made solely on the basis of merits of the case as outlined in the Department's Principles of Federal Prosecution. Certainly, we agree with you that political considerations must have no place in that process.

Congressional inquiries can help those of us in the executive branch do our jobs better. But oversight of internal, pre-decisional deliberations, in particular, criminal cases, does not lead to better prosecutorial decisionmaking. Respectfully, we submit that having thousands of Federal prosecutors throughout the country writing prosecution and declination memoranda, knowing that Congress may some day dissect and second guess their assessments of witness credibility and their exercise of prosecutorial discretion will not promote justice. Nor will it lead to fairer decisions in sensitive matters, if we deprive the Attorney General of the benefit of frank and unvarnished recommendations from his closest advisors.

As the Supreme Court has noted, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." The Court further observed that "the importance of this confidentiality is too plain to require further discussion."

This "chilling effect" concern applies with particular force to communications at the Attorney General level. Certainly the ability of the executive branch to fulfill its constitutional duty to see that the laws are faithfully executed would be substantially undermined if the Attorney General were unable to receive frank and confidential advice.

It is also clear that the integrity of Federal law enforcement and the rights of persons who may be subject to Federal investigation can be seriously implicated if the executive fails to insulate career line prosecutors and their internal deliberations from political pressure. The Founders' fundamental purpose in establishing the separation of powers in the Constitution was to protect individual liberty. legislative branch political pressure on executive branch prosecutorial decisionmaking is inconsistent with the separation of powers and threatens individual liberty.

These concerns, however, do not prevent us from cooperating with Congress or otherwise impeding a legitimate congressional oversight. The Department has certainly been willing to disclose to the Congress and to this committee the reasons for our final prosecutive decisions. Equipped with this information, Congress has been able to carry out its constitutional responsibilities.

This is not a new issue between our branches of Government. As President Washington said over 200 years ago, "The Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." And on that basis, President Washington subsequently refused a congressional request for confidential executive branch documents.

Moreover, concern about the specific dangers of exposing prosecutorial deliberations to undue congressional pressure has been expressed by both Democratic and Republican administrations, and by Members of congressional oversight committees. For example, in a 1993 letter to the vice chairman of the House Energy and Commerce Committee, then-Judiciary Chairman Hyde called on his colleagues to stop intrusive oversight of the Department's environmental crimes section, warning that, "We should not open the door to congressional micromanagement of prosecutions. That would threaten the integrity of the Justice Department and undermine public respect for our entire judicial system."

Just last year, Senator Patrick Leahy, in objecting to congressional questioning of line attorneys, emphasized that "It is critical to our system of justice that prosecutors have the ability to freely and candidly exchange opinions and ideas without the threat of political criticism or pressure." Current and former attorney Justice Department officials have also spoken out on this issue. In an October 1, 1992 letter, Assistant Attorney General Rawls objected forcefully to an oversight investigation of the Rocky Flats criminal case, noting that "[s]crutiny of [FBI street agents and career prosecutors] and their activities in a political arena is inconsistent with the apolitical character of law enforcement. We are gravely concerned that this process will chill the aggressive investigative and prosecutive efforts of agents and prosecutors, who will be obliged to consider the congressional response to their actions in a particular case, all to the certain detriment of the public interest."

In a 1994 article published by the Washington Legal Foundation, Stuart Gerson, who served as an Assistant Attorney General in the first Bush administration, and as acting Attorney General at the beginning of the Clinton administration, similarly warned that, "[i]f career prosecutors are subject to pressures and threats of punishment because of the decisions they make, they will be less inclined

to make such decisions in the future. If congressional committees are able to reverse decisions and prosecutive policies, the legislature will be performing an executive function. The net loss is less one of Branch prerogatives than it is of civil liberties and individual rights."

And finally, in remarks to the Heritage Foundation, former Attorney General Civiletti presented the point in a way that captures quite vividly the Department's longstanding concern about the potential threat. General Civiletti asked the audience to imagine a hypothetical circumstance where an individual under investigation who is trying to persuade a prosecutor not to indict him, "to be heard by the prosecutor, has to shout over the loud protestations of Members of Congress urging indictment of this very individual; or that Members of Congress are standing ready to chastise the prosecutor if no indictment is brought. To imagine such a scenario," former Attorney General Civiletti observed, "is to understand why congressional involvement in prosecutorial decisions can be perilous to civil liberty."

Based on the foregoing reasons, Mr. Chairman, the President has concluded that congressional access to the subpoenaed documents would be contrary to the national interest, and he has therefore asserted executive privilege with respect to the documents, and instructed the Department not to release them or otherwise make them available to the committee. However, let me stress that we remain willing to work informally with the committee to provide the information to the committee about the decisions related to these subpoenaed documents that you had not previously requested, consistent with the President's assertion of privilege and our law enforcement responsibilities.

Mr. Chairman, thank you for giving me this time to explain our position on prosecutorial decisionmaking documents.

[The prepared statement of Mr. Horowitz follows:]

Department of Justice

STATEMENT

OF

MICHAEL E. HOROWITZ
CHIEF OF STAFF
CRIMINAL DIVISION

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE FBI'S HANDLING OF CONFIDENTIAL INFORMANTS IN BOSTON
AND COMPLIANCE WITH THE COMMITTEE'S SUBPOENAS

PRESENTED ON

DECEMBER 13, 2001

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the Department's position with respect to the Committee's subpoenas for prosecutorial decision-making documents.

I want to stress at the outset that the Department fully understands that the Committee's interest in these documents is based upon its concern about the integrity of the Department's actions in prosecuting or declining to prosecute particular individuals. We all want to be sure that such decisions are based upon the evidence and the law, free from political and other improper influences. Indeed, it is for that very reason – to protect the integrity of federal prosecutive decisions – that the Attorney General, supported by the President, has declined to produce the internal deliberative memoranda you seek.

The Department has long recognized the interest of Congress in gathering information about how statutes are applied and funds are spent so it can assess whether additional legislation is necessary to rectify problems in current law or to address problems not covered by current law. Further, there have been occasions when the Congress has articulated an interest in obtaining information about specific cases in order to make informed decisions about legislative and policy issues. That is why the Department has promptly responded on numerous occasions to this Committee's requests for briefings about prosecutive decisions by the Department, including several of the matters referenced in the Committee's subpoenas. During those briefings, senior Department officials have advised the Committee of the reasons why a particular determination was made by the ultimate decision-maker at the Department – whether that decision-maker was the Attorney General, an Assistant Attorney General, or some other supervisory official. Since January 22, 2001, the Department has literally conducted dozens of briefings for this Committee about a variety of topics, and has produced over 3,500 pages of documents to the Committee

specifically concerning the FBI's handling of informants in Boston. The Department appreciates the acknowledgment in your September 6, 2001 letter to the Attorney General that "[f]or the most part, the Justice Department has been very cooperative and responsive to the Committee's requests for information."

What the Department has not provided to the Committee is a small group of documents, namely internal deliberative memoranda, which outline the specific advice provided to the decision-makers by the line attorneys who handled the cases. We have also declined to provide memoranda that reveal confidential advice to the Attorney General or other high ranking Department officials on particular criminal matters. Consistent with longstanding Department policy, we have declined these Committee requests because the disclosure of those deliberations would undermine the integrity of the core Executive Branch decision-making function at issue. And that is why the President has determined that an invocation of his executive privilege is necessary and proper.

It is important to emphasize what is stake. The power to investigate and prosecute for violation of federal criminal law is a uniquely Executive Branch power, and we recognize the importance of public confidence in those decisions. The fairness of our system depends, in large part, on ensuring that these important decisions are made solely on the basis of the merits of the case as outlined in the Department's Principles of Federal Prosecution. Certainly, we agree with you that political considerations must have no place in that process.

Congressional inquiries can help those of us in the Executive Branch to do our jobs better. We welcome oversight that is constructive. But oversight of internal, predecisional deliberations in particular criminal cases does not lead to better prosecutorial decision-making.

A congressional inquiry into the internal advice of career prosecutors will surely get their attention, but it will not encourage them to emulate the ideal of the federal prosecutor described so many years ago by Supreme Court Justice Sutherland in Berger v. United States – the prosecutor who "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . [A prosecutor whose duty] is as much . . . to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Respectfully, we submit that having thousands of federal prosecutors throughout the country writing prosecution and declination memoranda knowing that Congress may someday dissect and second-guess their assessments of witness credibility and their exercise of prosecutorial discretion will not promote justice. Nor will it lead to fairer decisions in sensitive matters if we deprive the Attorney General of the benefit of frank and unvarnished recommendations from his closest advisers.

As the Supreme Court has noted, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). The Court observed that "the importance of this confidentiality is too plain to require further discussion." Id.

This "chilling effect" concern applies with particular force to communications at the Attorney General level. The deliberative confidentiality interests of the Executive Branch are at

their zenith in the context of advice from senior officials to the President or to the heads of the departments and agencies. Certainly, the ability of the Executive Branch to fulfill its constitutional duty to see that the laws are faithfully executed would be substantially undermined if the Attorney General were unable to receive frank and confidential advice.

It is also clear that the integrity of federal law enforcement and the rights of persons who may be subject to federal investigation can be seriously implicated if the Executive fails to insulate career line prosecutors and their internal deliberations from political pressure. The Founders' fundamental purpose in establishing the separation of powers in the Constitution was to protect individual liberty. Legislative Branch political pressure on Executive Branch prosecutorial decision-making is inconsistent with the separation of powers and threatens individual liberty.

These concerns, however, do not prevent us from cooperating with Congress or otherwise impede legitimate congressional oversight. The Department has certainly been willing to disclose to Congress the reasons for our final prosecutive decisions. And equipped with this information, Congress is fully able to carry out its constitutional responsibilities.

This is not a new issue between our Branches of Government. As President Washington said over 200 years ago, "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public . . . ." 1 Writings of Thomas Jefferson 304 (1903). And on that basis, President Washington refused a congressional request for confidential Executive Branch documents.

Moreover, concern about the specific dangers of exposing prosecutorial deliberations to undue congressional pressure has been expressed by both Democratic and Republican

administrations, and even by members of congressional oversight Committees. For example, in a 1993 letter to the Vice Chairman of the House Energy and Commerce Committee, then House Judiciary Committee Chairman Henry Hyde called on his colleagues to stop intrusive congressional oversight of the Justice Department's Environmental Crimes Section, warning that "[w]e should not open the door to congressional micromanagement of prosecutions. That would threaten the integrity of the Justice Department and undermine public respect for our entire judicial system." [Letter from Chairman Henry J. Hyde to Congressman Carlos Moorhead, September 7, 1992] And just last year, Senator Patrick Leahy, in objecting to congressional questioning of line attorneys, emphasized that "[i]t is critical to our system of justice that prosecutors have the ability to freely and candidly exchange opinions and ideas without threat of political criticism or pressure." [Statement of Senator Leahy in Opposition to Senator Specter's Resolution Seeking Issuance of Subpoenas to Line Attorneys at the Department of Justice, March 23, 2000]

Current and former Justice Department officials have also spoken out this issue. In an October 1, 1992 letter, Assistant Attorney General W. Lee Rawls objected forcefully to an oversight investigation of the Rocky Flats criminal case being conducted by Chairman Howard Wolpe, noting that "[s]crutiny of [FBI street agents and career prosecutors] and their activities in a political arena is inconsistent with the apolitical character of law enforcement. We are gravely concerned that this process will chill the aggressive investigative and prosecutive efforts of agents and prosecutors, who will be obliged to consider the congressional response to their actions in a particular case, all to the certain detriment of the public interest." In a 1994 article published by the Washington Legal Foundation, Stuart Gerson, who served as Assistant Attorney

General for the Civil Division in the first Bush Administration and as Acting Attorney General at the beginning of the Clinton Administration, similarly warned that "[i]f career prosecutors are subject to pressure and threats of punishment because of the decisions they make, they will be less inclined to make such decisions in the future. If congressional committees are able to reverse decisions and prosecutive polices, the legislature will be performing an executive function. The net loss is less one of branch prerogatives than it is of civil liberties and individual rights." [Gerson, The Legislative Politicization of the U.S. Department of Justice, Legal Backgrounder Vol. 9 No 41, Washington Legal Foundation, at 2 (Nov. 18, 1994)]

And, in remarks to the Heritage Foundation, former Attorney General Civiletti presented the point in a way that captures quite vividly the Department's longstanding concern about the potential threat to individual liberty. General Civiletti asked the audience to imagine a hypothetical circumstance where an individual under investigation who is trying to persuade a prosecutor not to indict him, "to be heard by the prosecutor, has to shout over the loud protestations of Members of Congress urging indictment of this very individual; or that Members of Congress are standing ready to chastise the prosecutor if no indictment is brought. To imagine such a scenario[, General Civiletti observed,] is to understand why congressional involvement in prosecutorial decisions can be perilous to civil liberty." [Justice Unbalanced: Congress and Prosecutorial Discretion, by Benjamin R. Civiletti, Aug. 19, 1993, at 5-6.]

Based on the foregoing reasons, the President has concluded that congressional access to the subpoenaed documents would be contrary to the national interest, and he has therefore asserted executive privilege with respect to the documents and instructed the Department not to release them or otherwise make them available to the Committee. We, of course, remain willing

to work informally with the Committee to provide information about the decisions relating to the subpoenaed materials that you had not previously requested, consistent with the President's assertion of privilege and our law enforcement responsibilities.

Mr. Chairman, thank you for giving me this time to explain our position on prosecutorial decision-making documents. I look forward to responding to your questions.

Mr. BURTON. We have a vote on the floor. I'd like for those who are interested in this to come back as quickly as possible so we can get to the question portion of the hearing.

So we will stand in recess until we get back from the vote.

[Recess.]

Mr. BURTON. We will reconvene, knowing that other Members in all probability will be back shortly.

Let me start off the questioning period by saying that I listened very carefully to everything you said, Mr. Horowitz. But if we follow the logic of this Executive order and of the decision that was made to not allow anyone to have access to previous Presidents' papers without their consent, which was issued by the President, then in effect what has happened is, Congress will not have any oversight ability unless the President says OK. That is the problem.

And as I said in my opening remarks, this is not a monarchy. This is not a single branch of Government that runs the government. There are co-equal branches. If the Congress does not have the ability to oversee the executive branch and the Chief Executive, then he in effect can do anything he wants without having to worry about it, and people in this administration can do anything they want without having to worry about it.

And that is a recipe for all kinds of mischief. So I certainly don't agree with the premise that this administration has come up with, and that is that Congress has no responsibility other than to legislate, and we have no authority to oversee the executive branch. Because that is in essence what your opening statement—I know all the things you referred to and all the people you quoted, you made a few misstatements. Mr. Hyde was not the chairman in 1993. We unfortunately didn't have control of the House at that time.

But in any event, the whole argument's going to boil down to, and the whole fight is going to boil down to whether or not the Congress has the authority and the ability to oversee the executive branch of Government or whether we don't. That's what it amounts to. If the Chief Executive of this country has the ability to say, yes, Congress, you can look at this, and no, Congress, you can't look at that, then we have in effect a Government run only by the executive branch, and all the rest of us are superfluous except for legislation.

And that isn't right. It's just not right.

And now let me get to the Salvati case. The Salvati case was 30 some years ago. The case has been closed forever. And it wasn't until recently that we found out that Mr. Salvati was innocent. And it wasn't until recently that we found out through documents that we were able to obtain before these decisions were made that the FBI was involved in a cover-up about Mr. Salvati's innocence in order to placate and protect members of the underworld who were informants.

Now, how does one clean up a mess like that? How does the Congress help clean up a mess like that if we have no authority to look at documents that will help give us a real picture of what happened? And what's happening here is, you're throwing a veil of secrecy down over this whole issue, and other issues too, I might add, so that Congress cannot review those. If we're to clean up the mess,

if we need to take legislative action, we need to know what the heck went wrong, and why it was allowed to happen. Then of course if we find that people did things that were wrong, it will be up to the Justice Department to prosecute those individuals.

But at this point, we need information. And you're not going to give it to us, and that's not right. And that's why we're going to be at loggerheads probably for the next several months. And this is going to be a very highly publicized issue.

Now, we subpoenaed documents related to our Boston investigation 3 months ago, Mr. Horowitz. Has the Justice Department asked us a single question about why we want these documents? Did you ask us anything about why we wanted these documents?

Mr. HOROWITZ. I personally did not.

Mr. BURTON. Well, do you know of anybody at the Justice Department that asked us why we wanted these documents?

Mr. HOROWITZ. I know there were discussions back and forth between the committee and the Department. I can't say——

Mr. BURTON. Well, I was a participant in those discussions that included even the Attorney General. And they did not discuss why we wanted those documents or what we wanted to find out in those documents. They just were flat out saying, you can't have them. There was no discussion about the reasons or the contents.

Before the President asserts executive privilege, don't you think it's appropriate that the executive branch makes a good faith effort to understand Congress' need for the documents? Before he says, no, you can't have them, don't you think there ought to be some discussion and have us explain why we want the documents?

Mr. HOROWITZ. Mr. Chairman, I obviously do believe there should be discussion with the committee and with the Department over what the need is for the documents and why the documents are requested.

Mr. BURTON. There was none. There was none. I met with the Attorney General. I was there. And the only thing they said was, we said we want the documents, and they said you couldn't have them, you can't have them. So they wouldn't even ask us why we wanted them.

Doesn't it show a lack of good faith that you don't even care why we want these documents?

Mr. HOROWITZ. Mr. Chairman, as we have done in the campaign finance related investigations when the committee asked for declination in those, we provided extensive briefings, we are certainly prepared and are willing to provide briefings. We've produced documents, indeed, to this committee concerning the investigation.

What we are talking about here are a very small number of declination memos written by lower level line attorneys in many cases, concerning those matters. And we're prepared to brief on those decisions and discuss with the committee what happened in those cases. Indeed, Salvati was a State prosecution, as you know. So we actually would not have——

Mr. BURTON. But it involved FBI officers.

Mr. HOROWITZ. Right, I recognize that.

Mr. BURTON. Let me just say this, that I talked not only to the Attorney General about this, I talked to the President's chief counsel, Mr. Gonzalez. And we talked to them about giving us these

documents to look at, and to discuss in private, if they were so sensitive that the public shouldn't know about them, if there was a question of classified information or things that would hurt the United States of America.

And there was a carte blanche statement, you can't have them. You can't look at them for any reason. Even though we were willing to do that in closed session. So we've been stonewalled by this administration regarding these documents and other documents. And we had another investigation that was going on that was not concluded from the previous administration. And because of the Executive order that was issued by the President of the United States, a veil of secrecy has been brought down on that as well. Because now we can't get any information unless the previous President or any other President in history doesn't allow us to get those.

Not only is that a problem for us, it's a problem for history. Because the archives will not be allowed to be open to people who want to write historical documents or historical references to what happened, history books, if you will, on presidencies, like Teapot Dome or Watergate or anything else, unless those Presidents give their specific approval. That's not right.

I see my time has expired. Let me go to Mr. Tierney, then we'll go to Mr. Shays.

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. Horowitz, was it your advice to the President or to the Attorney General to claim privilege in this instance?

Mr. HOROWITZ. It was not my personal advice.

Mr. TIERNEY. So you're just left here holding the bag?

Mr. HOROWITZ. Well——

Mr. TIERNEY. Can you tell us then, with respect to these declination memos that were made by lower level or line attorneys, what was the principle that the declination or privilege was intended to protect?

Mr. HOROWITZ. Well, the concern that the Department has is that in preparing these memos, what the line attorneys are doing is writing to their supervisors up the chain their thoughts on a case, their views on a case. The ultimate decision is not made by the line attorney or the writer of the memo, it's ultimately made by the recipient of the memo or someone further up the chain of command within the Department of Justice.

The concern is that as they write these memos, line attorneys are encouraged to give full, frank advice to discuss their assessment of witness credibility, their assessment of the strengths of the case, and to give that advice to the supervisor. But ultimately, it's not their decision as to whether the case is prosecuted or not.

Mr. TIERNEY. So take for instance in the Salvati case, if some line attorney was writing it up saying, I don't think we can prosecute on this, because the FBI's been lying through their teeth, and they're up to their knees in involvement with the informants, and this is never going to withstand trial, you don't think that the public policy of knowing that kind of an assessment, having that kind of information, would far outweigh the claim of privilege?

Mr. HOROWITZ. No, Congressman, I actually do think our obligation at that point is to brief the committee on the decision that was made and why the decision was made——

Mr. TIERNEY. Briefing is one thing. Why don't you just turn over the document? Never mind briefing the committee. That's an instance where you strike the balance, it would seem to be a clear call. That's the potential of what could be in there, you're 30 years later, you certainly can't be worried about the timidity of those line officers, and you can't expect that anybody else is going to be timid later on, because it would be their obligation to put that kind of information in a briefing.

What's the reason? Why not just turn over the document?

Mr. HOROWITZ. Because, Congressman, we're not talking about preventing the Congress from getting the information. We're talking about providing the information to Congress, it's the means by which——

Mr. TIERNEY. Then we're stuck with your interpretation of somebody else's interpretation of what the document says, as opposed to having the authentic, original document.

Mr. HOROWITZ. No, actually, what happens here, having been a line prosecutor and a supervisor in the U.S. attorneys office, I've seen it from both sides. When a supervisor, and I've dealt with U.S. attorneys and others who ultimately have to make the decision, when the line attorney writes up the memo or prepares the analysis, that is sometimes the ultimate outcome and the decision that is reached and accepted.

Sometimes it's not. Sometimes there are more factors, more information that goes into the decision. And in many instances, certainly in those instances, a briefing can provide the committee with a full picture of what happened and why it happened.

We are not talking about not providing the information. We're talking about providing the information. The discussion here is over what form the information is going to go, whether it's going to be in the form of pre-decisional, deliberative documents written by line attorneys in the connection with the Boston——

Mr. TIERNEY. Or you explaining to us verbally what it says. Are we drawing a fine line here, a distinction that isn't worth your fight here? So you're going to read to us the document as opposed to showing us the document? Is that the idea?

Mr. HOROWITZ. The idea is to brief the committee on all of the various reasons for what the decision is, whether they were in the memo or not in the memo, and we've done that, and I've had the opportunity to do that for this committee, and the staff has been extremely courteous and professional as we've done these. I think they've been useful.

Mr. TIERNEY. You're familiar with the In Re Sealed case, the 1997 case that Congressman Delahunt was referring to, where the court indicated and quoted, shielding internal Government deliberations in this context does not serve the public's interest in honest, effective Government?

Mr. HOROWITZ. I'm not. I'd have to take a look at that.

Mr. TIERNEY. All right, well, I think you should, because I think that's the case that this thing turns on. The fact of the matter is, you're claiming deliberative process privilege, am I right?

Mr. HOROWITZ. That's correct.

Mr. TIERNEY. As a principle, would you agree with me that shielding internal Government deliberations in this context does not serve the public's interest in honest, effective Government?

Mr. HOROWITZ. No, actually I think what the President is saying is that when the memo——

Mr. TIERNEY. No, I'm asking you, do you agree with that statement? Do you have a problem with that, or do you agree with it?

Mr. HOROWITZ. I think it depends very much on the facts and the circumstances of the particular case. I think preventing the information from coming to the Congress would certainly be problematic. But we're talking about providing the information.

Mr. TIERNEY. The court in fact said that it was a qualified privilege, and it depends on a case by case basis. So I think you're right on the money there. So now we have to agree on whether there's a reason to think that these documents somehow in the balance should not be disclosed as opposed to should be disclosed. And I think that the court has been clear on that. When the balance strikes to the public, and its interest in having honest, effective Government, then it ought to be turned over.

Here we're talking about trying to determine what went on in a situation where the FBI clearly is in a tough situation here, where Judge Wolf and others have said they're in it up to their eyebrows. I think it's in the public interest for us to have all the documentation on that and that if the balance clearly comes down on disclosure, and not some claim of privilege where it seems to me it's putting form over substance.

Mr. HOROWITZ. Well, I do think, Congressman, that what we are prepared to do and what we are going to do from this point forward, as we did on the campaign task force matters that were under subpoena as well, is come up, brief the committee, provide the committee with the information that the committee is seeking concerning those matters.

And let me just add that we recognize the problems that happened in Boston with the FBI. We created a task force of prosecutors to look into that. We've indicted an FBI agent who is actually scheduled, as I'm sure you know, for trial next month in Boston on this very matter. So——

Mr. TIERNEY. If I'm not mistaken, some of those documents haven't been turned over, either. We asked for some of the documents, in fact, it was the Connecticut U.S. attorney, I think, that was the head of that investigation. And he's keeping some documents out on this.

I hear what you're saying, and I just have to say clearly that I hope this committee prevails in changing your mind, if not changing your mind, in overruling that ruling, whether it means we have to go to the floor and vote or otherwise. Because I think you're strictly putting form over substance and disregarding what In Re Sealed case clearly sets out, I think, as the controlling language here, that when we strike a balance, the balance comes down on disclosing that.

Just out of curiosity, are all these gentlemen behind you working for the Department?

Mr. HOROWITZ. Yes, all the ones in the row directly behind me. I don't know the individuals behind them.

Mr. TIERNEY. One, two, three, four, five, six, seven, and you. Thank you.

Mr. BURTON. Let me, before I go to Mr. Shays, make one comment. I was sitting in this chair for the last 5 years. I remember when we were trying to get documents from the previous Justice Department, and they would say, we'll come up and tell you what's in them but we won't let you see them.

Well, ultimately, the Freeh and La Bella memos we did see. We were able to force that issue. It took a long, long time, but we were able to force it. What we were being told was an incomplete story. It did not cover everything that was in those documents.

So what you are saying, in essence, is, look, we'll sit down and talk to you and we'll tell you what's in them. But it's your interpretation. And when we're talking about something as important as the Salvati case, we don't want your opinion. We want to see what's in those documents to find out whether or not justice was done.

We know justice was not done. And the only way we can correct those things legislatively or deal with the problem is for us to know what's in those documents. Not your opinion, not the opinion of seven or eight attorneys from the Justice Department. The Congress of the United States, in our oversight responsibilities, needs to take a hard look at those things.

Mr. Shays.

Mr. SHAYS. Mr. Horowitz, I moved to a city called Bridgeport. It has a mayor of one party and a council of the same party with no minority members whatsoever. Very honest, good man, I thought. And over time, he just accumulated so much power, and there really was no oversight by the council because it was of one party and they didn't want to ever find themselves embarrassing him.

Well, in the process of that, he now has 24 indictment counts against him. And he's probably going to spend some time in jail. It to me was one of the best examples of how power ultimately corrupts absolutely.

The order that the President signed is almost intimidating to me, because I think, you know, he's my President and general, my President just like Mr. Clinton was my President. I view him to be extraordinarily honest and competent, and I view him as well to be needing our support in every way we can give it to him. That's why I voted and support the tribunals, the wire tap law, the arrests that I think help break up cells.

And now I'm learning I'm going to have very little oversight of that. I promised people who didn't want me to vote for that law that we would watch the Justice Department, and when we had to, we would subpoena information and we would get information. I think the best thing I can do for this President and this administration is to make sure that this order doesn't stand.

I found your testimony insulting. I'm not saying you're insulting, but the testimony was. You made an extreme argument that because a congressional inquiry might impede candor under some circumstances, congressional oversight must be always resisted under all circumstances. You assume congressional inquiries infect the decisionmaking with untoward political considerations when we're trying to purge the process from corruption within internal politics.

You posit examples of the damage to current investigations if prosecutors knew Congress would dissect and second guess their decisions. In fact, we're talking about decisions that were made many years ago.

I also think in effect that the Department is saying, we're fine, nothing can go wrong here, trust us, we've got important work to do and you don't, so leave us alone. That's why I think what you have said is extraordinarily insulting. At the risk of offending people I love in the administration, I have more than 5 minutes of questions, so I'll look forward to having my time come back.

I'm going to go over this statement with you, I'm going to have you explain it to me. Then I'm going to have you tell me about the Salvati case. And I want you to remember the person who was sitting like the second chair over having been the FBI guy who got him sent there, and he didn't give a damn about it. And for you to suggest somehow this is local, when it was the FBI, corrupt FBI.

Would you look on statement page 2, I want you to read me that whole paragraph on page 2, where it says, it is important to emphasize what is at stake. Page 2 of your statement.

Mr. HOROWITZ. I have to get it out, Congressman.

OK.

Mr. TIERNEY. Would you read it out loud, the whole paragraph?

Mr. HOROWITZ. It is important to emphasize what is at stake. The power to investigate and prosecute for violation of Federal criminal law is a uniquely executive branch power and we recognize the importance of public confidence in those decisions. The fairness of our system depends in large part on ensuring that these important decisions are made solely on the basis of the merits of the case, as outlined in the Department's Principles of Federal Prosecution. Certainly we agree with you that political considerations have no place in that process.

Mr. SHAYS. OK. What happens if the process is corrupt? How can I have confidence in a corrupt process? That's what we're trying to get at. We're trying to understand why, and who is responsible for the corruption. And you are part, in my judgment, of being involved in a cover-up. You don't want us to know that.

How can I have confidence in a system that we can't check out?

Mr. HOROWITZ. I certainly did not have the intention of leaving you with that impression, Congressman. We are prepared to explain fully the facts, what happened, provide the committee documents——

Mr. SHAYS. I want to see the documents.

Mr. HOROWITZ [continuing]. And we will continue to provide the committee documents.

Mr. SHAYS. I don't have any confidence in you or someone else giving me a translation of what we need to see. How can we have faith in that? That's your interpretation of what happened. I was elected to interpret, you weren't elected to interpret for me.

Mr. HOROWITZ. No, I understand, Congressman. What we're talking about here in connection with the Boston matter are the predecisional memos of the line attorneys. We're not trying to prevent the committee in any way——

Mr. SHAYS. What happens if the pre-decisional are corrupt statements of the facts? What happens if those people who made those

memorandums are in fact lying to the Director? What happens if they in fact disclose that the Director knew facts that proved the innocence of this man? What happens in that case?

What we're trying to determine in one part is, Mr. Hoover, was he corrupt? Did he in fact know that this man was innocent? And did he cover it up? And we would like to know what those documents tell us.

Mr. HOROWITZ. And my understanding is, we've provided to date, thousands of pages of documents from the FBI concerning this matter, which describe some of the facts, some of the background about the circumstances there. We've also indicted an FBI agent——

Mr. SHAYS. I want to see the documents that are given to people that then make decisions. And because I believe with real certainty that we'll learn from those documents that when people who made those decisions said they weren't told will know they were told. Then we'll know they lied. And then we will make determinations based on that.

But you don't want us to have that information.

Mr. HOROWITZ. I think the concern as laid out in the President's order was that——

Mr. SHAYS. No, the order was blanket. And I'm talking specifics. You gave me the absurd examples of extreme cases, and I'm giving you a real case right now. And it makes me wonder if you know the case. I know the President doesn't. I know he doesn't. But we know, and I'll go to the next paragraph.

Mr. BURTON. Let me just say for the record, because I want to make sure everything's correct, we did receive documents that were heavily redacted, with a lot of things crossed out that were relevant to what we wanted to know. That's part of it.

The second part is, you could give us 10,000 documents and only keep 3. But those three could be very, very important in the conclusions that are drawn about the corruption of the FBI in the Salvati case. So it's not the number of documents you give us, it's the relevance to our investigation.

You know, it could be one document you don't give us, but that could be the key. And we have found in previous investigations, we look at tons and tons, boxes of documents and then we find one that tells us the story. And your interpretation isn't what we want.

The gentleman from Massachusetts.

Mr. DELAHUNT. I thank the Chair. I was just going to make the point, in fact, I had just written redaction. Have you had an opportunity, Mr. Horowitz, to examine the documents that were provided to the committee yourself?

Mr. HOROWITZ. I have not myself reviewed those documents.

Mr. DELAHUNT. I have to tell you, I sat in, at the invitation of the Chair, in a hearing here last May. And because I have some experience in law enforcement in the State of Massachusetts, I could pose questions that, how shall I say, revealed some names that were redacted.

I'd like to know who made the decision in terms of the redactions.

Mr. HOROWITZ. I will have to go back and followup on that, Congressman.

Mr. DELAHUNT. Because I have to tell you, from a review of the redactions, there was absolutely nothing, in my opinion, in the redactions, that warranted those names to be redacted. There was no disclosure of confidential informants, ones that haven't been made public. There were names of FBI personnel, both at the supervisory level and at the field level, whose names were redacted. The Chair might very well want to hear first-hand oral testimony from those individuals, yet the names were redacted.

Mr. HOROWITZ. I would have to go back, as I said, Mr. Congressman, and review——

Mr. DELAHUNT. I understand, but what you're asking, and maybe I'm misinterpreting this, is, trust us. Trust the Department of Justice. We'll give you and we'll translate and we'll provide a lens for you. And yet when you pose a question about the redactions, nobody has the answer.

Let me ask you something else. When the decision was reached to not disclose this, the information requested via the subpoena, who participated in that decision?

Mr. HOROWITZ. I would have to consult with others, Congressman, to determine who exactly participated in the decisions. We'd have to consider that.

Mr. DELAHUNT. Then it's a safe——

Mr. BURTON. Would the gentleman yield?

Mr. DELAHUNT. I yield.

Mr. BURTON. Was it anybody behind you?

Mr. HOROWITZ. I do not——

Mr. BURTON. Well, let's turn it around. Were any of you gentlemen involved in the redacting of those names? Any of you?

Any of you? Raise your hand if you were. I don't think they want to talk. Were any of you involved?

Nobody—none of those were involved? May I have a yes or no from you, please? None of you were involved?

Go ahead, I'm sorry. I thank the gentleman for yielding.

Mr. DELAHUNT. Mr. Horowitz, did you help prepare the statement that you delivered?

Mr. HOROWITZ. I helped participate in the preparation of the statement.

Mr. DELAHUNT. Who else?

Mr. HOROWITZ. There were a number of officials.

Mr. DELAHUNT. How many?

Mr. HOROWITZ. I don't know the exact number of people who participated in the drafting. There were a lot of people who reviewed it and commented upon it. Some who did not comment upon it and saw it anyway.

Mr. DELAHUNT. You did the edits, I presume?

Mr. HOROWITZ. I certainly participated in the editing.

Mr. DELAHUNT. But you don't know who told you that the decision had been made not to comply with the subpoena issued by the Chair and the committee? I'm not asking you to disclose any information, I want to know who participated. Who gave you the instructions to appear here today?

Mr. HOROWITZ. There were a number of discussions about who would attend today's hearing. I believe it was the Assistant Attor-

ney General for the Office of Legislative Affairs, I believe, who ultimately told me to appear.

Mr. DELAHUNT. And who is, can you name that individual?

Mr. HOROWITZ. Dan Bryant.

Mr. DELAHUNT. So you drew the short straw?

Mr. HOROWITZ. My understanding was that there had been some discussions to schedule the hearings, so that my boss, my immediate boss, Mr. Cherdoff, the head of the criminal division, could appear to testify. But he is not available today.

Mr. DELAHUNT. In your experience, how long have you been with the Department?

Mr. HOROWITZ. Since 1991.

Mr. DELAHUNT. Since 1991. Can you, let me rephrase it. Isn't it unusual to seek the involvement of the White House in decisions pertaining to matters like this, based upon your experience? You're a career prosecutor, apolitical.

Mr. HOROWITZ. Since most of my experience, 8 of the 10-years, was as a prosecutor in New York, most of my cases did not involve requests of information from congressional committees. So I have had little experience in requests for this type of information.

Mr. DELAHUNT. I found interesting that, I said in my opening statement that this deliberative process privilege is really subject to a case by case determination, that balances the public's right to know and the necessity for the Government to withhold information. I think you'd agree with me, the public's right to know is important.

Mr. HOROWITZ. I would agree with you.

Mr. DELAHUNT. Let me suggest this to you. You said we, meaning presumably the Department of Justice indicted an FBI agent and that the case is going to be tried next month, did I hear you say that?

Mr. HOROWITZ. My understanding is it's scheduled for trial next month. Whether it actually goes to trial or not, as you know, depends——

Mr. DELAHUNT. Right. From what I read in the Boston newspapers, that's not the case. Are you aware that prior to Judge Wolf's involvement in this case, that there was an internal investigation by the FBI, by the Department of Justice?

Mr. HOROWITZ. I'm familiar that we created a task force to look into this matter.

Mr. DELAHUNT. That wasn't my question, Mr. Horowitz. Are you familiar with an internal investigation conducted by FBI agents to determine whether there was any criminal culpability on the part of Department of Justice personnel? And within that, I mean the FBI.

Mr. HOROWITZ. Are you referring to a specific internal investigation? Because the task force's responsibility in part was to review the activities of, the internal——

Mr. DELAHUNT. What I'm suggesting to you, and maybe I can clarify it by saying, it's my understanding that there was an internal investigation by the FBI that uncovered no malfeasance whatsoever. But because of Judge Wolf's insistence and the fact that the cases against Bulger and Flemmi were before him, and as his orders elicited new information, that, that is when the task force was

created, Mr. Horowitz. It was not sua sponte, it did not happen automatically. It did not come out of anything but public pressure.

And if you have any information to the contrary, would you let us know? You could let us know now.

Mr. HOROWITZ. I would have to go back and through——

Mr. DELAHUNT. You'd have to go back again.

Mr. HOROWITZ [continuing]. Chronology and put together for my own personal information how that developed.

Mr. BURTON. We're going to come around for a second—yes, we'll do 10 minute segments after this round. That will give you more time to followup.

Let me just say that, before I go to Mr. Cummings, in Teapot Dome, in Watergate, in the investigations we're involved in with the Clinton administration or now, if the President can simply use his Presidential prerogative to block the Justice Department from giving the Congress any information, then you'll never get to the bottom of any corruption in Government. You'll never get any place. Because we'll be able to be blocked by a Justice Department that is controlled by the White House.

If the Attorney General of the United States is a close friend of a President who is involved in corrupt activities, and the President issues this kind of an Executive order or executive privilege document, how is the Congress ever going to be able to investigate it? We'll be blocked. And that's the problem, one of the main problems we're facing today.

Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman, and I want to thank you, Mr. Horowitz, for being with us this morning.

I just want to, as I was sitting here, I could not help but think about the many, many defendants that I represented when I practiced law that would walk into the Federal court and would literally seem to have chills walking in there, knowing that their lives could possibly be interrupted in some major way.

Then I thought about the Patriots bill that I voted against. The reason why I voted against it was because I have seen the misuse of power. And I've seen it up front, and I've seen it with many clients, I've seen prosecutors who have been literally ripped apart by judges because they failed to disclose evidence and various types of misconduct that took place.

And as I listen to all of this, it just amazes me that we, you know, the Government says trust us. I've got to tell you that if I were looking at this on Fox or C–SPAN or whatever, and I heard this and it was somebody in my district who, you know,the people that I represent, they would say, why should I trust the Government?

First of all, they don't trust the Government anyway, because they have seen too much abuse by the Government. Then when they hear this, and they hear the chairman, who is an honorable man, who has simply requested certain information so that we can do our job, and then they look at us as their representatives, and I do agree with President Bush, the war is about trying to make sure that we maintain the type of government that we have, a representative government, and here we are, supposed to have all this

power up here, and supposed to be representing 600,000 people each. And when we ask for documents, we're told, trust us.

I don't think that sends a very comforting message to my constituents. I'm just wondering, you heard the concerns of the Members of Congress who have addressed you this morning. And you have heard our frustration. It is abundantly clear that there's information we want, and you have proposed a method of getting some of the information through the documents with, as Congressman Delahunt has already talked about, how all kinds of things are crossed out. And you talked about the conferences, I read your statement. And that doesn't meet our satisfaction.

So I'm trying to figure out, help us help ourselves and help the people that we represent, and tell us, how would you proceed with this, having heard that we're not satisfied with what's going on?

Mr. HOROWITZ. Thank you, Congressman.

I believe that the process we have an obligation to undertake with the committee is, as we've done in other matters, an accommodation process, to provide the committee with the information it is seeking in a manner that doesn't cause us to have to produce materials, documents, that's, as I said earlier, a narrow set of documents, but the concern in the Boston case, the pre-decisional memos of line attorneys and in the campaign finance task force case, memoranda to the Attorney General and other high ranking officials.

We have an obligation to come to the committee and to provide the committee with information that it is seeking. We have a responsibility to engage in that dialog, which we've done in the past, and to have a give and take with the committee and work with you to see how we address your concerns.

Mr. CUMMINGS. Let me say this before you go on. When I read your statement, I don't think that most cases rise to the level of this kind of interest. You talked in your statement about my good friend Ben Civiletti from Maryland, and his statement about the statement you made in the record. I don't think they rise to that level.

But it goes back to the question of corruption, and how do we get to corruption, how do we get to problems within say, the prosecutor's office? How do we get to that, or the FBI? Because if you feel like there's constant roadblocks to that, again, every case doesn't rise to this level where Members of Congress merely want to see what's going on. It's not like we're asking for 99 percent of the cases. This is just a few, probably a few cases.

And I'm just wondering if what you are telling us is just a bit overkill, and all we're trying to do is get to a few basic facts. Do you follow me?

Mr. HOROWITZ. I do, Congressman. And I guess what I'm trying to do in responding is trying to indicate that I'm not trying to put forward a message, like you said, of overkill. What I'm trying to do, and with limited success, I recognize, is to present to the committee a recognition of our responsibility to provide the information to the committee, but to try and do so in a way that doesn't impinge upon what we believe is a valid and fair right to try and protect internal deliberative documents. I agree with you, there are certainly circumstances, we've mentioned Teapot Dome and Watergate, where,

as we do a case by case analysis, as Congressman Delahunt mentioned, that disclosure is appropriate and necessary.

What I would hope we would do, going from today's hearing, is to try and work on that accommodation, to try and work with the committee in providing that information to you. Because what happened in Boston was an awful misuse of Government power. We have undertaken an effort to try and do that, the prosecutors, by creating a task force, by trying to thoroughly investigate this matter, and to proceed with criminal indictments of wrongdoers.

And so we certainly agree with you that there is a need for an accounting of this matter.

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

Mr. BURTON. We'll go to 10 minute rounds right after Mr. Gilman. Let me just say once again that what you're talking about is filtering the information through your opinions, instead of letting Congress decide for itself whether or not there may be corruption in the Justice Department or the FBI or the executive branch. We'll get the filtered opinion of people from the Justice Department instead of us seeing the documents themselves. That just isn't going to wash.

Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman.

You know, the President, Mr. Horowitz, has said that he's concerned about congressional pressure on the executive branch prosecutorial decisions. Tell me, this is a Government Reform Committee that has primarily a responsibility on oversight. How would we best proceed to perform, to fulfill our responsibility on oversight if we can't look into the decisionmaking process on why some of these events were not properly pursued? What is your suggestion? How can we fulfill the responsibility of this committee if we don't have that opportunity to undertake our oversight?

Mr. HOROWITZ. Well, I think one of the, certainly the most important thing we can do for the committee is first of all, provide documents that we do not believe are privileged. And we have produced, as I said, many documents in connection with this investigation. To the extent we have documents that we do not believe have an executive privilege, we should be producing those to the committee.

With regard to the documents that we have concerns about, these pre-decisional memoranda by line attorneys, what we have an obligation to do is come before you, come before this committee, and fully outline for you what the ultimate decisionmaker decided. Because the point I tried to make here is that the writer of the memos, the line attorney, is writing his or her summary of the facts, his or her analysis of witnesses, of legal positions. Oftentimes those memoranda are, sometimes they're adopted, but many times they're not adopted as the totality of the reasons for the decision.

And so in some of those circumstances, having the briefing and laying out for the committee the full rationale for the decision, with the full statement of reasons, can be in fact a fuller explanation for the committee. And we have an explanation to do that and recognize the committee's need for the information.

Mr. GILMAN. Well, of course, it's not the intent of this committee to apply any pressure on this kind of prosecutorial decisionmaking. What we're looking for is, where the decisions that were made

here, was there any breach of responsibility by the Justice Department?

Mr. HOROWITZ. And let me——

Mr. GILMAN. We're looking to see whether there's any wrongdoing. And I think you said you thought the Justice Department is looking at this, or should have looked at this wrongdoing to correct it. That's our responsibility as well, to make certain that is being fulfilled.

Mr. HOROWITZ. And I certainly agree with that, Congressman.

Mr. GILMAN. How do we do that without the proper appears before us?

Mr. HOROWITZ. Well, what we're discussing today, and I'm trying to talk about today in terms of these particular documents that we're talking about, we're not talking about preventing the committee from getting to the facts, or in any way trying to filter the facts from the committee. What we are trying to do is prevent the legal analysis, the deliberations prepared by, the deliberative memos prepared by the line attorneys, and the lower level decisionmakers, the people who did not ultimately make the decision, protect their ability to give the candid advice to the people up the chain of command who actually have to make the decisions.

So we're not seeking to prevent the committee from getting the facts. We're certainly as I said earlier, prepared to work with the committee and try to accommodate its needs for that information and do it in a way that hopefully we can protect the ability of line attorneys to write those deliberative materials.

Mr. GILMAN. I'd be pleased to yield.

Mr. SHAYS. Aren't you doing more than just advice? Isn't there sometimes these memos have no advice, they just have statement of fact? And they present information with no advice whatsoever? And you're preventing us from getting even memos that have no advice in them?

Mr. HOROWITZ. I'm not saying that if a memo has no deliberative advice in them that's what we're talking about. My understanding of the memos that are at issue here are memos that do in fact do more than what you're asking about, Congressman, that do in fact go into an analysis.

Mr. SHAYS. The President's Executive order, though, doesn't it also include information without advice?

Mr. HOROWITZ. My understanding of the order and what's at issue here is that we have an obligation, pursuant to the President's decision, to go through on a case by case basis of individual documents, and not produce those materials that contain the type of deliberative material I'm discussing, but consider whether we can produce other documents that don't do that.

Mr. GILMAN. Thank you, Mr. Shays. Just one more question.

Mr. Horowitz, I hope that the Justice Department will take another look at all of this. If we're going to perform and fulfill our responsibility of oversight, we need to have some of the basic decisions that were made with regard to this kind of a situation that occurred in Boston. By preventing us from having that kind of material, it hampers our oversight responsibility. And that's what we're concerned about. So I hope that you would take this back to the Attorney General and ask him to try to work out a better ar-

rangement than we're confronted with in this Executive order that was, I assume, recommended by the Justice Department to the President, or it wouldn't have occurred.

Thank you very much.

Mr. BURTON. Thank you, Mr. Gilman. We'll now go to 10 minute rounds.

Do you remember President Nixon and Watergate?

Mr. HOROWITZ. I do. I was young, but I remember.

Mr. BURTON. You've probably read your history.

Mr. HOROWITZ. Yes.

Mr. BURTON. Do you remember John Mitchell?

Mr. HOROWITZ. Yes.

Mr. BURTON. Do you know who John Mitchell was?

Mr. HOROWITZ. Former Attorney General of the United States.

Mr. BURTON. Do you know what happened to John Mitchell?

Mr. HOROWITZ. I do.

Mr. BURTON. What happened to him?

Mr. HOROWITZ. He was prosecuted for violations in connection with his responsibilities in office.

Mr. BURTON. And he went to prison. Now, let me ask you this. What if President Nixon and John Mitchell did what we're seeing today, and they said, there'll be no deliberative documents, no information whatsoever, given to the legislative branch? What would happen?

Mr. HOROWITZ. My understanding is that what we're dealing with here is a case by case analysis.

Mr. BURTON. The point I'm trying to make, and I think you're missing my point. The point is, that if you have corruption in the Justice Department, or in a branch of the executive branch, and you allow this kind of executive decision to stand, and it becomes a precedent, we won't be able to root out corruption, because we won't be able to fulfill our oversight responsibilities.

You said you're going to give us the facts. How do we get the facts if the Attorney General and the President of the United States say, you can't have them? How do we get them?

Mr. HOROWITZ. I don't think that's what we're saying, with all due respect.

Mr. BURTON. No, no, no. The Executive order says we can't have them.

Mr. HOROWITZ. I think what the Executive order covers are just the pre-decisional deliberative memoranda that I've mentioned earlier.

Mr. BURTON. But that may be very relevant, that may be very relevant to correcting a situation. And unless the Congress has the ability to fulfill its oversight responsibilities, we can't do that.

Now, let me ask you a few questions. The Attorney General and the White House counsel personally told me in my office that Congress will not be allowed to review deliberative documents from closed criminal investigations. For the record, is that the position of the Attorney General?

They told me that we will not be allowed to review deliberative documents from closed criminal investigations. Is that the position of the Attorney General?

Mr. HOROWITZ. My understanding of our position is that we need to review these materials on a case by case analysis, the documents on a document by document analysis, and make those decisions in that way, consistent with the President's directive.

Mr. BURTON. So what you're saying is, if the Attorney General decides that we're not entitled to see criminal deliberative documents, we can't see them?

Mr. HOROWITZ. No. I think what I'm saying is, what we are obligated to do is to review those documents. If they contain the type of information that's at issue here, we believe——

Mr. BURTON. I understand what you're saying. So if the Attorney General says, these documents should not be given to the Congress, and they are deliberative documents in a criminal investigation, we can't see them.

Mr. HOROWITZ. But what we should be doing at that point is coming to the Congress and this committee and trying to work out an accommodation on how to get the information to the committee——

Mr. BURTON. Without us seeing them.

Mr. HOROWITZ [continuing]. Concerns about the privileged materials. We are not trying to prevent the facts and having all of the facts concerning this matter in Boston before this committee.

Mr. BURTON. Who determines what the facts are? You? The Justice Department? Who determines what the facts are?

Mr. HOROWITZ. If a document contains legal analysis, these memos go through and say the facts, legal analysis, and if the documents contain legal analysis——

Mr. BURTON. OK, who makes that determination?

Mr. HOROWITZ. Well, just as in every case where we have to review the materials, we have to make a determination, for example, of grand jury matter, privilege——

Mr. BURTON. But who makes the determination?

Mr. HOROWITZ. The Department does.

Mr. BURTON. The Department of Justice.

Mr. HOROWITZ. Correct.

Mr. BURTON. OK, so when you come before us and you say, we've decided that you shouldn't see these documents, then it's your determination. You've made that decision. So Congress has no right, if you make the decision, or the Chief Executive or the Attorney General says that we've made a decision that they shouldn't see them, then we're not going to see them, is that right?

Mr. HOROWITZ. Just as we do on the grand jury matters, for example, we have to make a decision on that. We have to do it in a fair and faithful way to our obligations as lawyers and prosecutors reviewing these matters. Yes, we do.

Mr. BURTON. Congress has the responsibility to oversee the executive branch and we can't do it. Is that the President's position as well, the same position as the Attorney General on this?

Mr. HOROWITZ. The only position I know of the President is what I read from the Executive order.

Mr. BURTON. The Attorney General and the White House counsel did not indicate that there would be any exceptions to this policy. They indicated there would be no exceptions to this policy. Is that what you've been told?

Mr. HOROWITZ. What I've been told is that, based on the order that I have here, that the particular memos at issue in this case and this request are not going to be——

Mr. BURTON. Well, what I was told by the Attorney General and the White House counsel was that it was not just the Salvati case. It was just, this was going to be the policy and there would be no exceptions to the policy. That's what they told me. So there's no exceptions to the policy. This is just one manifestation of what they're going to be telling the Congress. And that is, nose out, butt out, you guys, because if we say you shouldn't see those documents, you're not going to see them. That means that the Congress of the United States, if we don't fight this, is going to be impotent, if we try to correct a situation in the executive branch where there may be corruption. And there's been corruption in the whole series of administrations.

Now, has the Justice Department, prior to 2001, ever provided Congress with deliberative documents from a criminal investigation? Do you know if they've ever done that?

Mr. HOROWITZ. I believe they have.

Mr. BURTON. Yes, they have. What specific issue or incident prompted this change in policy? What prompted this change from what's been the policy in the past?

Mr. HOROWITZ. We don't believe we've changed the policy. What we believe has occurred over our Nation's history with regard to executive privilege matters is on a case by case analysis, administration by administration, we've reviewed the requests from the committee or from the Congress and have determined in certain matters to produce the deliberative materials to Congress and in other matters, administrations have invoked executive privilege to protect the deliberative material.

Mr. BURTON. So you would analyze these things and then make a determination?

Mr. HOROWITZ. We would, we certainly have an obligation to analyze documents, Mr. Chairman.

Mr. BURTON. But I mean, you would look at the documents and then make a determination as to whether we should get them?

Mr. HOROWITZ. We would need to do that.

Mr. BURTON. Do you know in the Salvati case, you've never done that? Did you know that? You never even asked us what documents we want or why we want them. You've never asked any of that. So you haven't, you're saying you're not going to give us these documents, but you haven't analyzed them. Because we've never even discussed that. They just said flat out, we're not going to give you any.

Mr. HOROWITZ. Well, as I said, I have not been involved.

Mr. BURTON. I know, and I'm disappointed in the Attorney General for not sending you better prepared up here, because many of us have asked questions and you just don't know the answers. People behind you, I would have thought, would be relevant to your testimony today, but nobody's said anything and we've asked a number of questions that you couldn't answer.

We issued a subpoena to the Department of Justice over 3 months ago. It appears you have documents that are responsive to

the subpoena. How many documents have you found? How many documents have you found that were responsive to our subpoena?

Mr. HOROWITZ. As I sit here, I don't know the number off the top of my head.

Mr. BURTON. Turn around and ask those guys behind you how many documents have been relevant. You brought a million dollars worth of legal talent up here and nobody knows anything.

Yes, we probably will ask the Attorney General to come eventually.

Mr. HOROWITZ. Mr. Chairman, my understanding is that to date, in looking through the number of files that would be responsive, we've located 20 documents to date that would be responsive to the subpoena, although we're continuing to try and gather, as you've indicated, 30 year old files in some regards here to——

Mr. BURTON. So you've found about 20 documents thus far that you would rather we wouldn't see?

Mr. HOROWITZ. That's correct.

Mr. BURTON. Do you have them with you today?

Mr. HOROWITZ. I certainly don't.

Mr. BURTON. Nobody has them with you back there?

Mr. HOROWITZ. I don't know that we've——

Mr. BURTON. Are you going to give them to us?

Mr. HOROWITZ. Well, I think in light of the President's order, we do not plan on doing that.

Mr. BURTON. Under what authority are you avoiding compliance with a valid congressional subpoena that compels you to produce these documents?

Mr. HOROWITZ. As the President indicated, Mr. Chairman, the executive privilege of the executive branch has been invoked by the President.

Mr. BURTON. When did he claim executive privilege?

Mr. HOROWITZ. The date of the memorandum is December 12, 2001.

Mr. BURTON. December 12. Did the President claim executive privilege over these types of documents?

Mr. HOROWITZ. That is our understanding.

Mr. BURTON. Excuse me. Did President Clinton claim executive privilege over these types of documents? And we really had a thorough investigation of him.

Mr. HOROWITZ. Well, my understanding——

Mr. BURTON. No, just answer the question. Did President Clinton claim executive privilege over these types of documents?

Mr. HOROWITZ. I believe there was an invocation of executive privilege with regard to some matter by President Clinton before this committee. But I know there was——

Mr. BURTON. Over these types of documents?

Mr. HOROWITZ. I don't know the answer.

Mr. BURTON. Well, the answer is no. We got numerous declination memoranda, but we got the documents eventually. The La Bella and Freeh memos are two examples. And they didn't claim executive privilege.

How about President George Herbert Walker Bush?

Mr. HOROWITZ. I would have to go back——

Mr. BURTON. Well, the answer is no. How about President Reagan?

Mr. HOROWITZ. My understanding is that there were invocations of executive privilege with regard to deliberative memoranda by prior administrations, including President Bush's administration. They are——

Mr. BURTON. According to my legal counsel, and they've been doing research on this, according to them, President George Herbert Walker Bush, President Reagan, President Carter, President Ford, President Nixon, President Johnson, Kennedy, Eisenhower, Truman, Roosevelt, Hoover Coolidge and President Harding, none of them used executive privilege over these types of documents. This is the first time we know of.

Mr. HOROWITZ. Let me just say that there are two——

Mr. BURTON. Over these types of documents.

Mr. HOROWITZ. Well, when you say these types of documents, my understanding is that deliberative materials, which is what we're concerned about here, that there have been such invocations. There's a 1982 and 1983 OLC opinion that outlines the invocations over the centuries by the Presidents of executive privilege in circumstances involving deliberative documents.

Mr. BURTON. Let me just go ahead and allow Mr. Tierney to take his questions and then I'll make a statement.

Mr. TIERNEY. Thank you.

I want to again go back to the case I talked about earlier, which is In Re Sealed case. It clearly says, where there's reason to believe that documents sought may shed light on Government misconduct, then this type of privilege is routinely denied. I think you must get by now that's what we're saying. This is a case where we think these documents shed some light on Government misconduct. It's not enough to ask you to give us an idea of what was in there or give us your interpretation of what was in there.

The facts that are listed in that memorandum, the advice that may be given may at least give us the information of an individual who came to a conclusion that we may assume depended on some knowledge of Government misconduct, and we may want to bring that person in and question them. Or the facts alone may show that, or just the advice given may lead us to that conclusion that advice would never be given unless this person knew something else that we did it, and that's why we need it.

Now, I'm troubled by the fact that the committee sent the Attorney General an invitation here and there was talk about this hearing, it's entitled The FBI's Handling of Confidential Informants in Boston: Will the Justice Department Comply with Congressional Subpoenas. The chairman invited a representative of the Department to testify and said that person will be asked to explain the new policy, which unfortunately, you haven't really been able to do fully, you haven't been able to differentiate the change in policy that you present here today or the President now imposes, compared with past policies. And asked that you be able to provide the committee with information regarding justification for the refusal.

Now, we've had questions to you asking about your involvement or knowledge of the FBI's handling of confidential informants in

Boston, and I don't think you have specific knowledge of that, am I right?

Mr. HOROWITZ. I have general knowledge of the matter.

Mr. TIERNEY. You do not have knowledge of who gave the orders to redact certain parts of the information that was given to the committee. That was beyond your knowledge.

Mr. HOROWITZ. My understanding was that the producers of the documents at the FBI and the Department who were preparing them were the people who had to review them for 6(e) and other material. I don't know the exact names of who——

Mr. TIERNEY. But you don't know names, exact names of who——

Mr. HOROWITZ [continuing]. When it was done, how it was done, physically did the redacting.

Mr. TIERNEY. And I would guess that you don't have any specifics on the internal FBI investigation, you weren't able to converse with Mr. Delahunt about the fact that there was an internal FBI investigation that in fact turned out to be a whitewash, because when Judge Wolf got the matter, he had pretty much discredited that report that ended up in a subsequent investigation. And you didn't really have information about the initial FBI investigation, right?

Mr. HOROWITZ. As I sit here, I don't have information on that initial FBI investigation that Congressman Delahunt mentioned.

Mr. TIERNEY. So the Attorney General had notice of the hearing——

Mr. DELAHUNT. Would the gentleman yield for a moment?

Mr. TIERNEY. Sure.

Mr. DELAHUNT. I just want to clarify. That was an OPR, Office of Professional Responsibility investigation. So it was done in conjunction with FBI agents. I think it's important to put that on the record, John, and to clarify, so that Mr. Horowitz is not under any misunderstanding.

Mr. TIERNEY. Thank you.

Now, the Attorney General had notice of the hearing, notice of the hearing subject, was specifically asked to send somebody that was knowledgeable about these materials, about the specific case in Boston, about the policy, about the changes in policy. And I would be curious to know why someone with more specific information was not sent. It seems he's done you a disservice and the committee a disservice by not sending up a person or some persons with substantially more information on that. There had to be a number of people involved in those decisionmaking processes, or whether or not things would be disclosed or redacted or whether privilege would be claimed. And then he sent you with at least seven others, eight others, I see now, up here.

So what I would like you to do for us is, would you introduce to us by name, by title and by responsibility vis-a-vis this material, each of the individuals that you brought with you?

Mr. HOROWITZ. Eric Sanstedt, who is Deputy Chief of Staff in the Criminal Division.

Mr. TIERNEY. What is his responsibility with regard to the matters that were in the invitation?

Mr. HOROWITZ. He's on the aides to Mr. Cherdoff, who has been involved in some of these matters, as the chairman knows.

Mr. TIERNEY. So would he know who redacted all the information?

Mr. HOROWITZ. I don't believe so.

Matt Martens, who is also in the front Office of the Criminal Division. Steve Bunnell, who is in the front Office of the Criminal Division. Carl Thorsen, who is in the Office of Legislative Affairs. Ed Whelan, who is in the Office of Legal Counsel. Paul Colborn, who is in the Office of Legal Counsel.

Mr. TIERNEY. Anybody else?

Mr. HOROWITZ. And Jim Rybecki, who is a paralegal, Legislative Affairs.

Mr. TIERNEY. And the gentlewoman behind you?

Mr. HOROWITZ. I'm sorry. Faith Burton, who is also in the Office of Legislative Affairs.

Mr. TIERNEY. What contribution have any of them made to this morning's presentation?

Mr. HOROWITZ. They were involved in, at least many of them were involved in discussions and preparing for the hearing. And——

Mr. TIERNEY. I'm just flapping—I mean, none of them know anything, but they were helping you prepare for the hearing, which you weren't able to testify about most things?

Mr. HOROWITZ. They do know about, as I obviously haven't conveyed to the committee, my knowledge about the decision to invoke executive privilege and what that involves in this particular matter.

Mr. TIERNEY. Who made the decision to invoke executive privilege? Who specifically was the one who bit the bullet and said, all right, this is where we're going?

Mr. HOROWITZ. The President of the United States signed——

Mr. TIERNEY. Ultimately, someone drafted that for him to sign.

Mr. HOROWITZ. I don't know, and I don't believe it's appropriate——

Mr. TIERNEY. Do any of these people here know?

Mr. HOROWITZ. I don't believe that we're in a position to discuss internal deliberations——

Mr. TIERNEY. Well, you are, and I'm asking you, do you know who made that decision, and if you don't know, do any of these people here know?

Mr. HOROWITZ. The Attorney General made the recommendation to the President and the President agreed with the recommendation the Attorney General made.

Mr. TIERNEY. So we're comfortable here as a committee here, we've all decided that the Attorney General is the one that actually made the recommendation?

Mr. HOROWITZ. To the President, that's correct.

Mr. TIERNEY. Who made the recommendation to the Attorney General?

Mr. HOROWITZ. I don't believe we're prepared to go into discussions about who had what discussion with the Attorney General. Again, it's a problem——

Mr. TIERNEY. Again, trust me. You can tell me who gave the opinion to the Attorney General that this should be invoked.

Mr. HOROWITZ. I personally do not know whether there was one or many individuals that the Attorney General consulted to——

Mr. TIERNEY. Well, why don't we have the committee convene again and see if we can determine from them——

Mr. HOROWITZ. This is a matter that we believe is, our advice to the Attorney General is precisely the issue that's laid out by the President in the order he issued, which is the need to protect deliberations within the Department and to provide to the Attorney General——

Mr. TIERNEY. All we're asking for is the name of the individual that gave the opinion. We're not asking the basis of the opinion, what the context of the opinion was, we want to know who had to make the decision. I mean, there's eight people here being paid on the taxpayer's dime and they didn't make the decision. They haven't done much here this morning except watch. Now I just want to know collectively if everybody can determine who made the decision, who made the recommendation to the Attorney General?

Mr. HOROWITZ. Congressman, I will need to go back and consult with the leadership, including the leadership of the Department, to discuss who made what decisions, who was present when decisions and what we can disclose with regard to that.

Mr. TIERNEY. Now, is that because none of you know, or because you'll all go back and discuss the issue of whether or not you can disclose it?

Mr. HOROWITZ. I think it's in part a decision about what can and should be disclosed about who the Attorney General consulted with.

Mr. TIERNEY. So amongst all of you, do you know who made the decision and you just refuse to tell us, or do you not know and have to go back and find out?

Mr. HOROWITZ. Well, Congressman, I am not in a position to answer those questions. The leadership of the Department is going to have to decide to what degree the Attorney General wants to provide to the committee the individuals who were involved in the process.

Mr. TIERNEY. Well, now, let me get real simple. You can't tell me, from this committee of many here, whether or not anybody in this group knows who made the advice to the Attorney General? That's the simple question at this point. Do any of you know who it is? You don't have to tell me who at the moment, but do you know who made that recommendation to the Attorney General?

Mr. HOROWITZ. Congressman, we don't believe it's appropriate at this point for me or any of the people sitting behind me to make the decision for the Department to provide to the committee who the Attorney General consulted with and discussed this matter.

Mr. TIERNEY. Now I'm not asking you who, I'm asking you if you know who. That's yes or no, not a name. Do any of you know who made that recommendation to the Attorney General, or is that something that nobody in this room knows?

Mr. BURTON. Would the gentleman yield to me?

Mr. TIERNEY. Sure.

Mr. BURTON. Does the gentleman that I had sworn, at the beginning, do you know? You're under oath. Do you know who made the

decision. You don't have to tell us who it was. Do you know who made the decision?

Mr. WHELAN. Sir, I believe that's a privileged matter that I'm not entitled to address.

Mr. BURTON. Do you know who made the decision? I'm not asking who it was. Do you know?

Mr. WHELAN. Sir, as the questions from Congressman Tierney have established, you go a little bit down this road, a little bit down this road, it's not a road that I can go down answering any questions on.

Mr. TIERNEY. Are you a lawyer?

Mr. BURTON. Wait a minute. You were sworn. Would you come to the desk and take the microphone? This is pretty important. You're saying, Mr. Whelan—thank you for yielding—that you can't even answer if you know who made the decision to ask the President to issue an Executive order? You can't even say that you know that? We're not asking you who it was, but you can't even say that you know?

Mr. WHELAN. Congressman Burton, the next question down the line is obviously not, this is not a matter on which I am authorized to speak.

Mr. TIERNEY. And I'm going to reclaim my time, too. Sir, are you a lawyer?

Mr. WHELAN. I am a lawyer.

Mr. TIERNEY. Then you full well know we're not dealing with the next question down the line. We're dealing with the immediate question in front of you and Mr. Horowitz now. And that is, after consulting with all the people that you brought to this room, the simple question is, do you or do you not know who that individual is? We'll worry about the next question down the line when and if we ever get there.

Mr. WHELAN. The answer to your question is plainly covered by the deliberative process privilege. And I am not entitled to answer it.

Mr. TIERNEY. I can't hear him, Mr. Chairman. He's got to speak up.

Mr. BURTON. Pull the microphone closer, please.

Mr. WHELAN. I apologize. With all respect, the answer to your question is covered by the deliberative process privilege. And I am not authorized to answer it.

Mr. TIERNEY. You think the deliberative process privilege extends to testifying as to whether or not you know who an individual was that might have given advice?

Mr. WHELAN. Absolutely.

Mr. BURTON. We will pursue this further.

I want to tell you, if the American people are watching this, I think they're going to be very chagrined that you can't even tell us if you know or don't know something. That is amazing. It's just amazing. If the Executive order, or the issue of executive privilege extends to you sitting before this committee and saying, I can't even tell you if I know or don't know something, then we've really gone off the deep end.

Mr. SHAYS. Mr. Horowitz, I understand you're here because Mr. Chertoff couldn't be here.

Mr. HOROWITZ. That's correct.

Mr. SHAYS. And I guess I should be grateful for that. But would you tell me what your position is?

Mr. HOROWITZ. I'm Chief of Staff to Mr. Chertoff.

Mr. SHAYS. So you are basically an administrator for the Assistant Secretary for——

Mr. HOROWITZ. Hopefully I do a little bit more than the administering. I actually am involved in substantive issues as well, Congressman.

Mr. SHAYS. Right. But you are his chief of staff, right?

Mr. HOROWITZ. Yes, and provide him counsel on a variety of issues.

Mr. SHAYS. See, our committee is having a chief of staff, and when Mr. Lieberman has this same issue, he's going to have the Attorney General, that's going to be the difference. And he's the one basically who has signed off on this, and he is the person who has come to me and others to ask for immense powers.

And I hold, I know you're here to present the position of the Department. I have a very difficult time, in part because I know about the case. Do you know about the case?

Mr. HOROWITZ. I know the general details of the case. I don't know——

Mr. SHAYS. Was Mr. Salvati innocent?

Mr. HOROWITZ. I think there's a serious issue about whether he was indeed innocent. I do know that there were failures, inappropriate failures, to produce relevant information.

Mr. SHAYS. OK, so right now, you and I have a disagreement, because he was innocent. And he was let out of jail because he was innocent. So right now, we have a problem. Because if you have that view, the papers you're going to let us see are based on a distortion, in my judgment, of the case.

Tell me about his wife. What do you know about his wife?

Mr. HOROWITZ. I don't know much about his wife, any details about his wife.

Mr. SHAYS. Do you know how often she visited him?

Mr. HOROWITZ. I do not.

Mr. SHAYS. You don't know that she visited him every week for 30 years? Did you know that?

Mr. HOROWITZ. I did not know that until you mentioned that, Congressman.

Mr. SHAYS. Do you know how many children he has?

Mr. HOROWITZ. I do not.

Mr. SHAYS. Do you know that all of his children, that they were very, very young, and for the next 30 years, they basically came to visit him at least twice a month for 30 years?

Mr. HOROWITZ. I do not know that.

Mr. SHAYS. Do you know that the FBI agent who sent him to jail knew he was innocent?

Mr. HOROWITZ. I understand that there was information that the FBI had that indicated he may well have been innocent.

Mr. SHAYS. Do you know that there was information that the Chelsea police had that would have proved that he was innocent?

Mr. HOROWITZ. I don't know as I sit here what the Chelsea police have.

Mr. SHAYS. Did you know that the Boston police had information that would prove he was innocent?

Mr. HOROWITZ. I believe I had heard that.

Mr. SHAYS. Do you know that the State Police had information that would prove he was innocent?

Mr. HOROWITZ. I believe I had heard that there was relevant information in the State Police.

Mr. SHAYS. Are you aware that all four, the FBI, the Chelsea police, the Boston police and State Police, even though they knew he was innocent, still let him stand on trial, and that he was originally going to be sent to death, had a death sentence?

Mr. HOROWITZ. I'm aware of that, and I indicated earlier, Congressman, I think what happened there was terrible. I'm not disputing that in the least.

Mr. SHAYS. No, but you're not sure he's innocent. That's part of the problem.

Mr. HOROWITZ. The reason I'm saying that is, I have not sat and read every fact and every circumstance and I——

Mr. SHAYS. But we have. We have. We have information that you don't have, and now we're trying to understand how the Chelsea police, the Boston police, the State Police and our own FBI could allow an innocent man to spend 30 years in jail. That's why I am angry. That's why I'm angry.

And so that's what I have to wrestle with right now, is thinking that you all are preventing us from getting the facts and understanding why this has happened.

Mr. HOROWITZ. And——

Mr. SHAYS. That's what you're doing.

Mr. HOROWITZ. Well——

Mr. SHAYS. You're doing it because you think you're right. You have stated in a statement to us that this is not a new policy. But that's frankly untrue.

Mr. HOROWITZ. My understanding is it is not a new policy for the Department of Justice and the executive branch as a whole to protect deliberative memoranda.

Mr. SHAYS. So you're saying that Congress for years and years and years hasn't been getting these memos?

Mr. HOROWITZ. What I'm saying is, there are examples where the Department and where the President has decided to produce information. There are also examples, as outlined in these two OLC opinions from 1982 and 1983 that demonstrate almost 200 years of history where Presidents have invoked executive privilege to protect deliberative materials.

Mr. SHAYS. No, wait a minute. We've had executive privilege, I mean, that's disingenuous. I know that. But on these documents that this is not a new policy?

Mr. HOROWITZ. These documents are a subset of documents that involve internal deliberative memoranda.

Mr. SHAYS. On a closed case 30 years old.

Mr. HOROWITZ. That's correct. But they are a subset of deliberative materials. The issue here is deliberative materials. And that's what, as outlined in these summary decisions——

Mr. SHAYS. Do you know why we want this information?

Mr. HOROWITZ. I understand the committee's interest in trying to get——

Mr. SHAYS. No, tell me why. Why do we want this information?

Mr. HOROWITZ. The committee is, among other things, reviewing the handling of informants by the FBI by these other entities and other——

Mr. SHAYS. Why do we want to do that?

Mr. HOROWITZ. There could be a number of reasons. I certainly don't presume to say what the number of reasons, but there could be a number of reasons.

Mr. SHAYS. No, no, I want you to explain to me, why would we even want to look at the informants?

Mr. HOROWITZ. I could envision a desire to write new legislation, I could recognize a desire——

Mr. SHAYS. Tell me the abuses that took place. Tell me the abuses. Why would we be so outraged at this case, and why would we want to understand why the people who were supposed to enforce the law were breaking the law? Tell me why we would want to know about informants.

Mr. HOROWITZ. Congressman, I understand completely why anyone who looked at this, including this committee, would be outraged by what they saw. I had a——

Mr. SHAYS. You don't know the case, though. You don't know the case.

Mr. HOROWITZ. I have, as a prosecutor, I prosecuted a number of law enforcement officials for corruption.

Mr. SHAYS. No, but you don't know this case.

Mr. HOROWITZ. I understand how terrible it is.

Mr. SHAYS. Mr. Horowitz, do you know this case?

Mr. HOROWITZ. I explained to you my general understanding of what happened here.

Mr. SHAYS. And your general understanding was, you didn't know how many kids he had, you didn't know that his wife went to visit him, you didn't know. Tell me about the two informants.

Mr. HOROWITZ. I——

Mr. SHAYS. No, stop. Stop. Tell me about the two informants. Tell me about those informants. You know about the case. Tell me about it.

Mr. HOROWITZ. My understanding is that——

Mr. SHAYS. Tell me their names.

Mr. HOROWITZ [continuing]. Mr. Bulger and Mr. Flemmi were FBI informants——

Mr. SHAYS. Right.

Mr. HOROWITZ [continuing]. And providing information at the same time. There are allegations, and I have to be careful what I say, because there is an indicted case right now in Boston, involving the FBI's handling of those informants and whether there was corrupt activity involving the handling of those informants.

Mr. GILMAN. Would the gentleman yield?

Mr. SHAYS. Why is Mr. Bulger involved in the Salvati case? Tell me why you're saying he's involved.

Mr. HOROWITZ. When you mentioned the two informants, those are the two informants under indictment right now in connection——

Mr. SHAYS. OK, and how is he involved in the Salvati case?

Mr. HOROWITZ. I can't as I sit here today describe for you what each person did in that case.

Mr. SHAYS. Because you don't know. The reason is you don't know. He's not involved in the Salvati case.

Mr. HOROWITZ. What I'm trying to——

Mr. SHAYS. You heard his name mentioned over there, so you made an assumption——

Mr. HOROWITZ. No, believe me, Congressman, having spent time in Boston, I understand completely the significance of Mr. Bulger, Mr. Flemmi and while I may not know the specific facts about how many children and all that they had——

Mr. SHAYS. I'm going to yield to my colleague.

Mr. HOROWITZ [continuing]. I frankly don't think it matters. It's obviously even——

Mr. SHAYS. It matters to me.

Mr. HOROWITZ. Let me finish, please. To me, whether he had 3 kids or 10 children, what would have happened, to send an innocent person to jail, would be wrong. And that's what I know. And that's——

Mr. SHAYS. You know why it matters? Because the FBI tried to keep him in jail. They didn't just send him to jail, the tried to keep him in jail.

Is the FBI under the Justice Department?

Mr. HOROWITZ. It is.

Mr. SHAYS. It's a dumb question, right, and you can smile.

Mr. HOROWITZ. No, I'm not, it's just——

Mr. SHAYS. The reason I'm asking is, the Justice Department oversees the FBI. And we're trying to get information that the Justice Department has, but they don't want us to get it. Shouldn't I be a little uncomfortable with that?

Mr. HOROWITZ. What I would hope is that as we go forward in trying to provide the committee with documents and materials and information, that the committee would see that we are willing to provide the information that allows the committee to take a full review of this matter. That is certainly what I understand we will go forward.

Mr. SHAYS. I yield to Mr. Gilman.

Mr. GILMAN. I thank the gentleman for yielding. I'm being called to another meeting and that's why I thank the gentleman for yielding.

Mr. Horowitz, you said that it was the Department, the attorneys that recommended to the Attorney General that there be a change of policy, is that correct?

Mr. HOROWITZ. No. What I tried to get across was that it is my understanding that the position of the Department, the position of the executive branch has been that deliberative memoranda, in this case deliberative memoranda written by line attorneys, has long been viewed to be covered by executive privilege.

Mr. GILMAN. But what I'm asking you is, did anyone in your Department make a recommendation to the Attorney General that there be a change of policy?

Mr. HOROWITZ. I appreciate the question. I am told that discussions about who recommended what to whom is something we need to consult with——

Mr. GILMAN. Well, the Attorney General didn't do this on his own, did he? I'm sure he took advice from his counsel. Is that correct?

Mr. HOROWITZ. I assume so, yes.

Mr. GILMAN. All right, then, the Attorney General, after getting advice on the change of policy then made a recommendation to the President, is that correct?

Mr. HOROWITZ. My understanding is that the Attorney General did make a recommendation to the President.

Mr. GILMAN. Do you know when that occurred?

Mr. HOROWITZ. I do not know.

Mr. GILMAN. And then the President, just in the last few days, made this change of policy, is that correct?

Mr. HOROWITZ. The order is dated yesterday, December 12th.

Mr. GILMAN. And was that based upon this case, this change of policy?

Mr. HOROWITZ. If I could have a moment.

Mr. GILMAN. Please.

Mr. HOROWITZ. Congressman, it was occasioned by this subpoena, so it involved this specific matter.

Mr. GILMAN. It was occasioned by this case?

Mr. HOROWITZ. That's correct.

Mr. GILMAN. Thank you very much. Thank you for yielding.

Mr. BURTON. The gentleman's time has expired.

Mr. Clay.

Mr. CLAY. Thank you.

Let me first say that, you know, the FBI is an organization that has a history of successes combating criminal activity and threats. And I applaud the Bureau for those successes.

The Bureau has also a history of failures and subsequent coverups as well. And we do not have to name all of these, as most are well documented. The Salvati case is an example that illustrates the need for oversight, as is the performance of the FBI in so-called undercover work with the Ku Klux Klan during the era of civil rights unrest in the 1960's and 1970's. There are other incidents of note.

Whitey Bulger is on your most wanted list, correct?

Mr. HOROWITZ. That's correct, he's on the top 10 list.

Mr. CLAY. And is that where you make the assertion that, are you asserting privilege because he is part of the ongoing criminal, active criminal investigation?

Mr. HOROWITZ. There is the concern about the open case that's about to go to trial in Boston. But the documents at issue here are, the concern and the reason for the invocation involves the deliberative nature of the documents, not necessarily the open case issue.

Mr. CLAY. OK, now, you know, it's customary for a party asserting privilege to submit a privilege log identifying each document subject to a claim of privilege and providing a general description of the document. And the purpose of this is to help us determine if the claim of privilege is valid or just an effort to conceal information. Mr. Horowitz, will the Justice Department provide a privilege

log to the committee describing all documents that you believe are subject to executive privilege or any other privilege?

Mr. HOROWITZ. If I could, I would certainly go back to the Department and raise that issue and consult and get an answer to the committee promptly on that question.

Mr. CLAY. Well, you know, for you to assert privilege, you know, a recent ruling says that when there is a reason to believe the documents sought may shed light on Government misconduct, the privilege is routinely denied on the grounds that shielding internal Government deliberations in this context does not serve the public's interest in honest and effective Government.

I mean, you know, what are we shielding here? We know Bulger is on the 10 most wanted list for the FBI. Yes, he's been indicted. What are we trying to protect?

Mr. HOROWITZ. Let me just correct, he has been indicted in the Boston matter.

Mr. CLAY. I said he's been indicted, yes.

Mr. HOROWITZ. Oh, I'm sorry. What we're discussing here is the protection of the deliberative materials that invocations that have occurred, as I said in my opening statement, back to George Washington through administrations of the present on deliberative documents, as a general matter, that's what's at issue here with regard to the Boston case. It's not, we don't believe, a new policy.

What we are prepared to do is work with the committee to get the committee the information so that the committee can look at this matter, look and see what happened in Boston.

Mr. CLAY. Well, would any release of this information undermine an active criminal investigation?

Mr. HOROWITZ. That's a separate matter, and it might well. I would need to go back and do an analysis on open case. Because there is, as I said, a pending indictment, and there will be a trial. It's currently scheduled, I'm told by the prosecutors who handle it, next January, in a month. And I would certainly, in order to answer that question, we would need to go through it and determine which of the documents might relate to an open case.

Mr. CLAY. OK, thank you.

[The prepared statement of Hon. Wm. Lacy Clay follows:]

STATEMENT OF THE HONORABLE
WM. LACY CLAY
FOR THE COMMITTEE ON GOVERNMENT REFORM

DECEMBER 13, 2001

Thank you for yielding, Mr. Chairman.

I want to welcome the witnesses testifying today, Mr. Daniel Bryant, Assistant Attorney General for Legislative Affairs, U.S. Department of Justice; and Mr. Michael E. Horowitz, Chief of Staff, Criminal Division, U.S. Department of Justice.

I do not agree with the new Justice Department policy not to comply with congressional demands for internal, deliberative, Justice Department documents related to criminal investigations.

I also do not favor tying the hands of law enforcement in a manner that circumvents the completion of their mandates. Additionally, I do not advocate the discontinuation of oversight or allowing the agencies to dictate to Congress the degree and type of oversight that will be accepted. The FBI is an

organization that has a history of successes combating criminal activity and threats. I applaud the Bureau for those successes. The Bureau has also a history of failures and subsequent cover-ups as well. We do not have to name all of these as most are well documented. The Salvati case is an example that illustrates the need for oversight, as is the performance of the FBI in so-called undercover work with the Ku Klux Klan during the era of "Civil Rights" unrest in the 1960's and 1970's. There are other later incidents of note.

We will not have a Gestapo in America. I am not accusing the FBI of being one. The FBI is not the Gestapo. I am saying that we will not have loose cannons in our government that are completely independent of accountability except when and how they decide to allow it. The American people demand accountability of everyone, inclusive of the Congress, and that is the way it will be.

Mr. Chairman, I ask unanimous consent to submit my remarks to the record.

Mr. BURTON. Thank you, Mr. Clay.

Mr. Cummings.

Mr. CUMMINGS. I was just sitting here thinking—thank you, Mr. Chairman. I want to thank you, Mr. Chairman, for calling this hearing. I've got to tell you that this is totally frustrating. And it, you know, they're taught in law school about things being shocking to the conscience. The lack of information that we're getting here today is frightening.

And as I sit here, I was just wondering, who do you all go back to after this is over and who congratulates you for what you've been able to achieve here today? I mean, when you go back to the office, somebody's going to say, guys, you did a great job of stonewalling, and I sure would like to know who that is. This is so frustrating.

I mean, I'm sitting here, and I'll be frank with you, I've been in many, many situations, but this is one of the most frustrating situations I have ever been in in my 6 years in Congress. Because I feel like, you know, I remember during the Watergate hearings, somebody said, I'm not a potted plant, one of the lawyers. And that's how I feel, I feel like a potted plant today.

It's not, and I guess I feel it more not so just because of me, but because of the people that I represent. They still believe in a democracy. You know, they want to believe in a democracy. They want to believe that Government is open and that Government is fair. They want to believe that. They want to believe that prosecutors do the right thing, they want to believe that when somebody is convicted wrongfully, a prosecutor wants to vomit, because they knew that person was wrongfully convicted. They want to believe that.

They want to believe that someone would, in a prosecutor's office, would cry murder if somebody spent 30 years, 30 Christmases, 30 Easters, 30 years, of their life. We have one life to live, this is no dress rehearsal, and this is the life. Just the idea of it. And I don't get that, I don't feel it. I don't feel it.

And then we ask questions, and we can't get simple answers. You know, at some point, we've got to ask ourselves, where are we headed in this society. We criticize other governments for the way they do business and the way they conduct trials and the way they send people to prison. And then we sit here as a Congress and we can't get simple answers.

I guess I'm curious as to how was the team, the team of people that are here, I mean, I'm just trying to figure out why we're even here if we can't get answers. We're paying folks to do a job, we're paying dollars, taxpayers dollars, and we're wasting our time. And it's very, very frustrating. And I'm not saying this because—I'm just sitting here saying, why am I sitting here.

So tell me, since we don't seem to be able to get answers to the questions that have been asked, how was this team assembled that are here? Who are they and why were they picked, and the gentleman that's sitting next to you? I'm just curious. Why do we have this team here today? Who are they? What are their roles?

Mr. HOROWITZ. Well, Congressman, first let me apologize if I haven't been able to impart information——

Mr. CUMMINGS. Well, let's go back to the first part. Who's going to say congratulations for stonewalling?

Mr. HOROWITZ. I'm not expecting anybody to say congratulations, and I'm not here to do any stonewalling. I'm here to try and explain——

Mr. CUMMINGS. But that's how it feels, and it's frustrating.

Mr. HOROWITZ. I certainly understand that, and I understand certainly the Members' concern about what happened in Boston. As I mentioned before, I've been in circumstances where I've prosecuted police officers and Federal law enforcement officers and people have gotten out of jail because of it who should not have been in jail. Fortunately, for my circumstance, no one had been in for 30 years, but they'd been in for many months and in some cases years.

So I agree with you completely that this is not any matter to sit back and congratulate anyone about. We are trying to provide the information that we can, consistent with our constitutional responsibilities, and to do it in a way that gets the committee as much as information as we are able to do about all of the facts, all of the circumstances that happened here. And like I said, I'm not looking to go back for anyone to congratulate me. Hopefully I came here and offered some assistance in explaining what our views were. Obviously, if I didn't do that, I certainly apologize to you and the other members of the committee. But that's what I'm trying to do.

Mr. CUMMINGS. OK, do you understand our frustration? Somebody said a little bit earlier, you know, you've got Democrats and Republicans frustrated over this. This is major stuff.

Mr. HOROWITZ. No, I——

Mr. CUMMINGS. I mean, because we don't agree on a whole lot of things.

Mr. HOROWITZ. Believe me, I understand that, Congressman.

Mr. CUMMINGS. Any time you get me agreeing with the chairman, I mean, they tell me I'm far left, and they tell me he's just to the right of center. And we agree on this. I mean, it's just—I guess like I said, I think about my constituents and I think about all the people who have gone through so many situations and then it just seems that Government takes the position that we are right. Well, Government isn't always right. And in order for us to get to where our Government is wrong, we have to have information.

And so I yield back, Mr. Chairman.

Mr. BURTON. The gentleman yields his time.

Mr. Delahunt. Incidentally, Mr. Delahunt, you were prosecuting attorney at the time that the Salvati case took place, were you not?

Mr. DELAHUNT. Mr. Salvati was prosecuted, Mr. Chairman, before I became district attorney.

Mr. BURTON. But you were district attorney up there, and you're conversant with a lot of these things?

Mr. DELAHUNT. I am. I'm conversant with it, unfortunately I'm conversant with it.

You know, we've focused today on Mr. Salvati, and that's appropriate. I respect the passion I just heard from my friend to my right. But let's be clear. The Salvati case is not unique. Would you agree with that, Mr. Horowitz?

Mr. HOROWITZ. I certainly think there are more issues beyond the Salvati case with regard to the handling of informants——

Mr. DELAHUNT. Not just in Boston.

Mr. HOROWITZ. Right.

Mr. DELAHUNT. There have been allegations about other offices, not just in Boston, but in New York. I don't want to enumerate them, I don't think that's necessary. But what we're talking about is, as Senator Specter and Senator Grassley said during the course of the confirmation hearings of the Attorney General, was that it's a culture.

And it isn't just about depriving people of their liberty. It's about murders. Stop and think, Mr. Cummings, for a moment, about those who because of misconduct by personnel within the Department of Justice, and I'm correct in stating that the FBI is within the Department of Justice, correct, Mr. Horowitz?

Mr. HOROWITZ. That's correct.

Mr. DELAHUNT. That because of conduct, that people were given information that led to the murders of people. Is that a fair statement?

Mr. HOROWITZ. If you're raising allegations I need to be careful——

Mr. DELAHUNT. Well, is there some evidence that would indicate that?

Mr. HOROWITZ. There are certainly allegations, if I could phrase it that way, Congressman.

Mr. DELAHUNT. Right. Now, I mentioned, and I think it's really important, too, because when we continue to hear, well, the Department of Justice has taken steps, we created a task force, we did A, B, and C, I think it's important to really understand that they did it reluctantly. This simply didn't happen. It's my understanding that Judge Wolf, but let me pose it in the form of a question.

Is it your understanding that Judge Wolf had to threaten the deputy attorney general in a previous administration with contempt of court before the names of Mr. Bulger and Mr. Flemmi were revealed as informants?

Mr. HOROWITZ. I do not know if Judge Wolf specifically ordered or threatened the deputy attorney general with contempt. I do know——

Mr. DELAHUNT. Let me rephrase. I understand it's the assistant attorney general. Let me rephrase it so I can make sure I'm not misstating it, a senior official in the Department of Justice.

Mr. HOROWITZ. And as I said, my answer would stay the same as to whether he indeed issued a contempt order. I do know that Judge Wolf spent, as you indicated, a fair amount of time digging and reviewing into this matter.

Mr. DELAHUNT. Right. But it was the Department of Justice that refused to disclose the names of Mr. Bulger and Mr. Flemmi as informants until the threat of a contempt citation was put forth by Judge Wolf. I guess what I'm suggesting to you is that the record of the Department of Justice in this entire matter is abysmal. It truly is abysmal for all fair-minded people. I'm not suggesting anyone here that works for the Department of Justice intended bad things to happen. But with all due respect to Mr. Whelan, not to

respond to the Chair's question and not to respond to Mr. Tierney's question about, do you know if, without getting on to the second question, that does not carry confidence in the Department of Justice.

I would suggest that you go back and think of what you're doing. Because I've got to tell you what you're doing. You're undermining the confidence of the American people in the Department of Justice by this presentation here this morning. And I'm not singling out any individual. But you've got to go back and say, we didn't hear anyone on this panel from left to right, from Democrat to Republican, appreciate or respect the testimony that we proffered this morning.

And I don't know if it's already been inquired of, but in your statement, on page 4, there's a declarative sentence that says legislative branch political pressure on executive branch prosecutorial decisionmaking is inconsistent with the separation of powers and threatens individual liberty. Are you suggesting that this committee is exercising its authority in creating political pressure on the Department?

Mr. HOROWITZ. No, Congressman. What the concern is is that making documents, deliberative documents of line attorneys available for public dissemination——

Mr. DELAHUNT. Well, why did you make that statement, Mr. Horowitz?

Mr. HOROWITZ. The concern is that could be a result of making available line attorney pre-decisional memoranda to their supervisor and chill their ability or their willingness to carefully and fully analyze the case and decide whether to prosecute or perhaps not to prosecute.

Mr. DELAHUNT. Well, let me followup. In your testimony, or in your discussions, and again, I don't know if you agree with my interpretation of the Supreme Court decisions, a case by case basis, but you fail to even assert that the Department has a particularized interest in withholding the information that was requested. Is that a fair statement?

Mr. HOROWITZ. I think what we've tried to address and lay out for the committee, and the committee has the President's order, is the concern about chilling the deliberative process.

Mr. DELAHUNT. Chilling. But you did not, have you provided a log of statements, any of the documents that have been requested, given us an, identifying those documents which are subject to a claim of privilege?

Mr. HOROWITZ. Congressman Clay actually asked us to prepare and produce for the committee a privilege log. And as I mentioned to him, I will certainly go back and discuss that and respond.

Mr. DELAHUNT. I understand. You're going to be so busy when you go back, Mr. Horowitz, with all due respect. I understand negotiations between counsel for the committee and the Department have been going on for some time. For you to come forward today without having an answer to that particular question, I'm just—I'm disappointed. I'm truly disappointed.

You can provide us with a statement quoting a variety of statements. We can all indulge in platitudes and string them on and on. But you're an attorney. You've tried a number of cases, I presume.

Mr. HOROWITZ. That's correct.

Mr. DELAHUNT. Then why didn't you assert a particularized need to withhold information given the documents that were requested by the Chair and by counsel?

Mr. HOROWITZ. My understanding is that the request first came in connection with the subpoena issued back in September, that—I'm also told that in light of what happened on September 11th, that the decision was made to delay the request for the documents until a later date, and that this hearing was then set fairly recently.

Mr. DELAHUNT. You know, honestly, that's just an unsatisfactory response. I mean, you're here with a number of professionals from the Department. To think that you would come before this committee without having a log prepared, without having a description of a particularized need to withhold that information, I mean, there is no one on this—go ahead, you can interrupt.

Mr. HOROWITZ. I was going to say, I think as far as I'm aware, there is only one court decision that specifically addresses an assertion of executive privilege in connection with a subpoena request from a congressional committee, and that was the Senate Select case decided by the D.C. circuit. And what the D.C. circuit laid out was that the Department, upon an assertion of the Department that certain documents fell within the scope of its executive branch privilege, that the Congress was then obligated to present the particularized reason and the critical need for the documents, and that, to my understanding, is the only court decision out there that specifically addresses a congressional request for information.

Mr. DELAHUNT. It's my understanding that there are numerous cases. I think I would yield any time he might want to the majority counsel.

But again, let me go back to what I was saying earlier.

Mr. BURTON. If Mr. Delahunt would just yield, I have to go to another meeting. I'd like to take my time and then Mr. Shays is going to take the Chair. You gentlemen, we'll allow you as much time for questioning as you want. And I hope you will take advantage of that.

Let me just cite for the record that the Attorney General of the United States, Mr. Ashcroft, was on CNN's Late Edition with Wolf Blitzer, and I'm sure you're aware of this. And he was asked, when we were trying to get documents from Janet Reno regarding some cases regarding the previous President, President Clinton, and Mr. Ashcroft said, and I'm paraphrasing him, because I don't have the exact quote, that Janet Reno ought to comply and ought to give us those documents, that the Congress had a right to them.

Now he's the Attorney General and he's taking an entirely different position. And that is very disconcerting to me.

Mr. HOROWITZ. Can I respond to that, Mr. Chairman?

Mr. BURTON. Sure.

Mr. HOROWITZ. I actually have, you cited that in your letter, which I have with me. If I could just address that.

What then-Senator Ashcroft said was, "There are only two reasons why a person can fail to respond to a subpoena from the House. One is that there is no jurisdiction of a committee." This committee clearly has jurisdiction here. "Secondly, executive privi-

lege would be asserted." And he goes on, two sentences later, saying, "I think the House simply has to say, either our subpoenas are respected or they are challenged on appropriate grounds. And if they are not, stonewalling won't do it." And he goes on.

So I do think the distinction here is, and what then-Senator Ashcroft was saying was, there are two options, executive privilege or you produce. Stonewalling is not a third option.

Mr. BURTON. I see. So you don't call this stonewalling?

Mr. HOROWITZ. No. The President has asserted executive privilege.

Mr. BURTON. If there was a court order for a deliberative document prepared during a criminal investigation, would you comply? If it was a court order?

Mr. HOROWITZ. I think at that point the case law says, and there is Supreme Court case law on that issue, that the court has to do a balancing of the asserted privilege basis by the Government, by the executive branch, against the need of the judicial branch for the information, the same type of balancing that would go on——

Mr. BURTON. So you're saying it would have to go to another court to make the determination that the Court that ordered that would be allowed to have it, right?

Mr. HOROWITZ. If we are talking in terms of court order, I am thinking court subpoena——

Mr. BURTON. No. If there was a court order for a deliberative document prepared during a criminal investigation, would you comply?

Mr. HOROWITZ. If there is a court order, I think we would probably comply. I think people would have to look at the document to determine whether there were any privileges that could or should be raised, that we are obligated to——

Mr. BURTON. So why would you comply with a request from the judicial branch and not from our branch?

Mr. HOROWITZ. I think, Mr. Chairman, it really depends on a fact-by-fact analysis, as we have discussed before. It really depends on what the document is at issue.

Mr. BURTON. I am sure we are not going to change your mind, and I am not going to take a lot more time on this. But it looks to the Congress, you have seen across the spectrum, from right to left, from Democrat to Republicans, we all disagree with you. We all think this is stonewalling. And I think the American people are going to draw the same conclusion when they hear this. It is just a terrible, terrible precedent to set, and it is a precedent. I just think this is absolutely wrong. And at the end of the day, it looks like the Justice Department is hiding something. And I would like to recapitulate what is at stake for just a couple of minutes.

This committee is conducting a thorough investigation of the FBI's use of a confidential informant, or informants, in Boston. The picture could hardly be worse. Earlier this year we had a hearing and we heard from Joe Salvati and his wife Marie. He spent 30 years in prison for a crime he did not commit. And worse, the Government knew about it. They knew he was innocent and they left him in prison. And he would have gotten the death penalty if they had their way. And who was Salvati doing time for? The real guilty party was a government informant that the FBI was working with

named Jimmy Flemmi. Jimmy Flemmi. He was known to the Director of the FBI J. Edgar Hoover as a man who had killed numerous people, but he was being protected because he was an informant. The Government also wanted his brother to be an informant, and they succeeded. Stevie Flemmi ended up serving as a government informant for decades. During the time he was a government informant he was protected by the FBI and he killed dozens of people—and they knew it. He is currently under indictment for many of these murders.

There are many reasons that we are conducting this investigation. First, we need to know whether we should change the laws. And you are blocking us in that area. We will have hearings about this subject next year, and we are going to have a lot of them. It is also important to reach a complete understanding of what happened. Inscribed on the United States Archives are the words, "What is past is prologue." How can we avoid the terrible mistakes made in Boston if we sweep the conduct under the rug? And we do not know how to get to all these things if you keep us from getting documents. And finally, the people who suffered, Joe Salvati, who spent 30 years in prison for a crime he did not do, the mothers and fathers of many people killed by Stevie Flemmi and Whitey Bulger, the sons and daughters of those who died, they all deserve to have someone take a long, hard look at what happened.

It should be made public, all of it; something the Justice Department could not do, even if it wanted to. And now the Justice Department will not let us conduct a thorough investigation. They are blocking the Congress who has legitimate oversight responsibilities. If we knew that the Justice Department was policing themselves, it might not matter that much. But they are not policing themselves. The first question we ask witnesses when we talk to them is: Has the Justice Department talked to you? A lot of these people we asked if the Justice Department has talked to you, the answer over and over was no. After we had Paul Rico in here, the FBI agent, at our May hearing, we found that no one had even bothered to talk to him and he was complicitous in putting Joe Salvati in jail for 30 years knowing he was innocent. And you guys at Justice never even talked to him. And you will not let us have documents so we can do our job.

Time and again, we have found that the Justice Department just has not done its homework. And today is another manifestation of that. Why not? What are you protecting, and why? And if you are not going to do the work, why don't you let us do the work? As I said, you have got $1 million worth of talent out there and nobody wants to answer anything or knows anything.

I asked the Justice Department a few months ago to provide me with a list of all the situations in the past where deliberative documents have been provided to Congress. The Justice Department has not provided that list. Tell me about what you have done to prepare a list like that. Can you tell me that?

Mr. HOROWITZ. Well——

Mr. BURTON. You are looking around. You do not know.

Mr. HOROWITZ. I do not know what has been done to prepare the list.

Mr. BURTON. You do not know. Do the guys behind you know anything about that?

Mr. HOROWITZ. We will check into that and get back to the committee with a list of what we have got and provide the committee with those materials.

Mr. BURTON. OK. Who, in the case of Salvati, has been interviewed by the Justice Department so we can end up with a complete list? Who has been interviewed? Can you give us any names that you have interviewed regarding this guy being in jail for 30 years for something he did not do?

Mr. HOROWITZ. I am not familiar with who specifically was interviewed in connection with the investigation.

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

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

Mr. BURTON. We are asking about other cases, not this case, other cases where you have provided deliberative documents. That is the list we want to have.

Mr. HOROWITZ. We will go back document by document review it and provide the committee with materials that do not involve these type of deliberative documents.

Mr. BURTON. Can you envision any circumstance where Congress would need deliberative information from a criminal investigation and that you would comply? Can you think of any case where you would give us that information? The deliberative information.

Mr. HOROWITZ. Certainly in situations as the chairman has mentioned, the Teapot Dome scandal and the Watergate scandal, there are situations that materials have been provided to committees.

Mr. BURTON. No. I am talking about in the future. Can you envision any circumstance where Congress would need deliberative information from a criminal investigation that you would give us?

Mr. HOROWITZ. If there were situations analogous certainly to those matters, yes. But it is hard for me to sit here and hypothesize about particular cases that have not happened or how will they come up.

Mr. BURTON. Well, OK. But if you would give them to us under those circumstances, why would you not give us deliberative documents in the Salvati case?

Mr. HOROWITZ. Because as—and I know I am covering old ground—as laid out in the President's order, and then, as I said in my opening statement, we are prepared to go and try and work on accommodations with the committee in providing the information short of these handful of documents we are talking about.

Mr. BURTON. So you are saying, because of the President's claim of executive privilege in this particular instance, you would not or could not do anything. So are we going to have to have the President claim executive privilege in the future on other areas where we want deliberative documents?

Mr. HOROWITZ. No. I think what is likely to go——

Mr. BURTON. This one covers it? Will this one cover any deliberative documents in the future that we might want?

Mr. HOROWITZ. I think with regard to every request and every subpoena, there would need to be an accommodation. And hopefully, that would resolve the dispute and there would be no need for consideration of requests.

Mr. BURTON. No. I am saying does this Executive order from the President, the claim of executive privilege, does that cover any deliberative documents in the future that we might want? Have you read that thing? Do you understand it?

Mr. HOROWITZ. With respect to any case?

Mr. BURTON. Yes, any case coming up that you want to claim executive privilege, would this cover that?

Mr. HOROWITZ. I think that this order would involve the subpoena at issue, or the subpoenas involved, which in this case were the Gore memoranda, the Middleton memoranda, and the Boston matter. I think for other future matters, we would need to reconsider and determine from there whether they were covered by privilege.

Mr. BURTON. That really does not make sense, because we have read that claim of executive privilege and it appears to me to be far-reaching. And if you guys have read that thing, it appears to me that it is going to cover deliberative documents anytime the Attorney General does not want to give them to us. But you are saying that is not the case.

Mr. HOROWITZ. I do not believe that is the case, Mr. Chairman.

Mr. BURTON. So you believe that the President would have to claim executive privilege again if we asked for other deliberative documents in the future?

Mr. HOROWITZ. In other circumstances, in other cases, in other requests, I think we would have an obligation to review it. That is my understanding.

Mr. DELAHUNT. Mr. Chairman, if I may just for a minute.

Mr. BURTON. Yes?

Mr. DELAHUNT. I would just point to you, and maybe this is what you are referring to, the language in this Executive order that states: "memorandum written in response to those memoranda and deliberative memoranda from other investigations containing advice and recommendations concerning whether particular criminal prosecutions should be brought." This is far-reaching.

Mr. BURTON. It is a blanket.

Mr. SHAYS. Would the gentleman yield?

Mr. BURTON. Yes, I will yield.

Mr. SHAYS. The reason why I again find this puzzling and almost disingenuous is that this is the worst case you could choose to withhold information. It is 30 years old. It involves such an outrageous example of government abuse. And that if you would do it on this case, you would clearly do it on others. Why in this case would you want to withhold those documents?

Mr. HOROWITZ. Well, it goes beyond this case.

Mr. SHAYS. Exactly.

Mr. HOROWITZ. When you say "this case," there were a series of cases referenced in the subpoena, including some of the campaign finance matters.

Mr. BURTON. If I might reclaim my time. Let me just say, because I am going to turn the Chair over to you, this is a far-reaching document and I do not believe it limits it to the cases in question. I think it is going to set a precedent unless we challenge it, and we will be challenging it. It smacks of a totalitarian approach to administering law. It really does. Because if we do not have the right in the Congress, when we know there is corruption in a branch of the executive branch like the FBI or the Justice Department, if we cannot get access to documents, we will never be able to protect the American people from the abuse of power. We just will not.

We are elected by the people of this country to make sure there are not abuses of power in the executive branch. But if you have a President and an Attorney General who are complicitous with one another in keeping documents from the Congress where there is a criminal case involved, and they might even be involved themselves, then how are we ever going to stop abuse? How are we ever going to stop corruption in Government?

If I were going to be elected President of the United States under the circumstances that we see today, I would first appoint an Attorney General who would march in lock step with me, and I would make sure that nothing that we did that was illegal or questionable would ever be questioned by the Congress of the United States. And in my opinion, you are providing that by this Executive order and this decision of the President. I think it is just wrong and I think it is very dangerous.

This President I think is doing a good job. I voted for this President. I support him on almost everything. He is my President. He is a Republican. But the point is he is setting a precedent and the Justice Department is setting a precedent that, in my opinion, is going to go down the road and we may have another corrupt President in the future. The only protection against the abuse of power is for the Congress to be able to conduct oversight. And you are blocking us with what you are doing today.

And with that, I will turn the Chair over to Mr. Shays from way up north.

Mr. SHAYS [assuming Chair]. Mr. Horowitz, what our intention is, Mr. Delahunt has some questions, I have a few, then we are going to go to the committee. Do you need a break?

Mr. HOROWITZ. No. I can proceed. I am fine for now.

Mr. SHAYS. Would you like a 5-minute break?

Mr. HOROWITZ. That is fine. I am just going to go have some water, if you do not mind.

Mr. SHAYS. Yes. Sure.

[Recess.]

Mr. SHAYS. At this time, we now recognize Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Shays. They made me sit up here. I am trying to understand what the premise is of the refusal. All I hear is a general harm, a chilling effect in terms of line USAs or line FBI agents. Is that the extent of the rationale?

Mr. HOROWITZ. You are talking about that in part, but also the ability of supervisors who make the decisions to get the full advice of their subordinates, to be able to have internal deliberations, whether it is the line attorneys or the supervisors who are rec-

ommending to the ultimate decisionmaker, can have the ability to have that discussion.

Mr. DELAHUNT. OK. So it is the communication between the supervisor and the line personnel?

Mr. HOROWITZ. As well as the ability of senior officials of the Department to be able to gather advice and to make the ultimate decisions that need to be made. There are two parts to this.

Mr. DELAHUNT. OK. But again, let me go back, what is the harm to the disclosure of the information requested in the subpoena in this case?

Mr. HOROWITZ. The harm is that as prosecutors write these types of memos and decide these——

Mr. DELAHUNT. No. Mr. Horowitz, you are not listening to the question. What is the harm in this case to providing the information to comply with the subpoena? This is a specific subpoena that has been issued to the Department of Justice.

Mr. HOROWITZ. And what I am trying to say is that the harm is similar to the harm that comes from producing to the Congress internal deliberative memoranda similar in many cases——

Mr. DELAHUNT. OK. Then let me just stop you there because I think you answered the question. If that is the premise, then that same concern would apply in every case involving deliberative memoranda.

Mr. HOROWITZ. And this is where the case is made clear.

Mr. DELAHUNT. Am I correct?

Mr. HOROWITZ. The case is made clear. As I think you mentioned earlier, that the case-by-case analysis is undertaken to determine whether there is an ability to, first of all, accommodate the interest and provide the information, and that is what we have an obligation to undertake with the committee, and then to make the determination at that point whether or not to assert the executive privilege.

Mr. SHAYS. Would the gentleman yield for just a second?

Mr. DELAHUNT. Sure.

Mr. SHAYS. You will have as much time as you need. What Mr. Delahunt wants to know, what I want to know, and what the committee wants to know is, you cannot make an argument on withholding this information as it relates to this particular case. This case is an old case. You cannot make that argument. So you really are making the argument solely to state a principle that you wish to use in the future. Because there is no harm in this case.

Mr. HOROWITZ. Well, in this case, first of all, not all the memos, as you indicated, are 30 years old. As you know, there have been developments in the whole timeframe that could be responsive and I think there are more recent memos than 30 years ago. There is also, as I indicated before, the pending criminal investigation and criminal indictment. And so there is the possibility and the potential that some of these documents may in fact——

Mr. SHAYS. So, based on that, why not just release some of the older documents?

Mr. HOROWITZ. Because I think the decisions that have analyzed this matter, the Supreme Court case, have indicated that, first of all, the fact that we are a year, or 5 years, or 10 years from when

the memo was written does not diminish the chilling impact that prosecutors today writing memos——

Mr. SHAYS. So you are getting back to the chilling effect which is something that is a future concern, not a past concern.

Mr. HOROWITZ. Well, it is a present and future concern, because we have people writing memos everyday.

Mr. DELAHUNT. It is like utilizing the term "national security" and just saying it. It is meaningless. And you have not provided a factual analysis for the refusal to fully comply. You have not shown any particularized harm for the issuance of certain documents. Mr. Horowitz, you come here without a log of identifying the documents that you refuse to produce to the committee. I would like to know was there an analysis of each document, and what is the rationale, other than this chilling effect, that would provide on a case-by-case basis a rationale and a justification for not releasing the document that was requested?

Mr. HOROWITZ. Congressman, I know on this matter we may disagree on what the case law there says. But the Senate Select Committee case, the only case that we are familiar with that exists out there that involved a congressional request for documents, talked about, as I said earlier, the executive branch analyzing the documents and determining whether they are covered by privilege, and then what was outlined in the decision was the Congress demonstrating in that case, what the court required, was the Congress demonstrating a critical need for the documents.

The documents at issue here, the subpoena specifically called for the deliberative documents that are at issue here. The subpoena request that is at issue here in the Boston matter, as well as in the campaign finance matter, involved a very specific set of documents. I guess 20 so far have been located as the search is ongoing.

Mr. DELAHUNT. Again, all I can say is—we are going around the mulberry bush here—you are creating I think a precedent that you should go back and reflect on. I cannot image that Congress as an institution, as an independent branch of Government would accept this new concept of privilege which deals more with vague, general suggestions about a chilling effect. I mean, you are undermining the confidence not just of this institution, but, as the chairman conducts additional hearings, the confidence of the American people in what the Department is doing. I would be embarrassed to have to respond to the kind of questions that I think are being made in good faith by members of the committee by providing the answers that you are giving here today.

The most awesome power in a democracy is vested in the prosecutor, in the prosecutorial arm of the Government. You have the ability to deprive people of their liberty, to injure their reputations. And to put that at risk I think is a very dangerous course to follow. I really do. I will be honest with you, I am really surprised by your testimony today. I know that you are the messenger and Mr. Whelan is the messenger and everybody has to comply with whatever the line may be. But this is a total misreading of the law and what good, sound public policy is regarding dealing with a congressional committee. It truly is. General harm, coming here without a log, without being specific. I do not see how you get away with

it. I do not see how the Department of Justice gets away with it. I really do not.

You heard members in their observations and you could tell I am sure they are very genuine. This is not about political rhetoric and blame. I just think that people that serve on this committee are stunned. This is dangerous. This is really dangerous. I yield back.

Mr. SHAYS. I thank the gentleman.

Mr. Horowitz, I want to be clear. When you use deliberative documents and pre-decisional memos, how would you describe the difference? Are you using them interchangeably or do they have fine terms of legal art that I need to be aware of?

Mr. HOROWITZ. I think when I am saying pre-decisional memoranda that we are talking about are, in fact, deliberative. So that would be a subset of deliberative materials.

Mr. SHAYS. OK. When this hearing started my biggest issue concern is about the Salvati case. The bottom line is the Department is preventing us from doing our job of resolving this case. Basically, whatever the motivation is, you are impeding our investigation of the Salvati case.

After hearing it, I thought there would be such an outrage, because when I asked you about his wife and so on, his wife visited him for 30 years, remained faithful to him, supported her family, brought her kids, I thought there would be such an outrage that anyone with any ability to help would kind of like extend themselves. So I thought when my party took over, my Republican party, when they gained control of the Attorney General's Office, they would recommend to us that we compensate him, that they would kind of lead the charge. So my outrage really stems from the fact that I find the exact opposite has happened. I did not think my own party would do it. I did not think Mr. Ashcroft would do it. I really did not. I thought this man who is so focused on honor and religion and God would extend himself. So then I tried to think that maybe they do not know about the case and maybe if they knew about it. So that is partly why I was asking you some of those questions about the case.

I have religion, as Mr. Ashcroft has religion. I have religion on the Salvati case. I have religion on it. I will do anything and everything I can to understand this case, to make sure it does not happen again, though I know it happens, and to do what I can to see that he receives compensation and his kids do.

So on one local level I am concerned. Then I thought, well, my Gosh, if they are willing to do this on the Salvati case, then there must be something so overriding they do not want Lieberman to get information or they do not want someone else to get information on some other case, so they are setting a precedent. They do not want the Senate, which will be a little more aggressive, clearly, than the House will be, they do not want them to get something in the future. And I am trying to think what are those things. So, I do not have those answers. But then what I hear you saying is you kind of seem like you are backtracking. You set a principle that basically if it is a deliberative document or pre-decisional matter, you are not going to get the information. But then you are saying that, well, we will take it on a case-by-case, which strikes me as bizarre. Why fight it on this case when you really should be

bending the other way unless you want to set the precedent. So I am puzzled by this kind of what I think is waffling on the decision.

You told me, if I heard you correctly, that if this were just an issue of facts there would not be a question. Is that accurate?

Mr. HOROWITZ. That is my understanding.

Mr. SHAYS. OK. But if it is an issue of where it is a pre-decisional memo where the recommendations of the author are there, then we want to hold them confident. Is that accurate?

Mr. HOROWITZ. That is correct. Where there is analysis and consideration of the facts.

Mr. SHAYS. So in a document that is prepared, an analysis is after they look at the facts, right? I mean, they state the facts and in the recommendation memo or a pre-decisional memo there would be a statement of what the facts are, there would be an analysis of the facts based on the law, and then a recommendation. Is that accurate?

Mr. HOROWITZ. Generally, that is how they are done.

Mr. SHAYS. Now what happens if we believe—now you have to trust us like you were asking us to trust you—what happens if we believe that the facts were distorted and that the FBI did not give proper facts to people who would prepare a memo for recommendation for the prosecutor? What would you say to something about that?

Mr. HOROWITZ. Well, we would be providing the Congress with an outline of the facts as they were understood by the decision-makers. And so the Congress would be aware of——

Mr. SHAYS. Why not just redact the information? Why not give us the documents and redact the recommendation?

Mr. HOROWITZ. My understanding is that in terms of the documents that we are producing that are nondeliberative and nondeclination material that factual information is there. But we are also prepared to sit down and to the extent the committee needs clarification or an understanding——

Mr. SHAYS. I am not interested in what you are prepared to do in the future right now. I am just trying to understand why the Department would be so stupid as to get us into this position. That is what I am trying to understand because I think it is really stupid. I want to understand why you would not have said we cannot give you this but we will give you the listing of the facts and here they are. Did you make that offer?

Mr. HOROWITZ. I think we are prepared to do——

Mr. SHAYS. I do not want to know what you are prepared to do. I want to know if you did it.

Mr. HOROWITZ. I do not know if a specific discussion was had as the chairman has just outlined. Although, let me add, on the subpoenas regarding the Middleton matter and the Howard matter, we did provide such a briefing.

Mr. SHAYS. What does that mean?

Mr. HOROWITZ. A briefing as you suggested to provide the committee with an overview of the facts and circumstances.

Mr. SHAYS. Did you give us documents?

Mr. HOROWITZ. We produced some documents and we provided a briefing with regard to the declination memos.

Mr. SHAYS. I guess what I am trying to understand is a document that does analysis has to have facts preceding it.

Mr. HOROWITZ. That is correct.

Mr. SHAYS. And did you provide us those documents redacted?

Mr. HOROWITZ. We did not provide those documents. We briefed the committee on those specific documents and provided the factual documents to the committee.

Mr. SHAYS. Do you think the Senate is going to accept this kind of change in policy? And that is what it is, a change in policy, because we got pre-decisional memos from the previous administration. Not all, but we got them. What do you think the Senate's reaction is going to be?

Mr. HOROWITZ. Well, I understand that you received pre-decisional memoranda from the prior administration but, as you indicated, there were other circumstances where you did not.

Mr. SHAYS. And now we will not receive any. That is the change in policy.

Mr. HOROWITZ. There have been invocations of executive privilege on deliberative materials from many administrations. I do not presuppose to guess as to what the Senate's view would be.

Mr. SHAYS. Were you just not being alert, or did you accept the question Mr. Gilman asked you maybe 10 times about a change in policy. He asked when, and you tried to find the date. Were you just not paying attention to his making reference——

Mr. HOROWITZ. I have tried, as people have asked questions, to correct what I disagreed with in the question when they did not ultimately ask the question.

Mr. SHAYS. Well, the bottom line is it is a change in policy, whether you want to agree to it, because the policy now is it will apply in all instances, not in some.

Mr. HOROWITZ. I do not believe that is the case.

Mr. SHAYS. Is it your testimony under oath that the administration will provide pre-decisional documents to this committee and to the Senate?

Mr. HOROWITZ. I do not know as I sit here what those requests will be and what those will involve. And as I said on the——

Mr. SHAYS. I want to ask you this under oath. Were there discussions that said it is going to be the policy of the Department not to submit pre-decisional documents?

Mr. HOROWITZ. I do not recall myself being part of such discussions. Were there other people involved in such discussions, I do not know as I sit here today.

Mr. SHAYS. Let's just not even suggest that you were part of the discussions. Are you aware of any Department policy to establish that we are going to send a message to Congress that we will not provide pre-decisional documents?

Mr. HOROWITZ. My understanding about conversations that, for example, the chairman referenced earlier——

Mr. SHAYS. No. I am not going to talk about any conversations. Just the policy.

Mr. HOROWITZ. As I sit here today, I do not understand the policy to be that from here on out we will not look at documents individually, that we will simply take a blanket view on every potential document that could conceivably have a deliberative nature to it.

Mr. SHAYS. So it will not be the policy of the Department to exclude some pre-decisional documents or prevent us from getting those documents?

Mr. HOROWITZ. As I understand it, what we will do in future cases is analyze the request and analyze the documents. I cannot sit here and tell you, Mr. Chairman, that——

Mr. SHAYS. But when I listened to your statement I guess I just was not paying attention. I thought you were basically saying the policy is not to give pre-decisional documents because it has a chilling effect. But maybe I did not hear your statement right. So your statement is that it is going to be case by case and it is not the policy of the administration to exclude pre-decisional documents. Is that correct? And do you want to check with anyone before you answer?

Mr. HOROWITZ. My understanding, Congressman, and my statement regarded the specific subpoena at issue here and the specific invocation by the President on those documents.

Mr. SHAYS. So it only applies to this case?

Mr. HOROWITZ. As I sit here today, and as you question me about this matter, my understanding is that the President's invocation concerns this—these. I have got to be careful, there are multiple subpoenas outstanding, these subpoenas.

Mr. SHAYS. I understand what his document did. I want to know the policy of the Department. Is it the policy of the Department to not provide pre-decisional documents to Congress?

Mr. HOROWITZ. My understanding of the policy is to consider it on a case by case basis from here on out.

Mr. SHAYS. Mr. Whelan, I want to ask you the same question.

Mr. WHELAN. I am only aware of the Department's response to these subpoenas at issue. Obviously, the response by the Department and by the President reflects a certain policy that if adhered to the future may have certain consequences.

Mr. SHAYS. So you are not aware of any effort on the part of the Department to refuse in the future to give Congress pre-decisional documents? It is going to be case by case? Under oath, that is your testimony. No discussion whatsoever that we should not provide pre-decisional documents in general to Congress?

Mr. WHELAN. My apologies, it is difficult hearing you over the bells.

Mr. SHAYS. I am going to ask the question again. And we are going to have to recess, unfortunately. My question to you is, are you aware of any effort on the part of the Department to have a widespread claim of not providing documents that are pre-decisional to Congress?

Mr. WHELAN. And my answer is what I just said. That as I am aware of the response to the pending subpoenas, the response reflects a certain policy which if adhered to in the future would have certain consequences.

Mr. SHAYS. So now I am back to square one. It just really relates to this case, right? It relates to this case, correct?

Mr. HOROWITZ. You are questioning me under oath, Congressman, and I understand this issue and I want you to understand it. I do not want you to walk away thinking I have been evasive in any way, because I have tried to be fully candid with this commit-

tee. But as I sit here today, that is my understanding, that it applies to this fact pattern and these documents. My understanding is that if there are future subpoenas and future document requests, we need to look at those individually and make that determination. Obviously, the President's decision is out there from this matter, as are prior decisions by prior Presidents.

Mr. SHAYS. But we are agreeing to something. I was getting confused and now I am getting less confused. I am puzzled about why it would be this case. But I am accepting your point that you are going to take it on a case by case, that the argument of chilling effect relates to each case as it comes up, that it does not relate in general to pre-decisional memos because it is going to be on a case by case basis. We are there. We agree.

Mr. HOROWITZ. Let me be clear. Obviously, as Mr. Whelan suggests, to the extent the same principle is at play, a similar analysis would need to be done. But I agree with you that you need to look at each document to determine how deliberative it is because, as you yourself recognize, some documents may well have very little deliberation in it.

Mr. SHAYS. We were here, and then we were over here, and I thought we were back to here. Now we have opened the door because we are saying the same principle applies. So, in this document you presented, your testimony, tell me how you relate pre-decisional memos to the Salvati case and what we requested. Show me in your document where it is. Where do I find it? Now it is just based on Salvati. So I want to see where in the Salvati case in what we have asked about is there a chilling effect? Is there anything on page 1? I want to go page by page. Is there anything on page 1 that relates directly to the Salvati case?

Mr. HOROWITZ. I must say, Congressman, I think the entire document relates to the entire request. As I sit here today, I——

Mr. SHAYS. No, no. You are not going to get away with that.

Mr. HOROWITZ. No. But let me explain, please. I am reviewing this and my testimony concerns the entirety of the subpoenas at issue here. It does not concern one particular case, it concerns all of the documents at issue; there are multiple documents here. And I have to add that, as far as I understand, no declination memo in Salvati is at issue here because that was a State case and whatever prosecutorial pre-decisional documents were written would not have been Federal documents. That is why I am concerned when you mention, sir, the Salvati case.

Mr. SHAYS. Let me ask you, is there anything on page 1 that would tell me why we should not get it as it relates to the documents we have requested?

Mr. HOROWITZ. I am sorry, I cannot hear you.

Mr. SHAYS. Anything we have requested, in your statement on page 1, is there anything that specifically relates to the documents that we asked for in specific terms telling us why you cannot do it? I want to understand why this case would be different than any other case of pre-decisional.

Mr. HOROWITZ. I think it would depend, as you mentioned——

Mr. SHAYS. Tell me, on page 1, is there any information on page 1 that would help me understand that? Tell me and show me the line?

Mr. HOROWITZ. As I mentioned, Congressman, I do not know that I could go through here and pick every sentence, sentence by sentence.

Mr. SHAYS. So nothing on page 1. Is there anything on page 2?

Mr. HOROWITZ. I disagree with you. I think the whole statement does that.

Mr. SHAYS. Is there anything on page 2?

Mr. HOROWITZ. Yes. I think the entirety of the statement does.

Mr. SHAYS. Tell me on page 2 where it would refer specifically to the documents we want and is not a general argument about pre-decisions. Tell me something specific that relates to this case on page 2.

Mr. HOROWITZ. I think the document and the statement and the President's order deals with all of the documents as a whole and they all fall in the same categories.

Mr. SHAYS. Is there anything on page 3?

Mr. HOROWITZ. Again, I stand by the answer I just gave. I think every page has something.

Mr. SHAYS. Is there anything on page 4?

Mr. HOROWITZ. Yes. I think every page does.

Mr. SHAYS. Show me on page 4.

Mr. HOROWITZ. I think on every page——

Mr. SHAYS. Show me specifically as it relates to the documents that we have requested.

Mr. HOROWITZ. In this statement, if you are asking is there a specific reference to a specific document, there is not a specific reference to a specific document. But that is because——

Mr. SHAYS. But could you not use this statement and deliver it any time you did not want a pre-decisional? Isn't the answer yes to that?

Mr. HOROWITZ. This was formulated in——

Mr. SHAYS. Mr. Horowitz, listen to the question.

Mr. HOROWITZ. It is not something I can give a yes or a no answer. I need to explain——

Mr. SHAYS. Mr. Horowitz, isn't this a boilerplate response to why you cannot give pre-decisional documents to the committee?

Mr. HOROWITZ. I think it touches upon the general concern about pre-decisional documents, and beyond that, it touches upon the need for the Attorney General and other high ranking officials to get advice from their inferior officials.

Mr. SHAYS. Right. So it is a boilerplate. This is an argument—no, truly, Mr. Horowitz, you are a bright man, and I may not be as bright as you but I am not dumb—this is a boilerplate argument on why you do not want to give us a pre-decisional document. And that is why I believed when I listened to your document that it would not be on a case by case. You are the one who said it will be case by case. So now I am trying to understand why in this case involving someone who was in jail for 30 years you cannot give us the documents. That is what I am trying to understand. I am trying to understand this boilerplate document as it relates to a specific case—the documents we want.

So tell me what I need to know about the documents we are asking for that would have a chilling effect.

Mr. HOROWITZ. As I said earlier, Mr. Chairman, producing documents that contain internal deliberative pre-decisional analysis has the potential to chill prosecutors today, tomorrow, and as we go forward.

Mr. SHAYS. And that would apply in any case. That argument would apply in any case.

Mr. HOROWITZ. That could well apply in other cases. I am not denying that these concerns could apply in future cases, Mr. Chairman. I am not trying to impart that sense to you. What I am trying to focus on here is as an attorney in the Department, as you know, as we do as attorneys, you look at the specific case, the specific request, and the specific documents. And I am hesitant to sit here and tell you what the position will be in future cases with future documents with future facts. In addition to that, it is not going to be my decision as to whether or not in those circumstances to invoke executive privilege.

Mr. SHAYS. Unfortunately, you are going to get the break that you did not ask for. We are going to have a vote. It is two votes. And counsel is going to have questions, I may interrupt them once or twice, and then you will be able to get on your way.

Mr. Horowitz, I know you to be a very competent person. I have been told that. I believe that chiefs of staff have to know a heck of a lot about so many things. I just think it is unfortunate you are the one put in this position because this is a real policy issue that transcends you as a chief of staff. And I regret the dialog we are having, but I am really mystified and I think you are probably mystified too.

We are going to recess. We will be back shortly.

[Recess.]

Mr. SHAYS. I call this hearing to order.

I recognize counsel. I do not think you will use the full allotted time, but we will let you get on your way.

Mr. WILSON. Mr. Horowitz, I wanted to followup on one thing that Representative Shays was just talking to you about. You indicated that the Department of Justice will analyze on a case by case basis congressional requests. Correct?

Mr. HOROWITZ. My understanding is that we are obligated as we get a subpoena and we gather documents in response to that subpoena to look at the specific documents, how deliberative are they, analyze that, analyze what the request and investigation concerns, and do that analysis obviously in light of principles that have been laid out. But we need to do that analysis on a case by case matter.

Mr. WILSON. And is it fair to assume that because you are here you have already done that with the current subpoena that this committee has issued?

Mr. HOROWITZ. My understanding is that with regard to the documents at issue here in this specific subpoena that has been done by officials in the Department.

Mr. WILSON. So to characterize this fairly simplistically, there is a chasm and on one side of the chasm are cases that are unworthy of your providing documents to Congress, and on the other side of the chasm there are cases where it would be appropriate to provide documents to Congress. Is that correct?

Mr. HOROWITZ. I think that overstates what we are saying. We are not saying that no documents should be provided. In fact, as you are aware, we have provided several thousand pages of documents with regard to this particular matter and we are certainly prepared to provide additional documents as we come to find those documents and find them responsive to the request.

Mr. WILSON. Let's not go down that rabbit hole because we subpoenaed specific documents, did we not, deliberative documents; correct?

Mr. HOROWITZ. That is correct. The subpoenas we are talking about today have specific requests.

Mr. WILSON. OK. So the other documents are a red herring for this discussion. Correct?

Mr. HOROWITZ. Well the other documents concern this Boston investigation that were responsive to earlier requests for materials.

Mr. WILSON. But they do not concern this subpoena. Is that correct?

Mr. HOROWITZ. They did not concern this specific subpoena, as I understand it.

Mr. WILSON. So, I do not want to belabor this point, but it does seem that there is a chasm that is set up. On one side of the divide are the cases where, after the Department of Justice analyzes all the relevant concerns, subpoenaed information is withheld from Congress. And then there is another type of case where after the analysis is conducted information might be provided to Congress. That is what is meant by a case by case analysis, correct?

Mr. HOROWITZ. Again, what we are trying to do is provide the committee with all the information we can.

Mr. WILSON. But this is a little unfair, because a subpoena does not call for information, it calls for documents, correct? We cannot subpoena information that is not embodied in a document.

Mr. HOROWITZ. That is correct. That is why it is obligated upon us to consult with the committee and discuss how we can best accommodate the committee's needs and what type of information you are desiring to get, what your investigation concerns, and how we can provide you that.

Mr. WILSON. So let's take information off of the table and focus specifically on subpoenaed documents. The committee has subpoenaed documents. And it is our understanding after today that you have identified certain documents that are responsive to that subpoena. Correct?

Mr. HOROWITZ. That is correct.

Mr. WILSON. OK. We are here today because the Members of Congress would like to review specific documents, not other information but specific documents. Will you work with me on that one?

Mr. HOROWITZ. That is my understanding.

Mr. WILSON. OK. So if it is true what you say, that there is a case by case analysis, it naturally follows that there is a case by case analysis you are prepared to concede, and indeed you said this earlier when you mentioned sort of off-handedly Watergate type situations, you are prepared to concede that certain cases that are behind the specific document subpoenas might lead the Justice Department to provide to Congress the subpoenaed documents. Is that fair?

Mr. HOROWITZ. That is a fair statement. That we have an obligation, just as the committee does in deciding what to subpoena, to analyze the request and make a determination about whether to invoke the privilege that we believe exists to protect deliberative documents and in certain circumstances to not protect those documents.

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

Mr. HOROWITZ. And I believe it is ongoing review.

Mr. WILSON. Perhaps more. Perhaps more. And you have made a determination that in this case, not in a hypothetical case, in this particular case, this subpoena, the September 6 subpoena, in fact the President has made this decision, that he will not permit the Justice Department to provide to Congress the documents that pertain to our Boston investigation. Is that correct?

Mr. HOROWITZ. That is correct. The President has made that determination, although he has not prohibited us from discussing with the committee and providing information.

Mr. WILSON. Right. But we are not talking about discussions, we are talking about the documents. Because I am going to ask you some questions about that in a minute. But the President has decided that the Members of Congress will not be permitted to see specific documents.

What is it in our Boston investigation that puts this particular investigation and these specific documents on the side of the divide that would have the President order you not to provide them to Congress?

Mr. HOROWITZ. My understanding is that the concern that the President expressed in his order was, as mentioned before, really two concerns, one, to protect internal deliberations, and second, to protect the free flow of information from line attorneys in preparing pre-decisional memoranda. What we then have a responsibility to do, as the President has outlined in his order, is to work with the committee to try and provide the committee with information and do so in a way that is consistent with the outlines of the order of the President.

Mr. WILSON. I did not want to bring this up, but let me just bring up something that was mentioned at a meeting that you were not privy to, and the only value-added I can provide is that I go to all these meetings so I have some corporate memory. We went to one meeting at the White House and one of your colleagues told us that, yes, there will be an analysis of situations on a case by case basis, but the analysis will be conducted by the Department of Justice and the White House and they will always win. That is what we were told. It was a somewhat jocular aside but it actually describes precisely what has happened here because there has not been 1 minute of discussion with the committee about the committee's need for these particular documents. So that is a factual statement.

But going back to the policy you just articulated as to why we cannot get documents that are germane to the Boston investigation, this is precisely what Congressman Shays said, they apply to all situations. The most egregious situation you could imagine—

and let's just take a real case, the case of Attorney General Dougherty, who first resided in Washington as Attorney General and then resided in prison as a felon. In that situation, should Congress, and let's start as a hypothetical, should Congress have asked for those documents, the rationale that you just provided to the committee apply equally as to any other situation.

Mr. HOROWITZ. I think the general principles would apply, as you said, in most, if not all, circumstances. But that does not mean that there is some, at least to my understanding, some wooden application of the principles. That is why there is a need to look at the particular documents and the particular circumstances at issue to determine whether or not to make the production.

Mr. WILSON. Are you able to tell us why when the Attorney General articulated his approach to the chairman and the counsel to the President articulated his approach to the chairman they said something different than what you are saying today? They did not aver to any case by case analysis. They spoke of a strict policy.

Mr. HOROWITZ. I was not present, as you know.

Mr. WILSON. I understand.

Mr. HOROWITZ. But I can tell you that I am speaking to you from my experience in dealing with privilege issues, whether it is attorney-client privilege, 6E law enforcement privileges, privileges you have to deal with occasionally as a line prosecutor or in private practice. And in those circumstances, my experiences in every one of them is you need to review the materials and review the documents and make the individual determination that I am discussing here. And that is why talking about this is from my understanding. That is how I would be looking to pursue this if and when a subpoena comes that I might have a responsibility to be involved with.

Mr. WILSON. OK. So just going back to the specific question about the subpoena for Boston documents. Is there anything that is specific to the Boston cases that would lead the President to direct Congress not to receive this information?

Mr. HOROWITZ. I think that perhaps what would be beneficial going forward from today's hearing is to meet with the committee and the staff and discuss particularized needs and whether there is some way to reach an accommodation that would address the needs that you have in part articulated today and perhaps want to have a further dialog and discuss. But as I sit here today, I cannot tell you that in reaching the decision that there was a specific fact about these specific documents that resulted in the decision to invoke the privilege, other than the sense that these were deliberative materials and it was important for the executive branch to allow the deliberations to go forward in an unfettered way.

Mr. WILSON. Would you be able to confer with your colleagues and see if there is in their minds a specific rationale beyond the general matters you have just described that would have the President prevent Congress from receiving these documents.

Mr. HOROWITZ. Give me one moment. With regard to your specific question, what I would propose is that we be allowed to go back, consider the request and get back to you in writing with an answer to the question of whether there were individuals or there are people who believe there are particular issues with regard to these documents.

Mr. WILSON. Certainly. That would be very much appreciated.

Let me just switch to another conceptual type of matter. Are you willing to admit that it is possible for Justice Department personnel to make mistakes?

Mr. HOROWITZ. Absolutely I am.

Mr. WILSON. What you are offering to us, and we have certainly taken you up on it, but what you are offering to us is a briefing about specific material that we have subpoenaed. How do you get around the problem that you might make mistakes when you provide the briefing, you might not understand the significance of information?

Mr. HOROWITZ. My concern with that is that if that were the principle, that there would be a concern about briefing, then in every case there would be a decision to turn over the documents no matter what the case involved, how big or how small. In some cases I think we would all agree a briefing should be sufficient. And at a certain level, just as we have to place our good faith in your exercise of your constitutional powers, that at a certain and at least in certain circumstances you have to do the same with us and presume that the President, through his Justice Department, are acting in good faith with the committee.

Mr. WILSON. But this is an important point because assuming good faith, and we start with the presumption of good faith, but assuming good faith, would it not be possible that information would not be provided in a briefing that would be germane to our investigation? Just is that possible?

Mr. HOROWITZ. There are obviously possibilities in many circumstances. That is why I mentioned that. But to suggest that the mere possibility that someone would make an error in a briefing means that in every case the Department would be obligated to produce deliberative material regardless of how important the case was, Watergate, Teapot Dome, or how small, a buy bust on a street corner, I think that is the danger of taking that principle too far.

Mr. WILSON. But this is to suggest that no matter what the type of investigation you will have full command of all facts to the extent that you can provide the information that is relevant to an investigation. And in this case it is particularly difficult for us because nobody has ever asked the committee any questions about what they are doing. So it makes it difficult. If I were to say to you now we would like a briefing, short of reading us the precise document and seeing the juxtaposition of the words and how they are placed on the page, and whether there is marginalia, and all of the things that make any document or review worthwhile, that you would, and this is assuming good faith, that you would get it right and provide us all the information that would allow us to understand the circumstantial aspects of particular cases.

Mr. HOROWITZ. And that is true. But let me shift to an example that——

Mr. WILSON. But it is either true or it is not true.

Mr. HOROWITZ. No. But let me just explain an example of a similar scenario, where, for example, as you know as a line prosecutor, there is a Brady obligation that we have to produce and a rule 16 obligation on the Federal Criminal Rules. And that obligation the courts impose on us to cull our documents and to determine what

is material not only to our prosecution but material to the defense. And we have in certain circumstances obligations to go through and fairly make those decisions and not draw the lines too close and to present that information. I understand your concern that you might be analyzing or thinking about information or a matter in a way that we might not. But I think——

Mr. WILSON. You understand that concern. Is it a valid concern or an invalid concern?

Mr. HOROWITZ. I am sorry, is what a valid concern?

Mr. WILSON. We appreciate you understand our concern. But is it a valid concern?

Mr. HOROWITZ. I think it is a valid concern, and that is what requires us to have discussions with the committee to make sure we are fully aware of what the various reasons might be for the committee's interest in particular documents or particular information. And that can vary from case to case.

Mr. WILSON. But that is to assume that we would conduct—for example, in this case we have conducted an investigation that has proceeded for nearly 9 months. That is 9 months of accumulation of documents and we have a bag of 60 pounds of letters here from the central witness in the Deegan murder prosecution that we found that provide all these candid assessments of what was happening in some of these cases. I could dump them in front of you. And the point I would make is nobody from the Justice Department has even bothered to ask for those documents. So a negotiation or a discussion would be to assume that you would be able to understand in certain cases what might have taken us 9 months to understand, or that maybe a tangential matter for you might end up being a significant matter for us. This happens very rarely, that is why this is a significant——

Mr. HOROWITZ. I understand. And that is why I think the dialog is important. There have been situations where we have engaged in dialog that I think has been helpful to illuminate what is at issue and what the committee's concerns are. And you have also, as I said earlier, been responsive when we have raised concerns about particular issues and you have recognized those. And the only reason they have happened is because there was a dialog.

Mr. WILSON. This discussion assumes good faith.

Mr. HOROWITZ. Right.

Mr. WILSON. And we do assume that. But there are times in the administration of justice where an assumption of good faith would be misplaced, Attorney General Dougherty perhaps, Attorney General Mitchell perhaps. You are saying something to us today that we presume you would like to be in place after you are not sitting at the table that applies to the Department of Justice. How can the committee get around the situation where there is an assumption of bad faith? Let's just take as a specific example the Teapot Dome situation where Congress was able to obtain documents that indicated there was misconduct. Everything that you have said to us today indicates that what would happen in the future is that there would be an analysis by a number of people and those people would decide what Congress received. Correct?

Mr. HOROWITZ. Well, I think that what would happen is——

Mr. WILSON. Well, I mean is that right or wrong?

Mr. HOROWITZ. Well people will analyze, obviously.

Mr. WILSON. So people at the Justice Department and perhaps the White House.

Mr. HOROWITZ. Correct. But it is certainly important for us to have an understanding if the committee has reason to think we are not acting in our presumptive good faith, that, as you have indicated, there is some bad faith somewhere in the executive branch, that we understand that and that should in analyzing the materials inform our decision and weigh in the balance.

Mr. WILSON. But if that were true, sometime in the last 6 months somebody would have come to us and asked us for a rationale to back up what ultimately resulted in the subpoena. But 6 months, it is 9 months actually, now have gone by. Not all of that applied to the Boston documents. But no one did that. So perhaps you are saying that this henceforth will be the policy. But that was not the policy for all of these months.

Mr. HOROWITZ. Well, like I said, I was not in the discussions that you have outlined and you obviously have to some extent more information as to what the back and forth was between the committee and the Department and the executive branch. But that is my understanding, which is that if there were information about bad faith activity by the executive branch that would certainly be a factor for us to weigh in deciding whether or not to produce the materials.

Mr. WILSON. Fair enough. Let's go back the Attorney General Dougherty. Let's take you out of the seat and let's put him there. He is sitting there articulating the policy that you are articulating, and he has read the same statement that you have read, and he said I will come up personally and I will give you a briefing. We would say, well, that is not acceptable to Congress because we have a concern that there are issues that we need to analyze. And he would say but I will give you a briefing, and he would talk about a chilling effect and all the other things. As you sit here today, that is all we get. There is no recourse beyond that. Because if we do not see the underlying material, it ends there. It ends with the assertion that we will operate in good faith.

Mr. HOROWITZ. I think in both the Teapot Dome situation or the Watergate situation that we have been talking about, certainly you would have a reason to provide, to lay out that demonstrated, or that there was certainly at least allegations if not actual facts, that demonstrated bad faith and corrupt activity by the President.

Mr. WILSON. Which is our point, because those allegations were made after Congress, perhaps before, but certainly they were perfected when the American people saw the documents and Congress saw the documents. It is kind of a circular argument here because those are situations where Congress did get the documents. Now you are saying henceforth, if General Dougherty were sitting there, he would say, no, you cannot have these because there is a chilling effect, no you cannot have these for various other principle reasons. We would not get them and we would not have known about what happened.

Mr. HOROWITZ. My understanding from looking at the LLC opinion that summarizes some of the information here as well as some of the earlier cases, the McGreen case and others, is that there

were allegations out there prior to the litigation that resulted in those cases.

Mr. WILSON. But if you set the standard on allegations, you are in big trouble because there are a lot of allegations that get made. And if you want to offer to us that if we make allegations then you will give us documents, then that is not a good one.

Mr. HOROWITZ. There has clearly got to be a discussion about the significance of the information and how serious is it, but——

Mr. WILSON. OK. So let's go back to the specifics of this situation. Here we have perhaps between 20 and 60 murders. Let's start with that. Forget about a scandal involving money somewhere. Here we have got murders. Here we have got FBI agent's subornation of perjury. All these things that Director Freeh has averred to the possible accuracy of these allegations, you yourself have averred to the possible accuracy of these allegations. Just sitting aside they are allegations, forget the evidence.

Mr. HOROWITZ. And I was not challenging the allegation. I was just trying to keep the language in terms of allegations because of the pending cases.

Mr. WILSON. I understand. I understand. But that takes us back to this divide. And for some reason the President of the United States has been briefed and he has been convinced that the Boston investigation conducted by this committee is on the wrong side of the divide and we do not get the documents that we have subpoenaed.

Mr. HOROWITZ. My understanding is there has been no allegation that this Attorney General or the new FBI Director, Director Mueller, have in any way engaged in bad faith or failed in any way to present to the committee the documents that lay out the facts of what happened or have in any way demonstrated an unwillingness to provide the committee with the information. So I think it is in that regard different from, say, the Teapot Dome case scandal that you have mentioned.

Mr. SHAYS. Can I just ask you this question. When you say the facts of what happened, there are other facts as well. There may be facts that are presented that are inaccurate. So I am a little uneasy when you say the facts of what happened.

Mr. HOROWITZ. What I meant to say is that with regard to the comparison, say, to the Teapot Dome or Watergate, in those cases the allegations, at least as I read them, involved corruption by the then Attorney General and the then Department officials who were deciding these issues. All I mean to say is that the allegations at issue here, while certainly involve corruption, do not involve this Attorney General or this FBI Director. That is all I was trying to say.

Mr. WILSON. But at the end of the day, all you are saying is that this case just is not that important. That is all you are saying.

Mr. HOROWITZ. I do not think that is the message at all from this administration. I am certainly not sitting here saying that. This is a very important matter that we in the criminal division, by putting this task force together, care deeply about. I do not for a minute think that this is an unimportant matter.

Mr. WILSON. Maybe I should not have said unimportant. But I thought I said less important. If I did say unimportant, that was

a bad choice of words. But what we are saying is you are prioritizing. You are saying, OK, in the Dougherty situation, fair enough, may be. In the Watergate situation, fair enough, may be. In the case of dozens of murders and a guy falsely imprisoned for 30 years, that just does not rise to the level that gets us real excited.

Mr. HOROWITZ. I am not saying that at all, and I hope that is not my message in this discussion. What I am saying is that what we need to look at in terms of these cases as they develop is Teapot Dome, in Watergate, the allegation involved corruption by the individuals, as you indicated, who were going to be culling the documents and making decisions. That is the factor I am talking about. I am not sitting here by any means trying to tell you how important this case is compared to other cases. This is an important case. As I said, the criminal division has certainly invested substantial resources in pursuing this investigation.

Mr. WILSON. But there is a slight factual problem there, because in Teapot Dome the Attorney General that gave up the documents was not the Attorney General that went to prison. It is analogous precisely in that, although there may be more years between the underlying conduct and the provision of documents to Congress, Attorney General Harlan Fisk Stone gave documents to Congress. And in this situation, Teapot Dome, you had a new Attorney General giving documents about conduct in a previous administration. And that is all we are asking for. We are asking for this Attorney General to give documents to Congress about conduct that happened under the watch of a different Attorney General. So, it did not work real well.

Mr. HOROWITZ. I think the difference is, the distinction is when the corruption had involved in Teapot Dome the Attorney General who had been involved in discussions with the committee. I think there is a legitimate assumption——

Mr. WILSON. So again, there are distinctions. But this is corruption that goes potentially to the Director of the FBI. So you are saying only if the conduct goes to the Attorney General might we do this, but if it is merely the Director of the FBI, that does not rise to the level of providing documents.

Mr. HOROWITZ. I guess what I am saying is it depends on each case. And I would, and I think the Department, would be more than happy to have from the committee a discussion and dialog on the particularized need in this case.

Mr. WILSON. That is fine and we will obviously take you up on that. But you have already done it. I saw this morning an order to the Attorney General signed by the President of the United States about this particular issue. So you have already done it. We can have meetings in the future but everything you have said today indicates that people have considered this issue, they have thought about it, and they went to the President of the United States and a decision was made. So I am a little surprised that you are saying, and I do not mean to mischaracterize it, but maybe we did not do our homework, we will go back, we will meet with you again, we will try and figure out what you really wanted, and maybe in the future we will give you the documents. But today the President of the United States, for the first time in the new admin-

istration, invoked executive privilege. You go back and you look at——

Mr. SHAYS. And I want to say invoked executive privilege on what I call the Salvati case. This outrageous case. This is where you set your marker. It is bizarre.

Mr. WILSON. There have been Presidents of the United States that have not invoked executive privilege in 4 years. Many of them maybe once, maybe twice. So it is nice that we can have a meeting in the future, but the decision has been made.

Mr. HOROWITZ. Although my understanding was that there had been several months of back and forth discussion leading up to it. As I said, I certainly was not in every meeting and I am not even sure how many I was actually in on this discussion back and forth with the committee. And if that was not a discussion or was not probed and discussed back and forth, then we should——

Mr. WILSON. But there was no need to probe it because there was a declarative statement of policy, no, never will you get these types of documents. For example, we sent a letter last week, we sent a letter this week asking for a witness. The letter articulates clearly what we understood the Attorney General and White House's position on this matter was. You did not come in in your statement and say we got a letter with a factual inaccuracy in it, which would have been the first thing that a careful lawyer would have done one thinks.

Mr. HOROWITZ. Well I think that what we have tried to do in laying out in the memo—I do not believe in my statement, and I do not believe the President in his order suggests that this is a policy that will not require particularized review of specific cases. I understand what you are suggesting, but I do not think that by invoking in this case that the President has said that there will be no need for future dialog with the committee about these matters or about other matters that may come up, that you do not need to discuss it. In fact, the President explicitly instructs the Attorney General to work informally with the committee to provide such information as it can consistent with——

Mr. WILSON. Do you think you need more than, I did not count, but there were 13 Members of Congress today articulated their concerns about why they think it is important for the executive branch to provide to Congress documents about this investigation of the FBI's handling of confidential informants in Boston? Is that enough? Do we need to do anything else beyond what you heard today?

Mr. HOROWITZ. I think one of the things that we need to do is provide you and the committee with information and briefings about information that might be in those memos that you might be seeking. I do think there needs to be a dialog to go down that road.

Mr. WILSON. I do not make these decisions, obviously. But you admitted that our concern was valid that the Department of Justice may not fully understand the significance of certain types of information. So if that is a valid concern, then a briefing is not in this particular case appropriate.

Mr. HOROWITZ. But I do think that what the case law says also is, in the Senate Select case, the D.C. Circuit, the Supreme Court decisions that deal with this issue, it says that there needs to be

a dialog between both branches to try and accommodate the need. And that may be——

Mr. WILSON. We agree. And I apologize for cutting you off, but if I do then we will all finish quicker. We have said that for 9 months, there should be a dialog. And all we got was a clear articulation of policy, with the one exception of one individual who said, yes, we will do an internal analysis but we will always win. But when the Attorney General, the Deputy Attorney General, the head of the criminal division, the White House counsel, the deputy White House counsel, and a number of other employees spoke to either the chairman or committee staff there was no dialog about a congressional meeting. It was a policy.

Mr. SHAYS. Let me just say what is unsettling. And you may some day be Attorney General or President of the United States, but in your present capacity, the people who have relayed this information, frankly, out rank you. And so it is a little unsettling that we have spent all day having this testimony. You are their messenger but you are not able to override conversations that they have said, admittedly not in public.

Mr. HOROWITZ. And let me just say for the record, my understanding was the Attorney General asked for the hearing to be delayed because he and Mr. Chirtoff are traveling in connection with the September 11th investigation, and that request was denied. That is why I am here.

Mr. SHAYS. That is a very important point.

Mr. HOROWITZ. They certainly did not want to——

Mr. SHAYS. No, no. And so you are accommodating us. And I understand that we accepted your accommodation. It is a good lesson for this committee. The challenge is that may not have been the wise thing to do.

Mr. WILSON. Let me just finish with one thing.

Mr. SHAYS. Are you about finished?

Mr. WILSON. Yes.

Mr. SHAYS. And then I am going to recognize Mr. Horn.

Mr. WILSON. That is a good segue to my final thought, questions. In your statement, Mr. Horowitz, you have said that "consistent with long-standing Department policy, we have declined these committee requests." And I know the reasons you have advanced. But is it not fair to say that the long-standing Department of Justice policy is to provide deliberative documents to Congress in certain circumstances?

Mr. HOROWITZ. Well that is a key qualifier to put on "in certain circumstances." There are, as I learned in reviewing the material here and looking at some of the LLC opinions that gather the information from 200 years of invocations of executive privilege, there are examples from almost every administration where there was an invocation of executive privilege, or at least a significant number of past administrations, where there was an invocation of executive privilege to protect deliberative documents generally, not specifically with regard to criminal matters, but generally deliberative documents. And there are examples which I know you have cited or the committee has cited where decisions were made to produce deliberative documents given the specific case.

Mr. WILSON. So isn't that the policy, that there is a long-standing policy of producing to Congress these very types of documents that we seek right now?

Mr. HOROWITZ. From my reading of history and reviewing these, the policy is that these documents, the presumption is that they are presumptively privileged and that an exception need be made in the particular case to decide to not protect deliberative documents.

Mr. WILSON. That we understand. But is it not just true, is it not just simply a statement of fact that every administration since Harding administration, that we have been able to figure these things out on, has had a policy of accommodation, and in that policy of accommodation they have accommodated Congress. And I will not say in every administration, but we are aware of many cases, as are you, where in many administrations Congress has received deliberative documents of the very sort that you are now protecting. So should you not at least aver to that as being long-standing policy?

Mr. HOROWITZ. I certainly agree with you that the obligation is accommodation and that we need to have that mindset in looking at these. But accommodation does not necessarily mean simply producing the documents.

Mr. WILSON. But is has meant that, correct? Is it not correct to say that it has meant that?

Mr. HOROWITZ. I do not necessarily agree with that characterization of it. As I looked at this 1982 LLC opinion which summarized invocation after invocation of executive privilege, you have got President Washington, you have got Jefferson, you have got Monroe, it moves through many administrations.

Mr. WILSON. But that is irrelevant. There are times when there is a privilege invoked and we might agree. We might back down. But by and large, over 70 years the Justice Department has provided to Congress the very types of deliberative documents, and, indeed, in the Clinton administration, for 8 years they provided many declination memos, precisely the types of documents we are seeking. That is the policy.

Mr. HOROWITZ. Can I just cite the example of President Eisenhower in the Army-McCarthy hearings where he advised his subordinates to protect deliberative material from the committee. President Kennedy did the same thing in a hearing during his administration. I do think it is fair to say that, generally speaking, the executive branch has looked at these deliberative materials as materials that are privileged because of the deliberative nature of them. Obviously, you need to look at how deliberative they are, and the chairman has made that point and it is certainly a fair point, but we then need to look at the circumstances under which that request is made.

Mr. SHAYS. Mr. Horowitz, Mr. Horn has got a question or two. I am just going to have some closing comments and I will let you make a closing comment.

Mr. HORN. Thank you, Mr. Chairman. The facts are that President Washington gave all of the papers with regard to the Army of the Saint Claire expedition. He gave it all to Congress. You can just read the annals of Congress and there it is. He felt it should

be done by Congress because that is their role in supporting the Army and all the rest. So this is not new and it did not start with Harding.

I am curious, how many Special Agents have been interviewed to see if others have put innocent citizens in for 30 years, 25 years, 15 years. Has that investigation occurred?

Mr. HOROWITZ. My understanding is that the investigation is ongoing, has pursued questions regarding the handling of informants, and whether individuals were improperly pursued, and that there is an indictment pending. I must say that, in order to get back, I would need to proffer the figure and determine how those questions specifically went and who was specifically questioned. But my understanding is that the task force is designed to uncover the corruption that occurred in the allegations and pursue them. So I certainly would do that.

And on the President Washington example, if I could go back. Certainly, as you stated on the Saint Claire matter and the request, certainly President Washington determined not to invoke. But with regard to the Congress' request for materials on the Jay Treaty and the negotiations, he did ultimately decide to not produce the materials after reviewing the matter. And I think other administrations subsequent to President Washington have done similar balancings as they have looked at this issue. So I think there are a number of examples on either side.

Mr. HORN. With Washington, he was pretty important on that and he knew what he was doing. And so did Eisenhower. He put those papers under Assistant Secretary of Defense Seton so they would not be all over the Pentagon, and if it was needed it would be given to the Congress.

I am curious, if I were President of the United States and I had this problem and the Attorney General came up to me and gave me the Executive order that is before us this morning, I would say "Mr. Attorney General, I am going to be looking for another Attorney General because I do not want my administration to look like it is covering up corruption in the bureaucracy. That is just wrong. The American people do not just sit there. They want clean government. So do I. I want the President of the United States not to get in on this type of what I would call corruption. So I would hope that the President would drop that Executive order. It just gets Congress mad, it is going to get the press mad, it is going to get the average citizen mad, and I do not want that kind of a situation.

Mr. HOROWITZ. And I certainly understand that, Congressman. I hope today I have outlined the Department's view that we are not looking to prevent the committee from getting the information that you are talking about in terms of factual information. I think we have a disagreement, obviously, over a narrow set of documents. But certainly no one in the administration is looking to try and be seen as covering up any corrupt activity in Boston. Indeed, hopefully by bringing indictments up there as we have done, and having our task force dig on this, the public will be satisfied that we have done our job that they rightfully expect us to do, and I could not agree with you more on that.

Mr. HORN. Thank you.

Mr. SHAYS. Thank you, Mr. Horn.

Mr. Whelan and Mr. Horowitz, is there any question that you wish we had asked that you want to answer?

Mr. HOROWITZ. I guess given the statement or the question about why I did not initially correct the characterization of the hearing in the invitation letter about the scope of the policy, at least my understanding of the scope of the policy, I guess I certainly regret not having the opportunity at the outset to have explained what my understanding was of this policy.

Mr. SHAYS. Let me say to you I feel that the Department's refusal to cooperate with this committee has a chilling effect that sends shivers down my back. I am one of the biggest fans of your boss. As a moderate Republican, I defend him in the Northeast, I go on TV and defend him, I say he needs these additional powers. But in the back of my mind the safeguard is that we have oversight. And I feel that he is sending out a real dangerous message and I feel that the message he is sending out is give me more powers and we are going to change the policy to be even less cooperative than previous administrations when you need information.

I also want to say to you that I do not think I was unfair in asking you to go page by page, Mr. Horowitz, through your document. I reread it when I went over to vote and came back here. You could take out two sentences and use this at any hearing where you were going to refuse to provide prosecutorial decisionmaking documents. In fact, your opening sentence is "Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the Department's position with respect to the Committee's subpoenas for prosecutorial decisionmaking documents." You did not say as it relates to what. You stopped. That was the sentence. The only two sentences I could take out are, "Since January 22nd," on the first page to the top of the second page. Everything else is boilerplate. It could be read anywhere. No reference to the committee.

I have not learned anything today that tells me why this case would have a chilling effect. I have not learned anything. So I am going to hope that the committee and the Department will sit down, that somehow we will find a way to get the information that we have a legitimate right to have in my judgment, which is the documents that we have requested, maybe some variation, maybe some redacting of something. But this is the wrong case to build your argument about not providing decisionmaking documents. We know that almost every President has in some cases said yes, in some case said no, but never had a blanket for all. You are saying there is no blanket for all. But in the case that you have decided to set your marker, you have done it in the Salvati case. Big, big mistake. Big mistake.

I am going to personally request a meeting with the Attorney General to discuss all the other things that I and others have supported him on and ask him what he thinks the impact has on whether we have done the right thing, because I just have a big warning sign out there. I consider you a man of good will. I consider the people who work for the Attorney General to be people of good will. I hope this is just a bad dream for all of us.

With that, I will adjourn the committee.

[Whereupon, at 3:42 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

[Additional information submitted for the hearing record follows:]

THE WHITE HOUSE

WASHINGTON

December 12, 2001

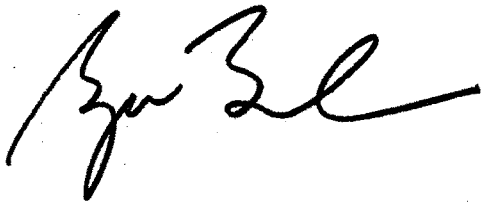
MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: CONGRESSIONAL SUBPOENA FOR EXECUTIVE BRANCH DOCUMENTS

I have been advised that the Committee on Government Reform of the House of Representatives has subpoenaed confidential Department of Justice documents. The documents consist of memoranda from the Chief of the Campaign Financing Task Force to former Attorney General Janet Reno recommending that a Special Counsel be appointed to investigate a matter under review by the Task Force, memoranda written in response to those memoranda, and deliberative memoranda from other investigations containing advice and recommendations concerning whether particular criminal prosecutions should be brought. I understand that, among other accommodations the Department has provided the Committee concerning the matters that are the subject of these documents, the Department has provided briefings with explanations of the reasons for the prosecutorial decisions, and is willing to provide further briefings. I also understand that you believe it would be inconsistent with the constitutional doctrine of separation of powers and the Department's law enforcement responsibilities to release these documents to the Committee or to make them available for review by Committee representatives.

It is my decision that you should not release these documents or otherwise make them available to the Committee. Disclosure to Congress of confidential advice to the Attorney General regarding the appointment of a Special Counsel and confidential recommendations to Department of Justice officials regarding whether to bring criminal charges would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions. Moreover, I am concerned that congressional access to prosecutorial decisionmaking documents of this kind threatens to politicize the criminal justice process. The Founders' fundamental purpose in establishing the separation of powers in the Constitution was to protect individual liberty. Congressional pressure on executive branch prosecutorial decisionmaking is inconsistent with separation of powers and threatens individual liberty. Because I believe that congressional access to these documents would be contrary to the national interest, I have decided to assert executive privilege with respect to the documents and to instruct you not to release them or otherwise make them available to the Committee.

I request that you advise the Committee of my decision. I also request that the Department remain willing to work informally with the Committee to provide such information as it can, consistent with these instructions and without violating the constitutional doctrine of separation of powers.



THE HISTORY OF CONGRESSIONAL ACCESS TO DELIBERATIVE JUSTICE DEPARTMENT DOCUMENTS

WEDNESDAY, FEBRUARY 6, 2002

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

The committee met, pursuant to notice, at 10:03 a.m., in room 2154, Rayburn House Office Building, Hon. Dan Burton (chairman of the committee) presiding.

Present: Representatives Burton, Barr, Gilman, Morella, Shays, Horn, Miller, Ose, Duncan, Waxman, Kanjorski, Maloney, Norton, Kucinich, Tierney, Clay, Lynch and Delahunt.

Staff present: Kevin Binger, staff director; James C. Wilson, chief counsel; David A. Kass, deputy chief counsel; Mark Corallo, director of communications; Chad Bungard and Pablo Carrillo, counsels; Robert A. Briggs, chief clerk; Robin Butler, office manager; Elizabeth Frigola, deputy communications director; Joshua E. Gillespie, deputy chief clerk; Michael Layman, legislative assistant; Nicholas Mutton, assistant to chief counsel; Susie Schulte, staff assistant; Corinne Zaccagnini, systems administrator; Phil Schiliro, minority staff director; Phil Barnett, minority chief counsel; Michael Yeager, minority deputy chief counsel; Ellen Rayner, minority chief clerk; and Jean Gosa and Earley Green, minority assistant clerks.

Mr. BURTON. I call the hearing to order.

A quorum being present, the Committee on Government Reform will come to order. I ask unanimous consent that all Members' and witnesses' opening statements be included in the record and without objection, so ordered.

I ask unanimous consent that all articles, exhibits, extraneous or tabular material referred to be included in the record and without objection, so ordered.

I also ask unanimous consent that questioning in the matter under consideration proceed under clause 2(j)(2) of House rule 11 and committee rule 14 in which the chairman and ranking member allocate time to committee counsel as they deem appropriate for extended questioning not to exceed 60 minutes divided equally between the majority and minority and without objection, so ordered.

I also ask unanimous consent that Representatives Frank, Delahunt and Meehan who are not members of the committee, be permitted to participate in today's hearing and without objection, so ordered.

I ask unanimous consent that we rename the Subcommittee on Civil Service and Agency Organization to the Subcommittee on Civil Service, Census and Agency Organization and without objection, so ordered.

Finally, I ask unanimous consent that Congressman Dan Miller be appointed to the Civil Service Subcommittee as vice chairman and without objection, so ordered.

Let me preface my opening statement by saying that members of the Justice Department and the White House have been calling majority members urging that we not conduct these series of hearings and I don't know if the minority has likewise been contacted. One of the things that has been said by the White House and by the Justice Department is they feel we should have discussions about this issue on whether or not the documents we have asked for and subpoenaed be given to us. For the majority members who are here and those who will be coming, and I hope my colleagues will convey this to them, we have had at least three meetings with the counsel to the President, Mr. Gonzales, one meeting with him, and at least two meetings with the Attorney General and his chief criminal counsel. So we have already done that. The problem we have is that the Justice Department and the White House continue to be recalcitrant in that they don't want us to see documents that go back 30 years on the Salvati issue and that is where the crux of this matter lies. It is not that we are not trying to work with them; it is just they are very, very hard-nosed about it and for that reason we have to proceed.

The U.S. Department of Justice allowed lying witnesses to send men to death row. They allowed lying witnesses to send men to death row. It stood by idly while innocent men spent tens of years, decades behind bars. It permitted informants to commit murder. Everybody in America ought to know this. It allowed informants to commit murder. It tipped off killers so they could flee before they were caught. It interfered with local investigations of drug dealing and arms smuggling, and when people went to the Justice Department with evidence of murders, some of them ended up dead because some FBI agents tipped off the underworld figures about it and they ended up dead.

If there was ever a time that the Justice Department should welcome a congressional investigation, this is it. If there was ever a situation that called out for the facts to come out, this is it. The Justice Department and the White House should bend over backward to help us with this investigation but they are not doing that. The administration does not appear to want a full public accounting of what happened. The thing that troubles me is there may still be people in jail today who were innocent and are innocent and there may have been people executed for crimes they didn't commit and that needs a full airing. I am not just talking about the Salvati case.

I admire people who act on principle. The White House and the Justice Department say they are acting on principle and I would like to believe that but today, we start to grapple with an important question, what is the greatest good? I believe and I think everyone on this committee believes that the greatest good is for the Congress to be able to conduct thorough oversight of the executive

branch, especially when it appears that people in the executive branch have done something wrong. Coverups never benefit a democracy.

With what happened in Boston, I cannot believe that anyone from the President on down would want to keep all the facts from coming out but that is what is happening. All we are trying to do is get the facts, put them before the American people and make sure the laws are properly written and the peoples' money is well spent.

The Justice Department has a different function. It prosecutes people. It doesn't search for and release documents to the public. It doesn't write reports. In fact, it is required by grand jury rules to keep some information secret. So the people cannot always look to the Justice Department for facts or explanations. If Congress is prevented from doing a thorough job, people will always wonder what really happened and that would be a tragedy. Lincoln said, let the people know the facts and the country will be saved. That is just as true today as it was when he said it.

Why is the Boston investigation so important? I believe that the strength of our democracy is based on our ability to look at our mistakes and allow the people to have a voice in correcting those mistakes. The only way we can do that is to search for the truth but if the Justice Department has its way, we won't be able to get the truth. We may get some of the truth but some of the truth is not enough and still worse, the people will know that we didn't get the truth.

I worry that there may be other cases, as I said, like Joe Salvati's. There may be other innocent men sitting in prison somewhere that we don't even know about and there may have been some that were executed that were innocent. There could be other Flemmis or Whitey Bulgers out there who is on the 10 most wanted list. There could be other Joe "the Animal" Barbozas, who was the first person in the witness protection program who killed at least 19 people and 1 that we know of while he was in the witness protection program and was protected by the FBI. While he was in the witness protection program, he killed people and he was protected by the FBI. Why is it that Justice doesn't want all this to come out?

Here we are today spending time over a fight that no one on this committee wants to be a part of but the stakes are high. If the Justice Department keeps deliberative information from Congress, it is going to set a terrible precedent. Our ability here in Congress to search for the truth will be gutted. Already this committee is being tied up in knots in its quest for information. The Justice Department has started to fight to maintain secrecy in more than $1 billion of civil lawsuits in Boston and now the President has claimed executive privilege, saying it is in the national interest for us not to pursue this.

I think the President is doing a great job as far as the war is concerned. I think he is doing a great job in trying to get this economy on the right track, but this goes beyond that. This is a tragedy and would be morally wrong if we did not challenge it. I am the last person in the world who wants to spend time arguing over documents but in the end, we are here because the Justice Depart-

ment and the White House want us to be here. They want to establish a precedent. The question is, should we let them establish the precedent? I will hold many more hearings on this to explore this question and I look forward to hearing the views of the Criminal Division of the Justice Department and the Attorney General on this subject. I would also like to have Judge Gonzalez, the White House counsel, come up here and share his views.

So we are going to have you, who I wanted to testify today, and the Attorney General testify and we are going to have the White House counsel testify. We are going to give you a chance to air your views and be questioned by the committee.

What is at stake? We have to see documents that relate to our Boston investigation. The Justice Department said no and the President has said even reviewing these documents, even looking at them would be contrary to the national interest. Joe Salvati and others spent their lives in prison for crimes they did not commit. Joe "the Animal" Barboza, who was described by the FBI Director, J. Edgar Hoover, as "a professional assassin responsible for numerous murders and acknowledged by all professional law enforcement representatives in New England to be the most dangerous individual known," lied under oath and put people on death row and the Government protected him and even went to bat for him when he committed a murder while he was in the witness protection program. Stevie "the Rifleman" Flemmi and Whitey Bulger were protected by the Government for decades while they killed people with impunity. Some of them killed their girlfriends when they got tired of them and they were not pursued for that, even though it was known they were doing it. If they got tired of some girl, they would kill her and get another. Can you believe that?

Witnesses who came to the Justice Department with information about Flemmi and Bulger were killed after Flemmi and Bulger were tipped off by the FBI. In my mind, it would be contrary to the national interest if we sat back and did nothing. One thing is certain, covering up the facts doesn't do any good. I personally believe there are other people in jail today who are innocent because of this kind of activity and I want to find out if there are innocent people in jail and if so, I want to find out who put them there that was in our Justice Department and the FBI because those people should be held accountable and brought to justice because they are criminals for putting innocent people in jail.

I don't think there is anyone here to who doesn't understand that if the executive branch gets its way, Congress will forever be diminished, both the House and the Senate. The funny thing is that any of this can be called funny. When I was trying to get the same types of documents when there was a Democrat in the White House, I don't remember a single time when a Republican called me up and said I was doing something that would hurt the Justice Department or the executive branch. When it was Reno over there, none of my Republican colleagues were complaining. In fact, for a time, we had a working group on this committee that would vote on subpoenas. The other two Republicans that voted on subpoenas at that time were Speaker Dennis Hastert and Chris Cox, both of whom are in leadership. When they voted to subpoena deliberative documents, even more sensitive ones than those we have asked for,

I don't remember anyone telling them they were doing anything wrong, and they weren't doing anything wrong.

When Henry Hyde, Orrin Hatch and Trent Lott fought Janet Reno for deliberative documents more sensitive than the ones we want to see, I do not remember any Republican telling them they were doing the wrong thing. That is because they were right and today's Justice Department witness, Mr. Bryant, used to work on the House Judiciary Committee for Henry Hyde when he was the chairman. He had a front row seat when that committee was asking the Justice Department for deliberative documents. I doubt that he saw anything wrong with his boss doing so either.

So what is the background to today's hearing? Almost a year ago, I asked the Justice Department for documents and the Attorney General, who didn't seem to have a problem with Congress getting deliberative documents when he was in the Senate, told me that I wouldn't get the documents I asked for. Judge Gonzalez, the White House counsel, said the same thing. There was no ambiguity whatsoever. Congress simply would not get deliberative documents ever again. In fact, no one even wanted to know why Congress wanted the documents we asked for. All they said was a flat no.

This inflexibility and inflexible policy hit me and the committee pretty hard. It meant that Congress, Republicans or Democrats, would be hamstrung when they conducted oversight of allegations of corruption in the executive branch. It meant that when we were trying to find out if taxpayer money was being used improperly or if the law should be changed, we would have one hand tied behind our backs. It meant that the Teapot Dome, that scandal, or parts of the Watergate scandal would have remained a mystery. That is why I issued the subpoena last year. After the Justice Department got the subpoena, here is what a senior administration official told the Washington Post: "We are prepared to invoke the privilege to create the clear policy that prosecutor discussions should be off limits." Assistant Attorney General Bryant, who is here today to testify, said on the same day, "Whatever the historical record is, it won't change the Department's current position."

The committee responded verbally and in writing that this inflexible position was unacceptable. On December 13, 2001, the Chief of Staff in the Criminal Division, who is here with us today, modified the previous position. I don't know what happened but perhaps he realized that an admission of inflexibility would be a real problem if this dispute ever went to court. He said the Justice Department would respond to congressional document requests on a case by case basis but when he was asked about the Boston case and how it led to the claim of executive privilege, he could not answer.

Here we are today, nearly 2 months later, asking the same question. If there is no inflexible policy, then why can't the committee review the Boston documents? Perhaps more important, if we can't see the Boston documents, then isn't it fair for us to conclude that the case by case analysis is simply a different way of telling Congress that it will never get a deliberative document from the Justice Department? Unfortunately, I am beginning to come to that conclusion. It is a bit like Alice in Wonderland, sentence first, verdict afterwards. Here, however, it is a matter of saying you can

bring the case to us but it won't really matter because we have already decided that you are going to lose. In fact, that is precisely what one Justice Department official told congressional staff at a White House meeting last year. He said that the Justice Department would review each case on the merits, but that Congress would always lose. This seemed like a joke at the time, but now it appears the words were carefully chosen and the communication was precise.

Today, we have a simple goal. In a number of cases the White House and the Justice Department have said they are merely attempting to resolve a balance that was lost during the Clinton years. They said deliberative documents were not provided to Congress prior to the Clinton administration. Assistant Attorney General Chertoff told me in a meeting that before 1993, the Justice Department did not provide deliberative documents to Congress. Maybe no one ever thought I would say these words, but I think that does a disservice to former President Clinton. Those kinds of documents were provided to Congress by Presidents Bush, Reagan and Carter. Even Calvin Coolidge, when President, gave Congress these types of documents.

We have gone back, and I will give you a list of what we found, but we want to know what you have found as well. That is why 5 months ago I asked Mr. Bryant to do some research and tell the committee how many times the Justice Department has given Congress access to deliberative documents. I made this request because I thought the debate we are now having required facts and the facts would be helpful to both sides. It took 5 months to get an answer and the information we received last Friday after 5 months of stonewalling by you guys, to be kind, was extremely incomplete. Today, I hope the Justice Department has done its homework. Congress and the executive branch will be better equipped to assess this committee's request and possible Senate request if we know what happened in the past.

At the end of the day, it may be that Mr. Bryant's words from last year are the final words from the administration when he said, "Whatever the historical record is, it won't change the Department's current position." Maybe that is precisely what the administration meant. If that is true, I don't expect to hear anymore claims that the Justice Department is merely trying to go back to an earlier time when the executive branch never gave this type of information to Congress.

If we do find that Congress got so many deliberative documents in the past and Mr. Bryant has been unable to count them, then we will at least know for a fact that when the President claimed executive privilege over the Boston documents, it was because he wanted to do something that no President has ever done before and we will be able to get past the spin and get on with the debate.

I look forward to the statements of my colleagues today and to the testimony of our distinguished witnesses. I really appreciate Senator Grassley being here with us today. You did this of your own volition and called us. I wish more Senators were as willing to jump into the frying pan with us as you. You are a good man.

Let me end by saying one more thing and then I will yield to Mr. Waxman. I went to a movie this week. I went to see the Count of

Monte Cristo. Have any of you ever read the book or seen the Count of Monte Cristo? It is a story about a man that spent 16 years in prison for something he didn't do. It told about the travails that he went through during that 16 year period. It is a horrible story.

Granted the conditions in the prisons at that time were probably much more difficult than they are today but Mr. Salvati spent twice as much time as the Count of Monte Cristo did in that story in prison. His kids grew up without him, his wife had to learn a trade, she wasn't prepared to deal with, she had to have somebody drive her to the prison every week for 30 years and their life was ruined. Somebody has to account for that. The FBI all the way up to J. Edgar Hoover knew he was innocent. We have documents to that effect and you, in Justice, don't want us to find out why. You don't want us to see that. That is a travesty and it is one that will not stand. I want you to know that this is going to go on all year long and I don't want to hurt this President, I don't want to hurt my party politically but this is something that is more important than politics because if this sets a precedent, then we're going to have future Presidents doing the same thing.

I don't believe there is corruption with George W. Bush, I think he is a good man, but I think there may be corruption in the future like Teapot Dome or Watergate or something else, and I don't know whether it will be a Democrat or Republic but if this stands, then they are going to use this same executive privilege to block Congress from investigating and that is something we cannot let happen.

[The prepared statement of Hon. Dan Burton follows:]

OPENING STATEMENT OF CHAIRMAN DAN BURTON
COMMITTEE ON GOVERNMENT REFORM
"THE HISTORY OF CONGRESSIONAL ACCESS TO DELIBERATIVE JUSTICE DEPARTMENT DOCUMENTS"
FEBRUARY 6, 2002

The United States Department of Justice allowed lying witnesses to send men to death row. It stood by idly while innocent men spent decades behind bars. It permitted informants to commit murder. It tipped off killers so that they could flee before they were caught. It interfered with local investigations of drug dealing and arms smuggling. And then, when people went to the Justice Department with evidence about murders, some of them ended up dead.

If there was ever a time that the Justice Department should welcome a Congressional investigation, this is it. If there was ever a situation that called out for all the facts to come out, this is it. The Justice Department and the White House should bend over backwards to help us with this investigation. But they aren't doing that.
The Administration does not appear to want a full public accounting of what happened.

I admire people who act on principle. The White House and the Justice Department say they are acting on principle, and I'd like to believe that. But today we start to grapple with an important question: 'What is the greatest good?' I believe, and I think everyone on this Committee believes, that the greatest good is for Congress to be able to conduct thorough oversight of the executive branch, especially when it appears that people in the executive branch have done something wrong. Cover-ups never benefit a democracy. With what happened in Boston, I cannot believe that anyone – from the President on down – would want to keep all the facts from coming out. But that's what is happening.

All we're trying to do is get the facts, put them before the American people and make sure that the laws are properly written and the people's money is properly spent. The Justice Department has a different function. It prosecutes people. It doesn't search for and release documents to the public. It doesn't write reports. In fact, it is required by

grand jury rules to keep some information secret. So the people can't always look to the Justice Department for facts and explanations. If Congress is prevented from doing a thorough job, people will always wonder what really happened -- and that would be a tragedy.

Why is the Boston investigation so important? I believe that the strength of our democracy is based on our ability to look at our mistakes and allow the people to have a voice in correcting those mistakes. The only way we can do that is if we search for the truth. But if the Justice Department has its way, we won't be able to get the truth. We may get some of the truth. But some of the truth isn't enough. And worse still, the people will know that we didn't get the truth. I worry that there may be other cases like Joe Salvati's. There may be other innocent men sitting in prison somewhere that we don't even know about. There could be other Flemmis or Bulgers out there. If there are, Congress should do something about it.

So here we are today. Spending time over a fight that no one on this Committee wants to be a part of. But the stakes are high. If the Justice Department keeps deliberative information from Congress, it will set a terrible precedent. Our ability here in Congress to search for the truth will be gutted. Already, this Committee is being tied up in knots in its quest to get information. The Justice Department has started to fight to maintain secrecy in the more than one billion dollars of civil lawsuits in Boston, and now the President has claimed executive privilege. The President is doing a great job. I support him. But he is getting terrible advice on this issue. I am really worried that people will start to get the message that the Justice Department is covering up what I have called the greatest failing in federal law enforcement history. And that would be a tragedy. And it would be morally wrong.

I am the last person in the world that wants to spend a lot of time arguing over documents. But, in the end, we are here because the Justice Department and the White House want to be here. They want to establish a precedent. The question is, should we let them establish the precedent? I will hold many more hearings to explore this question.

I look forward to hearing the views of the Criminal Division of the Justice Department and the Attorney General on this subject. I'd also like to have Judge Gonzales, the White House Counsel, come up and share his views with the Committee.

What's at stake? We've asked to see documents that relate to our Boston investigation, the Justice Department said no, and the President has said that our even reviewing these documents would be "contrary to the national interest." "Contrary to the national interest." Joe Salvati and others spent their lives in prison for crimes they did not commit. Joe "the Animal" Barboza, who was described to FBI Director Hoover as "a professional assassin responsible for numerous homicides and acknowledged by all professional law enforcement representatives in [New England] to be the most dangerous individual known," lied under oath to put people on death row. The government protected him, and even went to bat for him after he committed a murder while in the Witness Protestion Program. Stevie "The Rifleman" Flemmi and "Whitey" Bulger were protected by the government for decades while they killed with impunity. Witnesses who came to the Justice Department with information about Flemmi and Bulger were killed after Flemmi and Bulger were tipped off. In my mind, it would be "contrary to the national interest" if we sat back and did nothing. One thing is certain, covering up the facts does no good.

I don't think that there is anyone here who doesn't understand that if the executive branch gets its way, Congress will forever be diminished. And the funny thing is – if any of this can be called funny – when I was trying to get the same types of documents and there was a Democrat in the White House, I don't remember a single time when a Republican called me up and said that I was doing something that would hurt the Justice Department or the executive branch. In fact, for a time we had a working group on this Committee that would vote on subpoenas. The other two Republicans were Dennis Hastert and Chris Cox. And when they voted to subpoena deliberative documents, even more sensitive than the ones we have asked for, I don't remember anyone telling them that they were doing anything wrong. They weren't doing anything wrong. And when Henry Hyde and Orrin Hatch and Trent Lott fought Janet Reno for deliberative documents more sensitive

than the ones we want to see, I don't remember any Republican telling them that they were doing the wrong thing. That's because they were right. And today's Justice Department witness, Mr. Bryant, used to work on the House Judiciary Committee when Henry Hyde was the Chairman. He had a front row seat when that Committee was asking the Justice Department for deliberative documents. I doubt that he saw anything wrong with what his boss was doing either.

So what is the background to today's hearing? Almost a year ago I asked the Justice Department for some documents. And the Attorney General – who didn't seem to have a problem with Congress getting deliberative documents when he was in the Senate – told me that I wouldn't get the documents I asked for. Judge Gonzales, the White House Counsel, said the same thing. There was no ambiguity whatsoever. Congress simply wouldn't get deliberative documents ever again. In fact, no one even wanted to know why Congress wanted the documents it had asked for. All they said was flat out no.

This inflexible policy hit me pretty hard. It meant that Congress – Republicans or Democrats – would be hamstrung when it conducted oversight of allegations of corruption in the executive branch. It meant that when we were trying to find out if taxpayer money was being used improperly, or if the laws should be changed, we would have one hand tied behind our back. It meant that the Teapot Dome scandal, or parts of the Watergate scandal, would have remained a mystery.

That's why I issued a subpoena last year. And after the Justice Department got the subpoena, here is what a senior Administration official told the Washington Post: "We are prepared to invoke the privilege to create a clear policy that prosecutors' discussions should be off limits." And Assistant Attorney General Bryant, who is here today to testify, said on the same day as the Washington Post article appeared: "whatever the historical record is, it won't change the Department's current position." The Committee responded verbally and in writing that this inflexible position was unacceptable.

On December 13 of last year, the Chief of Staff in the Criminal Division modified the previous position. I don't know why that happened, but perhaps he realized that an admission of inflexibility would be a real problem if this dispute ever got to court. He said that the Justice Department would respond to Congressional document requests on a case-by-case basis. But when he was asked what about the Boston case led to the claim of executive privilege, he couldn't answer.

So here we are today, nearly two months later, asking the same question: if there is no inflexible policy, then why can't the Committee review the Boston documents? Perhaps more important, if we can't see the Boston documents, then isn't it fair for us to conclude that the "case-by-case" analysis is simply a different way of telling Congress that it will never get a deliberative document from the Justice Department? Unfortunately, I am beginning to come to that conclusion. It's a bit like Alice in Wonderland – "Sentence First, Verdict Afterwards." Here, however, it is a matter of saying you can bring the case to us, but it won't really matter because we have already decided that you will lose. In fact, that is precisely what one Justice Department official told Congressional staff at a White House meeting last year. He said that the Justice Department would review each case on the merits, but that Congress would always lose. This seemed like a joke at the time, but now it appears that the words were carefully chosen and the communication was precise.

Today we have a very simple goal. On a number of occasions, the White House and the Justice Department have said that they are merely attempting to restore a balance that was lost during the Clinton years. They said that deliberative documents were not provided to Congress prior to the Clinton Administration. Assistant Attorney General Chertoff told me in a meeting that before 1993, the Justice Department did not provide deliberative documents to Congress. Maybe no one ever thought that I would say these words, but I think that does a disservice to former President Clinton. These kinds of documents were provided to Congress by Presidents Bush, Reagan and Carter. Even President Coolidge gave Congress these types of documents. That's why, five months ago, I asked Mr. Bryant to do some research and tell the Committee how many times the Justice

Department has given Congress access to deliberative documents. I made this request because I thought the debate we are now having required facts, and that the facts would be helpful to both sides. It took five months to get an answer, and the information we received last Friday was, to be kind, extremely incomplete.

So today I hope that the Justice Department has done its homework. Congress and the executive branch will be better equipped to assess this Committee's requests if we know what happened in the past. Now, at the end of the day, it may be that Mr. Bryant's words from last year are the final word from the Administration. When he said "whatever the historical record is, it won't change the Department's current position," maybe that is precisely what the Administration meant. If that is true, I don't expect to hear any more claims that the Justice Department is merely trying to go back to an earlier time when the executive branch never gave this type of information to Congress. If we do find that Congress got so many deliberative documents in the past that Mr. Bryant has been unable to count them, then we will at least know for a fact that when the President claimed executive privilege over the Boston documents it was because he wanted to do something that no President had ever done before. And we will be able to get past the spin and get on with the debate.

I look forward to the statements of my colleagues, and to the testimony of today's distinguished witnesses. And I also really appreciate Senator Grassley coming here today to testify. The world of Congressional oversight is lonely. There are not a lot of legislators who take oversight seriously. But Senator Grassley is one of the few. And he is certainly one of the best, and we really owe him our thanks.

I want to close with one final thought. I read Mr. Bryant's testimony. First, he has avoided the subject of today's hearing. There is always a reason people try to change the subject, but will get to that later. At the end of the statement, he said: "the public interest is well-served by safeguarding from disclosure the documents that advise whether or not to prosecute."

Was the public well-served when Stevie Flemmi and Whitey Bulger were killing people with impunity?

Was the public well-served when Joe "the Animal" Barboza killed a man while under government protection and then the Attorney General of the United States helped him get a lighter sentence?

Was Joe Salvati well-served when he spent 30 years in prison for a crime he didn't commit?

I don't think so.

Mr. BURTON. Mr. Waxman.

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

I want to congratulate and commend you for your courage and your dogged determination to protect the rights of the Members of Congress and the American people and your zeal to make sure that justice has been done.

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

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

Ten months ago, Congressman John Dingell and I tried to obtain the most basic information about the energy task force chaired by Vice President Cheney. We also asked the General Accounting Office to conduct an independent, nonpartisan review of the task force's operation and funding. Our initial interest in the workings of the task force began with news reports that the task force had met privately with major campaign contributors such as Kenneth Lay, the former CEO of Enron, but had denied similar access to environmental and consumer groups.

My staff later examined the plan that emerged from this process and found at least 17 policies that were advocated by Enron or that benefited Enron. I have taken great pains not to accuse anyone in the administration of misconduct but these facts raise questions that deserve straight answers. The Bush administration has unfortunately responded with secrecy. Left with no alternative, the Comptroller General has been forced to take legal action to compel the disclosure of information that should be in the public light.

Nine months ago, I and other members of this committee requested adjusted census data collected as part of the 2000 census. This was not top secret information. It was information that the Census Bureau had already collected which included corrections for errors using modern statistical techniques. We did this because the raw data released by the Commerce Department missed over 6 million Americans and could affect, among other things, the allocation of more than $185 billion in Federal grants. The Bush administration again responded with secrecy and refused to release the adjusted data. The administration took this position even though Federal courts had ordered similar data released after the last census. Left with no other alternative, I and 15 other Members filed a lawsuit to force disclosure of this important information. Last month, a Federal district court judge ordered the Commerce Secretary to

turn over this information which should have been released from the very outset.

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

I have with me an article written by David Rosenbaum which appeared this past Sunday in the New York Times and I ask unanimous consent that it be included in the record.

Mr. BURTON. Without objection.

[The information referred to follows:]

For the record Cong. Waxman
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When Government Doesn't Tell

BYLINE: By DAVID E. ROSENBAUM

DATELINE: WASHINGTON

BODY:
MORE than any of its recent predecessors, this administration has a penchant for **secrecy.**

The Bush White House has steadfastly refused to tell Congress about contacts last year between corporate executives and a task force to develop energy policy headed by Vice President Dick Cheney. Last week, the General Accounting Office, the investigative agency of Congress, announced it would sue the White House to obtain the information, the first time it has ever filed such a suit. That is only the most recent example of the Bush administration's keeping material from becoming public. Some of these moves, of course, are related to the attacks of Sept. 11. For example, President Bush determined that accused terrorists could be tried in secret military tribunals.

The government has also refused to reveal the identities or nationalities of the Taliban and Al Qaeda fighters held captive at Guantanamo Bay, Cuba, or the names and locations of hundreds of immigrants imprisoned in the United States, because the authorities insist they might be able to cast light on the terrorism.

"Proclamation of a wartime crisis automatically increases the amount of government **secrecy,**" said former Senator Daniel Patrick Moynihan, who wrote a book in 1998 about excessive **secrecy** in Washington.

But the Bush team's inclination to keep information under wraps goes far beyond the reaction to terrorist attacks or even what can be regarded as traditional efforts to conduct delicate government affairs out of the limelight.

"This administration has a knee-jerk response -- **reflexive secrecy,**" said Thomas S. Blanton, director of the National Security Archive, a research center at George Washington University.

Steven Aftergood, director of the project on government **secrecy** of the Federation of American Scientists, said he knew of no previous administration so determined to withhold routine information. Last month, Mr. Aftergood sued the government to gain access to the Central Intelligence Agency's budget for 1947 -- data he has been denied even though the 1997 and 1998 C.I.A. budgets have been declassified and are public.

Last year, to the dismay of historians, Mr. Bush signed an executive order restricting public access to the papers of former presidents. Attorney General John Ashcroft also established more restrictive rules governing what agencies release under the Freedom of Information Act.

The government is even refusing to give Congress the results of a survey taken after the 2000 census to

calculate how many people were either missed or double-counted by the census takers -- data that has nothing to do with national security, law enforcement, confidential communications or any other normal grounds for keeping data from Congress. The Commerce Department says it is not confident the figures are accurate.

Exactly why the administration is so tightfisted with so many kinds of information is something of a mystery. One administration lawyer offered a theory. He said Mr. Bush and Mr. Cheney want to right a balance they believe has tilted much too far toward Congress, largely because of precedents established when President Bill Clinton misused executive authority by trying to keep matters secret to cover up wrongdoing. The same thing happened, for the same reason, in the Nixon administration, the lawyer said. He recalled that Mr. Cheney had been chief of staff for President Gerald R. Ford and familiar with a White House playing a weak hand against Congress.

As essential as openness is in a democracy -- without it public officials could never fully gain the consent of the governed because there would be no way to hold officials accountable -- no one doubts that some democratic processes require **secrecy.** Clearly, for example, diplomatic negotiations and grand jury proceedings cannot take place in public, and taxes could not be collected if returns were not confidential.

Those cases are easy to recognize, like night and day, said Dennis F. Thompson, a professor of political philosophy at Harvard who has written widely about government **secrecy.** But other cases are more like dusk, Mr. Thompson said. Usually, as in the case of the energy task force, they involve efforts by the White House to withhold information sought by political opponents that might embarrass the president or hamper his policies.

Mr. Bush asserts he is withholding details about Mr. Cheney's task force to protect the right of a president to get unvarnished confidential advice. "We're not going to let the ability for us to discuss matters between ourselves to become eroded," he told reporters last week. "It's not only important for us, for this administration. It's an important principle for future administrations."

David M. Walker, who as comptroller general heads the accounting office, said he was not after confidential advice. He was not asking for minutes or transcripts of what was said at the task force meetings. What Congress wants, Mr. Walker said, is merely the names of the participants and the dates, times and topics of the meetings, information he said was essential for Congress to fulfill its duty to oversee the activities of the executive branch.

AS is so often the case, these arguments about principle mask a political dispute. Democrats would like to show that Mr. Cheney and his colleagues met extensively with major campaign contributors and froze environmentalists out. The White House would like to limit any disclosures that call further attention to the administration's ties to oil and gas companies, particularly to the Enron Corporation.

But the philosophical clash between the executive and legislative branches over access to information is also real and important, a conflict fought in almost every administration since George Washington refused to give Congress papers about a disastrous battle with Indians in the Northwest Territory. Usually these disputes are eventually settled by a compromise that allows both sides to claim victory.

Leaving politics aside, the line between what information should be kept confidential and what should be revealed to Congress and the public is hard to draw. Mark J. Rozell, a professor of politics at Catholic University and an expert on executive privilege, said the basic principle in a democracy should be that the presumption is in favor of openness and information is kept secret "only in the service of some absolutely clear national interest."

Professor Thompson of Harvard suggested that a distinction could often be made between the advice and the formulation of policy. A president, he said, should be able to keep advice secret, but "it's very important for citizens to know the reasoning that goes on behind policymaking and not just the final decisions."

Such prescriptions may be useful in the abstract, but are hard to apply to specific cases. For when it comes to the president and Congress, politics can rarely be left aside.
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GRAPHIC: Photo: President Bush, center, visited Little Rock, Ark., last year for a fund-raiser for Senator Tim Hutchinson, left. They were joined by Gov. Mike Hukabee, right, at the airport for a public appearance. More than recent predecessors, though, this administration has had a penchant for **secrecy.** (Associated Press)

LOAD-DATE: February 3, 2002

Mr. WAXMAN. Mr. Rosenbaum writes that "More than any of its recent predecessors, this administration has a penchant for secrecy." In the same article, Thomas Blanton, the Director of the National Security Archive at George Washington University, says "This administration has a knee jerk response, reflexive secrecy."

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

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

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

I look forward to the hearing today, learning the testimony of our witnesses, and having all of the members of the committee deal with this very important issue that transcends partisanship. It goes to the very fundamental function of Members of Congress, the balances and checks provided in our Constitution between the legislative and executive branches. If we cannot exercise our oversight responsibilities, then more power is vested in the executive branch and, Mr. Chairman, power corrupts. Let us do this administration a favor. Let us not let them get so much power that they push the envelope even further, thinking the power they have will allow them to do more and more in secret and not be open to the Congress and to the American people.

I yield back the balance of my time.

[The prepared statement of Hon. Henry A. Waxman follows:]

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

February 6, 2002

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

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

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

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

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

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

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

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

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

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

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

Mr. BURTON. Thank you, Mr. Waxman.

My other colleagues who have opening statements who just arrived, we agreed that Mr. Waxman and I would make opening statements, then yield to Senator Grassley and then we will come back to the Members who have statements they would like to make. We are doing that in deference to Senator Grassley because he has other commitments.

Senator Grassley, I want to thank you once again for being here. We appreciate your being here and sharing with us.

Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman, for being a champion of oversight and with Congress writing legislation in such a broad manner, delegating so much to the executive branch of Government, our oversight functions in Congress have become more important than our legislative functions. So we have all got to get geared up to doing more of what you are doing.

I would think the mere fact that the distinguished chairman and the distinguished ranking member singing off the same song sheet on this issue ought to get somebody's attention in this town. I also have had an opportunity to work with Mr. Waxman on nursing home oversight, so I share with members of this committee a lot of things in common that I won't go into.

Listening to your comments reminds me that so often common sense ought to prevail and I think in these instances you are talking about, what this town ought to turn to is just a little dose of common sense because I think if people stand back and look at it, people in the front of this argument, these issues particularly on a 30-year old case, ought to be worked out.

It seems to me if the President of the United States would look into this a little bit, maybe he has, I don't want to say he hasn't, but if he hasn't, if he would, rather than listening to advisors on this issue, it would be resolved because the President Bush I got acquainted with in the cold winter of January traveling the State of Iowa going to our caucuses or getting ready for the caucuses is the sort of person that will cut right through this, I believe.

With those opening, off the cuff comments, let me say in a more formal way, thank you for the opportunity to testify on an issue that I feel is the core, the vitality of our democracy. That issue is more sunshine in government. I firmly believe that openness of government has kept our country as strong as it is today. If we can see clearly what our public servants do, we in Congress can correct deficiencies and make government more effective and more accountable. That is the essence of congressional oversight.

It has been my principle over the 20-plus years of oversight and investigation to treat administrations the same regardless of whether a Republican or Democrat is in the White House. You have given your own experience on that as background in your opening statement, and that ought to give you credibility on this issue more so than people would think.

Oversight is and should be nonpartisan, and I believe what we have heard this morning indicates that it is in this committee. I

think it is wise for all who do oversight to abide by the principle of impartiality. As I said, my intimate involvement began only a year after I was elected to the U.S. Senate. Since that time, I have been involved in crusades to reform the Defense Department, management practices to force the Justice Department to aggressively prosecute fraud against taxpayers, to force the Congressional Budget Office to produce more honest and realistic budget numbers, to reform the FBI's culture of arrogance, and its practice of putting image over product, and to transform the IRS from a cabal of bureaucratic barons to hopefully a more customer oriented and friendly service.

Each of these endeavors required inside information. Each agency used fast energies to stonewall and at no time were they ultimately successful because each time, as you are doing today, I made the case for access to the public and to my colleagues and each time the public and Congress backed me. Eventually, the information was provided. The result has been a litany of successful reforms throughout government and without inside information, Mr. Chairman, and that is what you seek, what shouldn't be inside information but presumably is thought to be by some. Without that none of these corrections would have been possible in my case.

Let me make clear that this stonewalling by the executive branch has happened under both Democratic and Republican administrations, so just as I have tried to treat each administration the same, unfortunately, each administration has treated my oversight investigations the same as well. It seems like deny, delay and stonewall.

That brings us to the issue before this committee about Joseph Salvati. Certain key documents are being withheld from the committee under executive privilege. The withholding of these documents is interfering with your ability to conduct oversight over a case over 30 years old, which involves an undeniably egregious miscarriage of justice as you have described, perpetuated by an agency, the FBI, that is undergoing major reforms designed to address the same cultural problems that led to the Salvati case. It may be a 30 year old case, but obviously, as you have said, it has present day implications.

Nonetheless, the Justice Department says its need to preserve the deliberative process supersedes the public's right to know why the FBI let four men be sentenced to death and later life imprisonment for a murder the FBI knew they did not commit. The Justice Department has said it will deal with the request for deliberative process documents on a case by case basis. If that is so, there is not a more compelling case than this one. In my view, Mr. Chairman, the deliberative process argument is just one arrow in the Justice Department and other agencies' quiver of excuses for blocking legitimate congressional oversight.

Over the past year, I have attempted to conduct numerous oversight investigations as a member of the Finance Committee and Judiciary Committee. I have been blocked at this point, not by executive privilege but by Privacy Act restrictions, rule 6(e) and the old ongoing investigation excuse that is so often used. Let me make clear that on some occasions these restrictions on congressional access to information may be legitimate. I am not here arguing that the executive branch has no rights to prevent the release of certain

information. All too often we see agencies abusing the legitimate limitations on information to cover up bureaucratic snafus, foul ups, mistakes and in the case of Mr. Salvati, gross misconduct.

Let me highlight two cases from investigations I am currently conducting. First, the John Solomon case. He is an AP reporter who had his home phone records subpoenaed and searched without his knowledge. The Justice Department is required to follow certain procedures before issuing a subpoena for phone records without the reporter's knowledge. I have been trying for months to determine if these DOJ procedures were followed, just to see if they followed their own procedures.

The Department has responded with a shell game for why they will not answer. At first, it was because the case was ongoing. Then when the case was closed, they invoked grand jury secrecy and then the Privacy Act. It is inconceivable to me that the law is such that Congress cannot look at the records to determine whether the Justice Department did or did not follow its own rules, its own guidelines regarding the subpoena of a reporter's phone records. While the Justice Department works with me on this matter, and they are at least giving the impression they are working along, it has taken months to get even the most basic information.

One other example and then I will stop. I discovered that the IRS had placed on paid administrative leave at a salary of $80,000 an employee who was indicted, who was convicted and who was sentenced to home detention for a felony, and at the same time being paid $80,000 doing no work for the IRS. The IRS claims because of the Privacy Act, they cannot tell me, the ranking member of the Finance Committee, whether this IRS employee, Mr. Kenneth Dossey, has been fired. In addition, Treasury claims under the Privacy Act that they cannot identify the IRS managers who decided to continue paying Mr. Dossey $80,000 a year while he was on home detention and not working. Again, the Treasury Department is working with me, so they want me to believe, but it has taken months for them to provide even the most simple answers.

So, Mr. Chairman, I fear that there is a widespread, deliberate policy by agencies to deny or delay giving information to Congress. I think this is a very dangerous policy for two reasons. First, it interferes with our Constitutional duty to oversee the executive branch and assure the public that its servants here in Washington are acting properly and ethically. Second, an agency that stonewalls such requests inevitably risks a credibility gap with the public. Also, I find it often means the agency has something to hide.

Basically, the reason political leaders in all branches of government are in trouble with our constituents is people are cynical about people in government, that leads to cynicism about our institutions of government. You have to remember, as good a Constitution as we have, maybe the most perfect political document in the world for self government, it still is based upon peoples' confidence in it. We have this going back and forth and as you indicated, you shouldn't be here doing this. You ought to spend your time on more important things. You getting these documents, you ought to be doing your work but people on C-Span hear this and it just adds to their cynicism.

I know that our President wants to reduce that cynicism. This is one way he can help in a common sense way to reduce it. A prime example is the Salvati case which involves FBI corruption at the highest levels. The FBI stood by silently, knowing the poor men took the rap for the murder they didn't commit. Two of these men died while in prison, the others have been let out only recently after 30-plus years. The same FBI cultural arrogance that allowed this miscarriage of justice to occur may very well be prevalent in today's FBI, although I think we have a new Director committed to overturning this. It takes a while to find out. He has been tied down with the war on terrorism, so he didn't get off to a very good start, but I think he is trying. That is not giving him a good bill of health from Chuck Grassley, but at least it has given him wiggle room and opportunity before we judge. That culture is the target of five ongoing investigations by the Government, including a management reorganization by the FBI, plus soon to be introduced FBI reform legislation. We are trying to deal with those things and improve the situation. To prevent Congress from learning the lessons of the Salvati case and applying that to our ongoing FBI oversight work would be a gross injustice to the public.

There is no question, Mr. Chairman, that the details of the Salvati case are critical to fulfilling the responsibilities of committees of Congress. How the Justice Department cannot approve the release of these documents on a case by case basis as it says it wants to is beyond explanation. Getting to the bottom of the Salvati scandal and fixing the cause of this injustice far outweighs any need to preserve the deliberative process.

I conclude by urging you and members of your committee to be firm, to be resolute on this issue. I don't need to urge you, I heard your opening statement. You are, and thank you for being that, not just from me but that ought to be a thank you from 534 other Members of Congress. You must continue to make your case to the public. It is sad that you do and in time I think you will be successful in the court of public opinion, which is the key to successful resolution of this impasse. If they have to go on television and argue this point, they are going to lose. This is one of those instances if you cannot tell your side of the story in the 30 second commercial, you are wrong.

I commend your fine oversight work on FBI corruption in the Boston field office and once again, thank you for the chance to share my views with the committee.

Thank you.

[The prepared statement of Senator Grassley follows:]

UNITED STATES SENATOR • IOWA
CHUCK GRASSLEY

http://grassley.senate.gov
press@grassley.senate.gov

Contact: Jill Kozeny, 202/224-1308
Kimberly Cass, 202/224-0484
Beth Pellett, 202/224-6197

Statement of Sen. Chuck Grassley, of Iowa
at the House Committee on Government Reform
during a Hearing on Congressional Access to Justice Department Documents
Wednesday, February 6, 2002

Mr. Chairman, members of the Committee, thank you for the opportunity to testify on an issue that I believe is at the core of the viability of our democracy. The issue is sunshine in government. I firmly believe that openness of government has kept our country as strong as it is today. If we can see clearly what our public servants do, we in Congress can correct deficiencies and make government more effective and accountable. That is the essence of congressional oversight.

It has been my principle over 20-plus years of oversight and investigation to treat administrations the same regardless of whether a Republican or Democrat is in the White House. Oversight is and should be non-partisan. I think it is wise for all who do oversight to abide by this principle of impartiality.

As I said, my intimate involvement in oversight began only a year after I was elected to the United States Senate. Since that time, I have led crusades to reform Defense Department management and practices; to force the Justice Department to aggressively prosecute fraud against taxpayers; to force the Congressional Budget Office to produce honest and realistic budget numbers; to reform the FBI's culture of arrogance and its practice of putting image over product; and, to transform the IRS from a cabal of bureaucratic barons to a truly customer-friendly service.

Each of these endeavors required inside information. Each agency used vast energies to stonewall. At no time were they ultimately successful. Each time, I made the case for access to the public and to my colleagues. And each time, the public and Congress backed me up. Eventually, the information was provided. The result has been a litany of successful reforms throughout government. Without inside information, none of these corrections was possible.

Let me make clear that this stonewalling by the executive branch has happened under both Democrat and Republican administrations. So just as I've tried to treat each administration the same, unfortunately each administration has treated my oversight investigations the same as well – with deny, delay and stonewall.

That brings us to the issue before this Committee: the Joseph Salvati case. Certain key documents are being withheld from your Committee under executive privilege. The withholding of these documents is interfering with your ability to conduct oversight of a case that's over 30 years old, which involves an undeniably egregious miscarriage of justice, perpetuated by an agency - the FBI - that is undergoing major reforms designed to address the same cultural problems that led to the Salvati case. It may be a 30 year-old case, but it has present-day implications.

Nonetheless, the Justice Department says that its need to preserve the deliberative process supercedes the importance of the public's right to know why the FBI let four men be sentenced to death, and later life in prison, for a murder that the FBI knew they did not commit. The Justice Department has said it will deal with the requests for deliberative process documents on a case-by-case basis. If that is so, there is not a more compelling case than this.

In my view, Mr. Chairman, the deliberative process argument is just one arrow in the Justice Department and other agencies' quiver of excuses for blocking legitimate Congressional oversight. Over the past year, I have attempted to conduct numerous oversight investigations as a member of the Finance and Judiciary Committees. I have been blocked, to this point, not by executive privilege, but by Privacy Act restrictions; Rule 6E; and, the old on-going investigation excuse.

Let me make clear that on some occasions, these restrictions on Congressional access to information may be legitimate. I am not here arguing that the executive branch has no rights to prevent the release of certain information. All too often, we see agencies abusing the legitimate limitations on information to coverup cover-up bureaucratic snafus, foul-ups, mistakes and in the case of Mr. Salvati – gross misconduct.

Let me highlight two cases from investigations I am currently conducting. First, the John Solomon case. He's the AP reporter who had his home phone records subpoenaed and searched without his knowledge. The Justice Department is required to follow certain procedures before issuing a subpoena for phone records without a reporter's knowledge. I have been trying for months to determine if these DOJ procedures were followed. The Department has responded with a shell-game for why they won't answer. At first, it was because the case was ongoing. Then, when it was closed, they invoked grand jury secrecy and the Privacy Act. It is inconceivable to me that the law is such that Congress cannot look at the record to determine whether the Justice Department did or did not follow its own guidelines regarding the subpoena of a reporter's phone records. While the Justice Department works with me on this matter, it has taken months to get even the most basic information.

In another example, I discovered that the IRS had placed on paid administrative leave at a salary of $80,000 a year an employee was indicted, convicted and sentenced to home detention for a felony – and doing no work at the IRS. The IRS claims that because of the Privacy Act they cannot tell me, the ranking member of the Finance Committee, whether this IRS employee, Mr. Kenneth Dossey, has been fired. In addition, Treasury claims under the Privacy Act that they can't identify the IRS managers who decided to continue paying Mr. Dossey $80,000 a year while he was on home

detention and not working. Again, the Treasury Department is working with me, but it has taken months for them to provide the most simple answers.

Mr. Chairman, I fear there is a widespread deliberate policy by agencies to deny or delay giving information to Congress. I think this is a dangerous policy for two reasons. First, it interferes in our Constitutional duty to oversee the executive branch and assure the public that its servants here in Washington are acting properly and ethically.

And second, an agency that stonewalls such requests inevitably risks a credibility gap with the public. Also, I find, it often means the agency has something to hide.

A prime example is the Salvati case, which involves FBI corruption at the highest levels. The FBI stood by silently, knowing that four men took the rap for a murder they didn't commit. Two of these men died while in prison. The others have been let out only recently, after 30-plus years. The same FBI cultural arrogance that allowed this miscarriage of justice to occur may very well be prevalent in today's FBI. It is that culture that is the target of five on-going investigations by the government, including a management reorganization by the Justice Department, plus soon-to-be introduced FBI reform legislation.

To prevent Congress from learning the lessons of the Salvati case and applying them to our on-going FBI oversight work would be a gross injustice to the public. There is no question, Mr. Chairman, that the details of the Salvati case are critical to fulfilling the responsibilities of this committee. And how the Justice Department cannot approve the release of these documents – on a case-by-case basis, as it says it wants to do – is beyond explanation. Getting to the bottom of the Salvati scandal and fixing the causes of this justice for outweighs any need to preserve the deliberative process.

Mr. Chairman, I conclude by urging you and the members of your committee to be firm and resolute on this issue. You must continue to make your case to the public, and in time you will be successful in the court of public opinion, which is the key to successful resolution of this impasse. I commend your fine oversight work on FBI corruption in the Boston field office, and once again thank you for the chance to share my views with the Committee.

Mr. BURTON. Thank you, Senator Grassley. We really appreciate your coming over. We know how busy you are in the Senate.

We in the House from time to time say things about the Senate that are not all that favorable, and I know the same thing is true in the Senate about the House. Let me just say that you have impressed us today and improved the view we have of the Senate. Thank you, very, very much, Senator.

Senator GRASSLEY. Thank you.

Mr. BURTON. Do other Members have comments they would like to make? Mr. Horn.

Mr. HORN. Mr. Chairman, you will have a statue around here for what you are doing to clean house.

Mr. BURTON. Excuse me 1 second.

Senator Grassley, I think because of your schedule, we will let you go and we will talk with you later.

Mr. Horn.

Mr. HORN. Thank you for putting this hearing together. You will get a statue for having a clean house. Nothing is more important in government than having a Justice Department that has a conscience, that does the right thing. Going back to King Andrew Jackson, he sort of thought Congress was a little, tiny, weeny operation and he could do what he wanted. This is an outrage. The Bush administration has been doing well in foreign policy and domestic policy. This will bring down the administration if they let this keep going and don't clean house. If the Attorney General won't do anything, that is going to hurt the President. That should not happen. The AG needs to let his conscience think about this and stop the political appointees and the civil service appointees that have done this under the Clinton administration and under some others.

I was one of the founders of the National Institute of Corrections and served under 11 attorneys general. Just ask yourself, what would Elliott Richardson do? They wouldn't know what hit them if he was there. He was a man of conscience and he goes down in history for that. The cancer is there and we must cut it out.

J. Edgar Hoover in the 1920's, when Attorney General Stone, later quite a Justice, was brought in to clean house because the FBI or then Bureau of Investigations were doing awful things in the Mitchell Palmer bit and all that.

I think we have a very good Director for the FBI and this will become his legacy if he doesn't start doing it. You only have a few months at the most to do it and get rid of the people there that give this kind of nonsense that we can't give anything to Congress. Start reading Article I. I don't know what law school some of these students went to. From George Washington debacle, he gave the papers to the Congress and that's been the precedent that good Presidents do. We hope this President, I am confident, needs to get the documents and make sure that it goes to the Congress.

Mr. BURTON. Thank you, Mr. Horn.

Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman.

I also want to join the others in thanking you for having this series of hearings.

Before I make my remarks, I would turn to the oversight issue alluded to in Congressman Waxman's opening statement. We all know that the General Accounting Office has been attempting to get basic information from the White House on the operations of the energy task force. The GAO doesn't want internal memos between the White House staff and the Vice President, doesn't want internal memos circulated just among the Task Force. What the GAO really wants is just information about the Task Force contacts with outsiders, budgetary information and other routine information.

Senator Grassley, who was kind enough to testify here today, has been reported as saying he thinks the White House should release that information. I congratulate him on being consistent on his remarks and his belief of how important it is for openness in government and for this administration to stop stonewalling on a number of related issues.

I have been angered that we have learned in previous hearings about some of the FBI's actions in Boston during the last 35 years. The testimony we heard last year from Joseph Salvati of the 30 years he spent in prison as an innocent man was something I don't think anyone in this room will ever forget.

The Department of Justice unwillingness to share with this committee the documents that they have pertaining to the case is only compounding the crime and sending Mr. Salvati to prison and keeping him there. For that reason, I am pleased we are having this hearing today.

In December, representatives of the Justice Department came before this committee and told us they would not comply with our request for documents that would likely help explain three important elements of this case: one, how Mr. Salvati and others were convicted of crimes they did not commit; two, how FBI agents tasked with upholding the law and combating organized crime, aided and abetted such crimes; and three, how the FBI continued to protect violent criminals and keep them out of jail while covering up illegal acts within the Bureau.

The Justice Department argues that releasing the documents we requested would make agents less likely to give candid assessments and advice to their superiors in the future, yet this same type of secrecy allowed corrupt FBI agents to spend decades protecting some of Boston's most prominent organized crime figures. I am concerned that by bowing to the Department's wishes, we are telling the FBI they can protect their own without accountability. This does not serve the interest of justice.

The Justice Department has offered to share with the committee a summary of the documents that we have requested. That response is inadequate. The FBI and the Department of Justice have spent 30 years obstructing justice in the Salvati case and other related cases. Why should the committee, or the individuals wrongly imprisoned and their families, now trust the Department to fully and fairly summarize what is in the requested documents? The Department of Justice clearly has been unable to act as its own policeman in this case. It is largely because of the work of the committee that this issue is not being swept under the table altogether.

I might say also largely because of the good work of attorneys who dedicated their time to the Salvati family and others and good reporting by certain reporters in the Boston area, particularly Mr. Rea amongst them.

I am equally worried that the precedent that would be set by allowing the Department to refuse to share with Congress the documents we have requested. If we concede on this issue, we can be assured in the future the Justice Department will refuse similar information requests. Congress and this committee will be unable to fulfill their Constitutionally endowed oversight responsibilities.

Most troubling is that the President has chosen to exert executive privilege over these documents. The President argues he is trying to prevent political calculations from influencing prosecutorial decisions. I appreciate the need for good agents to be able to do their jobs without political interference but in this case, throughout 30 years, multiple FBI Directors and Attorneys General, the Justice Department has tried to sweep the actions of several bad agents under the rug.

I dare say when Senator Grassley was discussing the cynicism of the public, I think they continue to be cynical about this as long as Mr. Hoover's name remains on that building. Some day as this case unravels, we may well want to take a look at why that is the case.

All of this should give us pause to be concerned whether political calculations have already influenced decisionmaking within the Department. There is a long history of congressional access to deliberative Justice Department documents under both Democratic and Republican administrations. In the 1970's, two House subcommittees investigated crime in the oil industry and received needed testimony from the Justice Department. More recently in 1992, a House subcommittee investigated a plea bargain settlement between the Department and a company accused of environmental crimes. During that investigation, the Department allowed personnel under subpoena to answer the committee's questions about the plea bargain. There are other similar cases in which House committees and the Department have worked together in the interest of justice. I hope the Department will not reverse that precedent and compound the crime that has brought us here today.

Senator Grassley indicated he thought if President Bush took a look at this, he would cut through all this. It is clearly stated for us in the law, In re Sealed Case, where the appellate court set out a clarification for us very clearly. To make a valid claim of deliberative process privilege, the material need only be predecisional and deliberative. The deliberative process privilege is a qualified privilege, however, and can be overcome by a sufficient showing of need. This determination was made on a case by case basis, balancing such factors as the relevance and availability of the evidence, the role of the executive branch and the possibility of future timidity by government employees. Where there is reason to believe that the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government. If there ever was a case where the wording of that particular appellate

court decision applies, it is in the Salvati case. This is a case where the privilege should be routinely denied. It does not protect the public's interest in honest, effective government.

Mr. Chairman, I thank you for pointing that out today, for having these hearings and I look forward to our witnesses.

Mr. BURTON. Thank you, Mr. Tierney.

Mr. Barr passes at the moment. Mrs. Morella.

Mrs. MORELLA. Just a brief comment.

Mr. Chairman, again, I thank you for having this hearing. During our last hearing in December on this topic, I stated my surprise and dismay over the Justice Department's decision to withhold the deliberative documents in question. In the interest of time, I will not repeat those sentiments. I would only say that I hope the Justice Department can elucidate its rationale for not releasing the information.

I am still at a loss as to why the Department feels it is not in the national interest as President Bush stated in his executive privilege memo on December 12, for these documents to be released. Why shouldn't the public in this specific case know about the horrific abuses of power by the FBI? How does keeping this information cloaked in secrecy benefit the public? The chilling effect that the release of this information may have is, in my mind, superseded by this committee, this Congress and this country's right to know about corruption at the highest levels of our government. I have yet to hear anything from the Justice Department explaining how the public's right to know or Congress's does not apply in this case. I look forward to hearing that. The Supreme Court has stated that "Congress's power of inquiry is broad and is justified when probing into departments of the Federal Government to expose corruption, inefficiency or waste."

We have a panel of experts here today to discuss the long history of congressional access to deliberative Justice Department documents and having heard Senator Grassley discussing previous cases where he has obtained deliberative Justice Department records, and why the information is so important for congressional oversight, hopefully the Justice Department can enlighten us to their viewpoint.

I yield back the balance of my time.

[The prepared statement of Hon. Constance A. Morella follows:]

Constance Morella

Opening remarks

During our last hearing in December on this topic, I stated my surprise and dismay over the Justice Department's decision to withhold the deliberative documents in question. In the interest of time, I will not repeat those sentiments. I will only say that I hope the Justice Department can elucidate its rationale for not releasing the information.

I am still at a loss as to why the Department feels that it is not in the "national interest", as President Bush stated in his executive privilege memo on December 12, for these documents to be released. Why shouldn't the public, **in this specific case**, know about the horrific abuses of power by the FBI? How does keeping this information cloaked in secrecy benefit the public?

The chilling effect that the release of this information may have is, in my mind, superceded by this Committee, this Congress, and this country's right to know about corruption at the highest levels of our government. I have yet to hear anything from the Justice Department explaining how the public's right to know or Congress' does not apply in this case.

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The Supreme Court has stated that Congress' power of inquiry is "broad" and is justified when probing into "departments of the Federal Government to expose corruption, inefficiency or waste." We have a panel of experts here today to discuss the long history of Congressional access to deliberative Justice Department documents, and we even have Senator Grassley here to discuss previous cases where he has obtained deliberative Justice Department records and why the information is so important for Congressional Oversight.

Hopefully, the Justice Department can enlighten us to their viewpoint, and I yield back the balance of my time.

Mr. BURTON. Thank you, Representative Morella.

Representative Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman, for the invitation extended to myself and my two other colleagues who sit on the Judiciary Committee. Again, let me reiterate my gratitude and their gratitude for your work. As others have stated earlier, it is making a difference.

I am not going to be critical of the President, I am not going to be critical of the Attorney General. I think they are both getting terrible advice. When Mr. Horowitz testified on the previous occasion, I posed to him the question of how the decision in terms of this particular case was achieved. I still really don't understand his answer. It would appear it was done by committee, if you remember his response, but it clearly is not in the national interest.

Congressman Tierney discussed the fact that it is a qualified privilege, that it requires balancing, if you will, in terms of considerations. I think the overriding concern we as Members of Congress should have is that the confidence of the American people in the integrity of the justice system is at stake.

We heard Senator Grassley talk about the culture of arrogance in a way that it is almost accepted now by Members of Congress. I would like to read into the record some quotes that I excerpted from various media reports. Senator Leahy, "The image of the FBI in the minds of many Americans is that this agency has become unmanageable, unaccountable and unreliable. It's much vaunted independence has transformed some into an image of insular arrogance." Senator Danforth, who was commissioned to investigate the role of the FBI in the Waco, TX incident, "The FBI was uncooperative in his review of Waco. He had to get a search warrant before the FBI would turn over certain documents. A longstanding value of the FBI is not to embarrass the FBI. If something is embarrassing rather than admit it, cover it up." One of the directors of the GAO back in June 2001, a month before September 11, Norman Rabkin, "This office did a review of the Federal Government response to terrorist incidents"—note that it is before September 11. "The GAO ran into so many roadblocks from the FBI that it decided to drop the agency from its review. Of all the Federal agencies that the GAO monitors, the FBI is by far the most contentious."

By the Department's action and its advice to the President in this particular case, let me suggest there is a growing perception that the Department of Justice defers to the FBI in such a way that it creates the conditions for that culture of arrogance that Senator Grassley articulated in his testimony. Let me suggest this. The FBI as an agency is at its low point in terms of public perception. It is your responsibility to save the FBI from itself, along with the new Director, Mr. Mueller.

I yield back.

Mr. BURTON. Thank you, sir. We appreciate your being here with us today and your participation.

Mr. Shays.

Mr. SHAYS. Thank you for having this hearing.

I just want to say from the outset that had I been in the Senate, I not only would have voted for the Attorney General, I would have

spoken in favor of his nomination. The feelings I have are put in that context.

While we are engaged in a very real war against terrorism, the administration has chosen to invoke the Constitution in defense of an abstraction, candor and secret executive decisionmaking. Candidly, I believe invoking executive privilege to protect 30 year old memos relevant to our investigation of Justice Department corruption was premature, heavy-handed and borders on arrogance.

When the President and Attorney General have asked for and received extraordinary powers in the fight against terrorism, powers that we all acknowledge risk infringement of our Constitutional liberties, the executive branch should expect, if not demand themselves, increased congressional scrutiny of their use of those powers, even if that oversight risks infringement of their Constitutional prerogatives. It is fair and necessary under these extraordinary circumstances. This is no time for some legalistic jihad to regain the halcyon largely mythical days of unfettered executive powers. There can be no question there is an administrationwide effort to push back against what is seen as an erosion of executive prerogatives to conduct public business in secret.

We are confronted with an inflexible policy barring congressional access to very broad but still only vaguely defined classes of executive branch documents, often if not routinely, made available by previous administrations. The White House concedes that "Unusual circumstances like those present here where the executive branch has filed criminal charges alleges corruption in the FBI investigative process, even the core principle of confidentiality applicable to prosecution and declination memorandum may appropriately give way to the extent permitted by law if Congress demonstrates a compelling, specific need for the memoranda. What could be more compelling than the need to right the wrong done to Joseph Salvati, an innocent man imprisoned for 30 years based on the machinations of corrupt State and Federal prosecutorial processes.

With regard to the documents the committee has subpoenaed, the Department of Justice should conclude our review of 30-year old deliberative documents under these extraordinary circumstances threatens no one's candor and that our reading of long-closed case files in this instance will bring needed light to a very dark chapter in our legal history.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Christopher Shays follows:]

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INDEPENDENT

SUBCOMMITTEE ON NATIONAL SECURITY, VETERANS AFFAIRS,
AND INTERNATIONAL RELATIONS
Christopher Shays, Connecticut
Chairman
Room B-372 Rayburn Building
Washington, D.C. 20515
Tel: 202 225-2548
Fax: 202 225-2382
GROC.NS@mail.house.gov
http://www.house.gov/reform/ns/

Statement of Rep. Christopher Shays
February 6, 2002

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

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

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

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

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

Mr. BURTON. Thank you, Mr. Shays.

Mr. Lynch, I don't think I have had the pleasure of welcoming you to the committee.

Mr. LYNCH. No, sir, not in full committee, anyway.

Mr. BURTON. Your predecessor, Mr. Moakley, was a very highly regarded member and you have big shoes to fill. I am sure you will fill them but we all miss Mr. Moakley.

Mr. LYNCH. Thank you, sir, as do I. Thank you for your courtesy and your kindness.

I want to begin by saying that I think you are doing a courageous job and a noble one. I appreciate the way you are approaching this issue in searching for the truth. I think that is the highest ideal for government, certainly it was a high ideal held by Congressman Moakley and one I am proud to be a small part of.

I just want to say as my first venture into this that I am somewhat disappointed this morning by the Department of Justice response. I won't get into it in my opening statement but perhaps later on in the hearing. I have to remark that it seems quite thin I think to have the Department of Justice rely upon, as they do in this initial brief, that the President may withhold these documents as part of his obligation under Article II, Section 3 of the U.S. Constitution to "take care that the laws be faithfully executed." That is the phrasing they are relying upon. They provide some secondary and tertiary arguments that the history of the interbranch accommodations and the tradition of government working with each other provide the other two legs of the stool.

I just want to remind the judiciary if I may in a courteous way that the President has taken an oath not just to enforce and to faithfully execute certain parts of the Constitution and there are some notable parts of the Constitution that I think there are at issue in these hearings.

One, the President has taken an oath to the best of his ability to preserve, protect and defend the Constitution of the United States and all of its amendments thereto, not just his favorite parts of the Constitution. I might just mention a few: the fourth amendment, the right of the people to be secure in their persons, houses and papers and effects against unreasonable search and seizure; that no warrants shall issue but upon probable cause, the President also has an obligation to make sure that section is enforced; the fifth amendment against the deprivation for liberty, which is at issue here; and the sixth amendment, protection in the face of criminal proceedings and the protections provided to the individual in those cases.

Mr. Chairman, you are doing a wonderful job in upholding the very highest standard of requiring that the Constitution be adhered to, that we do our jobs as Members of Congress to make sure that in this case we get to the truth, to the truth. That is what we are after here. This is not politics of personal destruction; this is merely a search for the truth.

I yield the balance of my time.

Mr. BURTON. Thank you, Mr. Lynch.

Judge Duncan, who served on the bench and who is now a Member of Congress, who has dealt with many of these issues, we appreciate your being here today. You are recognized.

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

First, I would like to join my colleagues in expressing my great admiration and respect for your courage and determination in conducting these hearings. This is my 14th year in the Congress and as Chairman Burton noted, I spent 7½ years as a criminal court judge, a circuit court judge in Tennessee trying felony criminal cases. I have been shocked by the Salvati case and all that I have heard in the hearings I have participated in so far.

I think the first paragraph of Chairman Burton's opening statement is probably the most shocking statement I have ever heard in a congressional hearing, and I have sat through hundreds. His opening statement, for those who were not here, said, "The United States Department of Justice allowed lying witnesses to send men to death row. It stood by idly while innocent men spent decades behind bars; it permitted informants to commit murder; it tipped off killers so that they could flee before they were caught; it interfered with local investigations of drug dealing and arms smuggling; and then when people went to the Justice Department with evidence about murders, some of them ended up dead."

I don't know what all is behind that statement but I will say this. Anyone who is not totally, completely shocked by what the chairman said here this morning and by the Salvati case should reexamine his commitment to true justice and to our legal system. The primary purpose of the law in our legal system should be to protect the freedom and liberty of innocent citizens. That should be the primary purpose and goal of our legal system. Our term "justice" could be defined in many ways but in the end, it should and does mean fairness, simple fairness from one human being to another. Justice should mean fairness to all. Apparently, you had and still have Justice Department and FBI bureaucrats who are so blinded by arrogance and power that they can no longer see what true justice means. To me it is shocking.

Joseph Califano, who was a member of the Cabinet and a top advisor to President Clinton and President Carter, wrote in a column a few weeks ago in the Washington Post and said, "In the war against terrorism, which all of us support, we are missing a very alarming problem that is growing by leaps and bounds" and that is what he described as the "shocking, alarming rise in Federal police power."

If we are going to have true justice in this country, we can't end up with a Federal police state that allows the FBI and the Justice Department to do anything they want, no matter if it means that an innocent man ends up behind bars for 30 years when they know he is innocent, they cover it up and then attempt to continue to cover it up after the world knows all about it.

So Chairman Burton, I hope you will continue these hearings. I am sure that hope will not be realized but I hope that the Justice Department will take another hard look at their position in this case and realize how shocking it is to people who are outside of the Justice Department but who believe in true justice and the legal system of this country as strongly as perhaps maybe they used to before they got blinded by the power they now exercise.

Thank you very much.

Mr. BURTON. Thank you, Judge Duncan.

Ms. Holmes-Norton.

Ms. NORTON. Thank you, Mr. Chairman.

I think you deserve not only the commendations you have received but the thanks of all of us and of the American public for pressing this matter forward and not yielding with the change of administration. What is at stake here is a question of executive power versus congressional oversight.

I do not believe this committee should yield in its oversight when the kind of wrongdoing that has been discovered already is before us. Nor do I believe we can yield.

Those of us who heard the Salvati family, in particular, testify, and now the entire country has heard from this family because the case is so atrocious that it has caught the attention of the media, could not have been more shocked, more astonished that this could happen in our country. It just doesn't happen here. Very few cases of this kind have ever been uncovered in our country.

The American public who now knows about that case in particular, not to mention what may be a pattern here, obviously wants to know what in particular went wrong. We know there was wrongdoing, there is no question about that. This oversight is not about that kind of adversarial proceeding. As members of this committee, we now have an obligation, particularly with wrongdoing on the record, to ask and to find out what the cause of the wrongdoing was, whether there were bad actors, whether there is a flaw in the system, so that we can discover whether there is something the legislative branch should do. We can't just sit here and say, we have seen evil, now we hope it doesn't happen again. Maybe there isn't anything we should be doing, maybe there were a bunch of bad actors and if you clean out the place, there is enough law and regulations, enough ethical guidelines in place but we don't know that until we see the documents that the chairman has relentlessly tried to uncover.

The committee is making another important point. There is no agency of the Federal Government which is beyond the oversight of the Congress of the United States, not the Justice Department, not the FBI, not the Defense Department. There is no agency beyond our purview; this is still a republic; this is still a democracy. We must not have our right to know and then to act on what we know taken from us because we are denied the relevant information.

Mr. Chairman, we are not voyeurs here. You are not simply seeking some documents because you would like to see what they would do and you would like the committee just to riffle through their papers. There is a very important legislative purpose here. You must do as you are doing, Mr. Chairman. You must pursue that purpose and you have bipartisan support on this committee to do just that.

Thank you very much.

Mr. BURTON. Thank you, Ms. Holmes-Norton.

The next questioner was a former member of the Justice Department himself and a Federal prosecutor, U.S. Attorney, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

I think this is an extremely important hearing today. It does raise issues of fundamental Constitutional importance. It will hopefully lay the groundwork for some very important decisions. I don't

know whether they will ultimately be decided here in the Congress or in the courts but I do hope they are ultimately decided because they go to the heart of some of the arguments at the core of the founding of our Nation, including certainly separation of powers.

I hope that all of us will resist the urge to make this a political type issue or make a current events hearing or issue. It has nothing to do with current events; it has everything to do with whether or not there shall be any checks whatsoever on the ability of the executive branch to retain information unto itself. That is a fundamental question. All of us certainly understand that each of the two branches of government we are looking at here—the executive and the legislative—have very clear and very broad Constitutional authority to perform the functions of government laid out in our Constitution, discussed in length in the Federalist Papers and certainly fine-tuned over the succeeding decades by court decisions and by subsequent statutory enactments.

I think all of us, as Constitutional scholars, whether lawyers or not, also appreciate that those powers are not absolute. As one can readily see by looking at both the Federalist Papers as well as the history of relationships between the different branches of government, the admonition of our founding fathers that first and foremost among the power centers, as it were, is the people and among the branches of government, the mechanism of government constituted by the Constitution, the Congress. If, in fact, it is the position of any administration that it has absolute authority to keep information from that legislative branch and if that is the principle, indeed, ultimately upheld, then the form of government that will ensue based on that will be far different than that envisioned by our founding fathers.

I think it is unfortunate that this matter has come to a head but I commend you, Mr. Chairman, for not backing down simply because it has come to a head. One would have hoped that there had been some room for compromise. Maybe there still is and I know you, as a man always seeking to work something out without losing sight of the ultimate goal and the principles, will pursue that, but this is an important hearing, one of probably several we will have to have and this issue will certainly be argued in other forums as well.

I do commend you, Mr. Chairman, for raising this issue today and hopefully all of us on both sides, here and at the witness tables, will be able to keep our attention very, very keenly focused on the specific issue at stake here. That is the assertion that the Congress cannot—I don't know whether this is the Department of Justice view and I will look forward to hearing from them whether this committee or any committee of Congress duly constituted shall ever be able to trump the assertion that documents within the executive branch in a criminal proceeding shall never be surrendered. I think that is a very dangerous proposition. I hope that is not what the administration is contending here but certainly it raises some very fundamental issues.

I think this is not only a very interesting proceeding, Mr. Chairman, but also one of true Constitutional note. I again commend you and members of the committee for proceeding and commend the

witnesses for being here today to engage in what I think is a very, very important Constitutional debate.

Thank you.

Mr. BURTON. Thank you, Mr. Barr.

Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman.

Let me also thank you for conducting these hearings. Thank you for allowing my voice to be heard about this very important subject, congressional access to deliberative Justice Department documents.

As a member of this committee Constitutionally charged with providing congressional oversight, I am truly confounded by the refusal of the executive branch and the Justice Department to withhold numerous requested and important information regarding corruption in the Boston office of the FBI and other documents relating to criminal investigations which this committee has requested.

Congressional oversight and jurisdiction must not be regarded as a passing thought but rather as a vital check and balance component to our democratic system of government. For that reason, I support the requested release of the following information: the memorandum relating to the 13 individuals involved in the Justice Department investigation of organized crime in New England and Robert Conrad's report recommending the appointment of a special counsel to investigate campaign fundraising matters and related memoranda.

Finally, I stand firm with this committee in its formal request of accountability from the Justice Department.

Mr. Chairman, I ask unanimous consent to place my statement into the record.

Mr. BARR [presiding]. Without objection, so ordered.

[The prepared statement of Hon. Wm. Lacy Clay follows:]

Statement of the Honorable William Lacy Clay
Before the
Government Reform Committee
February 6, 2002

"The History of Congressional Access to Deliberative Justice Department Documents"

Good Morning, Mr. Chairman. Thank you for allowing me the time so that my voice can be heard about this very important subject: *Congressional Access to Deliberative Justice Department Documents.*

As a member of this committee constitutionally charged with providing Congressional oversight I am truly confounded by the refusal of the Executive Branch and Justice Department to withhold numerous requested and important information regarding corruption in the Boston office of the FBI and other documents relating to criminal investigations which this committee has requested.

Congressional oversight and jurisdiction must not be regarded as a passing thought but rather as a vital check and balance component to our democratic system of government. For

that reason I support the requested release of the following information:

- The memorandum relating to 13 individuals involved in the Justice Department's investigation of organized crime in New England;
- Robert Conrad's report recommending the appointment of a special counsel to investigate campaign fundraising matters, and related memoranda; and

Finally, I stand firm with this committee in its formal request of accountability from the Justice Department.

Mr. Chairman, I ask unanimous consent to place my statement into the record.

Mr. BARR. The Chair recognizes Mr. Kanjorski for any opening statement he might care to make.

Mr. KANJORSKI. I came to the hearing today to show my support for Chairman Burton's efforts here to assert the prerogatives of the Congress to examine these deliberative records. It seems to me that this is a very delicate and Constitutional question but if the House of Representatives and this committee is to fulfill its function as the ultimate overseer for the people, it is essential that in many of these cases, particularly the Boston case, we have an opportunity to receive and view the documents in question.

I want to commend the chairman and this committee and to indicate to the public that it is my sense that this is almost unanimous, if not unanimous, on a bipartisan basis that this prerogative of the House of Representatives and this standing committee is vitally important if truth is to come out in certain circumstances involving this case.

I yield back the balance of my time.

Mr. BARR. We will now hear testimony from our second panel, if the witnesses as they are introduced would please take chairs at the witness table. We are very happy to welcome today an extremely distinguished panel of witnesses who truly do have a deep appreciation and respect for the Constitution including the Constitutional principles which will form the basis for today's hearing.

First, we would like to introduce Assistant Attorney General Dan Bryant. He serves in the administration as the Assistant Attorney General, Office of Legislative Affairs. Mr. Bryant, welcome.

I would like to welcome Professor Mark Rozell from the Department of Politics at the Catholic University of America. Professor Rozell, thank you for being with us today.

I would like to welcome Professor Charles Tiefer, University of Baltimore Law School, a former Solicitor and Deputy General Counsel, U.S. House of Representatives. Professor, glad to have you here today.

Finally, we would like to introduce Mr. Morton Rosenberg, a specialist in American Public Law with the Congressional Research Service. Mr. Rosenberg, thank you for being with us today.

If each of the witnesses would stand to be sworn. Raise your right hands.

[Witnesses sworn.]

Mr. BARR. Let the record reflect that each of the witnesses responded in the affirmative in response to the question about their sworn testimony. Please be seated.

On behalf of the committee, all of us welcome you here today. I think all of you are familiar and I know Mr. Bryant is very familiar with the procedures for hearings before congressional committees. We do have a time clock simply to keep things moving along at a reasonable pace. We would ask each of you to try your best to limit your opening comments to 5 minutes. Certainly any additional material, either today or subsequently that you wish to be inserted in the record will be so inserted, including the entire text of your opening statements if you choose not to read them in their entirety or you don't have time to do so.

We will start with Mr. Bryant. Mr. Bryant, welcome, and you are recognized for an opening statement, sir.

STATEMENT OF DANIEL J. BRYANT, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

Mr. BRYANT. Thank you, Mr. Chairman.

Members of the committee, good morning. I welcome this opportunity to present testimony on behalf of the Department of Justice at this hearing regarding the history of congressional access to deliberative Department of Justice documents.

At the outset, let me make two comments, if I could. First, congressional oversight of the Justice Department is a good thing for the Justice Department. Second, the Salvati situation involved a terrible miscarriage of justice. It is not overstating it to call it a tragedy.

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

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

There is a diagram over here in chart form. I won't take the time just now since I have been admonished to try to move along in my opening statement, but I hope over the course of the testimony perhaps to explain the diagram and hope it will help clarify this question of different types of documents.

There are a number of relevant propositions that emerge from a review of the history of congressional access to deliberative Justice Department documents. First, it is apparent that the Framers of the Constitution envisioned tensions arising between the branches in the course of their discharging their Constitutionally assigned responsibilities. In fact, such tensions reflect one of the fundamental checks and balances at the heart of our system of government based on separation of powers.

One such intentional check is immediately apparent. Congress has authority to obtain information from the Executive so as to enable it to carry out its legislative responsibilities. At the same time, the Constitution requires the Executive in the words of Article II, Section 3 to "take care that the laws be faithfully executed" and in doing so, clearly contemplate the need to withhold certain information in order to faithfully fulfill this core executive function.

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

Third, the history of specific inter-branch accommodations can serve as a useful guide for present and future disputes but past inter-branch accommodations are not themselves binding precedent. Each specific inter-branch accommodation is highly case specific and is therefore of questionable value. Disputes between Congress and the Executive have, in the general course of things, been left to the parties themselves to settle. Consequently, the executive branch's concern to safeguard certain documents from improper disclosure has manifested itself over the decades in a wide variety of ways, depending on the particular circumstances and exigencies present at the time of the dispute.

Fourth, throughout the history of inter-branch disputes regarding deliberative Justice Department documents, the executive branch has consistently maintained that the sub-category of prosecutorial documents at issue in our current dispute is presumptively privileged and should be protected.

This position has been repeatedly articulated by the executive branch for decades and is supported by historical practice, scholarly commentary and case law.

The reasons for this position are clear. The authority to prosecute criminal suspects is one of the core executive powers vested in the President by the Executive power and the take care clauses of Article 2 of the Constitution.

In order to assist the President in fulfilling his Constitutional duty, the Attorney General and other department decisionmakers must have the benefit of candid and confidential advice and recommendations in making these extraordinarily important prosecutorial decisions impacting the liberty interests of citizens.

The need for confidentiality is particular compelling in regard to the highly sensitive prosecutorial decision of whether to bring charges. If prosecution and declination memoranda are subject to congressional scrutiny, we will face the grave danger that prosecutors will be chilled from providing the candid and independent analysis essential to the sound exercise of prosecutorial discretion and to the fairness and integrity of Federal law enforcement.

Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interest to the detriment of the decisionmaking process, so spoke the Supreme Court in a seminal case. The court observed that "The importance of this confidentiality is too plain to require further discussion."

Just as troubling the prospect of congressional review might force prosecutors to err on the side of investigation or prosecution simply to avoid public second-guessing. This has undermined public and judicial confidence in our law enforcement processes.

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

The disclosure of the contents of these documents could be devastating to the individuals they discuss.

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

Mr. Chairman, as stated by Judge Gonzales, counsel to the President, the Department is prepared to accommodate the committee's interest in a manner that should both satisfy the committee's legitimate need and that protects the principles of prosecutorial candor and confidentiality. That's why the department officials have offered to meet with you about the committee's interest in the Boston documents. I reiterate that offer today.

Thank you.

[The prepared statement of Mr. Bryant follows:]

Department of Justice

STATEMENT

OF

DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

PRESENTED ON

FEBRUARY 6, 2002

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

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

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

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

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

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

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

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

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

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

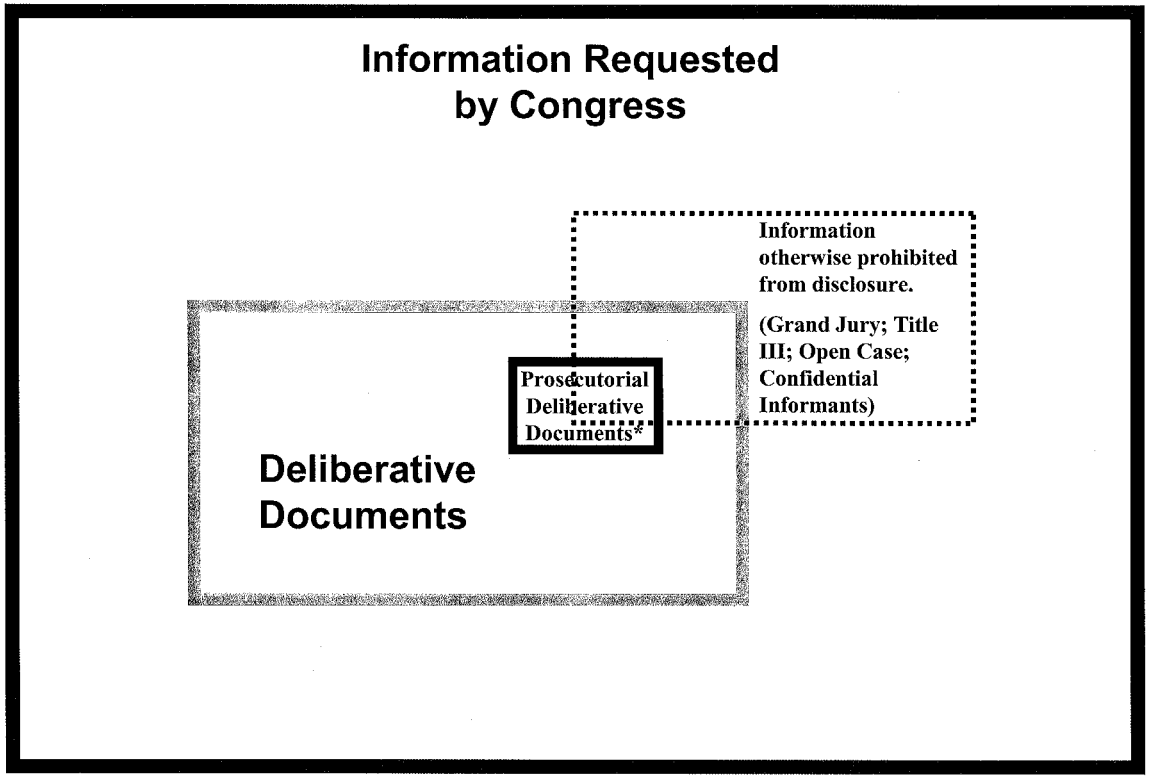
Disclosure of declination memoranda would also implicate significant individual privacy interests. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as

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

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

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

Thank you.



* DOJ makes the decision-maker available to provide briefings.

Mr. BARR. Thank you very much, Mr. Bryant. The eloquence of your statement and the research that went into it is indicative of your very long and distinguished service on the Judiciary Committee. We thank you for being with us today and sharing your thoughts.

We do have two votes scheduled, but I think professor Rozell, in an effort to move forward as quickly as we can, we will be glad to accommodate your opening statement at this point. If we have to break before you conclude, it's nothing personal. We will just have to allow members sufficient time to go vote.

If you would at this time, I would like to recognize Professor Rozell for his opening statement.

STATEMENT OF MARK J. ROZELL, DEPARTMENT OF POLITICS, THE CATHOLIC UNIVERSITY OF AMERICA

Mr. ROZELL. Thank you very much. I appreciate the opportunity to address the committee. I am the author of a book on executive privilege, one that I am presently updating and therefore have a very strong interest in following cases of legislative-executive disputes over access to executive branch information.

The current case has received enormous attention for many good reasons, but I would like to focus my comments on the question of Congress's right to access deliberative documents within the Department of Justice.

The administration's claim to secrecy in the current case does not meet the traditional standards for a valid claim of executive privilege. The history of the use of executive privilege clearly demonstrates that this is a legitimate Presidential power, but one that operates within the limits of a system of separated powers.

Presidents and their staffs often have legitimate needs of confidentiality and Members of Congress have needs of access to information to conduct investigations. When these needs collide, a balancing test is in order. Just as the congressional power of inquiry is not absolute, neither is the Presidential power of executive privilege.

Merely uttering the words "national security" or "prosecutorial" does not automatically settle an inter-branch dispute in the administration's favor. Executive privilege should never be used as an opening or an early bid in a dispute with a congressional committee, only to be negotiated away as Congress asserts its prerogatives. It is a power that should be used rarely and only in the most compelling circumstances.

Traditionally, claims of executive privilege have been valid in cases protecting, first, certain national security needs; and second, confidential deliberations where it can clearly be demonstrated that disclosure would harm the national interest. Related to the second, executive privilege may be appropriate to protect the integrity of ongoing investigations when disclosure would clearly undermine the pursuit of justice.

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

There is substantial precedent for Congress to receive access to deliberative documents from the Department of Justice and I will briefly outline a few such past cases.

First, during the Rehnquist confirmation hearings in 1986, Members of the Senate Judiciary Committee requested access to Department of Justice memoranda that Rehnquist had earlier written while he was head of the Nixon administration Office of Legal Counsel.

Rehnquist had no objection to his earlier memoranda being made available to the committee. Nonetheless, the Reagan administration Justice Department initially refused to turn over the memoranda and the President invoked executive privilege. The administration's position was that Congress should not have access to documents that contain confidential legal advice.

Republicans controlled the committee and these Senators both supported their President and the Rehnquist selection to be Chief Justice. Yet, there was bipartisan agreement that a congressional prerogative was at stake and that to allow the Justice Department to automatically withhold deliberative documents from a past administration would establish a terrible precedent.

The committee had the votes necessary to subpoena the documents and to delay the confirmation proceedings. The President withdrew his claim of executive privilege. The Justice Department and the Judiciary Committee then reached an accommodation in which Senators and certain staff would receive access to many of the disputed documents.

The mistake that the administration made in this case was to use executive privilege as an opening bid in a dispute with Congress over access to information rather than first try to work with Congress on some accommodation that would satisfy the needs of both branches.

The administration further erred when it claimed that as a matter of principle, Congress should not have access to Department of Justice deliberative documents, even in the case of documents from an earlier administration.

That the Reagan administration allowed access to some but not all of the requested documents makes it clear that the principle of denying Congress access to such materials is far from absolute.

A second example was a controversy during the George H.W. Bush administration over an Office of Legal Counsel opinion memorandum that said that the FBI may legally apprehend fugitives abroad without the approval or permission of the host country.

Members of Congress raised critical questions whether this new policy, which overturned an earlier OLC memorandum forbidding such a practice, lacked statutory authority and conflicted with international law.

The House Judiciary Committee requested access to the memorandum and the Department of Justice refused on the principle that to do so would violate its secret opinions policy. Now, no one had ever heard of a secret opinions policy before, but the department apparently had adopted one to deny Congress access to all OLC decision memoranda.

The Department also claimed that releasing the memorandum would violate the attorney-client privilege because to do so would make Federal agencies in the future reluctant to rely on Justice for confidential legal advice.

The Judiciary Committee voted to subpoena the memorandum. Once again, Congress and the administration reached an accommodation.

Mr. BARR. Excuse me, Professor, if I could. I apologize for cutting you off but it is only temporary. We will take a recess here so the members can go vote. We have about four and a half minutes left on this vote and then we have one other vote after that. So, we are probably looking at about 15 minutes. So, if you all want to take a break for a few minutes, we will be in recess until Members have voted.

Mr. BURTON. Let us get the panelists back before the committee. We will have other Members coming back. We had two votes on the floor and as a result people grab a sandwich and start drifting back in. So, we apologize that all of us aren't here at the moment.

We are glad to have you with us. Professor Rozell, I guess you were in the middle of your statement. We apologize for the break, but we can't control those votes.

Mr. ROZELL. That is fine. I understand how it works.

Mr. BURTON. You are recognized.

Mr. ROZELL. I will pick up where I left off, I assume. I was discussing a second example, and that was a controversy during the former Bush administration over an Office of Legal Counsel Opinion Memorandum that said that the FBI may legally apprehend fugitives abroad without the permission of the host country.

Members of Congress raised critical questions whether this new policy, which overturned an earlier OLC memorandum forbidding such a practice, lacked statutory authority and conflicted with international law. The House Judiciary Committee requested access to the memorandum and the Department of Justice refused on the principle that to do so would violate its secret opinions policy.

No one had ever heard of a secret opinions policy before but the department apparently had adopted one to deny Congress access to all OLC decision memorandum. The department also claimed that releasing the memorandum would violate the attorney-client privilege because to do so would make Federal agencies in the future reluctant to rely on Justice for confidential legal advice.

The Judiciary Committee voted to subpoena the memorandum. Once again, Congress and the administration reached an accommodation. The Department of Justice and the committee agreed to an arrangement whereby committee members could review, but not copy, department documents pertaining to the memorandum as well as the memorandum itself.

Someone in the Bush administration then leaked the full memorandum to the Washington Post. The Supreme Court ultimately upheld the practice of apprehending fugitives abroad, but this decision had no bearing on the issue of the committee's right to receive access to OLC decision memoranda.

A third example was a congressional investigation into allegations that Reagan administration Department of Justice officials had conspired to force the Inslaw Computer Co. into bankruptcy

and to then have Inslaw's leading software product bought by another company.

In 1991, when a subcommittee of the House Committee on the Judiciary sought access to the Department of Justice documents regarding Inslaw, the Bush administration refused and claimed attorney-client privilege. In this case the administration claimed that the need for secrecy was especially compelling because the requested documents concerned an on-going investigation by the Department of Justice.

The subcommittee voted to subpoena the documents and the full committee followed and did the same. Again, the two sides reached an accommodation, although it was not entirely satisfactory to the Congress. The Department of Justice agreed to turn over to the committee the vast majority of the requested materials, yet it refused to make a complete showing of all disputed documents.

What is significant about this case is that Congress received access to Department of Justice documents regarding an on-going investigation. All of the current cases under investigation by the committee are closed and therefore constitute an even stronger claim for disclosure than the Inslaw investigation.

The above cases make it clear that there is ample precedent for Congress to receive access to Department of Justice deliberative documents. There are many other cases of Congress receiving such materials in one way or another. The history of information disputes between the branches is mostly one of both sides working out reasonable accommodations.

In so doing, the branches respect one another's legitimate needs and Constitutional powers. In our system of separated powers it is not credible to argue that in cases of information disputes one branch has absolute power. There are limits to the exercise of executive privilege and to the congressional power of inquiry.

Nonetheless, the legislative power of inquiry is very broad and in a democratic system the presumption must be in favor of openness. The burden is on an administration to prove that it has the right to secrecy and not on Congress to prove that it has the right to investigate.

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

Now, I have elaborated a fairly brief statement here. I would be delighted to add to that in more detail if the committee wishes.

Thank you.

[The prepared statement of Mr. Rozell follows:]

"Congressional Access to Department
of Justice Deliberative Documents"

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

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

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

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

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

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

Congressional Access to Deliberative Documents

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

Mr. BURTON. We will have questions for you, Professor.

Professor Tiefer.

STATEMENT OF CHARLES TIEFER, UNIVERSITY OF BALTIMORE LAW SCHOOL, FORMER SOLICITOR AND DEPUTY GENERAL COUNSEL, U.S. HOUSE OF REPRESENTATIVES

Mr. TIEFER. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to testify on the important subject of today's hearing.

I had 15 years of experience, from 1979 to 1984 as assistant Senate legal Counsel and from 1984 to 1995 as solicitor and deputy general counsel of the House, experience with advising and participating in congressional oversight investigations and in litigating in court the issues that arose in connection with them.

I am also the author of a book based on that oversight, The Semi-Sovereign President and numerous Law Review articles.

My overall point for today is quite simple. My understanding of the Department of Justice position is that although they are aware that during the previous administration this committee had access to the type of material being sought now, that they believe that this was an aberration or they maintain that it did not occur, congressional access of this kind did not occur before 1993.

They also, as today's testimony by the Assistant Attorney General focuses on, believe that there's something particularly narrow and special about prosecutorial memoranda, that's memoranda of advice about whether to bring criminal charges.

Well, my testimony, which is based on my own personal experience from 1979 on with congressional investigations, is that they are misinformed. Before 1993, congressional committees did have access to precisely this kind of material.

I have done in my statement a chronology of the years from Watergate on. It's on the screen now, although it is in small print. I will not take the time to go through the entire chronology. I will skip Watergate. I will skip the Church Committee, which fully investigated FBI abuses.

I will start with my own experience with the Senate Billy Carter committee which was looking at the decision of the criminal division not to charge the President's brother, Billy Carter, with criminal charges, but only to make a civil settlement with them.

This was when he had received $220,000 from Libya. I personally was the head of the Senate committee's task force on the Justice Department in the Billy Carter matter. I personally read the prosecutorial memoranda and, more important, personally questioned the witnesses in the Justice Department, from the line attorney, Joel Lisger, up to the Attorney General, about how the deliberations had occurred, how the decisions had been made. That was the Carter administration.

In the Reagan administration, first term, we had Senator Grassley who did one important investigation. Mr. Rosenberg will talk about the major matter which involved a formal Presidential claim of executive privilege.

I just want to mention another of them that neither of them will talk about which was the Senate Abscam Committee which was about undercover activity, that's, after the Abscam matter in which

bribes were offered by a sting operation to Members of Congress, the Senate did an investigation of the undercover activity.

Although the terms of access were very elaborate and limited and controlled, that committee received the full details, the verbatim words of the prosecutorial memoranda in the Abscam cases.

We turn to the second Reagan term. I won't talk about the Iran Contra matter where I served as Special Deputy Chief Counsel, because I understand that the Justice Department has sort of a general exception, which says that if it's a very famous matter like Teapot Dome or Watergate or Iran Contra it doesn't count as a precedent. If you remember it, it doesn't count as a precedent.

They have a more full legal statement of what it is, but that's basically what it is.

I want to mention though the E.F. Hutton investigation, which was the House Subcommittee on Crime, looking at the fact that charges were made in a situation where E.F. Hutton had committed 2,000 counts of check kiting fraud. It was sort of the Enron of its time.

The company was charged, but officials weren't charged. The House subcommittee wanted to look at how that decision was made. The Justice Department went to court to resist. I litigated in opposition. They lost. We won. We got the files on the matter. We got the key memoranda on the matter and the House Subcommittee on Crime held hearings in which the line attorney was the witness, was questioned and was questioned on the basis of the prosecutorial memoranda. There was no other way to get at how the decision had been made.

I am going to move ahead in time. That covers up until the second Reagan term. I am going to move to the term of President Bush. Mr. Rozell has talked about two of the matters that are on my chronology, the 1990 Inslaw matter and the 1991 extra territorial kidnapping secret opinion.

I want to talk instead about a matter in 1992, the Rocky Flats investigation. Now, this was 1992. This was the last year before the Clinton administration, but as I understand the Justice Department, it's still the period of time in which supposedly congressional committees didn't get access to these kinds of materials.

The issue there, Rockwell Corp. has been operating a nuclear waste facility in Colorado. There had been a heavy release of toxic materials. They were allowed to essentially plead and pay a fine and the House Committee on Science, the Oversight Subcommittee of the House Committee on Science, wanted to look at whether this was a proper charging or there should have been more serious charging.

Well, there was a great struggle about whether the committee would get access. The Department of Justice came to the point of asking, they said all along that they might well claim executive privilege. They came to the point of checking with the White House and the answer came back, "We don't want to claim executive privilege in this matter." So, at that point the arrangement was made with the House committee that it got, its staff got to read and to take notes on and to make use of in a carefully limited way the prosecutorial memoranda concerning the Rocky Flats matter.

Now, after this, starting in 1992 and continuing until 1994 came the investigation by the House Commerce Committee of the Environmental Crimes Section. There also an arrangement was and ultimately, after a great deal of resistance the prosecutorial memoranda were reviewed. But that is during the Clinton administration. So, my understanding is that is discounted by the current administration as not counting because it's after 1993.

Nevertheless, I have not gone through the many, many issues of executive privilege because I believe that if the department ever comes down seriously to saying, well, we are arguing on a case-by-case basis; it's not an absolute. It is a case-by-case basis.

They are confronted with the fact that this is a rather poor instance to a case by case privilege because the committee is looking at the memoranda that are in closed cases and they are not merely closed cases, the memoranda that are being looked at, that are being sought, are an average of 22 years old. They don't get more closed than that. We looked at closed matters, but they weren't 22 years old. They had been closed. They weren't buried.

Anyway, I think that what the department will say is, "Well, but there is something very special about prosecutorial memoranda. They are different from other deliberative materials. If I may, having listened to the testimony of the Assistant Attorney General, if you draw a ven diagram, they are in the internal subset. They are in the very central subset on the ven diagram.

Well, that is what my statement is about. What did we see during the years before the Clinton administration? In the example of Billy Carter, we saw the prosecutorial memoranda. In Abscam we received the full details, the verbatim words of the prosecutorial memoranda.

Rocky Flats, we saw the prosecutorial memoranda.

Mr. Chairman, the precedents are on your side.

Mr. BURTON. Thank you, Professor.

[The prepared statement of Mr. Tiefer follows:]

UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer
Professor of Law

3904 Woodbine St.
Chevy Chase MD 20815
Tel: (301) 951-4239
Fax: (301) 951-4271

HOUSE COMMITTEE ON GOVERNMENT REFORM

HEARING ON THE HISTORY OF CONGRESSIONAL ACCESS

TO DELIBERATIVE JUSTICE DEPARTMENT DOCUMENTS

Executive Privilege Overclaiming

at the Justice Department

by Professor Charles Tiefer

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

This testimony can be summarized as a survey showing that in the years **from the 1920s through 1992, Congressional oversight committees were, indeed, been provided with access to Justice Department deliberative documents - contrary to the Department's current executive privilege claim.** The Department's contention that such access did not precede, or was a peculiar feature of, the Clinton Administration that can now, therefore, stop, is without

grounding in the facts. I say this based both on historical research that I, and the Congressional Research Service, conducted and published in Congressional hearings in 1990-1992 and have now supplemented, and my own personal experience with Congressional oversight of the Justice Department from 1979 to 1995.

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

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

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

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

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

To summarize briefly the background, the Committee's oversight of the Justice Department has focused on the matter of the Boston FBI, and, in particular, to obtaining several subpoenaed Justice Department memoranda, averaging 22 years old, that are the primary evidence from the regular channels of the Justice Department about the role that knowledge (or

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Chic. Roundtable 143-204 (1998); Charles Tiefer, Congressional Oversight of the Clinton Administration, and Congressional Procedure, 50 Admin. L. Rev. 199 (1998); Charles Tiefer, The Fight's the Thing: Why Congress and Clinton Rush to Battle with Subpoena and Executive Privilege, Legal Times, Oct. 14, 1996, at 25; Charles Tiefer, Contempt of Congress: Turf Battle Ahead," Legal Times, May 27, 1996, at 26. Charles Tiefer, Privilege Pushover: Senate Whitewater Committee, Legal Times, Jan. 1, 1996, at 24; Charles Tiefer, The Constitutionality of Independent Officers as Checks on Executive Abuse, 63 Boston U. L. Rev. 59-103 (1983).

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

ignorance) about such abuse played in its decisions and activities.[5] The Committee expects these memoranda to shed light on the Justice Department's relationship to FBI problems and abuses in handling and protection of an organized crime informant. On December 12, 2001, the President formally invoked executive privilege - an action the press is reporting as marking a new crusade against Congressional oversight - and the issues in dispute were explored initially at a hearing before this Committee on December 13, 2001, which today's hearing are following up.

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

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

[6] The Clinton Administration ultimately provided this Committee with access to the Freeh and LaBella memoranda relating to the 1996 campaign finance matter - once the subject of those memoranda was effectively closed - and, in 1993-94, providing the Energy and Commerce Committee with access to the memoranda regarding allegedly flawed efforts by the Environmental Crimes section. Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program, Staff Report, Subcomm. On Oversight and Investigations of the House Comm. On Energy and Commerce, 103d Cong., 2d Sess. (Dec. 1994)(Comm. Print 103-T)("*Damaging Disarray*").

during 1993-2000.[7] How could they tell this Committee otherwise? This Committee had direct experience with this - as did the Attorney General, Senator Ashcroft, then a strong proponent of Congress receiving access to Justice Department records for oversight.

So, the Justice Department witnesses at the December 13, 2001 hearing justified its executive privilege invocation on the ground that its current denial of access accords with precedents from before 1993-2000. Before then, the Department claims, Congress was not provided, even in closed cases, with access to deliberative documents. It admits certain exceptions, notably "Teapot Dome or Watergate," but tries to put them in a separate category which "involved corruption by the then Attorney General and the then Department officials who were deciding these issues." (Testimony of Michael E. Horowitz, Chief of Staff, Criminal Division, on Dec. 13, 2001, Tr. at 185). Apart from those exceptions, the Department places total reliance upon the repeatedly-referenced opinions of the Office of Legal Counsel in 1982-83,[8] supplemented with a letter of February 1, 2001, which maintains the Department's position even though the letter itself acknowledges many precedents to the contrary.

As in the section entitled "Defying Burton" in this week's *Legal Times* article on this

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

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

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

Before beginning the recounting, it may help to understand the points being advanced that deal with the Justice Department's position as to its claiming of executive privilege in this matter. The first and principal point is that Congressional investigations did, in fact, obtain access to deliberative Justice Department documents and their equivalent before 1993. In my own experience since starting in Congress in 1979, as well as my studies of the prior history, I

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

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

saw the same pattern before as after 1993. Namely, the Department makes arguments to fend off proper oversight by Congress, but before (as after) 1993, Congressional committees which had a sufficient need, and which persevered, succeeded in obtaining access to deliberative documents and their equivalent for closed cases during my twenty-plus years of such oversight, and, before as well.[11]

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

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

[12] Even if this were the only reason, the Committee staff has argued that this reason appears to be applicable to the Boston FBI matter. While I am not personally in a position to evaluate what level in the Justice Department had awareness of the Boston FBI matter, I do take issue with a suggestion that Teapot Dome, Watergate, or other instances in which access was granted can be distinguished from the Boston FBI matter because those involved allegations against the "sitting" or current Attorney General or Assistant Attorney General while the Boston FBI matter predates the current ones. The Teapot Dome investigations focused on the Harding Administration and Attorney General Daugherty but continued in the Coolidge Administration and the term of Attorney General Harlan Fiske Stone. The Watergate investigations started as to Attorney General John Mitchell and were resisted by Attorney General Kleindienst - himself later convicted of lying to Congress - and continued through the term of Attorney General Richardson to the term of Attorney General Saxbe. Moreover, the probes of FBI abuses - such as those of the Church Committee, Senate Abscam Committee, and House Judiciary/Intelligence/GAO investigation as to CISPES, all discussed below - all occurred, successfully, under Presidents and Attorneys General who came after the alleged abuses. The Justice Department theory that Congressional investigations of the Justice Department or the FBI

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

Third, the Justice Department employs certain characteristic but losing arguments before 1993 as now. I call the main argument the argument to "ignore the past" or respect the "new sheriff in town."[13] When it is seen how often this argument has been made without success, it

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are denied access because of turnover at the top is simply more of the "ignore the past" or "new sheriff in town" argument discussed below.

[13] A new administration comes to office as a change of party in power, and urges Congress to ignore the record of the recent past in which the predecessor Justice Department was subject to Congressional oversight. It argues that abuses such as occurred in the past will not recur on its

becomes apparent that the argument to "ignore the past" or to respect the "new sheriff in town" has no legal merit. Rather, it is a transparent cover for the actual underlying argument which is implicit and which is spelled out in private: that the new administration should get a pass, not from having an actual legal argument to ignore the precedents, not from being any more a "new sheriff" than every previous administration that tried out such a theme, but, simply, because the Administration wants it.

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

The methodology in this survey is quite simple. To show Congressional access to Justice Department deliberative documents, it traces, with supplementation, the accounts in the CRS 1993 memo, *1920-1992 Congressional DOJ Oversight*, and in my own 1991 memo, *Attorney*

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watch. Also, it urges Congress to forget the precedent of its predecessor's providing access to Congressional committees, suggesting this was a temporary aberration from a somehow completely different golden age of the past in which it exercised power without oversight.

General's Unsuccessful Withholding. Since the Justice Department testimony on December 13 put total reliance upon its 1983 OLC Opinion, this is simultaneously traced as well. Retracing the 1983 Opinion shows both that it actually records much Justice Department providing to Congress of access to such documents, and, that it skips over events like Teapot Dome, Watergate, and the then-recent investigations of the Nixon, Ford, and Carter administration Justice Departments and FBI.

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

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

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

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

The 1983 OLC opinion conspicuously omits to mention Teapot Dome, too. Coupled with its mentioning only one matter from the 1920s through 1941, the obvious explanation is that

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

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

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

the clarity and force of the Supreme Court's Teapot Dome opinions disabled any effort to shield the Justice Department from proper oversight for the ensuing decades, much as the Supreme Court's decision in Watergate did subsequently.[18]

Starting in 1941, the OLC opinion does mention one area of refusals to provide Congressional access: loyalty or domestic intelligence investigations, with several examples from 1941 to the 1954 Eisenhower directive that raised up "executive privilege" to prominence. However, this was not a matter of protecting the deliberative process, for in the disputes over those providing those files, the names and the file evidence themselves (because of the effect on the civil liberties of those named), not deliberative material, were the focus of contention.[19] By and large, the privilege assertions do not concern prosecutorial documents, but rather, FBI domestic intelligence files and the like; proper oversight in these contexts was restored by the Church Committee, Abscam, and CISPES Congressional investigations. Apart from loyalty or

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[18] After all, the Supreme Court could not have said any more plainly that Congress had the right to evidence about decisions not to prosecution. As the Supreme Court specifically held about the investigation of the Attorney General's failure to prosecute in the Teapot Dome matter: "Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." McGrain v. Daugherty, 273 U.S. 135, 177 (1927). Oversight was "plainly" legitimate when "the subject to be investigated was the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes . . . ." Id., 273 U.S. at 177 (emphasis added).

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

domestic intelligence matters, during the Truman Administration, the Congressional scandal-probing investigations of the Justice Department - notably, the investigation of Truman Administration fixing of criminal tax cases, also called the "Grand Jury Curbing Investigation" - succeeded in obtaining the deliberative memoranda they needed, which eventually led to an Assistant Attorney General going to jail.[20]

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

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

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

[22] "Once the proceeding is no longer pending. . . such information should, upon request, be made available by the Commission to an appropriate congressional committee." OLC 1983 Opinion, at 797-98. As to the key transaction of the Dixon-Yates scandal, "The Kefauver Senate Committee undertook an investigation of this transaction, whereupon President Eisenhower declared that it was 'open to the public'. . . . [T]he President had 'waived' his directive in this case so that 'every pertinent paper or document could be made available to the Committee.'" Berger, *supra*, at 238.

The other main DOJ example cited by the OLC opinion - and raised again in the DOJ letter of February 1, 2002 - consists of the DOJ resistance to proper oversight about the much-criticized consent decree by which DOJ settled the Truman Administration's suit against AT&T's Western Electric monopoly. OLC 1983 Opinion, at 798-99. What followed was a historic investigation by a House Judiciary Subcommittee chaired by Rep. Emanuel Cellar. The OLC opinion and the DOJ 2/1/2001 letter both cite the Department's resistance to providing evidence about that consent decree. There was no Presidential claim of executive privilege in that matter, an important point.[23] However, as the OLC Opinion admits, the House Subcommittee obtained, by a different route, the memoranda it needed - - of the repeated private meetings between Attorney General Brownell, and the head of AT&T, where the former gave the latter a famous "'friendly little tip'" that settled the case on terms of giveaway to the phone monopoly.[24]

The 1960s: In any event, when President Eisenhower was succeeded by Presidents

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

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

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

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

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

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

even during the intensified sparring of the late 1950s and restored after that brief period.[27]

II. The Period from Watergate to the 1983 Opinion

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

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

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

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

[30] As a 1969 example, the Justice Department explained, in response to a premature request by the House Armed Service Committee "investigation into the My Lai massacre. . . . 'a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress

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

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

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with information from open investigative files.'" 1983 OLC Opinion at 801 (underlining added). In fact, Congress persevered after the open case was closed (i.e., after the court-martial of Lt. Calley), and then did receive the files.

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

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

Apart from one misleading anecdote,[33] the OLC Opinion of 1983, which purports to discuss Congressional demands for DOJ and FBI evidence, simply omits what may well be the most thorough and important Congressional investigation of FBI abuses in history. In 1975-76, following an initial spate of inquiries by House committees - - including the Committee on Government Operations - - the Senate Select Committee on Intelligence, chaired by Frank Church, investigated abuses at the FBI and at other agencies.[34] "The overriding theme was the use that the Nixon administration had made of the FBI and other intelligence agencies to discredit its political enemies and spy on hundreds of American writers, politics and civil rights leaders." Jim McGee & Brian Duffy, *Main Justice* 508-509 (1996).[35] That FBI operation,

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

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

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

known as COINTELPRO, used a number of techniques, and these included working with informants whose management involved the kinds of issues of today's hearing about the (Boston) FBI. While the Church Committee met with various forms of resistance, the FBI simply could not withhold memoranda on grounds of deliberative document privilege.

Moreover, in response to the Church Committee probe, the Attorney General, Ed Levi, ordered OLC "to draft guidelines for the FBI that would cover the bureau's most sensitive investigations--pursuing organized crime groups, conducting undercover operations" — including what this Committee is overseeing in Boston, the FBI's pursuit of organized crime groups by use of informants — "and carrying out domestic security and counterintelligence investigations." *Id.* at 311. "These rules became known as the Levi Guidelines and they have shaped the operations of the FBI to this day." *Id.*[36] In a very real sense, all this Committee seeks to do by today's hearing, is investigate some apparent abuses of FBI authority in connection with informants that started even before the Church Committee but failed to come to light for decades thereafter, exercising the authority and looking at the kinds of FBI problems looked at by the original Church Committee.[37] That did not run afoul of privilege then, and, does not now.

Because I started as Assistant Senate Legal Counsel in 1979, at this point my discussion

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

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

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

It is striking that the OLC opinion, having omitted meaningful discussion of Teapot Dome or Watergate, now omits the major Congressional investigation of the Carter Justice Department. In other words, it systematically omits examples of successful proper Congressional oversight of the Justice Department, forcing it unpersuasively to attempt ad hoc exceptions and explanations when reminded of these. In 1980, a Congressional investigation probed in detail the exchanges within the Carter Administration's Justice Department following the declination by the Criminal Division of criminal prosecution of Billy Carter in favor of a civil settlement. The President's brother had taken $220,000 from Libya, and there were again

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

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

allegations of pressure upon, or monitoring of, the Criminal Division through the White House and the Attorney General. Then-Assistant Attorney General Philip Heymann had initially protested the oversight on the argument there had been no wrongdoing within his Division, but recognizing the necessity of oversight, eventually cooperated fully in the inquiry.[39] This is an instance referenced in the Justice Department letter of 2/1/2002; apparently, the Department now acknowledges that "deliberative prosecutorial memoranda, as well as factual investigative records, were disclosed."[40]

I served as the head of that Congressional investigation's Justice Department task force. I personally questioned officials at three levels in the Criminal Division, the Deputy Attorney General, and Attorney General Civiletti, precisely about the deliberative processes by which they had declined criminal prosecution of the President's brother. . With me in these interviews was Senator Strom Thurmond's counsel, Dennis Shedd, now a United States District Judge for the District of South Carolina. They answered all our questions and provided the documents; in this

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

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

instance, the answers to questions were of much more interest than the documents. Thereafter, those we interviewed, from Joel Lisker to Civiletti, testified at televised hearings before the Committee on these same points.

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

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

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

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

Another Congressional oversight investigation of the early 1980s warrants attention. The

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

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

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

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

To sum up: from Watergate to the 1983 OLC Opinion, Congressional committees with a sufficient need, and which persevered, were provided access to DOJ deliberative documents. While the Justice Department acknowledges Watergate, it glosses over the Church Committee investigation of the FBI, and the Billy Carter Subcommittee and Abscam Committee investigations of the Criminal Division, not to mention the other examples. These show why Congressional oversight was needed for closed cases, and why the asserted privilege simply does

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

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

not warrant denying access to the documents needed for proper oversight, whether deliberative or otherwise. And, they show that the current cycle of "ignore the past" or "new sheriff in town" argument repeats past failures in the claiming of privilege.

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

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

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

1984: Senator Grassley's committee conducted an investigation of General Dynamics contract fraud. The Justice Department initially resisted by seeking a 6(e) ruling, and lost in

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

court.[47] The Senate obtained the documents needed.

1985-86: The Criminal Division was investigated by a House Judiciary Committee subcommittee, regarding its decision to accept a corporate plea, without individual charges, from E.F. Hutton (which was caught in an extraordinary pattern of 2000 instances of check-kiting fraud). Initially, the Criminal Division resisted questioning of its line attorneys and the providing of their deliberative documents about its declination of charges against the corporate officials. The Criminal Division based its position on an interpretation of Rule 6(c), so it filed a case seeking a court order to block the oversight. I litigated the case and won.[48] The Assistant Attorney General for the Criminal Division then dropped his objection to a House Judiciary subcommittee hearing in which the line attorney in the matter answered in depth about the deliberations surrounding the declination of charges, and the Subcommittee obtained deliberative documents on the controversial aspects of the declination deliberations.[49]

1987: House and Senate special committees investigated the Iran-contra scandal. Of particular interest was the investigation of the so-called "fact-finding inquiry" by Attorney General Meese along with three Justice Department aides. No claim of executive privilege could be made in the climate of the times; all the Justice Department attorneys involved were questioned in depth; all their documents were examined, whether deliberative or otherwise.

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

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

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

After all, the case ultimately proved in the Iran-contra hearings and in court against the White House national security staff was of how they had obstructed both the House Intelligence Committee, and the FBI, by shredding documents in November 1986 while Justice Department attorneys were questioning them - literally, while the questioning was going on. The committee also thoroughly probed the ways that the White House national security staff had attempted to make improper use of the FBI and the Criminal Division to shield their "enterprise," again obtaining all the documents needed for this probe, whether deliberative or otherwise.[50]

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

1988: Attorney General Meese had refused to appoint an independent counsel to investigate allegations about Faith Ryan Whittlesey, the well-connected Ambassador to

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

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

Switzerland. The explanations for that refusal figured prominently in the 1987 amendments to the independent counsel statute, but those explanations were contained in deliberative memoranda reflecting a debate between the Public Integrity Section, which favored an independent counsel, and others upon whom General Meese placed more reliance. In 1988, with the matter closed, Senators Kennedy and Metzenbaum overcame Justice Department resistance to review those memoranda.[52]

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

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

1989-91: A House Judiciary subcommittee dealt with Attorney General Thornburgh's refusal to provide a then-secret Justice Department opinion about kidnaping suspects overseas for trial in the United States. That opinion was written simultaneously with a general memorandum,

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

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

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

"Congressional Requests for Confidential Executive Branch Information," referenced in the Justice Department letter of 2/1/2002.[55] What the 1989 opinion on withholding from Congress does not discuss is that, after two years of oversight effort, the House Judiciary subcommittee subpoenaed the document it sought. Although informally the President approved an assertion of executive privilege on the matter, in 1991, faced with a subpoena both for the INSLAW material and this opinion, the Department conceded on the claim of privilege in that 1989 pronouncement and agreed to Congressional access to the extraterritorial kidnapping opinion.[56] "Only a few days after it received the subpoenas, on July 30, 1991, the Justice Department announced that it would release the documents requested by the House Judiciary Committee relating to both the INSLAW controversy and the legality of seizing suspects of U.S. crimes in foreign countries."[57]

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[55] The Barr kidnapping opinion is dated June 21, the 1989 Barr opinion on withholding from Congress is dated June 19, and they were published together later, in 1993, in 13 Op. O.L.C. 185, 195 (1989).

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

[57] Joel D. Bush, Congressional-Executive Access Disputes: Legal Standards and Political Settlements, 9 J.L. & Pol. 719, 742 (1993). The INSLAW documents were slow in coming,

1992: A House Science subcommittee investigated the plea bargain settlement of the Department's case regarding the Rocky Flats facility. This is an instance referenced in the Justice Department letter of 2/1/2002.[58] It is worth noting, simply, that even the DOJ letter of 2/1/2002 admits that "[t]he deliberative prosecutorial documents were made available for use at the interviews [and] staff could take notes on the documents . . . ."[59]

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

This is only a partial list,[61] with few of the examples of Senate oversight, meant to draw

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whereupon the "Committee Chairman then announced that contempt of Congress proceedings against the Justice Department were being considered, and several hundred documents were soon produced . . . ." *Id.* (footnotes omitted).

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

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

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

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

primarily on my own personal experience. Taking the list as a whole, it establishes several points. First, in the years after the famous investigations such as Watergate and Iran-contra, it is just not the case that oversight ceased or the Justice Department could withhold documents or testimony about its deliberations. After President Reagan's initial experience with unsuccessful Presidential executive privilege claims in 1981 and 1982, he simply refrained from making formal claims in 1983-88, and Presidential claims continued to be rare in the Bush Administration of 1989-93.[62] On the contrary, with the lessons of those famous investigations reverberating, the Justice Department must provide access to documents, including deliberative documents. Its attempts not to provide this, although made, were unsuccessful. Those who now maintain that the providing of access by the Clinton Administration was something strange or novel are simply unaware that, after the debacle of the 1982 Superfund claim, the Reagan and Bush Justice Departments could not ultimately succeed in fending off oversight.

Second, the needs shown by Congressional committees are quite diverse, and not just limited to corruption by the Attorney General himself. The notion that there should only be oversight in a Teapot Dome or Watergate situation is without merit. Civil liberties concerns about undercover FBI operations, which figure in today's hearing, figured in the CISPES

Committee, under Chairman John Dingell and Chief Counsels Michael Barrett and Reed Stuntz, conducted a number of successful efforts to obtain Justice Department documentation, beyond the few being listed here.

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

investigations by the House Intelligence and House Judiciary committees, as they had figured in the Church Committee investigation in 1975-76 and in the Abscam oversight investigation of 1982.

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

Conclusion

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

YEAR	INVESTIGATION of DOJ and FBI	CONGRESSIONAL ACCESS OBTAINED
1973-74	Senate Watergate, House Judiciary - as to Watergate and ITT	Full details re: Criminal and Antitrust Divisions (despite Presidential privilege claims)
1975-76	Church Committee, House Gov't Ops - FBI abuses (COINTELPRO).	Full internal details of FBI undercover activity
1979	Senate Judiciary - contract cases	Memoranda of decisions
1980	Senate "Billy Carter" Committee	Prosecutorial memoranda, as to declination re: President's brother
1982-85	House Committees: EPA/Lands Division Withholding (Gorsuch)	Deliberative memoranda (despite Presidential executive privilege claim & 1983 OLC memo)
1982	Senate "Abscam" Committee - FBI undercover sting	Prosecutorial memoranda; full details of FBI undercover activity
1984	Senator Grassley's inquiry about General Dynamics charges	Documents as to criminal case
1986	House Judiciary - E.F. Hutton charges	Deliberative documents as to declination of corporate prosecution
1987	Senate, House Iran-contra as toAttorney General Meese and other DOJ/FBI	Questioning and documents as to DOJ role in cover-up
1987-89	House Intelligence and Judiciary/GAO as to FBI abuses (CISPES)	Full internal details of FBI activity
1988	Senate Judiciary, as to Whittlesey independent counsel declination	Access to decisional memoranda
1990	House Judiciary - Inslaw case	Questioning, memos
1991	House Judiciary as to OLC secret "extraterritorial kidnapping" opinion	Access to secret opinion (despite informal executive privilege claim & 1989 Barr memo)
1992	House Science - Rocky Flats	Questioning as to corporate plea deal deliberations, and documents

1992-94	House Commerce - Environmental Crimes section	Prosecutorial memoranda

Mr. BURTON. Chairman Gilman has to leave, so if you wouldn't mind, I would like to have the chairman ask a couple of questions and then we will get back to your statement.

Mr. GILMAN. Thank you, Mr. Chairman. I want to thank you again for conducting this very important hearing to clarify the congressional authority to look at the deliberative documents involved in any particular case.

Mr. Bryant has stated that the department is willing to sit down with the committee to discuss our access to the advice memorandum. Mr. Bryant, how far along were you willing to do that and starting with the premise that this committee has Constitutionally mandated oversight authority, why would it not be incumbent upon Congress, why is it incumbent upon Congress to justify our request for access to the documents that we are looking for. I would welcome your comments.

Mr. BRYANT. Yes, sir. My understanding, sir, is that pursuant to the one case that is directly on point to the instant situation, that case being the Senate Select Committee case of 1974, and I say it's the one case on point because it pertains to a congressional subpoena of the executive branch requesting information and documents.

Mr. GILMAN. What was that issue in that case? What was the issue?

Mr. BRYANT. The issue was Congress seeking information of the executive involving executive deliberations.

Mr. GILMAN. With regard to what issue?

Mr. BRYANT. I believe it was in the context of the Watergate matter. The court held there, and this is the D.C. Circuit Court of Appeals, the court held that there had to be a showing by the requesting committee that the documents requested were demonstrably critical to the interests of the committee, that the burden in effect was on the requesting party, the committee, to make such a showing with respect to the specific documents subpoenaed.

So, our view is that the subpoena in the instant case that brings us here today preceded any such showing with respect to the 10 Boston documents. So, we remain prepared to sit down with the committee to consider the request to each document involved to have a discussion about each document that has been subpoenaed, to evaluate the interest of the committee in each document and then to engage in an accommodation process which will hopefully meet the interests of the committee.

Mr. GILMAN. Well then, following that kind of a conference and review of the documents, would you then be prepared to accept the committee's request for turning over those documents?

Mr. BRYANT. Congressman, it would be premature for me today to suggest one way or the other. What I can say is that we would take the opportunity for such a meeting very seriously and would hear out the committee from beginning to end with respect to each document.

We feel ourselves to have an obligation to seek out a mutually acceptable accommodation with respect to those documents.

Mr. GILMAN. In that kind of procedure, would you then make that document available for review by committee staff or by one of the members?

Mr. BRYANT. Again, sitting here today on this side of any such meeting, not having the benefit of the actual discussion of such a meeting, it would be premature for me to suggest any specific accommodation.

Mr. GILMAN. How would the committee know of the importance of the particular document if you are going into a conference of that nature?

Mr. BRYANT. Well, that would be the purpose of such a conference between the department and the committee, to have a very extensive discussion where we describe the contents of each document, where we discuss what is in them, we discuss the committee's particular interest in each document and evaluate what the most appropriate accommodation would be, in light of the obligation that we, the executive, feel to ensure that high level, very sensitive prosecutorial advice memoranda not be disclosed improperly.

Mr. GILMAN. Well, Mr. Bryant, after you sit down with the committee, as you sit down with the committee and discuss the important of each document, if the committee feels that document is still important, would you be prepared then to turn it over to the committee?

Mr. BRYANT. That would be the question that at that time would have to be answered. Again, it would be premature.

Mr. GILMAN. Who would make that decision, Mr. Bryant?

Mr. BRYANT. There would have to be a meeting of the minds between the two parties involved in that accommodation process.

Mr. GILMAN. Just one other question. I see my time is up. Mr. Bryant, you indicated that unflattering character references in the department's advice memorandum, a memorandum over 20 years ago, should be protected by executive privilege.

Does that not infer that some unprofessional behavior and possible undermining of the principle of innocent until proven guilty may be found in those documents?

Mr. BRYANT. It does not necessarily imply that at all, Congressman. What it does imply is a degree of candor contained in those documents that's essential for a sound decision to be made about somebody as important as whether or not to bring a Federal prosecution against an individual.

So, it would include, for example, a testimony of various witnesses, various informants. They would be speaking candidly about things they had heard and seen that might not always put a person in a favorable light.

It is not to say there has been any pre-judgment in the memo itself.

Mr. GILMAN. Thank you, Mr. Bryant and thank you, Mr. Chairman, for allowing me to go ahead.

[The prepared statement of Hon. Benjamin A. Gilman follows:]

BENJAMIN A. GILMAN STATEMENT
ACCESS TO DELIBERATIVE DOCUMENTS HEARING
02-06-02

I WANT TO THANK CHAIRMAN BURTON FOR HOLDING THIS HEARING AND FOR VIGOROUSLY PURSUING THIS MATTER WHICH WE SEEM TO UNANIMOUSLY AGREE HAS IMPORTANT CONSEQUENCES FOR FUTURE RELATIONS BETWEEN THE EXECUTIVE BRANCH AND THE LEGISLATIVE BRANCH OF OUR NATION'S GOVERNMENT. INDEED, THE BI-PARTISAN AGREEMENT ON THE ISSUE OF CONGRESSIONAL ACCESS TO DELIBERATIVE DOCUMENTS WHICH WE SAW AT OUR PREVIOUS HEARING ON DECEMBER 13TH, SHOULD SERVE AS AN UNEQUIVOCAL SIGNAL TO THE JUSTICE DEPARTMENT THAT THIS IS AN ISSUE WHICH THIS COMMITTEE TAKES QUITE SERIOUSLY.

AT THE HEART OF THE ISSUE IS CONGRESS'

CONSTITUTIONAL RESPONSIBILITY TO OVERSEE THE OPERATION OF OUR FEDERAL GOVERNMENT. THE ADMINISTRATION'S DECISION TO DENY CERTAIN REQUESTS FOR DELIBERATIVE DOCUMENTS BY THIS COMMITTEE PERTINENT TO THE FBI'S HANDLING OF THE BOSTON MAFIA CASE MAY BE CONSTRUED AS A DIRECT CHALLENGE TO THAT RESPONSIBILITY. THIS IS PARTICULARLY TROUBLING IN LIGHT OF THE SALVATI CASE WHICH IS ONE OF MOST EGREGIOUS MISCARRIAGES OF JUSTICE IN THE HISTORY OF OUR NATION.

WHILE THIS DOES NOT NECESSARILY SUGGEST THAT THE JUSTICE DEPARTMENT IS DELIBERATELY OR WILLFULLY COVERING UP PAST MISCONDUCT, IT IS DIFFICULT NOT TO INFER THAT SUCH A POLICY MAY BE EMPLOYED TO CONCEAL ACTUAL OR PERCEIVED

UNPROFESSIONAL BEHAVIOR AT THE DEPARTMENT. ACCORDINGLY, I STRONGLY ADVISE THE JUSTICE DEPARTMENT TO REVIEW AND REVISE THIS HIGHLY QUESTIONABLE POLICY SHIFT IN ORDER TO ACCOMMODATE THIS COMMITTEE'S RIGHT TO ACCESS .

I AM CERTAIN THAT THIS COMMITTEE WOULD BE WILLING TO WORK WITH THE ADMINISTRATION TO REACH A SATISFACTORY SOLUTION TO THIS PROBLEM IF IT DISPLAYS A MORE FLEXIBLE ATTITUDE. I WELCOME THE COMMENTS FROM THE REPRESENTATIVES FROM THE JUSTICE DEPARTMENT SEATED BEFORE THIS COMMITTEE TODAY.

Mr. BURTON. Before we go to Mr. Rosenberg, let me just say in response to what we just heard from you, Mr. Bryant, the interpretation of documents by the Justice Department, which is the whole issue we are talking about, is something we don't want to rely on.

We want to see the documents. A man and others were put in jail for 30 years for a crime they didn't commit. We don't want to take your word or the word of somebody at the Justice Department who may be wanting to keep under wraps what took place during that time period or even today by rogue members of the Justice Department or the FBI.

We want to clean up the mess and make sure it doesn't still exist. To take your word or the word of the Justice Department when we know that Mr. Salvati spent 30 years in jail for a crime he didn't commit and Justice knew about it and so did the FBI is something that we cannot rely on. We can't rely on your judgment. We have to see the documents.

I will tell you, as more Members of Congress find out about this issue, and they are finding out, Senator Grassley found out about this on his own, when I get a majority in the House I am going to take you guys to court and we are going to win. You are going to give me those documents because the American people want to rely on the justice system and the only way they can rely on the justice system is to know that atrocities like what took place with Mr. Salvati will never happen again.

Mr. Rosenberg.

STATEMENT OF MORTON ROSENBERG, SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE

Mr. ROSENBERG. Mr. Chairman and members of the committee, I fully appreciate your allowing me to be here today on this extraordinarily important issue.

My plan was to discuss in detail two case studies, the Teapot Dome and the Burford Affair and their consequences. My fellow panelists, however, have detailed what we can find from the history of these individual cases. I am in agreement with them and my statement has an appendix which describes 18 cases from as early as 1920, the Palmer raids, through the Campaign Finance investigations that your committee took a great part in.

I have decided to depart from my opening statement because Assistant Attorney General Bryant raised an issue, which I have covered in my prepared testimony, in which he states that the prevailing case law holds that prosecutorial discretion, prosecutorial matters, are core Constitutional and executive powers that are implicitly that is, you know, a subject that will be covered by the President's claim of executive privilege.

I believe that is not a totally incontestable statement. I would like to talk about that in the context of those two cases and also with regard to the case that Mr. Tierney alluded to, the Espy case, which taken together give a different view of what the law is and what your authority is in this area.

During the investigation of Teapot Dome, the committee subpoenaed the brother of the Attorney General and he refused to appear and was arrested by the Sergeant-at-Arms of the House. The contest of the arrest went to the Supreme Court.

The Supreme Court upheld the Senate's authority to investigate Teapot Dome matter and the charges of maladministration, malfeasance and non-feasance in the Department of Justice. The court, in a critical part of its opinion, after recognizing the inherent power of congressional committees to investigate, described just what it was that the Senate committee could look at.

"The subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or being neglected and misdirected and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect to the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one upon 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."

The court therefore was underlining the fact that the Justice Department, like all other executive agencies, is a creature of the Congress and subject to its plenary legislative and oversight authority.

There's no indication whatsoever that its prosecutorial functions, which was the subject of the investigation and that was understood and then blessed by the Supreme Court in 1926 that prosecutorial functions are in any way immune from legislative inquiry.

The Burford Affair was a long one. It started with the President ordering the administrator of EPA to refuse to turn over sensitive litigation documents to several House committees. The administrator was held in contempt of Congress and before that contempt could go over to the U.S. Attorney for prosecution, the Justice Department filed a lawsuit attempting to stop the Congress from enforcing its contempt powers.

Ultimately, that was resolved. The court threw out the Justice Department's case and the document dispute was resolved. All documents were turned over in their entirety to House committees.

But that wasn't the end of the affair. The Judiciary Committee of the House then began a probe into exactly what occurred during that period when they were helping to contest the claim of executive privilege.

This probe by the Judiciary Committee lasted 2 full years in which ultimately intimate deliberative documents were all turned over to the investigating committee. The final report of that committee recommended of asked the Attorney General to have a Special Prosecutor appointed. A Special Prosecutor was appointed. The independent counsel subpoenaed a Justice Department official, the Assistant Attorney General for the Office of Legal Counsel. That official refused to obey the subpoena and ultimately that case went to the Supreme Court of the United States.

When the case reached the Supreme Court, it rejected specifically the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. The court, in that case, *Morrison* v. *Olson,* sustained the validity of the appointment and removal conditions for independent counsels under the Ethics in Government Act, stating that the independent counsel's prosecutorial powers are executive in that they have been "typically" performed by executive branch officials.

But it held that the exercise of prosecutorial discretion is no way central to the functioning of the executive branch. 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's oversight function by citing *McGrain* v. *Daugherty.*

Right after that case was decided, more litigation occurred in the Federal courts dealing with the False Claims Act and the delegation of prosecutorial authority to private parties to litigate on behalf of the government.

A ninth circuit case upheld the Constitutionality of the False Claims Act, citing Morrison to the effect that by using the quoted language, it was holding that there was no Constitutional assignment of exclusive prosecutorial authority in the President of the United States.

Finally, in the case that was mentioned by Mr. Tierney, which is very important, and this is the In re Sealed case dealt with an independent counsel investigation of Secretary of Agriculture Mike Espy. When allegations of improprieties of Espy surfaced, President Clinton ordered the White House counsel's office to investigate and report to him so they could determine what action, if any, he should undertake and they claimed executive privilege. The President withheld 84 documents claiming both executive privilege and deliberative process privilege for all these documents.

The motion to dismiss by the District Court was upheld, but it went to the Court of Appeals of the District of Columbia and that court reversed. At the outset of its opinion, the court carefully distinguished between the Presidential communications privilege and the deliberative process privilege.

Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decisionmaking. But the deliberative process privilege applies to executive branch officials generally. It's a common law privilege which requires a much lower threshold of need to be overcome and, the court said, disappears altogether, when there's any reason to believe misconduct has occurred.

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, but applies only to direct decisionmaking by the President with respect to core Presidential powers.

That privilege may be overcome only by a substantial showing the that subpoenaed documents are likely to contain important evidence and that the evidence is not available elsewhere. The court

turned itself to the chain of command issue, which elaborates why I'm doing this.

The court held that Presidential privilege must cover communications made or received by Presidential advisors in the course of preparing advice for the President, even if those communications are not made directly to the President. The court rested its view on the Chief Executives dependence upon Presidential advisors and the inability of the deliberative process privilege to provide those advisors with adequate freedom from public spotlight and to provide sufficient elbowroom for advisors to obtain information from all knowledgeable sources.

Thus the privilege will apply both to communications which those advisors solicited and received from others as well as to those that they offered themselves. The privilege must also extend, the court held, to communications authored or received in response to a solicitation by members of a President's advisor's staff.

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

Mr. BURTON. Mr. Rosenberg, if we could, we would like to get to the questions and answers, so if you have a final comment or two you would like to make.

Mr. ROSENBERG. One final comment is that what the Morrison, Daugherty and Espy cases demonstrate is that the commitment of prosecutorial discretion is to the Attorney General. It's not to the President of the United States and that your committee's authority to investigate, as was made very clear in the Daugherty case, and in the Teapot Dome case, is plenary and full and that there's no Constitutional authority that I'm aware of that can deter you.

[The prepared statement of Mr. Rosenberg follows:]

STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT REFORM

CONCERNING

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

PRESENTED ON

FEBRUARY 6, 2002

Mr. Chairman and Members of the Committee

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

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

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

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

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

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

The Legal Basis for Oversight

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

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

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

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

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

Illustrative Investigations and Case Law

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

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

[4] *Id.*

[5] *Id.* at 182.

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

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

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

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

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

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

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

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

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

[11] *Id.* at 1120.

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

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

[14] *Id.* at 2389.

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

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

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

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

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

[16] *Id.* at 1790.

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

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

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

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

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

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

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

[20] *Id.* at 290.

[21] *Id.* at 295.

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

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

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

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

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

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

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

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

[25] *Id.* at 1164.

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

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

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

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

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

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

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[28] *Id.* at 1184.

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

[30] *Id.* at 1168.

[31] *Id.* at 1169.

[32] *Id.* at 1172.

[33] *Id.* at 1173.

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

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

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

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

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

[36] *Id.* at 1265.

[37] *Id.* at 1265.

[38] *Id.* at 1266.

[39] *Id.*

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

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

[42] *Id.* at 1270.

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

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

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

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

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

[45] *Id.* at 694.

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

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

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

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

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

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

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[47] (...continued)

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

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

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

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

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

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

Assessment and Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[56] Id. at 745.

[57] *Id.* at 752.

[58] Id.

> decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigation and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. *See* AAPS, 997 F.2d at 910 (it is "operational proximity" to the President that matters in determining whether "[t]he President's confidentiality interests" is implicated)(emphasis omitted).
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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.[59]

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

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[59] Id. (footnote omitted).

[60] Id. at 752.

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

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

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

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[61] Id. at 752-53.

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

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

[64] Id. at 748.

[65] Id. at 750.

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

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

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

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

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

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[66] Id. at 752.

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

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

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

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

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

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

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

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

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

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

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

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

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. 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.

APPENDIX

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

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

Palmer Raids

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

Teapot Dome

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

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

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

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

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

273 U.S. at 177.

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

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

Investigations of DOJ During the 1950's

In 1952, a special House subcommittee was constituted to conduct an inquiry into the administration of the Department of Justice. The subcommittee conducted a lengthy investigation from 1952 to 1953, developing thousands of pages of testimony on a range of allegations of abuses and inefficiencies in the Department. Investigations of the Department of Justice: Hearings Before the Special Subcommittee to Investigate the Department of Justice of the House Committee on the Judiciary, parts 1 and 2, 82d Congress, 2d Session (1952), parts 1 and 2, 83d Congress, 1st Session (1953)(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.[1]

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

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

2. Prosecution of Routine Cases

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

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

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

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

3. New York City Police Brutality

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

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

Investigation of Consent Decree Program

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

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

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

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

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

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

Id.

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

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

Cointelpro and Related Investigations of FBI-DOJ Misconduct

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

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

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

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

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

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

White Collar Crime in the Oil Industry

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

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

Billy Carter/Libya Investigation

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

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

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

Undercover Law Enforcement Activities (ABSCAM)

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

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

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

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

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

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

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

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

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

Investigation of Withholding of EPA Documents

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

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

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

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

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

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

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

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

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

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

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

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

E.F. Hutton Investigation

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

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

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

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

Iran-Contra

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

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

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

Rocky Flats Environmental Crimes Plea Bargain

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

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

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

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

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

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

Investigation of the Justice Department's Environmental Crimes Section

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

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

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

Campaign Finance Investigations

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

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

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

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

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

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

Mr. BURTON. Thank you very much. I appreciate all of your testimony. We will now get to questions. I will start off by saying to Mr. Bryant that I am disappointed in your statement. I am sure you probably were aware of that. I asked you to answer a few basic questions regarding the history of congressional access to deliberative Justice Department records.

That was the purpose of your testimony. You have not really gotten into that at all. What I wanted you to do today was to come up and give me a list of cases and history regarding deliberative documents, and we would like you to do that. Now, we asked you these questions, I think, about 5 months ago. In your letter of February 1st, just recently, you cited a total of three cases and you did not address this subject at all in your opening statement.

So, I hope you found more than three examples. If you need us to refresh your memory, we can go through a whole litany of these.

Now, do you have a list of cases where deliberative documents have been given to the Congress when subpoenaed?

Mr. BRYANT. Yes, Mr. Chairman. I don't pretend that it's an exhaustive list.

Mr. BURTON. How many do you have on that list?

Mr. BRYANT. So as to not waste the committee's time, it is probably a handful or two, sir.

Mr. BURTON. Just a handful or two? How many is that?

Mr. BRYANT. I think I have close to a dozen instances, perhaps, here sir, that I would be happy to discuss with the committee.

Mr. BURTON. Can you go through those for us?

Mr. BRYANT. Sure. I have made an effort, Mr. Chairman, not pretending to scholarly expertise in this area, but I have made an effort to acquaint myself with instances of past accommodation.

Mr. BURTON. Excuse me, Mr. Bryant. I appreciate that comment you just made, but you have had 5 months. We are in the computer age and in the computer age I'm confident that the Library of Congress probably has a whole litany of these things.

For you to sit there and tell us that you really haven't had time to acquaint yourself with them or haven't done that kind of bothers me a little bit because it has been 5 months.

Mr. BRYANT. I have tried to acquaint myself.

Mr. BURTON. OK. Let's go through the 12 you have.

Mr. BRYANT. The instances involving past disclosure of deliberative prosecutorial documents would include the Palmer raids back in 1920 and 1921 where Congress investigated these raids directed by then Attorney General Palmer which involved arresting and deporting thousands of suspected Communists. As I understand it, deliberative memos were disclosed in that context.

Teapot Dome in 1927 where Congress investigated corruption in connection with Department of Interior oil reserve leases and the Justice Department's failure to prosecute various involved government officials. As this committee well knows, Attorney General Daugherty, in connection with that episode, went to prison.

As I understand it, open case information and prosecutorial deliberative memos were disclosed by the subsequent Attorney General, Harlan Stone. There are a couple of important cases that I know the committee is aware of, Supreme Court cases that came

out of the Teapot Dome, a situation which I would be happy to address if of use to the committee.

The third instance involving disclosure of deliberative prosecutorial documents that I have made an effort to acquaint myself with is the McGrath matter from 1952. That involved Congress investigating corruption in the Tax Division of the Justice Department. The Attorney General at the time, McGrath, resigned in connection with that. As I understand it, extensive Grand Jury materials and deliberative documents were disclosed.

Jumping forward a few decades, the Bill Carter matter that has been addressed here by persons on this panel with me, in 1980 that involved a congressional investigation regarding the Justice Department's handling of allegations about the President's brother's failure to register pursuant to the Foreign Agent's Registration Act.

As I understand it, deliberative prosecutorial memos were disclosed in that circumstance. The Abscam matter in 1982. There was a select committee that was established in connection with the congressional followup to the Abscam matter. It was established because of congressional concern with the Abscam undercover investigations of Members of Congress, that Members of Congress had been targeted.

In that context with that Select Committee having been established with that specific concern in mind, I understand that the department deliberative prosecutorial memos were disclosed.

Another case subsequent to that, the General Dynamics case in 1987, I've made an effort here in response to the chairman's letters, to try to acquaint myself with this matter. I understand the underlying matter occurred in 1984. What we have in our records or were able to uncover through our research is a 1987 notebook, as I understand it, that indicates that some deliberative prosecutorial memos were provided to Congress.

I am not entirely clear what they were based on the dearth of information in what we were able to uncover. I believe, however, that the context for the General Dynamics case in 1987 involved the Justice Department explaining wrongdoing at the Department of Defense in connection with various instances of procurement fraud.

In that context, the department did provide prosecutorial memos.

The next instance that I am aware of is the Rocky Flats immunity deal. This occurred or was looked into over the period of time from 1989 to 1990. A House Government Operations Subcommittee investigated the Rockwell Corp.'s request for immunity, which the Justice Department had declined.

Initially, it is my understanding that only factual records were provided pursuant to the congressional requests after extensive negotiations between the department and the committee. All but four deliberative prosecutorial memos were provided to the committee.

The dispute continued regarding those four documents and the department considered, as I understand it, seeking executive privilege in the matter, but ultimately did not and those documents were disclosed.

The next situation, another Rocky Flats concern, this one involving the plea agreement. A House committee investigated Rockwell's plea agreement in connection with violations of various environ-

mental laws. The committee asked to interview line prosecutors. In this circumstance the Justice Department, as I understand it, made an exception, largely relying on the fact that the two prosecutors had responded to media inquiries and had made themselves publicly available to the media.

In that context, the department agreed to make the line prosecutors available to Congress, but they did so with the stipulation that they were not to disclose internal deliberations leading up to the declination decision and that agreement was so, even after the line prosecutors had been subpoenaed.

As I understand it, after heated discussions and negotiations an agreement was reached 1 month before the Presidential election which involved making deliberative prosecutorial documents available and the line attorneys available to explain those documents themselves.

I have a few more, Mr. Chairman. I don't want to misuse your time.

Mr. BURTON. I don't want to belabor this. Why don't you just read the others real quickly so we have a record of them?

Mr. BRYANT. Surely. The other matters that I have developed some degree of familiarity with include the B&L matter from 1992, the Environmental Crimes Reviews that occurred over the period of 1992 to 1993, the White House Travel Office matter dating 1995 to 1996. Then, the LaBella inquiry memoranda matter dating over the time period of 1997 to 2000.

Mr. BURTON. Well, I am very familiar with the LaBella and Freeh memos and it took us a long time to get them. It may take us a long time to get these but we are going to get them. We are going to get these guys.

I don't know why you want to go through all this. If we have to go to court, we are going to get these documents. Now, you didn't mention Watergate, the Church Committee, the Senate Judiciary contract cases. You didn't mention the House Judiciary on E.F. Hutton. You didn't mention Iran-Contra. You didn't mention the House Intelligence and Judiciary GAO as to the FBI abuses, the Senate Judiciary as to the Whixley independent counsel declination, the House Judiciary on the Inslaw case which was alluded to earlier. You didn't mention the House Judiciary on the OLC secret extra territorial kidnapping opinion or the House Commerce Environmental Crime section, and we have a whole host of others. He did mention that one? I stand corrected.

Then we have a whole host of cases that go all the way back to Coolidge and even beyond. So, there's precedent for us getting these documents. We are going to continue to press this.

With that, Mr. Barr, I think you are next on questioning.

Mr. BARR. I thank you, Mr. Chairman. Mr. Bryant, define for me the term "faithfully executed," please.

Mr. BRYANT. Congressman, I'm not a scholar on that provision.

Mr. BARR. From this standpoint, you cite sort of the underpinning or the foundation on which the administration's position rests. Article 2, Section 3, "To take care that the laws be faithfully executed." That's correct, right?

Mr. BRYANT. Yes, sir.

Mr. BARR. What does it mean to "faithfully execute?" Basically, I think what your position is that you define what "faithfully executed," is and as I read the administration's position, it continues in perpetuity. Nothing can ever be faithfully executed sufficient to disclose information about what it was that has in fact been faithfully executed. It's sort of a catch–22.

From a prosecutorial standpoint, I think that's a very weak argument by virtually any index, any definition of executing a law, let's take the criminal law, it concludes when the case is concluded. Either a decision is made not to prosecute or a decision is made to prosecute. The case is prosecuted and it's appealed and so forth. At some point, I think all of us would agree there is finality to it. I mean when the appeals are exhausted, for example, doesn't that conclude the execution of a case?

Mr. BRYANT. I think applying the term "faithfully executed" to the situation at hand, the requirement of that clause in the Constitution would be to preserve the integrity of the criminal justice process. So, the President has an affirmative obligation under Article 2, Section 3 to ensure that action is taken.

Mr. BARR. But isn't that what the chairman is trying to do, to ensure the integrity of the criminal justice process?

Mr. BRYANT. Certainly rooting out corruption is one way of doing that in the department.

Mr. BARR. How can we do that if you all put up a brick wall and say even though a case has been concluded years and years before this, even though there's no damage to Grand Jury secrecy, even though there are no further deliberative decisions that have to be made, we are still going to deny you that because we interpret the phrase to take care that the laws be faithfully executed gives us an absolute in perpetuity, power, to withhold information about a case to the Congress.

Mr. BRYANT. It is not my understanding that our interpretation of the department's interpretation of that clause requires such an absolute and in perpetuity character. I think the concern in the instant case is to guard against pressure by another branch on the decision of whether or not to prosecute and that such pressure is inconsistent with ensuring the integrity of the criminal justice process.

So, it's incumbent on us in the current situation with respect to Boston——

Mr. BARR. This is all after the fact. This is not about a current case. What pressure can there be that would harm the Department of Justice regarding a case that was concluded long ago and as to which, unlike a case where there's no question at all about it and somebody might be just curious, as to which there is very significant evidence that there's a public policy matter involved here that whatever decisions any Department of Justice rendered be based on Justice and on the evidence and are not themselves violative of the law. Doesn't that public policy count for something?

Mr. BRYANT. To be sure. The harm in the instant case would not apply to the past case. Indeed the department has an obligation to provide information appropriately to this committee with respect to that past case. The harm would be present and prospectively ori-

ented. That is, the practice of disclosing such sensitive prosecutorial advice memos would have impact for present deliberation.

Mr. BARR. Then I think the department is reading this clause in the Constitution to take care that the laws be faithfully executed even more broadly than I thought it was. Not only are you saying that there's no time limit or finality to a decision about executing the laws faithfully that would allow Congress to look at what the department has done, but you are saying even if there were it would apply to every case in the future that we don't even know about.

So, what I think you are saying, Mr. Bryant, is that Congress can never get certain types of information and that type of information is left entirely up to the discretion of one branch of government which essentially nullifies oversight.

Mr. BRYANT. That is not what I intended to say, Congressman, so if I am leaving that impression I am misspeaking. In the current situation where the executive has clearly agreed and made a determination that there has been corruption of the investigative process, we have an unusual circumstance that invites the committee and the department to sit down and to carefully evaluate the committee's request for those documents. We are prepared to do that.

We view ourselves as having an affirmative obligation to address the current circumstances through the accommodation process. We do not mean to say that the committee will never be receiving certain materials.

Mr. BARR. Mr. Chairman, I have some other questions. I don't know whether you want me to proceed or whether you want to have a second round.

Mr. BURTON. We will have a second round. You know, there's an old saying, "the fox guarding the chicken house" and the corruption took place in the Justice Department, the FBI, and as a result the decision on what documents Congress sees to try to clean up the mess, to make sure it never happens again, should not be interpreted by the department that had the problem in the first place. That's what congressional oversight is all about. I think that is what we are all trying to get to.

Mr. Barr, do you have another question or two?

Mr. BARR. Yes, thank you. Going back to the underpinning of the administration's argument, Article 2, Section 3, to take care that the law has been faithfully executed, what did you do if you have a law that needs to be faithfully executed that relates to a congressional power?

Who makes the determination then whether or not it has been faithfully executed and what do you do then when you have that pressure point between the executive branch power and a responsibility to faithfully execute the laws and the congressional power to enact those laws and see that those laws are enacted and interpreted properly. For example, Title 2, Section 191, refusal of witness to testify about his papers. Wouldn't Congress have a right to that information?

Mr. BRYANT. We would not dispute the right of Congress to information——

Mr. BARR. So you are not disputing the right of Congress to get the information in this case?

Mr. BRYANT. Well, the distinction would be between information and particular documents. We have an affirmative obligation to work with the committee to get it information pursuant to its legitimate oversight activity, no question.

Mr. BARR. Would you then sit down with the chairman and members of this committee and go over the documents to then determine what properly can be released, but to allow the committee access to see the documents as part of the effort to determine what can properly be released and if there are any specific points of disagreement. I mean we can't determine whether there are specific points of disagreement if you keep all the cards.

Mr. BRYANT. Sitting here today, what I can assure the committee is that we are prepared to meet at a time convenient to the committee to comprehensively review the documents where an oral presentation about each and every document would be made by the person and persons with expert knowledge about the contents of those documents.

We would be able to hear from the committee its particular interest with respect to each document.

Mr. BARR. I am sure that I speak for you in saying that I certainly trust Chairman Burton. I speak for you and you agree with that. Would you not agree then that the only way that the chairman who speaks for the committee would be able to properly evaluate in a sense your arguments would be if he has access to those documents that you are discussing?

I think it's very unfair to put the chairman or any committee member, but especially the chairman, at the disadvantage of relying entirely on your oral disclosure, the department's oral disclosure and discussion of these documents. He never has an ability to see the documents for himself. It's not that he doesn't trust you. But there are interpretations of documents. You are relying on interpretations of documents and second-hand information.

It seems to me the only way we can reach an accommodation to avoid this going to court, and I agree with the chairman, I really don't think this is your strongest case to go to court on, to sit down and simply go over the documents so the chairman can look at them and then if there are specific areas of disagreement, put those aside and then let's argue about them and see if we can reach an accommodation. If we can, at least we have narrowed the differences.

Mr. BRYANT. Well, we are prepared to sit down immediately to discuss each and every document and to provide the facts that are contained in the documents, facts that don't require interpretation, but they just have to be stated. We would plainly state the facts from the documents so that we and the committee could take the next step.

Mr. BARR. You know as well as I do, Mr. Bryant, that on many of these documents there are nuances, there are notations, there are some under linings, I mean similar to a conversation, in order to really understand the import of a conversation you need to hear it. You need to see the person. We went over this in the impeachment at some length.

It's the same with documents. I have seen documents that if you just relate to somebody the facts in those documents it doesn't real-

ly convey to that person the nuances and some of the import of that document because of the way it's written, notations, under linings and I don't know, I presume that there are notations and under linings and so forth on some of these documents.

How realistic is it to presume that all of that could be conveyed to somebody by simply giving them an oral summary of the document or an oral recitation of the facts themselves?

Mr. BRYANT. I am not disputing that in certain circumstances the committee would find it preferable to see the documents. Obviously, we don't dispute that. The concern again is that the executive does have an obligation rooted in our judgment in the Constitution and in the tradition of executive functioning where we have to guard against in any way undermining the prosecutorial decisionmaking process.

That is where the concern arises then with respect to particular documents being turned over.

Mr. BARR. Who is it that would be undermined? Is it some future prosecutor that would be undermined by understanding that there was bad decisions made in the past? How would that undermine a prosecutor? How would that undermine a witness? What I think would undermine the future effective administration of justice is keeping all of this stuff secret because then you are left with this thing hanging out there that sounds terrible and may very well be.

But my experience as a prosecutor has always been that the most effective way to achieve prosecutorial successes is to have the public understand what the government is doing to be as much as possible a part of that, to know that the government will disclose information even if it gives itself a black eye because that builds credibility and confidence in the system.

How would that be built? I think it would be undermined by refusing to disclose information that clearly indicates that bad decisions were made.

Mr. BRYANT. There's much, if not most, if not all of what you just said with which I agree. We need to disclose information. We need to disclose facts. We are committed to that. The concern, again, is with respect to the four corners of the document itself. In answering your question, "How would disclosing the document undermine?" It's our view and it has ample support that the public interest would be undermined by a prosecutorial process that does not involve candid advice, especially on that key work product, the advice memo being given to the decisionmaker on whether or not to bring——

Mr. BARR. But we are talking about candid advice here, as the chairman indicated, it wasn't just candid, I mean it was very likely criminal. Now, how is the goal of the department to see that justice is done buttressed by keeping that information secret?

Mr. BRYANT. Again——

Mr. BARR. Certainly you are not going to rely on that in future prosecutions, that type of information.

Mr. BRYANT. We need to get the facts to the committee, no question.

Mr. BURTON. Mr. Delahunt just has a couple of minutes of questions. Mr. Delahunt, let me yield to you for a couple of questions

or a couple of minutes or whatever you need. We have exactly 8 minutes and 54 seconds on the clock.

Mr. DELAHUNT. I know there are other members of the panel that might—I saw Mr. Ose and Mr. Shays leave. I don't know if they are—are they coming back?

Mr. Barr covered much of the area that I had intended to cover. Let me just be clear in my own mind and I'll direct several questions to Mr. Bryant. The department acknowledges, presumably, that the claim, the deliberative process privilege, is a qualified privilege. Am I correct?

Mr. BRYANT. That is my understanding, yes, sir.

Mr. DELAHUNT. Well, am I correct when I say that's the department's position, that what we are talking about today is a qualified privilege. If you have any questions, I'm sure that the chair would indulge me and you could confer with Mr. Chertoff.

Mr. BRYANT. I am informed that your statement is correct, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Bryant. I think you just picked the worse case imaginable to test this particular provision. I should let you know, Mr. Chairman, you have the votes if you should go to the floor. I have spoken to a number of my colleagues on the Judiciary Committee, Members of the leadership on our side of the aisle.

Be assured, you have the votes. I think you should hear those remarks I just made and take them into account in whatever decision you should reach in terms of your discussions with the chair of this committee.

Also, Mr. Chairman, I would like to introduce a letter. I am just going to read the final paragraph. It's directed to the President, President George Bush.

"Mr. President, we support the House Committee on Government Reform's investigation of the FBI's misconduct. The integrity of the criminal justice system and the Federal Government has been compromised.

"We as public servants owe it to the American people to right any wrongs that were committed and must begin rebuilding a trust that has been lost as a result of this episode. We respectfully request that you reconsider your December 12, 2001 decision to exercise the executive privilege in this case."

It's signed by myself, Representatives Frank and Meehan who, as I indicated earlier, serve with me on the Judiciary Committee and the Chair has been kind enough to extend an invitation to us to sit in these hearings. Obviously, we are from Massachusetts and we have a profound interest in what is happening.

It's also signed by Representative Lynch who does serve on this committee and in addition, since Senator Grassley was here earlier this morning, we had requested and the two Senators from Massachusetts, Senator Kennedy and Senator Kerry have both signed this letter.

So, I would ask that this letter be submitted into the committee records.

[The information referred to follows:]

Congress of the United States

Washington, DC 20515

February 5, 2002

President George W. Bush
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

We are writing with respect to the request for documents related to the case of Mr. Joseph Salvati of Massachusetts submitted by the United States House of Representatives' Committee on Government Reform. As you are aware, Mr. Salvati and three other men were wrongly imprisoned for murder because the United States Department of Justice (DOJ) wittingly withheld documentation and investigative reports that would have proved their innocence. Mr. Salvati and Mr. Peter Limone each served thirty years in prison, while the two other men convicted, Mr. Louis Greco and Mr. Henry Tameleo, died in prison. Representative Dan Burton, Chairman of the House Committee on Government Reform, has been conducting an ongoing investigation of the misconduct of Federal Bureau of Investigation (FBI) officials in New England.

The responsibility of legislative oversight committees is to ensure that all agencies within the federal government are operating in a manner that is fair, just, and respects the individual rights of the American people. In the past, several inquiries into the conduct of the FBI and other agencies within the DOJ have been completed by Congressional oversight committees with the support and cooperation of the agency being investigated. It is this spirit of cooperation that has allowed our federal government to operate efficiently and effectively with the support of the American people.

The conduct of the DOJ in this case belies comprehension and tarnishes the image of the department and the federal government. Mr. Salvati and, indeed, the national public, are owed nothing less than a full explanation for how and why the federal government could knowingly perpetuate the imprisonment of innocent individuals. Essential to this explanation is the release of all internal documents and deliberative memoranda to the investigating committee that would shed light on this case. Beginning February 6, 2002, the House committee will begin a series of hearings focusing on your invocation of executive privilege in response to the subpoena of relevant documents and, specifically, will explore instances in which previous Administrations have provided similar documents to Congressional oversight committees.

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Mr. President, we support the House Committee on Government Reform's investigation of the FBI's misconduct. The integrity of the criminal justice system and the federal government has been compromised. We as public servants owe it to the American people to right any wrongs that were committed and must begin rebuilding the trust that has been lost as a result of this episode. We respectfully request that you reconsider your December 12, 2001 decision to exercise executive privilege.

Sincerely,

John F. Kerry

Edward M. Kennedy

Barney Frank

Marty Meehan

William Delahunt

Stephen F. Lynch

Mr. BURTON. Without objection.

We have a little over 3 minutes to vote, so I think you and I are going to have to sprint over there to vote.

Mr. DELAHUNT. Well, if I may come back, Mr. Chairman?

Mr. BURTON. Sure, you are welcome to come back. I will not be in the chair when we return, but Mr. Barr will and I will ask him to recognize you for further questions.

Mr. DELAHUNT. I thank you, Mr. Chairman.

Mr. BURTON. I would just like to say before I run off, to Mr. Chertoff who I appreciate being here today. He is such a nice guy. I wished I looked that good in a beard and moustache, I would have one. We really want to work things out but we must see those documents.

We don't want to press this issue and go to court, especially against a President that I admire a great deal. I don't want to do that. So, I hope that if we can sit down and look at the documents, go through the documents and read them together, then we can make some decisions on whether or not we ought to have physical control over the documents.

But we must see the documents. That is the only way we are going to have confidence that there isn't other cases of this type that may have been covered up. The thing that keeps me awake nights is there may be some other man or woman or people in jail today that were put there by rogue FBI agents in the past 30 years that shouldn't be there.

The thought of Mr. Salvati is bad enough, but what if there's other people out there? What if someone was put to death? He got the death penalty. It was commuted. I mean this is something that we have to clear up and we have to see the documents to be able to have confidence that the thing is cleaned up.

So, we do want to work with you. We don't want to be recalcitrant. We like you. But we have got to see the documents.

With that, we stand in recess. We will be back in about 10 minutes.

[Recess.]

Mr. SHAYS. I would like to call this hearing to order again. I would like to recognize the most distinguished gentleman from California, Mr. Ose.

Mr. OSE. Thank you, Mr. Chairman. That is a heavy burden.

I have a question, Mr. Bryant, and I am trying to understand this. What does case law say about prosecutorial discretion with respect to sharing the deliberations that they might undertake?

Mr. BRYANT. I think there are a couple of considerations, Mr. Congressman. It's my understanding that the case, *United States* v. *Nixon* which stands for a number of propositions held unanimously, that it's self-evident that there's a need for candor in executive deliberations.

So, it points to the confidentiality interests of such deliberations. The same case also spoke about the executive branch's authority and discretion to decide whether to prosecute cases.

The last point, of course, would be that under the Federal rules of criminal procedure, Rule 6(e), with respect to grand jury deliberations which are themselves then utilized in the course of the in-

vestigation, that those contents of grand jury discussions and deliberations are themselves not properly to be disclosed.

Mr. OSE. Mr. Rosenberg, do you agree with that?

Mr. ROSENBERG. I think that trying to blanket a claim of withholding of documents based on candor, in the case law and practicality requires that there be a concrete showing of a possibility or the fact that there would be a chilling of an officer or employees ability to be candid.

The Supreme Court addressed this issue in one case, *NLRB* v. *Sears Roebuck*. It addressed why Federal officials, including those Federal officials giving legal opinions don't have to hide behind such fears. It said, "The probability that an agency employee will be inhibited by freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight.

"The first when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports disclosure."

Mr. OSE. That's a Supreme Court citation?

Mr. ROSENBERG. Yes. I would also say that in the investigations that have occurred, those leading up to the request for the Conrad memo. It didn't appear that revelation of what was in the Freeh memo inhibited Mr. LaBella or that the revelation and disclosure of Mr. LaBella's memo chilled Mr. Conrad to make his recommendations.

There has to be some sort of concrete demonstration that the particular subject matter is damning in some way, but if it's damning, perhaps that is why we want to see it.

Mr. OSE. Professor Rozell, do you have any input on this?

Mr. ROZELL. Well, I think it's clear that the administration is making a poor claim of executive privilege in this case. The background that I have studied on executive privilege makes it quite clear that this is a Constitutional principle that exists for the purpose of protecting the public interest in some very substantive way. The administration has an obligation, when it wants to withhold information, to make a clear demonstration that in some way revealing information will cause grave damage to the national interest.

Now, the case law and the historic precedents, I think, make quite clear that in the case of a closed investigation, in this case one that's about 30 years old, the interest in secrecy withers. When there's a balancing test between an administration's claim to the right of secrecy and Congress's claim to need information, and particularly in a case where there are allegations of wrong-doing, then the claim for secrecy simply cannot stand under such a circumstance.

A closed investigation, allegations of wrongdoing—it is absolutely clear from the historic precedents that this is not the kind of case where a claim of executive privilege would stand.

Now, I wrote a book some years ago on the principle of executive privilege and I very much defended the Constitutionality of this principle, but of course, it is a Constitutional power that exists

with limits and often times has to yield to other considerations in our system of separated powers.

I made the argument in defense of the principle of executive privilege and it bothers me to see the use of this principle in a case where it's so weak and it is so obviously going to be shot down if it goes to the courts. Ultimately this kind of use of this Constitutional principle will weaken the principle in the long run and further give a bad name to the concept of executive privilege, rather than reestablish the viability of this Constitutional power.

I understand the administration has made the argument now—as I have been following the various statements—that they want to reestablish the viability of certain executive branch prerogatives that they believe have eroded over the course of the past 30 years, as I believe the Vice President said.

If they want to reestablish the viability of the principle of executive privilege, they should pick a really, really strong case where there's a clear demonstrable need for secrecy where it would be clearly in the national interest to protect certain kinds of information. But trying to withhold information by simply saying "If it involves prosecutorial matters, you cannot have access," or trying to withhold information in a closed investigation, or trying to withhold information in a case where there are allegations of real wrong doing in the upper reaches of the executive branch, I think just ultimately weakens executive privilege.

Mr. OSE. Thank you, Mr. Chairman.

Mr. SHAYS. Thank you.

At this time I would recognize Mr. LaTourette. The gentleman from Ohio has the floor.

Mr. LATOURETTE. Thank you very much, Mr. Chairman. Mr. Chairman, I apologize for not being here during the early stages of this hearing. Sadly, when I woke up this morning, I have something called a Maryland bridge that went flying out of my mouth. The good dentist at the Navy Yard put it back in my mouth so I could appear in public and not look like a hockey player from Boston, Mr. Delahunt.

I want to make some points. Maybe I will get to a question in my 5 minutes and if I don't in this first 5 minutes, I will come back as the chairman permits. But one, Mr. Bryant, I want to thank you and your colleague for coming and visiting me yesterday and attempting to explain the administration's position. I thought that was a good faith effort on the part of the administration to come and at least attempt to explain what it's you all had in mind.

Two, I would say to you that I feel bad for you today because I think you are taking a spear for a decision that has not been of your making.

Having said that, extended my thanks and recognizing that you are the messenger and perhaps should not be slain, I have to tell you, my observation since the last time we convened and members of the Justice Department declined the opportunity to hand over the documents that we are looking at and today's hearing and where we are joined by luminaries of Constitutional law and the history of executive privilege, that the conclusion reached by the Justice Department is crap.

I wish I could make it a more artful word, but that's my opinion. I had the pleasure of being a prosecutor as did Mr. Delahunt and Mr. Barr. I have seen rubber bands that have not been twisted so much as the conclusion that you all have reached in this particular instance.

Just something that's personal and has nothing to do with why we are here today, but I am amazed because the same Justice Department is prosecuting a colleague of mine in Cleveland, OH, Jim Traficant, and they are using things that I think are covered by the Speech and Debate Clause of the Constitution.

Now, that's for the Judicial Branch to figure out whether it is admitted into evidence, but the Justice Department had no difficulty obtaining documents from a co-equal branch of government and now they are attempting to use them in court. I think for you all to make these arguments, you are walking on both sides of the street and it's sad.

I did listen to Mr. Barr talk to you a little bit about what faithful execution of the national laws means. I don't consider this to be part and parcel of that. When I was a prosecutor, if one of my assistants wrote a memo to me indicating we should either proceed or decline prosecution and it contained something that I would be embarrassed if it went out in the public, that assistant would have been fired.

In this case, I have to tell you because we are dealing with the Salvati case, you are setting up a situation where you all determine what we get to see. The reason that is so abhorrent to me is, I am not saying that the current Attorney General or anybody that works there is a crook, but if you are all crooks and you had control of the gate and you could just throw up executive privilege and say that you are not entitled to see what it is that J. Edgar Hoover did 30 years ago or these slime balls in the FBI office did 30 years ago. That's a nonsensical argument and I can't imagine any interpretation of the U.S. Constitution that would cause that conclusion.

I wish I could be more artful, but I am pissed off by the posture that you put this committee in.

Then I would want to make a partisan observation and I mentioned it to you in my office. The administration is making the Republicans in the U.S. Congress and in the White House look bad by this decision.

I would hope that you take whatever opportunity is extended to you to come forward and meet with the committee and work this thing out. This thing should be resolved. This thing should be resolved in a way that we don't have to have the chairman get his blood pressure up and threaten to go to the floor and threaten to go to court and everything else.

I don't go all the way back to Teapot Dome and the Palmer Raids, but I was here during the Travelgate scandal. I was here during some of the other things in the later citations. I remember the difficulty we had with the previous administration and the previous Justice Department in achieving documents. I never thought I would see the day that I would sit as a member of this committee and have that kind of difficulty and this kind of legal mumbo-jumbo from an administration of my own party. It is an embarrassment to me as a Republican.

I hope if you take nothing else, and I don't blame you, as I said at the very outset of my observations, but I hope if you take nothing else from this hearing back to your superiors in the Justice Department that whoever wrote this advice, and I think it's a fellow that used to clerk at the Supreme Court, if I have things correctly. They are just wrong.

If you don't believe the scholars sitting next to you, I hope that you listen to other people because every one of these citations, the Congress got the stuff, as I understand it. The Congress got the stuff because we are entitled to the stuff. We are entitled to the stuff because we are a co-equal branch of government and if you are doing something wrong, just like if we are doing something wrong, the other branches of government are supposed to keep an eye on us.

If we can't keep an eye on you, and it's not even you, that is the thing that kills me. I mean J. Edgar Hoover is dead, for crying out loud. The fact of the matter is that Joe Salvati spent years and years in prison. I have no doubt that the guys that did it are wrong. They should be in prison if they are still alive.

And why you are not giving us this stuff—and here is the cynical argument I came up with last night before my tooth fell out: That's what occurs to me is that—and the reason that we look bad as Republicans, it is almost like you are hedging a bet. And that's, you are not so sure about the mid-term elections and you think our friends on the democratic side of the aisle might be in the majority in the second half of President Bush's first term and you are afraid that they are going to want all this stuff.

So, you say to us in the most blatant cases today, you can't have it so you can be consistent when the Democrats take over. Well, two things: One, the Democrats are not going to take over and two, you better give us the stuff.

I yield back my time.

Mr. SHAYS. I would just make the observation that the gentleman from Ohio said things that I am not sure I would have even dared to say, which really says something. But he is on target in everything he has said.

I will recognize Mr. Lynch and if not, then we can go to you, Mr. Delahunt. Mr. Delahunt, you have the floor for 5 minutes.

Mr. DELAHUNT. I concur with everything that the gentleman said except.

Mr. SHAYS. OK. I have the gavel and you are a guest of this committee.

Mr. DELAHUNT. I am, so I will be appropriate. No, I think Representative LaTourette said it. I think you have heard from—this is unanimous. This was a poor selection. I have wondered myself why this particular case. I am not interested in pursuing anything else other than the misconduct or the alleged misconduct of the FBI in Boston.

The ranking member made referenced to Enron. Myself and no other Member on this side of the aisle, I think, even alluded to that. But I would agree with the assessment by Representative LaTourette. I mean it just doesn't make sense. This is silly. This is absurd.

There's no disagreement. There are no political implications here. I would like to know, and I think it was Mr. Barr, or maybe it was Mr. LaTourette, I think it was Mr. LaTourette, that as the supervising attorney, the District Attorney in his jurisdiction in Ohio, I mean, chilling effect, I know there's language to that effect in the decision. But is there any evidence that it would be chilling?

I mean how many documents are we talking about, Mr. Bryant.

Mr. BRYANT. The number of Boston documents currently in dispute is 10.

Mr. DELAHUNT. Ten documents. What is in the nature of those documents that somehow would chill prosecutors currently serving in the Department of Justice?

Mr. BRYANT. It is the view of the department that disclosure of documents of that character as a routine matter or as a starting point——

Mr. DELAHUNT. As a routine matter?

Mr. BRYANT. In other words, the analysis is not limited just to the specific effect of a specific document. It is an analysis that relies on the rationale of various court cases including the Nixon case where the court said, "The importance of this confidentiality is too plain to require further discussion."

The point they are getting at is the importance of candor with respect to certain kinds of deliberation.

Mr. DELAHUNT. That's memorialized in writing, obviously.

Mr. BRYANT. Right. And so the concern is to ensure that considerations that go into whether or not to prosecute are completely as they should be, that they are not biased by any other consideration other than the law, the facts of the case and that advice is completely candid.

Mr. DELAHUNT. I just simply can't imagine any scenario where a prosecutor currently serving in the Department of Justice would in any way be impacted by the release of these documents to this committee. I just can't imagine. Of course, I don't know. Again, you do set up this, well, this committee has to show you why it needs the documents when they don't know what in the documents. I mean that's absurd. It is illogical.

But it's clear that there was, according to, well, Judge Wolfe, a patent, again this is right out of a decision. He is referring to reports that were the subject of hearings before Judge Wolfe in another set of cases with some of the individuals being referenced, the informants being referenced, the informants being referenced in the case involving Salvati et al.

He goes on and states, "The reports were improperly withheld by agents of the Boston FBI until it was too late to question relevant witnesses concerning them." Then he goes on and says, "These experiences were not isolated occurrences but part of a long pattern of the FBI ignoring the government's Constitutional and statutory duties to be candid with the courts."

I mean you are at counter, you are at loggerheads with both branches. Now the legislative branch as well as historically, at least in this matter, the judicial branch, and receiving, you know, criticism of a magnitude that I have never heard directed against any particular department or agency within a department since I

have served in this Congress. Because it just doesn't make sense. I makes no sense.

Mr. SHAYS. At this time I recognize the gentleman from California, Mr. Waxman, who hasn't yet had a round.

Mr. WAXMAN. Thank you very much, Mr. Chairman. In testimony and other written work, some of you have talked about the limits of executive privilege. I would like to take a moment and talk about the GAO's request for information on outside contacts with the energy task force.

The Vice President and his lawyers could have stopped GAO's request in its tracks by invoking the statutory limitation on GAO's investigative power. The Vice President could have certified that the GAO's request substantially impaired government operations.

But the Vice President didn't do that. He has couched his resistance to GAO's investigations in Constitutional terms alluding to separation of power considerations.

Now, Professor Rozell, are you familiar with the GAO's dispute with the Vice President over energy task force records?

Mr. ROZELL. Yes, I am.

Mr. WAXMAN. Under the law, do you think the Vice President is correct in withholding information from the General Accounting Office?

Mr. ROZELL. I do not. I think this is, once again, another poor use of, in this case I would say "executive privilege" even though the administration has not uttered the magic words "executive privilege." They have articulated all of the arguments that are traditionally associated with a claim of executive privilege. They are withholding, as I understand it, information regarding the names of individuals who participated on these various advisory boards rather than information that deals with exactly the kinds of advice that these individuals may have given in meetings or details of conversations and so forth.

It seems to me that is really benign information for Congress or in this case the GAO to be asking for from the administration.

Mr. WAXMAN. Let me ask Mr. Tiefer and Mr. Rosenberg if they could tell us whether they think under the law the Vice President is correct in withholding this information from GAO?

Mr. TIEFER. I think he is not correct. I do want to preface this for a moment by saying that it's perfectly possible for Members to draw a distinction between the two matters. Mr. Bryant admitted for the department in the Boston FBI matter that there has been corruption of the investigative process. It's a term of art. There's no such thing going on in the other GAO matter and Members are entitled to view the matters differently if they wish to, with perfect integrity.

Having said that, my own legal position is that the claim is weak in the GAO matter because you can't make a deliberative process claim that is strong when the process isn't between officials but is with officials and outsiders who themselves represent special interests and where what is being asked is what the context of the outsiders of the outsiders who represent special interests were. That's not part of the deliberative process.

Mr. WAXMAN. Let me ask Mr. Rosenberg. Maybe what is happening here is that the Vice President is using executive privilege

without calling it executive privilege. Suppose the Vice President would come right out and say, "This energy task force is dealing with outside lobbyists. We are subject to executive privilege." Do you think that would be a valid assertion of executive privilege?

Mr. ROSENBERG. I believe that would be stretching it if he brought that in. Let me just correct you, I am sorry, on one thing. It's the President, under the GAO statute, who could have made that determination and stopped the lawsuit. The Vice President, through his attorneys has been mouthing things that sound like executive privilege. I think if an executive privilege claim was made here that it would be very difficult to sustain because of what Professor Rozell and Professor Tiefer have pointed out.

What we are dealing with, and as I understand the current law on the reach of executive privilege, what it covers is advisors to the President who are in close proximity to the President.

Mr. WAXMAN. But not outside parties?

Mr. ROSENBERG. I don't see it covering outside parties, particularly in the situation here where all that is being asked for is who was there, when were they there and what was the subject matter.

Mr. WAXMAN. Let me ask this of Professor Rozell: I have said today that the Bush administration has shown a tendency for reflexive secrecy. I believe that's reflected in President Bush's use of executive privilege with respect to this committee's subpoena, in his order giving former Presidents greater ability to assert executive privilege after they have left office, and in the Vice President's approach to the GAO's request for energy task force records.

First of all, do you agree with what I just said?

Mr. ROZELL. Yes, I do. I think they are over-using executive privilege in a number of cases. I would add to what you talked about in your opening statement, I believe, the Presidential Records Act. The Executive order is another such case.

Mr. WAXMAN. Do you think that they are deliberately trying to expand the scope of executive privilege?

Mr. ROZELL. I believe that they are. If they can include executive privilege in a case such as a closed investigation, the one before the committee right now, and if they can use executive privilege to withhold names of individuals who advised these panels, then I think executive privilege can be used for a very broad reach of different kinds of information that Congress may want from the executive.

But that would cause a dangerous breakdown if that were allowed to stand in the traditional separation of powers system. So, I think the committee has every right to be challenging these particular claims of executive privilege. I wonder, too, if the committee should directly challenge the current circumstances with regard to the GAO and the Vice President.

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

Mr. SHAYS. Mr. Bryant, I am not going to have questions to ask you at this point, but I would like you to feel free, when I ask the three other witnesses, to jump in if you would like to jump in.

I would like our three other witnesses to tell me if you were the Justice Department the best argument you would make for withholding the Salvati documents. And then I want you to tell me why

you think even your best arguments don't hold up. What is the best argument you can make?

Mr. ROZELL. They put me on the hot seat first. It is hard for me to make an argument because I fundamentally disagree with the use of executive privilege in this case. But I have in the past argued that there are areas where executive privilege is perfectly appropriate if an administration can prove that releasing certain kinds of information in some way will cause an undue harm to the public interest.

If releasing certain types of documents would cause real irreparable harm, then there would be a legitimate case to be made. I think what needs to be done in this particular case and in others is for an administration to make a really strong case that there would be irreparable harm, rather than to just assert as a general principle prosecutorial matters are just off limits.

Mr. SHAYS. And then what breaks it down is you don't think they can make irreparable harm?

Mr. ROZELL. I don't think that they can make that case.

Mr. SHAYS. Mr. Tiefer.

Mr. TIEFER. Well——

Mr. BARR. Mr. Chairman, I have to leave soon, but could I ask one quick followup question?

Mr. SHAYS. Let me say this: You can jump in any time, or I can give you the floor because I can be here. I am just going to give you time. I won't yield. You have the floor.

Mr. BARR. Can you articulate, Mr. Bryant, some sort of irreparable harm other than the sort of vague generalities, and I don't mean that disparaging, but you are talking about things that might happen in the future and there might be a chilling. What is the irreparable harm with regard to these documentation on activities of the Department of Justice in its pursuit of justice?

Mr. BRYANT. By "these documents" you mean the Boston documents, the ones that are in dispute between——

Mr. BARR. I have another question because I had written down a quote. You mentioned earlier "documents of that character." What do you mean "documents of that character?"

Mr. BRYANT. There I am just trying to identify in general terms the nature of the 10 Boston documents that has been subjected to the claim of privilege.

Mr. BARR. What are they?

Mr. BRYANT. They are advice memos for prosecuting or declining prosecution of individuals.

Mr. BARR. OK.

Mr. BRYANT. As I understand it, and I am not in a position to comment on those documents because I lack personal knowledge and also we would want to have the conversation with the committee, none of the documents involved are specific to Salvati himself. None of those 10 documents are.

In terms of your first question, Congressman, regarding the showing of harm, we would go back to harm to a principle that itself is very important.

Mr. BARR. What principle is more important than the pursuit of justice that would be irreparably harmed?

Mr. BRYANT. I wouldn't be prepared to cite one, in fact it would be the pursuit of justice in part or one approach to ensuring that the pursuit of justice in part is done properly that compels the concern that the executive branch brings to these documents.

Mr. BARR. You are talking at best, arguendo, so pursuit of justice at some point in the future with some case that we don't even know about at this point. We are talking about a very tangible case where we know there has been injustice done and we are pursuing some effort insofar as we are able within our jurisdiction to see that justice is done if at all possible.

How would that be irreparably harmed by disclosure of these documents to the Congress?

Mr. BRYANT. I am not suggesting that the committee's pursuit of investigating this matter would be harmed.

Mr. BARR. But if our goal is the same, how would the Department of Justice be irreparably harmed?

Mr. BRYANT. Because the view is that the process itself by which the executive comes to make a determination of whether or not to prosecute or to decline prosecution would itself be weakened, would be inhibited, would be undermined because of the chilling effect on the candor of the advice and considerations that are contained in such memos.

We support the committee's investigation, Congressman. I don't mean to be perceived to be sitting here suggesting that we are concerned that the committee is investigating it. The committee should be investigating. It's appropriate that the committee be investigating it.

Mr. BARR. How can the committee do that if your best offer is to simply come in and tell us verbally somebody's impression, your impression, or somebody's impression or somebody's impression as related to you or to Mike or whoever what their impression is of these documents.

Where is the irreparable harm by sitting down and going over the documents themselves and explaining to the chairman and other members of the committee what the problem is with releasing these?

Mr. BRYANT. Again, Congressman, we are prepared to sit down——

Mr. BARR. But not with the documents on the table?

Mr. BRYANT. They might be able to be on the table but it would be the position that it would be premature to make a showing until we had a chance to hear from the committee its particularized need, again an obligation that's imposed on the committee by the D.C. Circuit Court of Appeals.

Mr. BARR. The department does not believe that the evidence that has already been uncovered is not particular enough?

Mr. BRYANT. It is our view that the Boston case, where corruption has been established, even by the executive, is clearly a case that invites every best effort at accommodation, which would compel the executive to seriously hear out the committee's interest in those documents and then to pursue an accommodation that meets the interests.

Mr. BARR. The department already knows that the committee is seriously interested in those documents.

Mr. BRYANT. But there has been no discussion, Congressman, between the committee and the department about each particular document and the committee's interest in each particular document.

Mr. BARR. You see, then we are in that catch–22.

Mr. BRYANT. We are prepared, though, to describe the document. We are prepared to present facts contained in the documents. We are prepared to do a very fulsome explanation of each document so that the discussion can then ensue, where we would hear back from the committee its particular needs.

Mr. BARR. You still maintain that there's something sacrosanct, that there would be irreparable harm to the government if those documents were physically shown to this committee.

Mr. BRYANT. I don't mean to suggest that there would be irreparable harm immediately associated with the disclosure of those documents. Ours is a position based on the principle of the effect of a practice of disclosure of such documents.

Mr. BARR. Is there some sort of vague potential irreparable harm? That is not irreparable harm in any legal sense. That's why I think you would lose any argument in court. A court is not going to be swayed, I don't think.

I haven't seen any cases that would lead me to believe that a court would be swayed by defining irreparable harm in terms of some vague future potential possible harm. I mean I have never seen a court that looks at irreparable harm in a legal context that way.

Mr. BRYANT. I think the courts have been prepared to suggest that the harm is more immediate and more palpable than the kind of vague, distant prospect of harm, that such harm is present with respect to a practice of disclosing these kinds of deliberative work product with respect to a practice of disclosing or harm, that such harm is present with respect to a practice of disclosing these kinds of deliberative work product regarding whether or not to prosecute individuals.

Mr. BARR. In the distant past?

Mr. BRYANT. Again, the analysis would go to the character of the document even if that document were——

Mr. BARR. Is the department prepared to go to court on this? Does the department believe that its position is that strong that it's prepared to go to court?

Mr. BRYANT. Congressman, I am not prepared, sitting here today, to characterize how the department might conduct itself in the future. I don't know the answer to that question.

Mr. BARR. But at this point the department still is not willing to disclose the documents and engage in a good faith discussion with the documents on the table?

Mr. BRYANT. It is not that we are necessarily unwilling ever to do that. We are simply requesting a meeting where we can have this discussion, where we can then evaluate options for accommodation. I don't want to rule out any specific options that might be part of such an accommodation.

Mr. BARR. You are still insisting on having your cake and eating it, too?

Mr. BRYANT. Just want to meet to talk about the documents.

Mr. BARR. That, I think, is inconsistent with the line of cases that we have looked at and the underpinnings of the Constitutional principles here. I don't think that our Framers intended for the executive branch to have that much control over the entire process.

Mr. BRYANT. Respectfully, Congressman, I have a different view based on the cases that I have looked at, including the Senate Select Committee case, the D.C. Circuit case, on point, putting the obligation on the requesting committee to explain its demonstrable, critical need for the requested documents.

The department then is in a position to respond to that statement of need and the accommodation process ensues from there.

Mr. BARR. I would simply urge you, as other Members have, to reconsider and sit down with the committee, with the documents and articulate from your standpoint what harm there would be with these particular documents and let the committee look at the documents in a meeting. It wouldn't have to be an open meeting initially.

I would strongly urge you to do that. I really don't think that is a strong case for you all.

Mr. BRYANT. Thank you.

Mr. SHAYS. I am going to first just ask if any of the three other witnesses just want to comment on any of the line of questioning that was just asked. Do any of you want to jump in on anything? I can go to my questions, but I just want to give you the opportunity.

Mr. ROZELL. I have a quick comment that once again, I hate to beat this Espy case to death, but the Espy case is the latest statement on executive privilege and how it might be overcome. The standard for overcoming it is a substantial showing must be made that, "the subpoenaed materials likely contain important evidence and that the evidence is not available with due diligence elsewhere."

The particularized needs is as you have been saying, is a catch–22.

Mr. SHAYS. So the bottom line is the standard is pretty low. In other words, we don't have much of a hurdle to get that information under that——

Mr. ROZELL. Well, assuming it's just a deliberative process claim, a likelihood of corruption takes away the common law privilege of deliberative process, which, I think, is the only privilege that applies here.

If it's the Constitutional Presidential communications privilege, then the threshold is higher. But still, the way it can be overcome and the way it was overcome in the Espy case where 84 documents were held by the White House, was that they likely contained important evidence.

Mr. SHAYS. Did the gentleman have any followup? Professor Rozell had answered the question I asked. In other words, give me your best argument for how the administration could proceed if they did want to withhold documents and then where the weakness would be even in your best argument.

Mr. TIEFER. Thank you. I hope I don't do too good a job. I think their best argument is a two-part argument. In the President's claim on December 12th——

Mr. SHAYS. Mr. Bryant, you are not allowed to take notes on this, you are not allowed to take notes on his best argument. That is a joke.

Mr. TIEFER. Thank you, Mr. Chairman. Is the particular statement "I'm concerned that congressional access to prosecutorial decisionmaking documents of this kind threatens to politicize the criminal justice process."

I combine that with the statement that Mr. Bryant made that what they are afraid of is a practice of Congress looking at such documents and they are concerned that there would be a politicization of the prosecution decisionmaking process if there's a practice of showing such documents to Congress.

Mr. SHAYS. What is the argument against it?

Mr. TIEFER. No, I am going to add to that.

Mr. SHAYS. OK.

Mr. TIEFER. Furthermore, Mr. Bryant concedes that there is in this instance a corruption of the investigative process in Boston. I don't know how carefully that term has been chosen. But there's a distinction in this matter between the investigative side, that is the FBI side, and the side represented by, I am going to call it the criminal division, although it's the U.S. Attorney's Office, the attorney side in the Department of Justice.

The argument could be that if the abuses here are primarily FBI abuses in connection with the informants, then there's no need to turn over copies or to show copies of documents on the attorney's side, the prosecutorial side.

So, you have the risk of politicization and unnecessary risk of politicization. I believe that's the best argument I would make for their side.

Mr. SHAYS. And so what is the weakness with it?

Mr. TIEFER. Well, first of all the risk of politicization is radically undermined in a situation where one is dealing with old prosecutorial decisions, 22 years on average, in which there isn't a political side at all. There are issues in prosecution that are politically sensitive, like in Billy Carter, whether to make a deal with the President's brother or in white collar crime whether to charge a corporation or the officials.

I don't believe there's a possibility of making a case-by-case point that there was a partisan issue about what to do about organized crime 22 years ago. That's the weakest possible case for a threat of politicization.

Furthermore, I think when you get to this, when the department makes the case that whatever the abuses were on the FBI side and that the attorney side was in ignorance of what was going on, if you have not seen the documents, you just will not know, no matter how they are orally characterized.

If you have not seen the documents you will not know what to make when they tell you they are looking at them, they are characterizing to you and they don't show one shred of awareness or involvement in the worst abuses on the attorney side. You won't know, no matter how it's characterized. Until you see the documents an assertion of innocence cannot be credited.

Mr. SHAYS. Let me just pursue this one point because it relates to another question I was going to specifically ask you and then I am going to come to you, Mr. Rosenberg.

I want to know basically, you have been involved in congressional investigations, correct?

Mr. TIEFER. For 15 years.

Mr. SHAYS. As a general rule, are there downsides to accepting a briefing instead of reviewing documents?

Mr. TIEFER. There are grave downsides. I almost broke in before to say that I applaud the line that I hear the chairman and Mr. Barr draw about the dangers of accepting, of not seeing the documents. All the years that Members would come back and I would give, for example, both of the executive privilege claims at the beginning of the Reagan administration were resolved by the Members seeing the documents on which the deliberative process had been claimed.

The 1981 mineral leasing claim, the 1982 Superfund claim, the Members got to see the documents. If Members come back and say, "We have seen the documents, now we can credit or not. We have seen the documents. We can credit the assertions of innocence about the content of the documents that has been made."

Then the Members can say that with a clear conscience. If they have not seen the documents, they can't do that.

Mr. SHAYS. Potentially, they could be told things that were not true in a briefing. Your briefer could leave out key details; correct? Your briefer might not fully understand the subject matter. I mean those would be some of the problems.

Mr. TIEFER. Especially the latter two. I don't impugn the truthfulness of briefings by the department. I do say that the issue of omissions is one and that the issue of understanding the context is another. The second and third points you made are crucial.

Mr. SHAYS. OK. So, if you were counsel to this committee, you would not settle for a briefing.

Mr. TIEFER. I would draw the exact line I heard the chairman and Mr. Barr draw.

Mr. SHAYS. Now, back to you, Mr. Rosenberg. I'm going to get your attention here. I want to know—I don't want a long answer, so I am going to make it a little more difficult, your best argument for the administration's side and if you think your best argument has an argument against it.

Mr. ROSENBERG. Being third after two strong arguments——

Mr. SHAYS. If you agree with the arguments, you can——

Mr. ROSENBERG. Well, I imagine an argument could be made that——

Mr. SHAYS. Were the best ones already made?

Mr. ROSENBERG. Yes.

Mr. SHAYS. OK, so we don't need to go there.

Mr. ROSENBERG. Well, you could make an argument that why does this committee need the documents? You know because of the court case that something went terribly wrong.

Mr. SHAYS. Let me just say something, I am not interested in your third best argument. I am not trying to think of all the ways. I am just trying to think of all the ways. I am just trying to think

of what your best argument would be and you have already heard it.

Mr. ROSENBERG. Yes.

Mr. SHAYS. OK. Let me then turn to Mr. Delahunt. Mr. Delahunt, it is very nice that you have been so patient because you do know so much about this case. I am going to give you as much time basically as you need.

Mr. DELAHUNT. I will take very little. I think everything that's germane has been said. Mr. Chairman and through you to Mr. Wilson, this might present an opportunity for this institution, for the U.S. Congress, to proceed, to go to court, to litigate this issue and to get a clarification once and for all in terms of this particular issue.

Probably, from what I am listening to, maybe it needs those bright lines, at least that I see, need to be reinforced. I think it was Mr. Rosenberg who said, and correctly so, that to ask the committee to demonstrate a particularized need is illogical. I think the committee through its hearings and through the testimony that we received has established that there is clearly a likelihood of important evidence.

I think it's really that simple and to base the argument on some abstract sense of chilling impact, I think Steve LaTourette got it when he said, "Come on, we really shouldn't be here today." We shouldn't be here today, but I think maybe from an institutional perspective it's an opportunity for Congress once and for all to clearly define the use of executive privilege as it relates to a deliberative process.

Professor Rozell, do you have a comment?

Mr. ROZELL. Well, just briefly. I think Mr. Barr alluded to this before. It shows a profound disrespect for Congress and for its Members to make the argument that they simply can't be trusted to see these documents.

Unless they can make the case that Burton is an untrustworthy guy or the Members of this committee are untrustworthy, I just don't think they have a good argument for denying access to the particular documents themselves. I think that anybody in this body would operate in good will and good faith and looking at the materials and if they determine that, yes, there's a legitimate argument here for withholding information, they wouldn't do something nefarious like release it publicly.

So it just strikes me that there's no argument there, that the material should be released to the committee and the individuals on this committee should be trusted to look at it and to behave responsibly.

Mr. DELAHUNT. Yes, I would hope again to the chairman to Mr. Wilson that the minority would be part of those discussions and those negotiations. I think what we are seeing here is a rather unique bipartisan approach to this. I think it's important that the chair consider sitting down at the table with the documents on the table and having these discussions. Because it's the institution of Congress that I would suggest is being disrespected here.

Mr. SHAYS. I thank my colleague. The counsel isn't eager to ask some questions. He wants me to ask them. Given my prerogative, I am going to have him ask them. He is going to ask just a few.

I would like to ask each of you, if we gave you some written questions, would you all be willing to respond to some written questions.

For the record, nodding of heads from everyone. That would be helpful. We don't have a lot longer to go. I am going to say, Mr. Bryant, I think everyone on this committee understands that you are doing your job for the administration. You have been asked, almost, frankly, in a bit of an unusual circumstances, for liaison to make these arguments. I think it's a slow ratcheting up of the cause on this side of the table here. So, however, painful it may have been for you, you did your very best job. I think you had, frankly, a tough argument to make, certainly with Members of Congress. So, I appreciate your good nature and your professionalism and your dedication to this administration.

I hope that when you get back to the office you are able to say to them, "You guys owe me big."

Mr. Wilson, you have the floor.

Mr. WILSON. It's very true, I would like someone else to ask questions, but very quickly, Mr. Bryant, when President Reagan permitted deliberative documents to be provided to Congress in the General Dynamics case, what was the specific harm that resulted from that decision?

Mr. BRYANT. What is the question, what was the specific harm?

Mr. WILSON. Yes, what happened? What was bad about that? Why did President Reagan make a mistake?

Mr. BRYANT. I don't know that I'm in a position, counsel, to delineate the specific harm that flowed from that. I would return to the point, and I won't belabor it because we have already discussed it, but I would return to the point about the principle, that's the backstop for an evaluation of each instance. The principle is worth being strengthened, not weakened. The principle being the imperative of candor with respect to advice memos.

Mr. WILSON. And we are very sympathetic to that principle, but history does teach lessons. If you have canvassed the relevant precedent and you are not able to point to specific harms, then should that not communicate something to you?

So, I will ask the other witnesses the same question. Professor Rozell, are you aware of any specific harm that resulted from President Reagan's allowing deliberative documents to be provided to Congress?

Mr. ROZELL. I am not aware of any specific harm that came as a result of that. In fact, I cannot name a single case where an administration has turned over to Congress information and thereby caused some irreparable harm to the national interest in cases such as this.

Mr. WILSON. You have taken away my next question. Can you point to any good that resulted from providing documents to Congress in the General Dynamic case?

Mr. ROZELL. Sure, if there was an opportunity to reveal that there was real wrongdoing that took place in the highest reaches of government and to disclose that and to enhance the system of accountability that occurs in our democracy, they talk about the potential for some kind of irreparable harm being created by not

being able to withhold information any time that they want to when it involves prosecutorial materials.

I think that there's an irreparable harm created by establishing a principle that individuals in the highest reaches of government don't have to be held accountable for their behavior or they know that they might not be able to be held accountable for the behavior, because there's this blanket right to complete and absolute secrecy where no one can reach in and find out what has taken place, even in cases where there are real allegations and real serious evidence of actual wrongdoing.

Mr. WILSON. Professor Tiefer, I will ask you the same question. Are you aware of a specific harm that resulted from President Reagan's decision to provide Congress with General Dynamics documents?

Mr. TIEFER. I am not. But I do want to mention the comment on the General Dynamics case in particular that the Justice Department made in its February 1, 2002 letter to the committee, which said about that matter, "I do not know whether the department," meaning the 1984 Justice Department, "I do not know whether the department considered its implications as we have in the instant matter."

Now, I will betray how long I have been around. I know what the department's views were and what its processes were in 1984 because I was dealing with them. At that time the Assistant Attorney General for the Office of Legal Counsel was Ted Olsen, a very strong believer in executive privilege, the author of the most thorough opinions on the subject in the history of the department.

It's impossible to imagine that the department failed to consider the implications in 1984, at least as thoroughly as the department is now, period.

Mr. WILSON. Mr. Rosenberg, are you aware of any harm that resulted from the General Dynamics documents being provided to Congress?

Mr. ROSENBERG. None.

Mr. WILSON. Now, let me just jump in and ask the question that Mr. Rozell answered. With all of the examples that are on the table before the committee now, when you consider all of them, are you aware of harm that resulted to the country from Congress receiving information?

Professor Tiefer.

Mr. TIEFER. No.

Mr. WILSON. Mr. Rosenberg.

Mr. ROSENBERG. None. I only see positive things from both sides, from the Congress' point of view and from the Executive's. From Congress' point of view it's a vindication of its role to disclose, and to protect individual liberties as in some of the cases that Professor Tiefer has been talking about.

There were two Attorneys General who had to resign and two Attorneys General who were convicted and went to jail. In retrospect, sorry for them, but the ability——

Mr. WILSON. That raises an interesting possibility. Would the result of what we know as the Teapot Dome scandal have been different if the current policy that it appears the administration is trying to implement, been in place at that time?

Mr. Bryant.

Mr. BRYANT. I don't know the answer to the hypothetical. It is an interesting question. I don't know that the answer can be dispositively stated.

Mr. WILSON. Professor Rozell.

Mr. ROZELL. I think clearly there would have been a different outcome because of the lack of ability to fully explore that matter. That's right.

Mr. WILSON. Professor Tiefer.

Mr. TIEFER. Well, I am going to answer your question to point out something that directly pertains to the Boston-FBI matter. One of the examples I mentioned of successful oversight by the Congress was mentioned in my written testimony, was the Church Committee, 1975 to 1976, which made a full investigation of the FBI domestic intelligence abuses.

Out of that work came what are known as the Levy guidelines, undercover activity guidelines of the Department of Justice which were subsequently revised twice, which governed the FBI undercover activity. There would be no benchmark in which to hold the FBI in Boston or the FBI elsewhere to account if there had not been a congressional investigation and the ensuring pressure to have limits.

So, I can think of no harm that resulted from that, but a great deal of good. I can only hope that this committee's investigation of the Boston FBI would have a similar salutary effect.

Mr. WILSON. I think we have less than a minute, so Mr. Rosenberg, if you could be brief.

Mr. ROSENBERG. I think the result would have been different. I think that the ability of Congress in some instances is the only authority able to get documents from the Justice Department.

Mr. WILSON. If I could request a yes or no answer to the last question, might the result of Watergate have been different if this precedent that we now see being placed before us was in place then? Yes or no?

Mr. ROSENBERG. Absolutely, yes.

Mr. WILSON. Professor Tiefer.

Mr. TIEFER. I can't conceive of what would have happened. It would have been so bad if the Justice Department had been allowed to keep the lid on.

Mr. WILSON. Professor Rozell.

Mr. ROZELL. I agree with my colleagues.

Mr. SHAYS. Let me do this, is there any question that we should have asked you that you wanted to answer in 15 seconds?

Mr. Bryant, do you want to have the last word here?

Mr. BRYANT. Just that the only question I would have hoped to have heard is: Would we be willing to come up this evening and meet to discuss each particular document. And we are prepared to do that.

Mr. SHAYS. Let me leave that on the record and let me just say that I have heard the word "chilling effect." I don't know if it's applicable, but I want to make this point: I tell my staff that everything they say to me may become public, that everything we write may become public and that therefore I want them to make that assumption.

I don't think that has a chilling effect. I think what it does is it makes sure that we are not losing our foundation. I think the knowledge that something is public basically makes sure that I am getting honest answers to honest questions and that I am asking honest questions and that we are not playing games and so on and so on.

I just tell you that when I hear the words "chilling effect" I am concerned that the withholding of documents has a chilling effect. I am concerned with the statement that somehow the public or someone else sees these documents, that somehow what was said would be different. I guess I could carry that analogy too far, but that is kind of how I come down on it.

I thank you all very much. I think all of you were very gracious, very patient with the committee, willing to spend so much time. I thank all of you. You were very helpful to the work of the committee. I thank each and every one of you.

This hearing is closed.

[Whereupon, at 2:30 p.m., the committee was adjourned, to reconvene at the call of the Chair.]