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

**Executive Privilege Overclaiming**

**at the Justice Department**

by Professor Charles Tiefer

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

This testimony can be summarized as a survey showing that in the years **from the 1920s through 1992, Congressional oversight committees were, indeed, provided with access to Justice Department deliberative documents - contrary to the Department's current executive privilege claim.** The Department's contention that such access did not precede, or was a peculiar feature of, the Clinton Administration that can now, therefore, stop, is without

grounding in the facts. I say this based both on historical research that I, and the Congressional Research Service, conducted and published in Congressional hearings in 1990-1992 and have now supplemented, and my own personal experience with Congressional oversight of the Justice Department from 1979 to 1995.

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

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<sup>1</sup> 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" Inlaw 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.

<sup>2</sup> 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).

<sup>3</sup> 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 Chic. Roundtable* 143-204 (1998); Charles Tiefer, *Congressional Oversight of the*

before Congressional committees on,<sup>4</sup> 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.

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Clinton Administration, and Congressional Procedure, 50 Admin. L. Rev. 199 (1998); Charles Tiefer, *The Fight for 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).

<sup>4</sup> Charles Tiefer, *Testimony, Rights of Involuntary Witnesses Not to be Broadcast*, in *Hearings Before the House Committee on Rules*, 105<sup>th</sup> Cong., 1<sup>st</sup> 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*, 104<sup>th</sup> 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*, 104<sup>th</sup> Cong., 2d Sess. (May 15, 1996).

To summarize briefly the background, the Committee's oversight of the Justice Department has focused on the matter of the Boston FBI, and, in particular, to obtaining several subpoenaed Justice Department memoranda, averaging 22 years old, that are the primary evidence from the regular channels of the Justice Department about the role that knowledge (or ignorance) about such abuse played in its decisions and activities.<sup>5</sup> 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.

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

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.<sup>6</sup> The Justice Department witnesses at the December 13, 2001 hearing did not effectively dispute that the Clinton Administration did provide access to deliberative process memoranda in closed cases during 1993-2000.<sup>7</sup> 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

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<sup>6</sup> 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*).

<sup>7</sup> 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.

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,<sup>8</sup> 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.

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<sup>8</sup> 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)

As in the section entitled "Defying Burton" in this week's *Legal Times* article on this issue,<sup>9</sup> 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")<sup>10</sup> 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.

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<sup>9</sup> Section entitled "Defying Burton," in Vanessa Blum, *Why Bush Won* "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.

<sup>10</sup> 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*, 101<sup>st</sup> Cong., 2d Sess. 83 (1990) ("Attorney General's Unsuccessful Withholding").

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

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<sup>11</sup> 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).



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<sup>12</sup> - there are other reasons as well. And, there is no better such reason than the subject of today's hearing: an allegation that the Department has let the (Boston) FBI abuse its potent tools, such as its management of informants, to invade civil liberties. There is a powerful tradition in Congressional oversight to dig out the records needed to investigate the apparent tolerance of abuse of FBI powers. Yet, when this Committee reminded the current Justice Department that it had overseen the alleged abuse of access to FBI files about public officials in the "Filegate" scandal, apparently the answer from the current Justice Department was that such oversight only occurred after 1993, and not before. Congressional investigations of abuses in relation to FBI management of

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<sup>12</sup> 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 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.

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 pastor respect the new sheriff in town.<sup>13</sup> When it is seen how often this argument has been made without success, it becomes apparent that the argument to ignore the pastor 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 sheriffthan every previous administration that tried out such a theme, but, simply, because the Administration wants it.

I describe how the ignore the pastor new sheriff in townnotion historically was tried unsuccessfully by the Justice Department. Having been personally involved in proper

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<sup>13</sup> A new administration comes to office as a change of party in power, and urges Congress to ignore the record of the recent past in which the predecessor Justice Department was subject to Congressional oversight. It argues that abuses such as occurred in the past will not recur on its watch. Also, it urges Congress to forget the precedent of its predecessor 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.

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 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<sup>14</sup>

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<sup>14</sup> 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

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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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.<sup>15</sup> From 1915 to 1941, the OLC opinion mentions only one single example - one obscure matter about a merger case.<sup>16</sup> 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.<sup>17</sup> For three days of Senate hearings, Palmer, accompanied by his Special Assistant J. Edgar Hoover, was grilled. Palmer provided the Congressional investigators with various Department memoranda, including confidential instructions to the Bureau of Investigation, Bureau of Investigation reports, and a "memorandum of comments and analysis" about the key case that had been in court. The OLC opinion conspicuously omits mention of the Palmer raids. A fair conclusion is that what had occurred so discredited the Bureau of Investigation that it spent ensuing decades rebuilding its shattered stature - - not asserting privilege.

The 1983 OLC opinion conspicuously omits to mention Teapot Dome, too. Coupled with its mentioning only one matter from the 1920s through 1941, the obvious explanation is that the clarity and force of the Supreme Court's Teapot Dome opinions disabled any effort to shield the

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<sup>15</sup> 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.

<sup>16</sup> OLC opinion, *supra*, at 788.

<sup>17</sup> 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.

Justice Department from proper oversight for the ensuing decades, much as the Supreme Court's decision in Watergate did subsequently.<sup>18</sup>

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<sup>18</sup> After all, the Supreme Court could not have said any more plainly that Congress had the right to evidence about decisions not to prosecute. 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).

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

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<sup>19</sup> 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.

<sup>20</sup> *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).

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.<sup>21</sup> 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.<sup>22</sup> 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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<sup>21</sup> Arthur M. Schlesinger, Jr., *The Imperial Presidency* 159 (1974) ("The Eisenhower directive ushered in the greatest orgy of executive denial in American history").

<sup>22</sup> "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 Celler. 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.<sup>23</sup> 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.<sup>24</sup>

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<sup>23</sup> 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.

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

The 1960s: In any event, when President Eisenhower was succeeded by Presidents Kennedy and Johnson, the brief late-1950s flurry of invocations of executive privilege ended. The 1983 OLC opinion does not cite a single example of withholding from Congress by the Justice Department during those eight years. 1983 OLC Opinion, 800-801 (skipping from Eisenhower to Nixon administrations).<sup>25</sup> 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□).<sup>26</sup>

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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<sup>25</sup> 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.

<sup>26</sup> 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.<sup>27</sup>

## II. The Period from Watergate to the 1983 Opinion

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<sup>27</sup> 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.

Of course, there was a historically famous shift during the Nixon Administration, which made new intense efforts to withhold documents.<sup>28</sup> 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.<sup>29</sup> Minor examples cited in the other OLC opinion actually confirm what is discussed here.<sup>30</sup>

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,

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<sup>28</sup> 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).

<sup>29</sup> 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.

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

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.<sup>31</sup> 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.<sup>32</sup> 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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<sup>31</sup> 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.

<sup>32</sup> 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,<sup>33</sup> 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.<sup>34</sup> 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).<sup>35</sup> That FBI operation,

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<sup>33</sup> 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.

<sup>34</sup> 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).

<sup>35</sup> 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<sup>36</sup> 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 <sup>to</sup> draft guidelines for the FBI that would cover the bureau's most sensitive investigations--pursuing organized crime groups, conducting undercover operations<sup>37</sup> including what this Committee is overseeing in Boston, the FBI's pursuit of organized crime groups by use of informants <sup>and</sup> carrying out domestic security and counterintelligence investigations.<sup>38</sup> *Id.* at 311. <sup>These</sup> rules became known as the Levi Guidelines and they have shaped the operations of the FBI to this day.<sup>39</sup> *Id.*<sup>36</sup> 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.<sup>37</sup> 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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<sup>36</sup> They were updated in 1983 by Attorney General William French Smith (the <sup>Smith</sup> guidelines<sup>40</sup>) 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.

<sup>37</sup> 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.<sup>38</sup>

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<sup>38</sup> 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.



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

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<sup>39</sup> 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).

<sup>40</sup> 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

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period of 1981-82 when President Reagan did assert executive privilege formally twice, and, the significant that at both times in 1981-82, the House Committees went on to obtain access anyway.

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 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.<sup>41</sup> Just as many cannot understand why the current Administration has drawn the executive privilege line on the Boston FBI matter, which seems so

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<sup>41</sup> Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27 (1981).

inappropriate a subject to claim privilege, many could not understand in 1981 why the line was drawn as to that obscure mineral lease matter. However, I recall well the "new sheriff in town" theme being sounded - that the new (Reagan) Administration would not be giving in on deliberative documents the way its (Carter) predecessor had, and would show this by staking out its privilege claim early by a formal Presidential claim. It has been tried before. It lacked merit and it failed. It is being tried again.

I personally recall the 1981 day that the House Committee on Energy and Commerce held a hearing about the history of executive privilege, just like today's hearing, with the primary testimony coming to Chairman Dingell from the leading historian of executive privilege, Raoul Berger; on another day, it received testimony from the famed oversight chair, Rep. John Moss; and, it released a strong opinion from the first modern General Counsel of the House, Stan Brand.<sup>42</sup> 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."<sup>43</sup> 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

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

<sup>43</sup> Contempt of Congress: Report of House Comm. On Energy and Commerce, H.R. Rept.

at 780-81. Once again, it is quite hard to read even the Justice Department's own OLC Opinion without noticing the providing of access to deliberative documents in closed cases. This was one of the only two instances in eight years, both failures, in which President Reagan formally claimed executive privilege.

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

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No. 97-898 (1982), at page III (the chairman's introductory letter of transmittal).

<sup>44</sup> *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.

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.<sup>45</sup>

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

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<sup>45</sup> 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

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.

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Cong., 1st Sess. (1985).

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.<sup>46</sup>

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

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<sup>46</sup> 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).

<sup>47</sup> *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.



1985-86: The Criminal Division was investigated by a House Judiciary Committee subcommittee, regarding its decision to accept a corporate plea, without individual charges, from E.F. Hutton (which was caught in an extraordinary pattern of 2000 instances of check-kiting fraud). Initially, the Criminal Division resisted questioning of its line attorneys and the providing of their deliberative documents about its declination of charges against the corporate officials. The Criminal Division based its position on an interpretation of Rule 6(e), so it filed a case seeking a court order to block the oversight. I litigated the case and won.<sup>48</sup> 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.<sup>49</sup>

1987: House and Senate special committees investigated the Iran-contra scandal. Of particular interest was the investigation of the so-called "fact-finding inquiry" by Attorney General Meese along with three Justice Department aides. No claim of executive privilege could be made in the climate of the times; all the Justice Department attorneys involved were questioned in depth; all their documents were examined, whether deliberative or otherwise. After all, the case ultimately proved in the Iran-contra hearings and in court against the White House national security staff was of how they had obstructed both the House Intelligence Committee, and the FBI, by shredding documents in November 1986 while Justice Department

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<sup>48</sup> In re Harrisburg Grand Jury, 638 F. Supp. 43 (M.D. Pa. 1986).

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

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].<sup>50</sup>

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<sup>50</sup> 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.

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.<sup>51</sup> It is surprising, hence, that the Department would withhold the documents needed for the (Boston) FBI inquiry now.

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

1989: The House Intelligence Committee similarly investigated the FBI's CISPES matter, and was not denied the documents needed.<sup>53</sup>

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<sup>51</sup> 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).

<sup>52</sup> 1987 Congressional Quarterly Almanac 365; Ruth Marcus, Impasse Over Documents Ends, Wash. Post, March 25, 1988, at A23.

<sup>53</sup> Report of the House Permanent Select Comm. on Intelligence, 100th Cong., 2d Sess. (1988).

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.<sup>54</sup>

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<sup>54</sup> 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).

1989-91: A House Judiciary subcommittee dealt with Attorney General Thornburgh's refusal to provide a then-secret Justice Department opinion about kidnaping suspects overseas for trial in the United States. That opinion was written simultaneously with a general memorandum, "Congressional Requests for Confidential Executive Branch Information," referenced in the Justice Department letter of 2/1/2002.<sup>55</sup> 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 kidnaping opinion.<sup>56</sup> 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

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<sup>55</sup> The Barr kidnaping opinion is dated June 21, the 1989 Barr opinion on withholding from Congress is dated June 19, and they were published together later, in 13 Op. O.L.C. 185, 195 (1989).

<sup>56</sup> 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 kidnaping 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

INSLAW controversy and the legality of seizing suspects of U.S. crimes in foreign countries.<sup>57</sup>

1992: A House Science subcommittee investigated the plea bargain settlement of the Department<sup>3</sup> case regarding the Rocky Flats facility. This is an instance referenced in the Justice Department letter of 2/1/2002.<sup>58</sup> 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 . . . .<sup>59</sup>

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somehow peculiar.

<sup>57</sup> Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & Pol. 719, 742 (1993). The INSLAW documents were slow in coming, whereupon the [C]ommittee Chairman then announced that contempt of Congress proceedings against the Justice Department were being considered, and several hundred documents were soon produced . . . .<sup>59</sup> *Id.* (footnotes omitted).

<sup>58</sup> *1920-1992 Congressional DOJ Oversight* at 17.

<sup>59</sup> 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 [P]resident 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.<sup>59</sup> Joel Bush, *supra*, 9 J.L. & Pol. at 743.

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.<sup>60</sup>

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

This is only a partial list,<sup>61</sup> with few of the examples of Senate oversight, meant to draw primarily on my own personal experience. Taking the list as a whole, it establishes several points. First, in the years after the famous investigations such as Watergate and Iran-contra, it is just not the case that oversight ceased or the Justice Department could withhold documents or testimony about its deliberations. After President Reagan's initial experience with unsuccessful Presidential executive privilege claims in 1981 and 1982, he simply refrained from making formal claims in 1983-88, and Presidential claims continued to be rare in the Bush Administration of 1989-93.<sup>62</sup> 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.

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

<sup>62</sup> 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.



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

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

#### Conclusion

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

<b>YEAR</b>	<b>INVESTIGATION of DOJ and FBI</b>	<b>CONGRESSIONAL ACCESS OBTAINED</b>
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[ ] 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 [ ] 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 [ ] 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 to Attorney 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	Prosecutorial memoranda

	Crimes section	
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