House Calendar No. 252

105th Congress, 2d Session – – – – – – – – – – – House Report 105–728

CONTEMPT OF CONGRESS

REPORT

BY THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

together with

ADDITIONAL VIEWS, MINORITY VIEWS

AND

ADDITIONAL MINORITY VIEWS

ON THE

REFUSAL OF ATTORNEY GENERAL JANET RENO TO PRODUCE DOCUMENTS SUBPOENAED BY THE GOVERNMENT REFORM AND OVERSIGHT COMMITTEE

SEPTEMBER 17, 1998.—Referred to the House Calendar and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, September 17, 1998.

Hon. NEWT GINGRICH,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: The Committee on Government Reform and Oversight has been conducting an investigation into campaign fundraising abuses since January 1997. As part of its investigation, the Committee has been conducting oversight of the Department of Justice investigation of the campaign finance scandal. Since the beginning of the Committee's investigation, I have had severe misgivings regarding the ability of the Attorney General to conduct an independent and thorough investigation of allegations involving her direct superior, the President of the United States, and his close advisors.

My misgivings have been confirmed throughout the Committee's investigation. The Committee has investigated allegations that the Justice Department failed adequately to investigate and prosecute a number of cases involving major Democratic National Committee fundraisers and donors. The Committee has learned that the two top advisors to the Attorney General on these issues—FBI Director Louis Freeh, and the Attorney General's hand-picked chief prosecutor, Charles La Bella—came to similar conclusions, and recommended that the Attorney General appoint an independent counsel to investigate the campaign finance scandal.

In July 1998, the Committee subpoenaed two memoranda prepared by the FBI Director, Louis Freeh, and the lead attorney for the Justice Department Campaign Finance Task Force, Charles La Bella. The memoranda reportedly contain the detailed legal reasoning of Director Freeh and Mr. La Bella, demonstrating that the Attorney General is required by law to appoint an Independent Counsel. The Committee has a need to review these documents as part of its oversight of the Justice Department's campaign finance investigation. It is of fundamental importance to the Committee to learn whether the Attorney General is following the law as it has been drafted by Congress. The Attorney General's top two advisors on these matters have apparently concluded that she is not.

Therefore, I issued a subpoena for these two memoranda. However, the Attorney General has failed to comply with that subpoena. She has not provided any legal justification for failing to comply with the subpoena. The Attorney General has ignored the Justice Department's own internal guidelines for complying with congressional subpoenas, and she has repeatedly made misleading

statements regarding the nature of the Committee's subpoena. Therefore, the Committee voted to approve the attached report. I am now transmitting this report and the resolution contained within it, and recommend it to the House of Representatives for favorable action.

DAN BURTON,
Chairman.

House Calendar No. 252

105TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 105–728

CONTEMPT OF CONGRESS

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Mr. BURTON, from the Committee on Government Reform and Oversight, submitted the following

REPORT

INTRODUCTION

On August 6, 1998, the Committee on Government Reform and Oversight, by a vote of 24 to 19, adopted the following report, including the following resolution, recommending to the House of Representatives that Attorney General Janet Reno be cited for contempt of Congress:

> *Resolved,* That pursuant to sections 102 and 104 of the Revised Statutes of the United States (2 U.S.C. §§ 192 and 194), the Speaker of the House of Representatives shall certify the report of the Committee on Government Reform and Oversight, detailing the failure of Janet Reno, as Attorney General of the United States, to produce papers to the Committee on Government Reform and Oversight, to the United States Attorney for the District of Columbia, to the end that Janet Reno, Attorney General of the United States, be proceeded against in the manner and form provided by law.

The Committee reluctantly took this position after the Attorney General refused to comply with its subpoena for two memoranda prepared by FBI Director Louis J. Freeh and Campaign Finance Task Force Chief Charles G. La Bella. These memoranda represent the factual and legal reasoning of the two highest-ranking lawyers working on the campaign finance scandal. Both have recommended that the Attorney General appoint an independent counsel. As part of its investigation into the campaign finance scandal, the Government Reform and Oversight Committee is conducting oversight of

the Department of Justice's handling of its investigation. It has been apparent from an early point that the Independent Counsel Act requires the Attorney General to appoint an independent counsel. It also has been obvious to observers across a broad ideological spectrum, including former President Jimmy Carter, Senator Patrick Moynihan, and House and Senate Judiciary Chairmen Henry Hyde and Orrin Hatch, that the Department cannot credibly continue to investigate the campaign finance scandal.

In an effort to obtain information which is vital in reviewing the Attorney General's failure to appoint an independent counsel, the Committee issued a subpoena on July 24, 1998, to the Attorney General to obtain the memoranda written by FBI Director Freeh and Task Force Supervising Attorney La Bella. On July 28, 1998, the Attorney General informed Chairman Burton that she would not comply with the Committee's subpoena. Although the Committee has read accounts of the memoranda in the press, Congress must be able to evaluate the analyses of the campaign finance investigation for itself.

The Committee is reviewing why the Attorney General has failed to follow the law, as well as the recommendations of her chief investigator and lead attorney in the campaign finance investigation. The Attorney General inexplicably has failed to follow the advice of the FBI Director and the Task Force Supervising Attorney, who advised the Attorney General that an independent counsel is warranted under both the mandatory and discretionary provisions of the statute. The press has reported that Mr. La Bella's memorandum advises the Attorney General that she "must seek an independent counsel if she herself is going to obey the law." [1] When the Attorney General and the Justice Department do not appear to follow the law or do not appear to be appropriately pursuing criminal and investigative matters, Congress must assume its basic oversight role with regard to the proper administration of the law.

I. Facts, Background and Chronology

In the closing days of the 1996 election, a number of news stories broke regarding the suspect fundraising practices of the Democratic National Committee. Despite the high level of public interest in the story, the White House delayed turning over information on many key figures involved until after the November election. By February 1997, the Democratic National Committee [DNC] had started to return substantial amounts of contributions that had been raised illicitly. A number of individuals suspected of raising or making illegal contributions, such as Yah Lin "Charlie" Trie and Pauline Kanchanalak, had fled the country. In January 1997, the Committee on Government Reform and Oversight began its investigation of political fundraising improprieties and other violations of law. The Committee soon began to issue subpoenas for documents and testimony, but found that a number of close associates of the President and other key figures involved in the investigation were not cooperative. Between the beginning of the investigation and the present, over 110 individuals have either invoked their fifth

[1] Roberto Suro, Reno's Handling of Justice Memo on Funds Probe Attracts Scrutiny, Washington Post, Aug. 2, 1998, at A8.

amendment rights or fled the country rather than cooperate with the investigation. Among this number are: Mark Middleton, former Special Assistant to the President; Webster Hubbell, former Associate Attorney General; John Huang, former Principal Deputy Assistant Secretary of Commerce and Vice Chair for Finance of the DNC; and Yah Lin Trie, close friend of the President and appointee to a Presidential trade commission. Many of their friends and associates are among the dozens of others who have invoked their Fifth Amendment rights or fled the country.

One of the difficulties faced by the Committee in the course of its investigation is that few witnesses have had an incentive to cooperate with the investigation. Despite the clear role of a number of individuals in efforts to funnel foreign money into the U.S. elections or to create elaborate straw donor schemes, the Justice Department has been slow to investigate them. In late 1996, the Department established a Campaign Financing Task Force charged with investigating allegations relating to the 1996 elections. For the first year, the investigation foundered, culminating with the replacement of the lead attorney with Charles La Bella. There were few indictments prior to Mr. La Bella's arrival. The Task Force then brought charges against individuals such as Charlie Trie, Antonio Pan, and Pauline Kanchanalak, each of whom was an obvious participant in schemes to make foreign contributions and conduit contributions to the DNC. However, it appears the Justice Department has failed to focus on other central figures in the campaign finance scandal, notably, John Huang, who is clearly connected to numerous questionable contributions. This delay has caused the Committee great concern that the Department does not have the necessary independence to pursue charges against high-level White House or DNC officials.

It has been apparent from the earliest days of the investigation that the Attorney General should not be conducting this investigation. Under the independent counsel law, she is required to appoint an independent counsel when she receives information alleging violation of a law by a covered official.[2] She also has the discretion to appoint an independent counsel when she determines that an investigation of a particular person by the Department may result in a personal, financial, or political conflict of interest.[3] In an investigation of White House officials and high-ranking DNC officials, the Attorney General clearly has a political conflict of interest of precisely the type mentioned in the Independent Counsel Act.

In December 1997, the Committee learned that the FBI Director had prepared a lengthy memorandum in November 1997 with his analysis of the facts and law implicated in the Department's investigation of the campaign finance scandal. Press reports indicated that Director Freeh had concluded that the Attorney General was required by both the mandatory and discretionary provisions of the law to appoint an independent counsel. However, the Attorney General made it clear that she did not accept Director Freeh's interpretation of either the law or the facts, and refused to appoint an independent counsel. The Attorney General indicated that she

[2] 28 U.S.C. § 591(a).
[3] 28 U.S.C. § 591(c)(1).

was receiving contrary advice from other Department lawyers, but she declined to identify them, or even confirm that they had any detailed knowledge of the case.[4] The Attorney General's failure to appoint an independent counsel, despite the strong recommendations of Director Freeh and Mr. La Bella, compels congressional oversight. Quite simply, is the Attorney General following the law or defying the law? This is a very serious issue. Many members of the Committee have recognized the need for an independent counsel for almost 2 years.

On December 2, 1997, Chairman Burton wrote to Director Freeh requesting his attendance at a Committee hearing, and requesting him to produce his memorandum to the Committee. On December 4, 1997, the Attorney General sent a letter to the Chairman refusing to comply with the request. Attorney General Reno cited the Department's general policy against giving to Congress investigative materials regarding open cases. On December 5, Chairman Burton wrote to the Attorney General, explaining that Congress had a right to receive the Freeh memorandum, and that the receipt of the memorandum was consistent with a long line of precedent regarding congressional oversight of the Department of Justice. Also, on December 5, 1997, the Chairman issued a subpoena to the Attorney General, requiring her to produce the Freeh memorandum by December 8. On December 8, the Attorney General and FBI Director wrote to the Chairman, reiterating their opposition to producing the memorandum. After the Attorney General and Director Freeh testified at a hearing before the Committee on December 9, the Chairman reached an accommodation with the Department of Justice. It was agreed that Department staff would give an oral briefing regarding the memo to the Chairman, the Ranking Minority Member, and their respective chief counsels. This compromise measure satisfied the Committee's needs at the time, but, developments of July 1998 changed those circumstances drastically.

On July 23, 1998, the New York Times reported that the departing lead prosecutor on the Justice Department Task Force, Charles La Bella, had prepared a 100-page memorandum for the Attorney General reviewing the facts he had gathered during the investigation.[5] According to press reports, La Bella concluded that Attorney General Reno was required by both the mandatory and discretionary provisions of the independent counsel law to appoint an independent counsel for the campaign finance investigation. Almost immediately, the Attorney General appeared to minimize the impact of the La Bella report, stating that "[t]here are a range of lawyers within the Department who have had long experience with the Independent Counsel Act. And what we do is hear from everybody, not just one lawyer . . . ."[6]

Given that the Attorney General seemed to be repeating the experience of December 1997, only this time with the even more conclusive findings of her own hand-picked head of the campaign finance investigation, the Committee sought both the Freeh and La

[4] *See* House Committee on Government Reform and Oversight, hearing on the Current Implementation of the Independent Counsel Act, Dec. 9, 1997, at 67–68.

[5] David Johnston, Report to Reno Urges a Counsel Over Donations, New York Times, July 23, 1998, at A1.

[6] Roberto Suro and Michael Grunwald, Independent Probe of '96 Funds Urged, Washington Post, July 24, 1998, at A21.

Bella memoranda. On July 23, the Chairman issued a formal request for the Freeh and La Bella memoranda to evaluate the recommendations which indicate that the Attorney General is not following the law in the appointment of an Independent Counsel in the campaign finance investigation. The Committee staff was informed by telephone on July 24, 1998, that Attorney General Reno would not comply with the request.

On July 24, 1998, the Committee issued a subpoena to Attorney General Reno for the two memoranda. The Committee's subpoena notably exempted from production any grand jury information covered by Rule 6(e) of the Federal Rules of Criminal Procedure. The subpoena to the Attorney General was served upon the Special Counsel to the Deputy Attorney General, Craig Iscoe, on July 24, 1998, and was returnable at 5 p.m., on July 27, 1998. At 5:05 p.m., July 27, 1998, the Chairman received a letter from Acting Assistant Attorney General L. Anthony Sutin, stating:

> This responds to your letter of July 23, and subpoena of July 24, seeking copies of a recent memorandum to the Attorney General from Charles LaBella and a November 1997 memorandum to the Attorney General from FBI Director Freeh.
>
> We would be happy to meet with your staff at their earliest convenience to discuss ways to accommodate the Committee's information needs to the fullest extent that we can, consistent with our law enforcement responsibilities. Because of the ongoing criminal investigation into the matters that are the subject of the memoranda, we are unable to provide the documents that you request at this time. Our position is based principally on the longstanding Department policy of declining to provide congressional committees with access to nonpublic information on open law enforcement investigations. We will provide to the Committee a detailed statement of our position tomorrow.[7]

Upon receipt of the July 27, 1998 letter, the Committee's Chief Counsel contacted Mr. Sutin to ask for a meeting as offered in the letter. In that discussion, it was requested that if there were to be a meeting, the Committee would ask that those who are involved in the decisionmaking process at the Department of Justice attend this meeting. Pointedly, the Chief Counsel requested that low-level legislative affairs officials not attend the meeting since it was clear that they were not familiar with the facts pertinent to the investigation and how such facts might interact with the independent counsel law. Despite this request, on July 28, 1998, the Justice Department sent two Office of Legislative Affairs officials, Anthony Sutin and Faith Burton, to basically reiterate the same points made in the Department's correspondence with the Committee. These individuals were not familiar with the facts in the investigation.

On July 28, 1998, the Attorney General and the FBI Director sent another, more detailed letter detailing their opposition to turning over both the Freeh and LaBella memoranda to the Committee.

[7] Letter to Hon. Dan Burton, Chairman of the Committee on Government Reform and Oversight from L. Anthony Sutin, Acting Assistant Attorney General, July 27, 1998.

The Attorney General and FBI Director outlined policy concerns of the Department, but did not make any claim of privilege in withholding the documents, citing only the Department's policy concerns. On July 31, 1998, the Attorney General and the FBI Director met with the Chairman and the Ranking Minority Member to discuss the subpoena. Unfortunately, the Attorney General merely reiterated the Department's policy grounds for refusing to comply with the subpoena. On August 3, 1998, the Chairman sent a letter to the Attorney General informing her that he had considered and rejected all of her objections, and insisted upon the production of the subpoenaed documents.

While the Committee understands the concerns expressed by the Attorney General and FBI Director, congressional authority to conduct oversight overrides such policy concerns, particularly in this extraordinary situation where the Attorney General has repeatedly rejected the advice of the two top officials she has put in charge of the campaign finance investigation.

II. Authority and Legislative Purpose

A. The Committee's Investigative Jurisdiction

The Committee on Government Reform and Oversight is a duly established Committee of the House of Representatives, pursuant to the Rules of the House of Representatives. House Rule X grants the Committee on Government Reform and Oversight jurisdiction over, inter alia, "The overall economy, efficiency and management of government operations and activities . . . ."[8] Rule X further states that the Committee "may at any time conduct investigations of any matter . . . ."[9] Pursuant to this authority, the Committee on Government Reform and Oversight is engaged in such an investigation.

The Committee is currently engaged in an investigation of political fundraising improprieties and possible violations of law. It began this investigation at the start of the 105th Congress. The investigation represents an exercise of the Committee's core oversight responsibilities, as it encompasses the role of government officials in campaign fundraising improprieties and related matters, and the impact of those improprieties upon government operations. On June 17, 1997, the Committee received special investigative authorities from the House of Representatives. House Resolution 167 granted the Committee power to take staff depositions, order the taking of interrogatories, or apply for the issuance of letters rogatory with respect to the Committee's campaign finance investigation. House Report 105–139, which was prepared by the Rules Committee in conjunction with House Resolution 167, describes the investigation as of June 19, 1997.

Numerous Supreme Court precedents establish and support a broad and encompassing power in Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In general, Congress and its committees, particularly the Committee on Government Re-

[8] House Rule X(1)(g).
[9] House Rule X(4)(c)(2).

form and Oversight, have virtually plenary power to compel information needed to discharge its legislative function from executive agencies, private persons and organizations, and within certain constraints, the information so obtained may be made public.[10]

Several decisions of the Supreme Court have firmly established that the investigative power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress. 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."[11] In *Watkins* v. *United States* the Court further described the breath of the power of inquiry: "[t]he power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[12] 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."[13] "[T]he first Congresses," it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"[14] 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."[15] 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."[16]

B. SUBPOENA AUTHORITY

Clause 2(m) of House Rule XI specifically authorizes the Committee to delegate subpoena authority to the full Committee chairman. The rules of the Committee on Government Reform and Oversight were approved by unanimous voice vote, a majority being present, on February 12, 1997. In accordance with the rules of the House, Rule 18 of the Committee rules provide that the chairman, "shall: (d) Authorize and issue subpoenas as provided in House Rule XI, clause 2(m), in the conduct of any investigation or activity or series of investigations or activities within the jurisdiction of the committee." This rule is not new or novel. It is the same authority contained in the House Government Reform and Oversight Committee's Rule 18 during the 104th Congress and for many prior years.

The subpoena authority granted to the Chairman of the House Government Reform and Oversight Committee is not unlike the subpoena authority utilized by similar investigative committees of Congress. For example, Rule 9 of the Rules of Procedure for the

[10] *See, e.g.,* 5 U.S.C. § 2954 (Executive agencies required to provide requested information to the Committee).
[11] 421 U.S. 491, 504 n.15 (quoting *Barenblatt* v. *United States,* 360 U.S. 109, 111 (1950)).
[12] 354 U.S. 178, 187 (1957).
[13] *Id.*
[14] *Id.,* at 182.
[15] *Id.,* at 194–95.
[16] *Id.,* at 200 n.33.

Senate Select Committee on Presidential Campaign Activities, more commonly know as the Watergate Committee, empowered its chairman to issue subpoenas for the attendance of witnesses and the production of documents.[17]

Other committees of the House of Representatives, 105th Congress, have authorized their chairmen to issue subpoenas without the authorization of a majority of its committee members. The Committee on Ways and Means, in its committee rule 14, "delegated to the Chairman of the full Committee, as provided for under clause 2(m)(2)(A) of Rule XI of the House of Representatives." Rule 7 of the Committee on Small Business provides that "[a] subpoena may be authorized and issued by the Chairman of the committee . . . as he deems necessary. The ranking minority member shall be promptly notified of the issuance of such a subpoena." Rule 7 of the Permanent Select Committee on Intelligence provides that "subpoenas . . . may be issued by the chairman, or any member of the committee designated by the chairman." These examples demonstrate that the authority of the Chairman of the House Government Reform and Oversight Committee to issue subpoenas is not unusual or irregular, and in fact, is the same as that enjoyed by other committees of the House of Representatives.

Recently, the Committee voted to add an additional provision to the subpoena process. In a unanimous vote on June 23, 1998, the Committee approved changes to its Document Protocol that affected the process for the issuance of subpoenas. The Document Protocol, as amended, requires the Chairman to provide proposed subpoenas to the Committee minority 24 hours prior to their issuance. If the Ranking Minority Member concurs with the subpoena, the Chairman may issue it. If the Ranking Minority Member objects to the subpoena, the Chairman sends the subpoena to a Subpoena Working Group, composed of the Chairman, the Vice Chairman, a majority member selected by the Chairman, the Ranking Minority Member, and a minority member selected by the Ranking Minority Member. The Working Group may deliberate about the subpoena, but if it does not reach consensus about the subpoena, upon motion of the Chairman, the Working Group may render its vote regarding the issuance of the subpoena. The Chairman has agreed to abide by the recommendations of the Working Group when deciding to issue subpoenas.

Pursuant, therefore, to its responsibilities and authority as mandated by the House of Representatives, the Committee has issued subpoenas for documents, records and other information which, as prescribed by Committee rules, were deemed essential to its inquiry. The subpoenas, which form the basis of this contempt report, were issued in full conformance with this authority.

C. ISSUANCE OF THE COMMITTEE SUBPOENA

Shortly after learning of the existence of the La Bella memorandum, the Chairman wrote to the Attorney General on July 23, 1998, requesting her to produce the Freeh and La Bella memoranda to the Committee. The Attorney General's staff informed the Committee staff by telephone that the Attorney General would not

[17] S. Rept. No. 93–981, 93d Cong., 2d sess., 418 (1974).

comply with the request. Also on July 23, 1998, the Chairman informed the Ranking Minority Member that he intended to issue a subpoena for the Freeh and La Bella memoranda if they were not produced voluntarily. Ranking Minority Member Waxman's staff informed majority Committee staff that Congressman Waxman objected to the issuance of such a subpoena. Therefore, on the morning of July 24, 1998, the Chairman convened a meeting of the Subpoena Working Group to discuss the issuance of the subpoena. At an early morning meeting, Chairman Burton, Mr. Cox, Mr. Waxman, and Mr. Lantos discussed the subpoenas, but were unable to reach consensus. The Working Group convened again later in the day to resume its deliberations. At this meeting, the Chairman moved that the Working Group render its vote on the subpoena. Chairman Burton, Mr. Cox and Mr. Hastert voted in favor of the issuance of the subpoena, and Mr. Waxman voted against the issuance of the subpoena. Mr. Lantos did not attend the meeting.

The Chairman therefore signed and issued the subpoena to the Attorney General on July 24, 1998. By the end of the day, the subpoena was served by hand upon Craig S. Iscoe, Special Counsel to the Deputy Attorney General, who had agreed to accept service for the Attorney General. The subpoena required the requested documents to be produced to the Committee by 5 p.m., on July 27, 1998.

On July 27, the Committee received a one page letter from L. Anthony Sutin, Acting Assistant Attorney General for Legislative Affairs, stating that "we are unable to provide the documents that you request at this time." The Attorney General and FBI Director sent a letter to the Committee on July 28, further explaining the reasons for the Attorney General's refusal to comply with the Committee's subpoena. Neither in the letter of July 27, 1998, nor in the letter of July 28, 1998, has the Attorney General invoked a legal privilege to avoid compliance with the subpoena. Each letter has contained a flat refusal to comply, followed by a statement of the Department of Justice's general policy against providing such information to Congress. On August 3, 1998, the Chairman sent a letter to the Attorney General rejecting her objections, and demanding that she comply with the Committee's July 24, 1998, subpoena.

As indicated above, Attorney General Janet Reno was summoned to furnish materials in her custody and control pursuant to valid and duly executed subpoenas of the Committee; however, she deliberately failed to comply with the terms of the subpoenas, thereby purposefully thwarting the Committee's investigation and necessitating a finding that Attorney General Reno is in contempt of Congress.

III. The Committee's Need for the Subpoenaed Records

The Committee is conducting its own investigation of campaign finance matters, and therefore has a unique knowledge of the facts and law with which the Department of Justice is working. Because the Committee possesses much of the same information as the Task Force, the Committee is concerned that the Department of Justice has a conflict in the investigation, as much of the information leads to the highest levels of the White House and Democratic National Committee.

The two memoranda subpoenaed by the Committee are written by the FBI Director and the Justice Department Task Force Supervising Attorney. These two individuals have the greatest overall knowledge of the facts of the investigation. They provided the Attorney General with their application of the facts to the law of the Independent Counsel Act and concluded that under either the mandatory or discretionary provisions of the Independent Counsel Act, the Department of Justice has a conflict of interest in investigating the campaign finance matter. They also advised that they believed the Attorney General had misinterpreted the law, thereby creating an artificially high standard for invoking the act.

While it is likely that the Committee is already in possession of most of the facts cited by the FBI Director and the Justice Department, the Committee needs to know the particular facts relied upon by these officials and the legal reasoning from those facts to their conclusion that an independent counsel must be appointed. This will enable the Committee to assess, on one hand, the strength of their recommendations to the Attorney General and, on the other hand, will hopefully provide the Committee with some insight into the reasons that the Attorney General continues to reject these recommendations. In the event that the Attorney General has identified some loophole in the statute that enables her to resist the appointment of an independent counsel contrary to the evident purpose of the Independent Counsel Act, this Committee will be able to recommend legislative changes to eliminate that loophole. Thus, the subpoena of the two memoranda represents an exercise of its basic oversight responsibilities.

A. WHY AN INDEPENDENT COUNSEL IS ESSENTIAL IN THE CAMPAIGN FINANCE INVESTIGATION

The concept of an independent counsel grew out of the Watergate investigation.[18] The first recommendation of the Watergate report was to create an institution, the office of independent counsel, where the President would have no influence over the prosecutor.[19] The recommendation was later introduced in the Watergate Reform Legislation, and was ultimately enacted in 1978.[20] Chief Counsel to the Watergate Committee Sam Dash, who many consider the creator of the Independent Counsel Act, explained that the statute is not related to the integrity of the Attorney General, but rather, is meant to appeal to the public perception of justice, "when serious charges are brought against the president or a high executive, the public has confidence that it is seriously investigated."[21] In fact, the Attorney General agreed with sense of that statement in her comments on the reauthorization of the Independent Counsel Act during her appearance before the Senate Governmental Affairs Committee on May 14, 1993:

> The reason that I support the concept of an independent counsel with statutory independence is that there is an inherent conflict whenever senior Executive Branch officials

[18] *Frontline: Secrets of an Independent Counsel,* (PBS Television Broadcast, May 19, 1998).
[19] *Id.*
[20] *Id.*
[21] *Id.*

> are to be investigated by the Department and its appointed head, the Attorney General.[22]

The language of the statute provides both a mandatory and discretionary provision for appointment of an independent counsel.[23] The statute is triggered when the Attorney General receives information alleging a violation of law by a covered official. Covered officials, in turn, include, the President and Vice President, cabinet members, senior employees in the Executive Office of the President, senior Justice Department employees, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the Internal Revenue Service, and "the chairman and treasurer of the principal national campaign committee exercising authority at the national level, during the incumbency of the President."[24] The Attorney General, in her discretion, may appoint an independent counsel to investigate alleged criminal violations of any person, not just covered persons listed in the statute, if she determines that an investigation of a particular person by the Justice Department "may result in a personal, financial, or political conflict of interest."[25]

The independent counsel statute was meant to provide a mechanism for investigating and prosecuting violations of law in cases where the potential for a conflict of interest is inherent in the relationship of the investigator to the investigated. Former Chairman of the House Judiciary Committee Peter W. Rodino wrote the following about the need for independent counsels:

> My experiences in serving as Chairman of the House Judiciary Committee during Watergate and Iran Contra have unambiguously convinced me that there is an overriding and recurring need for an Independent Counsel. Indeed, the reaction of Congress and the American public to the nascent "Whitewater" affair confirms the expectation that allegations of wrongdoing by those at the highest levels of the Executive Branch should not be handled through normal channels, but should be dealt with by an Independent Counsel.[26]

Attorney General Reno's previous statements about the Independent Counsel Act were similar to those of Chairman Rodino. She stated in testimony about the reauthorization of the act:

> The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level Executive Branch officials and to prevent, as I have said, the actual or perceived conflicts of interest. The Act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters, and to avert even the most sub-

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[22] S. 24, The Independent Counsel Reauthorization Act of 1993: Hearing before the Senate Committee on Governmental Affairs, 103d Cong., 1st sess., 11 (1993).
[23] 28 U.S.C. § 591 (1994).
[24] 28 U.S.C. § 591(b)(6) (1994).
[25] 28 U.S.C. § 591(c)(1) (1994).
[26] Peter W. Rodino, Jr., "The Case for the Independent Counsel," 19 Seton Hall Legis. J. 5, 24 (1994).

tle influences that may appear in an investigation of highly placed Executive officials.[27]

The campaign finance case not only reaches the highest levels of the White House, but also includes close associates of the President and high-level DNC officials. The Committee has seen much of the same evidence on which the Attorney General bases her decisions on whether to appoint an independent counsel, and has concluded that an independent counsel is warranted in this case. In addition, the two individuals with the most comprehensive knowledge of the Justice Department's Task Force investigation agree that an independent counsel should be appointed and have urged the Attorney General to do so. The Attorney General herself recognized that it is absolutely necessary to have the confidence of the public in investigations involving high level officials, "[i]t is absolutely essential for the public to have confidence in the system and you cannot do that when there is conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor."[28]

The subpoena of the memoranda written by FBI Director Freeh and Task Force Supervising Attorney La Bella, respectively, is an exercise of the Committee's oversight jurisdiction in reviewing the Department of Justice's nonfeasance or malfeasance in the campaign finance investigation. Historically, Congress has conducted such oversight of the Department. Former House Judiciary Committee Chairman Rodino has written that he does not subscribe to the notion that the Constitution alone is sufficient to police an Attorney General who "does not discharge [her] statutory duty to investigate the President." As Chairman Rodino wrote in 1994: "While I respect this high-minded view of our government, political pragmatism moves me to wonder who is going to investigate the Attorney General if such a breach of duty occurs."[29]

Although the Independent Counsel Act has drawn criticisms in the past, it nevertheless must be enforced. Watergate Special Prosecutor Archibald Cox testified before Congress prior to the enactment of the first Independent Counsel Act, "[t]he pressure, the divided loyalty, are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential."[30] The Committee is responsible for ensuring that the Department of Justice acts in a manner consistent with the law. In this situation, the oversight interests of the Congress are greater than the institutional policy concerns of the Department of Justice. The memoranda are essential for the Committee to carry out its responsibilities and review how the Independent Counsel Act has been followed in relation to the campaign finance investigation.

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[27] S. 24, The Independent Counsel Reauthorization Act of 1993: Hearing before the Senate Committee on Governmental Affairs, 103d Cong., 1st sess., 12 (1993).

[28] *Id.*

[29] Peter W. Rodino, Jr., "The Case for the Independent Counsel," 19 Seton Hall Legis. J. 5, 25 (1994).

[30] S. 24, The Independent Counsel Reauthorization Act of 1993: Hearing before the Senate Committee on Governmental Affairs, 103d Cong., 1st sess., 12 (1993) (quoting the Cox testimony).

B. FBI DIRECTOR FREEH'S MEMORANDUM TO ATTORNEY GENERAL RENO

One of the subpoenaed records at issue is a November 1997 memorandum from FBI Director Louis Freeh to Attorney General Janet Reno. Press reports of the memorandum emerged in early December 1997, citing a conflict between the FBI Director and Attorney General over the application and interpretation of the Independent Counsel Act.[31] Because of concerns for the integrity of the Department of Justice investigation, the Committee originally subpoenaed the memorandum on December 5, 1997. At that time, the Committee accommodated the Department of Justice by agreeing to a confidential oral briefing on the Freeh memorandum for the Chairman and Ranking Member.

On July 15, 1998, Senator Fred Thompson, who was also briefed on the Freeh memorandum, disclosed substantive portions of the memorandum during a hearing at which Attorney General Reno testified.[32] Senator Thompson stated that Director Freeh's conclusion was that the independent counsel statute should be triggered under either the mandatory or discretionary provisions. Ultimately, Director Freeh disagreed with Attorney General Reno's interpretation of the law and her application of the facts to the law.

Senator Thompson quoted directly from the memorandum, ***"It is difficult to imagine a more compelling situation for appointing an independent counsel."***[33] Director Freeh discussed the mandatory provision of the statute and found that the FBI's investigation led to the highest levels of the White House, including the President and Vice President. The memorandum also takes account of the legislative history of the Independent Counsel Act, noting that Congress intended that where unprecedented legal issues or differences of legal opinion occurred, such as in the instant case, an independent counsel would be sought.

In addition, Director Freeh pointed out that the Department of Justice is investigating other persons who, in addition to covered persons under the statute, give the appearance of a conflict of interest because of the nature of their relationship with the President. He raised concerns about a possible conflict due to the obligation of the FBI and Justice Department to keep the President informed of national security information which may be related to the investigation. He also pointed out that the Independent Counsel Act arose from the Watergate investigation, and therefore had a unique relationship to the campaign finance laws.

The last section of the memo compares the campaign finance investigation to the Attorney General's previous appointments of independent counsels. There were other instances in which the Attorney General relied upon the discretionary section of the act, and it would be consistent with her precedents to appoint an independent counsel in the campaign finance investigation as well. For example, in her application for an independent counsel in the Whitewater matter, the Attorney General wrote:

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[31] David Johnston, "F.B.I.'s Chief Tries to Influence Reno, Memo Argues for Appointment of Independent Prosecutor," New York Times, Dec. 2, 1997, A1.

[32] Department of Justice Oversight, Hearing before the Senate Committee on the Judiciary, 105th Cong., 2d sess., (1998) (Statement of Senator Fred Thompson).

[33] *Id.*

> I have concluded that the circumstances of this matter call for the appointment of an independent counsel pursuant to 28 U.S.C. § 592(c)(1)(A), because investigation by the Department of Justice of the allegations of criminal law by McDougal and other individuals associated with President and Mrs. Clinton in connection with Madison Guaranty Savings & Loan, Whitewater Development Corporation, and Capital Management Services, Inc., would present a political conflict of interest.[34]

Clearly in the Whitewater case, the Attorney General recognized the obvious political conflict. The same conflicts are present here with any number of close associates of the President who are providing large amounts of money to the DNC.

C. JUSTICE DEPARTMENT TASK FORCE SUPERVISING ATTORNEY CHARLES LA BELLA'S REPORT TO ATTORNEY GENERAL RENO

Director Freeh's conclusions were later echoed by Task Force Supervising Attorney Charles La Bella. The impetus for the Committee's subpoena was the disclosure in the media of the report written by La Bella to the Attorney General, described below. It is important at this time for all of the Committee members to have access to both documents to review and analyze the arguments which the Attorney General is failing to follow.

The Committee learned about the contents of Mr. La Bella's report in the same manner it first learned of the Freeh memorandum—through the media's disclosure. The only knowledge the Committee has of the report is from newspaper accounts.[35] Media reports noted that "government officials" were the source of the information contained in Mr. La Bella's report, and the accounts indicated that Mr. La Bella concluded Attorney General Reno had misinterpreted the independent counsel law, thereby creating an "artificially high standard"[36] in order to avoid invoking the statute. Mr. La Bella, along with Director Freeh, previously had recommended an independent counsel during Attorney General Reno's preliminary investigation of the President and Vice President's fundraising phone calls.

On July 24, 1998, the Committee issued a subpoena to Attorney General Reno for Mr. La Bella's report, as well as Director Freeh's November 1997 report. After learning of Mr. La Bella's recommendations, it was incumbent on the Committee to exercise its oversight authority over the decisionmaking process at the Department of Justice, specifically, Attorney General Reno's failure to appoint an independent counsel in the face of the second report indicating she misinterpreted the law.

Mr. La Bella found that there was sufficient information to warrant the appointment of an independent counsel based on both the mandatory or discretionary provisions of the statute. Mr. La Bella found enough specific information to justify an investigation of high

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[34] *United States* v. *McDougal,* 906 F. Supp, 499, 500 (E.D. Ark. 1995) (quoting from Attorney General Reno's application with the Special Division to request the appointment of an independent counsel in the Whitewater matter).

[35] David Johnston, "Report to Reno Urges a Counsel Over Donations," New York Times, July 23, 1998, at A1.

[36] *Id.*

level officials. He also determined that the Department of Justice could not objectively investigate such persons on its own. Mr. La Bella also suggested that an independent counsel should examine both national political parties" practices relating to issue advertising.

Mr. La Bella wrote the 100-plus-page report to Attorney General upon his departure from the Campaign Financing Task Force after 10 months as supervising attorney. The report was meant to summarize the investigation up until the point of La Bella's departure and to make his recommendations for future action. Because Mr. La Bella was the supervising attorney on the Task Force, he has the most intimate knowledge of the facts.

IV. The Attorney General's Refusal to Produce the Subpoenaed Records

A. The Justice Department has never raised a valid basis to avoid compliance

After receiving the Committee's subpoena on July 24, 1998, the Attorney General responded with two letters. The first, on July 27, stated that "[b]ecause of the ongoing criminal investigation into the matters that are the subject of the memoranda, we are unable to provide the documents that you request at this time."[37] The following day, the Attorney General and the FBI Director wrote that they were strongly opposed to releasing the subpoenaed documents.[38] Then, on July 31, 1998, the Attorney General met with the Chairman and Committee staff, and reiterated her opposition to producing the subpoenaed documents. The Attorney General has raised a number of objections to producing the subpoenaed documents. The objections have consisted solely of an enunciation of general Department policy against providing investigative materials to Congress, and an explanation of that policy, and the Attorney General has not asserted any claim of privilege in response to the Committee's subpoena.

The Attorney General's response to the Committee's subpoena is wholly inadequate. The Committee has issued a lawful subpoena, and the Attorney General has not made a claim of privilege in response. Rather, she has simply refused to comply with the subpoena. It is difficult to conceive of a more simple case for contempt of Congress. The Attorney General has not even attempted to interpose a legally adequate response to the subpoena.

The Attorney General primarily relies upon a 1986 memorandum by then-Assistant Attorney General Charles Cooper for the existence of a Department of Justice policy against granting congressional access to the Department's open investigative files. However, the Cooper memorandum makes clear that this policy governs only "in responding to an informal congressional request for information," where "the Executive Branch is not necessarily bound by the limits of executive privilege."[39] Once a valid congressional sub-

[37] Letter from L. Anthony Sutin, Acting Assistant Attorney General to Chairman Dan Burton, July 27, 1998.

[38] Letter from Attorney General Janet Reno and FBI Director Louis Freeh to Chairman Burton, July 28, 1998.

[39] 10 Op. O.L.C. 68, 75.

poena is issued for such information, the only potential basis for refusing to comply is a properly-invoked claim of executive privilege.[40] The Cooper memorandum itself makes this clear:

> [t]herefore, Congress could not, as a matter of statutory or constitutional law, invoke the criminal contempt of Congress procedure set out in 2 U.S.C. §§ 192 and 194 against the head of an Executive Branch agency, *if he acted on the instructions of the President to assert executive privilege in response to a congressional subpoena.*[41]

Moreover, as the Cooper memorandum acknowledges, the mere fact that a congressional Subpoena is allegedly inconsistent with the Department's "policy" does not mean that executive privilege can or should be invoked.[42] In the present case a claim of executive privilege, if asserted, would be highly dubious.[43] In any event, the President has not invoked executive privilege with respect to the Committee's subpoena (as he must in order for the privilege to be validly asserted), nor has the Attorney General even indicated that she intends to ask him to do so. Thus, even if the Department's policy concerns were well-grounded (which, as discussed below, they are not), there would be no legal basis for the Attorney General's refusal to comply.

B. THE OBJECTIONS RAISED BY THE DEPARTMENT

As outlined above, the Committee first subpoenaed the Freeh memorandum in December 1997. The Committee declined to enforce that subpoena as it came to an accommodation with the Department. Under that agreement, the Chairman, the Ranking Minority Member, and the majority and minority chief counsels were briefed on the Freeh memorandum.

However, in July 1998, the Committee learned from press accounts of the existence of the La Bella report. The Committee immediately requested a copy of the La Bella report, and was informed orally that it would not be provided with a copy.[44] Therefore, on July 24, the Committee issued a subpoena for the report. The response to the subpoena was due July 27, 1998. The Department of Justice initially replied on July 27 by providing the Com-

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[40] The Cooper memorandum notes that the validity of a congressional subpoena can be challenged based upon lack of jurisdiction. 10 Op. O.L.C. at 89–91. No such challenge has been, or could be, made in the present case.

[41] 10 Op. O.L.C. at 85 (emphasis added).

[42] *See* 10 Op. O.L.C. at 92 ("Under the terms of the Reagan Memorandum, executive privilege cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President. That decision must be based on the specific facts of the situation, and therefore it is impossible to predict in advance whether executive privilege could or should be claimed as to any particular types of documents or information.").

[43] As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. *In re. Sealed Case (Espy),* 121 F.3d 729, 745 (D.C. Cir. 1997). Since the subject of the Committee's subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here. The "deliberative process" privilege, which is a common-law privilege applicable to executive branch decisionmaking generally, has no application here because it is not of constitutional dimension. In any event, the deliberative process privilege is easily overcome by a proper showing of need or allegation of potential wrongdoing. Thus, even if the deliberative process privilege could be properly invoked here, it would not justify refusal to comply with the Committee's subpoena. *See id.,* at 737–38, 745, 746 (holding that the deliberative process privilege "disappears altogether when there is any reason to believe that government misconduct has occurred").

[44] *See* letter from Chairman Dan Burton to Attorney General Janet Reno, July 23, 1998.

mittee with a one-paragraph letter explaining that it would not comply with the subpoena. The July 27 letter stated that further explanation would be forthcoming. The following day, Department officials met with Committee staff to explain their position. In this meeting, Acting Assistant Attorney General L. Anthony Sutin and Faith Burton of the Office of Legislative Affairs outlined the Department's policy concerns, and assured the Committee that further correspondence would be forthcoming. They stated that this correspondence would explain the legal privilege that formed the basis of the Department's refusal to comply with the Committee's subpoena.

Later on July 28, 1998, the Committee received a letter containing the Department's reasons for failing to comply with the Committee subpoena of July 24. Despite the assurances of Department staff, it did not contain any claim of privilege or other legal justification for the Department's failure to comply. Rather, it contained a listing of the Department's policy concerns about providing the subpoenaed documents to the Committee. The concerns voiced in the July 28 letter were largely the same as those listed in earlier correspondence with the Department regarding the Freeh memorandum. None of the concerns stated in the July 28 letter, or in any other correspondence with the Department about the memoranda, amounts to a valid basis to refuse compliance with the Committee's subpoena. Nevertheless, we address the concerns voiced by the Department below.

1. "Congressional Interference with the Department's Investigation"

The Department's July 28 letter to the Committee states that "providing a congressional committee with confidential details about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecutions of criminal cases."[45] The concern cited by the Attorney General and the FBI Director would have some validity if a congressional committee were attempting to influence a decision whether or not to prosecute a particular person. Here, however, the Committee is investigating the Attorney General's failure to seek an independent counsel in the campaign finance investigation and her interpretation of the Independent Counsel Act, a statute specifically designed to remove the Attorney General from cases in which she has an actual or potential conflict of interest. Thus, the Committee's interest is not in particular prosecutorial decisions made with respect to the campaign finance investigation, but in ensuring that those decisions are made by a conflict-free prosecutor as required by the Independent Counsel Act.[46] If Congress cannot obtain information regarding how the Attorney General is interpreting and applying the Independent Counsel Act, it would be unable to ensure that the Attorney General is complying with the recusal provisions of the

[45] Letter from Attorney General Janet Reno and FBI Director Louis Freeh to Chairman Burton, July 28, 1998, at 2.

[46] This is not even a case where the Attorney General has concluded that no investigation is required because there is no "specific and credible" evidence that a crime has been committed. If Congress sought information regarding such a decision (as it has in the past), it might at least plausibly be argued that the Attorney General's exercise of prosecutorial discretion was being questioned. Here there is no disagreement that investigation is required; the only question is who should head this investigation. Congressional oversight of that decision can hardly be characterized as interference with the exercise of traditional prosecutorial discretion.

Independent Counsel Act as Congress intended, or, if necessary, make legislative changes to express congressional intent more forcefully.[47]

However, the ability of a congressional committee to oversee the activities of the Department of Justice, even those activities involving open cases, is well established. The Committee takes its oversight responsibilities very seriously. While it will not use them to interfere with the Department's investigation, it will not shirk those duties and allow the Department's work to suffer potential harm from within. Such oversight is essential to Congress' duty to oversee the activities of the executive branch. The Supreme Court has recognized that "[t]he power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[48] While this Committee intends to take care to see that it does not interfere with the Department's investigation, it is of great importance to ensure that the Department does not interfere with the Committee's constitutional oversight duties. As the Supreme Court has stated: "[t]he Court recognized the danger to effective and honest conduct of the Government of the legislative power to probe corruption in the Executive Branch were unduly hampered."[49]

The record bears out the fact that the Committee has a history of assisting, not hampering, the Department's investigation. It has provided numerous leads and documents to the Campaign Financing Task Force. It has consistently refrained from granting immunity to witnesses when requested by the Department. Similarly, it has refrained from publicly releasing subpoenaed documents when requested by the Department, even though it has the right to release the documents under established Committee protocols. The Committee has shown similar sensitivity in this case, by requesting that the Department redact all grand jury information from the memoranda. The Committee will continue to take every precaution to see that the investigation and prosecution of cases related to the campaign finance scandal are pursued. While the Department's concerns are not groundless, the Committee's legitimate oversight needs simply outweigh those concerns.

Of greater concern are actions taken by the Department that have a greater prejudicial effect on the work of the Task Force than any potential acts of the Committee. For example, the original supervising attorney on the Task Force departed after a short period of time, and now, the second supervising attorney has departed, with his recommendations being rejected to date, or at least appearing to have been minimized by the Attorney General.[50] The disruption caused by this rapid turnover likely has a greater impact upon the efficiency, morale, and likely, even the independence of the probe, than the Committee's action. In addition, the Depart-

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[47] The Cooper memorandum recognizes this fact as well: "Congress does, however, have a legitimate legislative interest in overseeing the Department's enforcement of the Independent Counsel Act and relevant criminal statutes and in determining whether legislative revisions to the Act should be made." 10 Op. O.L.C. 68, 74.

[48] *Watkins* v. *United States,* 354 U.S. 178, 187 (1957).

[49] *Id.,* at 194–95.

[50] *See* Roberto Suro and Michael Grunwald, "Independent Probe of '96 Funds Urged," Washington Post, July 24, 1998, at A21.

ment appears to have failed to make an aggressive attempt to obtain foreign records relating to its investigation. With all of the resources of the executive branch at its disposal, the Task Force's failure in this area is troubling, and adds to the common perception that the Department has a conflict in investigation potential wrongdoing at high levels of the Executive branch.

2. "Chilling Effect on the Attorney General's Advisors"

The Attorney General also has claimed that compliance with the Committee's subpoena would have a "chilling effect" upon the willingness of the advisors of the Attorney General to render their candid advice and recommendations to her.[51] The Committee has considered this claim, and is sensitive to the concerns raised by the Attorney General and the FBI Director. Nevertheless, the arguments raised in the July 28 letter do not amount to a countervailing claim of privilege that can outweigh the Congress' fundamental oversight duties.

Furthermore, the claim that the Committee's interest in the memoranda will have a chilling effect on the Attorney General's advisors is unconvincing. The conclusions of the Freeh memorandum were leaked to the media almost as soon as it was given to the Attorney General. The public discussion of Director Freeh's candid advice has not appeared to have any chilling effect on Department lawyers, as 7 months later, Mr. La Bella prepared an even more frank assessment of the Department's work.

Moreover, based on press accounts of the Freeh and La Bella memoranda, it appears that Congress has had far greater interest in the memoranda than has the Attorney General. She has refused to act on the recommendations of either memorandum, despite the fact that they contain detailed factual reviews and legal analyses of the campaign finance scandal by the two persons best situated to offer such reports. It is far more likely that the Attorney General's refusal to consider the recommendations of her close advisors will have a chilling effect on their willingness to offer such advice in the future.

3. "The Memoranda Offer a 'Road Map' to the Investigation"

The Attorney General claims that the production of the Freeh and La Bella memoranda could offer suspects in the campaign finance investigation a "road map" to the Task Force's investigation, allowing them to evade prosecution.[52] Such concerns are unfounded. First, the Committee's subpoena explicitly calls for all information covered by Rule 6(e) to be redacted from the memoranda. This would prevent grand jury information from being made available to suspects. Second, this argument ignores the numerous cases where Congress has received this type of information without harming the prosecution of targeted individuals. In fact, in this case, as in past cases, congressional oversight, and the Committee's receipt of the memoranda, is intended to facilitate the efficient investigation and prosecution of targeted individuals. Third, the At-

[51] Letter from Attorney General Janet Reno and FBI Director Louis Freeh to Chairman Burton, July 28, 1998, at 2; letter from Attorney General Janet Reno and FBI Director Louis Freeh to Chairman Dan Burton, Dec. 8, 1997, at 1.

[52] *Id.*

torney General has disseminated these so-called "road maps" throughout the Department, including, perhaps, to political appointees. They also have been leaked extensively to the press. If these memoranda contained such valuable prosecutorial information, it is likely that the Department would show greater care in how it handled them. Finally, the Committee is prepared to evaluate the memoranda upon its receipt of them, and take the necessary steps to ensure that information prejudicial to the prosecution is redacted prior to public release.

4. "This is an Unprecedented Demand"

In their letter of December 8, 1997, the Attorney General and the FBI Director claimed that "[i]t is unprecedented for a Congressional committee to demand internal decisionmaking memoranda generated during an ongoing criminal investigation."[53] In the meeting between staff of the Department of Justice Office of Legislative Affairs and Committee staff on July 28, the Justice Department staff stated that they stood by this assertion. However, even a cursory review of the history of congressional oversight of the Justice Department shows that this statement is clearly false. Not only is it common for congressional committees to demand this type of information, but also, the Department has frequently complied with precisely these types of demands.

5. "Grand Jury Information is Contained in the Memoranda"

The Committee's subpoena explicitly asks the Attorney General to redact from the memoranda any information covered by Rule 6(e) of the Federal Rules of Criminal Procedure. Nevertheless, the Department of Justice has raised the issue that the memoranda "rely heavily on information obtained by the grand jury" during the criminal investigation. However, such an observation clearly cannot rise to the level of an objection, as the Committee's subpoena does not call for such material. In addition, in the July 31 meeting with the Chairman and the Attorney General, the FBI Director stated that information covered by Rule 6(e) was a "very small part" of both memoranda. However, the Committee is mindful of the varying interpretations of exactly what material is covered by Rule 6(e), and when it does obtain the memoranda, will seek to ensure that the Department redacts only that information which is legitimately covered by the rule.

C. PRECEDENT FOR THE COMMITTEE'S ACTION

The Attorney General has claimed that not only would the Committee's receipt of the subpoenaed documents be unprecedented, but also that the Committee's demand itself is without precedent.[54] This is simply not the case. There are a number of precedents for both the demand and receipt of records relating to open Department of Justice investigations. In these cases, congressional committees investigating malfeasance or nonfeasance by the Department of Justice have received a wide array of information, ranging

[53] Letter from Attorney General Janet Reno and FBI Director Louis Freeh to Chairman Dan Burton, Dec. 8, 1997, at 2.

[54] *See* letter from Attorney General Janet Reno and FBI Director Louis Freeh to Chairman Dan Burton, Dec. 8, 1997, at 2.

from internal Department documentary evidence to testimonial evidence from Department officials. Such oversight by Congress has uncovered serious instances of wrongdoing within the Department, and has made possible the prosecution of criminal suspects when otherwise the Department would not have pursued such cases.

1. Palmer Raids Investigation

In the early 1920's, the Senate and the House held hearings into the raids and arrests of suspected communists conducted by the Department of Justice under Attorney General A. Mitchell Palmer. During the course of their investigation, the committees received a number of Department records relating to the raids. Included in the documents provided to the committees was a "memorandum of comments and analysis" prepared by a Department lawyer, responding to a District Court opinion, which was under appeal, and which criticized the Department's actions.[55] This document was provided to the committee even though it contained facts and the Department's legal reasoning regarding an open case.

2. Teapot Dome Scandal

Later in the 1920's, the Senate conducted an investigation into the Department of Justice's handling of the Teapot Dome scandal, specifically, charges of "misfeasance and nonfeasance in the Department of Justice."[56] The Senate committee heard testimony from Justice Department attorneys and agents who offered extensive testimony about the Department's failure to pursue cases. Likewise, the Committee also received documentary evidence from the Department about the Department's nonfeasance. Testimony and documents were received from a number of cases, some of which were still open.[57]

In one notable example, the Attorney General permitted an accountant with the Department to testify and produce documents relating to an investigation that he conducted. The accountant produced his confidential reports in which he had described his factual findings and made recommendations for further action. The Department had failed to act upon his recommendations, although the case was still open.[58] The Government Reform and Oversight Committee has actually asked the Justice Department for much less than the Senate committee was seeking. The only difference is that the Senate committee was faced with a cooperative Department that sought to assist the committee in exercising its oversight duties. Attorney General Reno, unlike Attorney General Harlan F. Stone, has not cooperated with Congress, forcing the Committee to issue a subpoena.

3. White Collar Crime in the Oil Industry

In 1979, the House Committee on Interstate and Foreign Commerce and the House Committee on the Judiciary held joint hearings on allegations of fraudulent pricing in the oil industry. As part

[55] Charges of Illegal Practices of the Department of Justice: hearings before a Subcommittee of the Senate Committee on the Judiciary, 66th Cong., 2d sess., at 484–538 (1921).

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

[57] *See, e.g.,* hearings before the Senate Select Committee on Investigation of the Attorney General, vols. 1–3, 68th Cong., 1st sess., (1924) at 1495–1503, 1529–30, 2295–96.

[58] *Id.,* at 1495–1547.

of that inquiry, the committees examined the failure of the Justice Department to properly investigate and prosecute related cases. As part of their hearings, the committees held closed sessions in which they received evidence regarding open cases in which indictments were pending.[59] In open session, the committees called a Justice Department staff attorney who testified as to the reasons for not proceeding with a certain criminal case, despite the fact that a civil prosecution of the same case was pending. The Department similarly provided the committees with documentary evidence relating to this case.[60]

4. Gorsuch/EPA Investigation

In the early 1980's the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation investigated the enforcement policy of the Environmental Protection Agency [EPA] with regard to the Superfund program. The Subcommittee investigated the EPA's enforcement policy with respect to both criminal and civil matters.[61] In response to the Committee's document requests, the EPA, with the advice and assistance of the Justice Department, objected to the request on the basis that "[i]nternal enforcement documents which form the basis for ongoing or anticipated civil or criminal prosecutions are extremely sensitive. These documents include, for example, memoranda by Agency or Department of Justice attorneys containing litigation and negotiation strategy, settlement positions, names of informants in criminal cases, and other similar material."[62] After the Committee's issuance of a subpoena for the documents, President Reagan asserted executive privilege over the documents, stating that "a controversy has arisen . . . over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties."[63] The Department of Justice took the position in the case that the policy against providing Congress with access to open law enforcement files applied to both civil and criminal matters.[64]

Despite the President's invocation of executive privilege in the Gorsuch matter, the Committee and the House of Representatives voted to hold Administrator Gorsuch in contempt of Congress for refusing to produce the subpoenaed documents. Ultimately the documents were produced, and the contempt citation was withdrawn.

5. Iran-Contra

The most well-known example of congressional oversight of the Justice Department involving the demand and receipt of informa-

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[59] *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 Committee on the Judiciary, 96th Cong., 1st sess., (1979).

[60] *Id.,* at 156–57.

[61] Contempt of Congress, Report of the Committee on Public Works and Transportation, H. Rept. 97–968 at 10 (1982).

[62] *Id.,* at 28 (letter from Robert M. Perry, Associate Administrator and General Counsel to Chairman Elliott H. Levitas, Oct. 7, 1982).

[63] *Id.,* at 42 (memorandum from President Ronald Reagan to the Administrator of the Environmental Protection Agency).

[64] *Id.,* at 87–88 (memorandum from Assistant Attorney General Theodore B. Olson to Attorney General William French Smith).

tion from open case files is the investigation of the Iran-Contra affair. As part of their work, the Iran-Contra committees investigated the nature of the Department of Justice's initial inquiry into the affair. The investigating committees demanded the production of the Department's files regarding their initial inquiry. The House committee requested, inter alia:

> (b) All records relating to Justice Department consideration of, or action in response to, the request of October 17, 1986, by members of the House Committee on the Judiciary for an application for appointment of an independent counsel.
>
> (c) All records relating to the consideration of, and ultimate preparation and submission of, an application for appointment of an Independent Counsel on the Iran matter.
>
> (d) All records from January 1, 1984, to December 15, 1986, relating to requests to, by, or through the Department of Justice to stop or delay ongoing investigations relating to the anti-government forces in Nicaragua and assistance being provided to them . . . .[65]

The Department resisted, making claims similar to those Attorney General Reno is making now. The Department claimed that the production of documents to the committees would prejudice the upcoming prosecutions by the independent counsel. The committees overruled this objection, and received all requested documents, despite the fact that the independent counsel was pursuing the prosecution of a number of open cases. The committees obtained both documentary evidence and the testimonial evidence of a number of high-level Department officials, including Attorney General Meese.[66]

6. Other Cases

In other cases where congressional oversight committees sought access to Department of Justice records relating to prosecution of cases, the cases at issue were closed. However, those committees were investigating the fact that the cases were closed, because they were closed through alleged malfeasance on the part of the Department. For example, in the Rocky Flats case, and in the case of Congressman Dingell's investigation of the Department's environmental crimes prosecutions, there were allegations that the Department was allowing guilty parties out of criminal prosecutions with only minimal punishment. In the Rocky Flats matter, Congressman Dingell described the Department's objections to disclosure, which are similar to those asserted here, as "misguided and legally unjustifiable." Ultimately, over the objection of the Department, investigating committees obtained a number of sensitive internal documents. In the Rocky Flats case, the committee even obtained testimony from line attorneys at the Department. It also obtained doc-

[65] Letter from Chairman Lee Hamilton to Attorney General Edwin Meese III, January 14, 1987.

[66] *See* Report of the Congressional Committees Investigating the Iran-Contra Affair, H. Rept. No. 433 and S. Rept. No. 216, 100th Cong., 1st sess., 310, 317, 314, 647 (1987).

uments, witness interviews, and other records submitted to the grand jury, but not subject to Rule 6(e).[67]

SUMMARY

Therefore, the Committee has considered and rejected all of the objections raised by the Attorney General in response to the subpoena. The receipt of the subpoenaed memoranda by the Committee is necessary for the Committee's investigation, and consistent with the Congress" constitutional oversight role, as well as the precedents established by earlier congressional committees.

V. RULES REQUIREMENTS

A. COMMITTEE ACTION AND VOTE

Pursuant to clause 2(l)(2) (A) and (B) of House Rule XI, a majority of the Committee having been present, this report was approved by a vote of 24 ayes to 19 nays.

B. STATEMENT OF COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Pursuant to clause 2(l)(3)(A) of House Rule XI and clause 2(b)(1) of House Rule X, the findings and recommendations of the Committee are contained in the foregoing sections of this report.

C. STATEMENT ON NEW BUDGET AUTHORITY AND RELATED ITEMS

Pursuant to clause 2(l)(3)(B) of House Rule XI and Section 308(a)(1) of the Congressional Budget Act of 1974, the Committee finds that no new budget authority, new spending authority, new

---

[67] Another notable example of the scope and need for congressional oversight of the Justice Department can be found in Watergate. In his testimony in the House Judiciary Committee's INSLAW hearings, House Counsel Steven R. Ross addressed the nature of congressional oversight in the Watergate scandal:

> The Impeachment Report concluded, "Unknown to Congress, the efforts of the President, through Dean, his counsel"—specifically, having the Assistant Attorney General tell Congress to hold off its investigation because of pending proceedings—"had effectively cut off the investigation."
>
> Of course, the excuse of pending proceedings did not keep Congress out of investigating Watergate forever; it only delayed that Congressional investigation. By Spring of 1973, Congressional committees were no longer accepting the claim of parallel proceedings as an excuse for withholding evidence. Ultimately, Watergate and its cover-up, including the role of Attorney General Mitchell, the role of Attorney General Kleindienst in related matters, and the manipulation of the Justice Department and the FBI, were thoroughly probed by the Senate Watergate Committee and the House Judiciary Committee. This probing occurred at the same time as the pending investigations and proceedings of Special Prosecutors Cox and Jaworski. . . .
>
> Watergate was a dramatic instance where the House and Senate investigations had to overcome, not mere claims of pendency of civil proceedings—let alone, as here, mere pendency of the appeal from such proceedings—but claims of impact on soon-to-be-tried criminal cases. It was up to the committees to determine what evidence they needed, not to the Justice Department to measure whether to block those committees. History reflects that it was only because this Committee insisted on obtaining all the documents and other evidence from the Justice Department, despite any claims about pending proceedings, that the depths of the scandal were ultimately plumbed.
>
> It is an appropriate note to this period that two Attorneys General—Kleindienst and Mitchell—were eventually convicted of perjury before Congressional investigations.

The Attorney General's Refusal to Provide Congressional Access to "Privileged" INSLAW Documents, hearing before the House Committee on the Judiciary, 101st Cong., 2d sess., December 5, 1990, at 88–90 (Statement of Steven R. Ross). Based on his review of this and the other precedents discussed above, Ross concluded that the Justice Department's policy of refusing access to open civil or criminal law enforcement files has been consistently rejected by the courts and by Congress. *Id.,* at 84, 94.

credit authority, or an increase or decrease in revenues or tax expenditures result from an enactment of this resolution.

D. STATEMENT OF CBO COST ESTIMATE AND COMPARISON

Pursuant to House Rule XI(2)(l)(3)(C) and Section 403(a) of the Congressional Budget Act of 1974, the Committee finds that a statement of Congressional Budget Office cost estimate is not required as this resolution is not of a public character.

E. STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to House Rule XI(2)(l)(4), the Committee finds that a statement of constitutional authority to enact is not required as this resolution is not of a public character.

F. CHANGES IN EXISTING LAW

Pursuant to House Rule XIII(3), the Committee finds that a statement of changes in existing law is not necessary, as the resolution does not alter existing law.

G. STATEMENT OF COMMITTEE COST ESTIMATE

Pursuant to House Rule XIII(7)(a), the Committee finds that a statement of Committee cost estimate is not necessary as this resolution is not of a public character.

H. STATEMENT OF FEDERAL MANDATES

Pursuant to the Unfunded Mandates Reform Act and Section 423 of the Congressional Budget Act of 1974, the Committee finds that a statement of Federal mandates is not necessary as this resolution is not of a public character.

CONCLUSION

The Committee has conducted an investigation into campaign fundraising abuses for over a year and a half. It has become increasingly obvious during that period of time that the Attorney General cannot conduct a credible, independent investigation of that scandal, when it involves so many high-level friends and associates of the President. Now it appears that the Attorney General's two closest advisors with knowledge of the Department's campaign finance investigation, the Director of the FBI and the former head of the investigation, agree. Both have written memoranda telling the Attorney General that it is her legal duty to appoint an independent counsel. However, to date, the Attorney General has rejected all calls for her to follow the law and appoint an independent counsel.

The Attorney General's decision represents an insupportable interpretation of both the facts and the law applicable to this investigation. Moreover, her decision to ignore the recommendations of her closest advisors has created an impression that she is incapable of conducting an independent investigation, free from political pressures. Therefore, the Committee needs access to those memoranda, to make its own evaluation of the Attorney General's judgment. Such access is a key part of the Committee's oversight responsibilities.

The objections raised by the Attorney General to complying with the Committee's subpoena are without merit. They are based on policy arguments that are either inapplicable to the present case, or simply wrong. As explained above, the Committee's actions are consistent with those of a number of other congressional committees that have sought and obtained similar documents.

In the final analysis, it is the mission of this Committee to provide oversight of matters in its jurisdiction, namely to investigate maladministration, malfeasance or nonfeasance in the Government of the United States. It is one of the key purposes of a congressional investigation to illuminate the facts. To that end, the Committee must preserve its lawful prerogatives based upon the issuance of the subpoena duly served upon the Attorney General. The Committee believes that the principle of true equality under law, with no citizen being above the law, compels us to seek action in this matter.

[Supporting documentation follows:]

DAN BURTON, INDIANA
CHAIRMAN

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ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

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JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE

BERNARD SANDERS, VERMONT
INDEPENDENT

December 2, 1997

The Honorable Louis J. Freeh
Director
Federal Bureau of Investigation
F.B.I. Building
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535-0001

Dear Mr. Director:

Pursuant to Rule X, clauses 2(b)(1) and 2(b)(2) of the Rules of the House of Representatives, the Committee on Government Reform and Oversight has general oversight responsibilities. In fulfilling our duties under House Rules, the Committee is conducting an investigation into campaign finance improprieties and possible violations of law. The Committee will be convening a hearing entitled "Current Implementation of the Independent Counsel Act" on Tuesday, December 9, 1997, at 10:00 a.m., in room 2154 of the Rayburn House Office building. I would like to request that you appear before the Committee to discuss the recent decision by the Attorney General Reno not to appoint an independent counsel.

In particular, I am requesting that you furnish to the Committee your recent memo to Attorney General Reno on whether or not an Independent Counsel should be appointed. I request this memo be provided to the Committee no later than close of business, Thursday, December 4, 1997.

Please provide 100 copies of your written testimony to the Committee by close of business, Friday, December 5, 1997, to the attention of Teresa Austin. Your entire written testimony will be made part of the hearing record. Furthermore, you will be provided the opportunity to present a preliminary oral statement if you so desire.

Finally, under Section 210 of the Congressional Accountability Act, the House of Representatives must be in compliance with the Americans with Disability Act. If you are in need of special accommodations based on a disability, please contact Judy McCoy, at least four business days prior to the hearing.

The Committee looks forward to hearing your testimony.

Sincerely,

Dan Burton
Chairman

DAN BURTON, INDIANA
CHAIRMAN

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JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE
HAROLD E. FORD, JR., TENNESSEE

BERNARD SANDERS, VERMONT
INDEPENDENT

December 4, 1997

The Honorable Janet Reno
Attorney General
United States Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear General Reno:

Pursuant to discussions between our counsel, it is my understanding that you still are reviewing the issue of whether to turn over to the Committee the memo provided to you last week by Director Freeh regarding his views on whether or not to appoint an Independent Counsel in the campaign finance investigation. By letter to Director Freeh on Tuesday, December 2, 1997, (see attached) I requested this memo in preparation for our hearing on Tuesday, December 9, 1997.

As you know, I have asked for this memo by close of business today. As my counsel has explained, we understand that Grand Jury material or other sensitive criminal investigatory material may need to be redacted from the memo. However, I would request that in the interest of providing Congress and the American people with as full and complete information as possible in this important matter, that the redactions be kept to those absolutely necessary under law.

I look forward to hearing from you on this matter.

Sincerely,

Dan Burton
Chairman

Office of the Attorney General
Washington, D. C. 20530

December 4, 1997

Honorable Dan Burton
Chairman
Committee on Government
Reform and Oversight
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your letters to FBI Director Freeh and me asking us to provide the Committee with a copy of Director Freeh's recent memorandum to me concerning whether I should request the appointment of an independent counsel with respect to the campaign finance matter.

The Department of Justice, including the FBI, recognizes the Committee's oversight responsibilities in this area and is committed to seeking to satisfy the Committee's legitimate needs for information. As I have done at previous congressional hearings, I will explain at the Committee's hearing next week my decisions regarding appointment of an independent counsel. Because of my responsibility to protect the confidentiality and integrity of our ongoing criminal investigation, however, I must continue to decline to discuss at congressional hearings the evidence developed in our investigation, our investigative strategies, the different views expressed within the Department concerning the many legal and investigative issues we have been considering, or the recommendations I receive regarding issues that arise during this investigation. These issues include, of course, the question continuously before me concerning whether the statutory requirements for appointment of an independent counsel have been triggered.

The memorandum you have requested contains precisely this type of information. Director Freeh has expressed to me his complete agreement with my judgment that our joint responsibility to protect the integrity of ongoing criminal investigations and prosecutorial decisionmaking requires that we decline to provide the memorandum. In fact, Director Freeh informed me that he independently reached the same conclusion before we even discussed the matter.

Our position is based principally on the longstanding Department policy of declining to provide congressional committees with access to open law enforcement files. Congress has been respectful of this policy, which has been applied consistently during Administrations of both parties. Charles J. Cooper, who served as Assistant Attorney General for the Office of Legal Counsel during the Reagan Administration, explained the rationale for this policy in a comprehensive opinion concerning congressional requests for information about decisions under the Independent Counsel Act:

> This policy is grounded primarily on the need to protect the government's ability to prosecute fully and fairly. Attorney General Robert H. Jackson articulated the basic position over forty years ago: "It is the position of this Department . . . that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the Laws be faithfully executed,' and that congressional or public access to them would not be in the public interest. . . ." 40 Op. Att'y Gen. 45, 46 (1941). Similarly, this Office has explained that "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 19, 1969). Other grounds for objecting to the disclosure of law enforcement files include . . . well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.

Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Re: Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76 (1986) ("Cooper Opinion").

We have in addition to our immediate concern about compromising the ongoing criminal investigation a more general, but no less substantial, concern that disclosure of such a quintessentially deliberative document "might hamper prosecutorial decision-making in future cases. . . .

Employees of the Department would likely be reluctant to express candidly their views and recommendations on controversial and sensitive matters if those views could be exposed to public scrutiny by Congress upon request." Cooper Opinion, 10 Op. O.L.C. at 77 (emphasis in original).

The need to protect the confidentiality and independence of an ongoing investigation and our prosecutorial decisionmaking is fundamental to the responsibilities Director Freeh and I have under the criminal justice system. We must therefore respectfully decline your request for the memorandum. I am prepared to respond to your questions about my decisions on the appointment of an independent counsel to the fullest extent I can, consistent with my law enforcement responsibilities.

Sincerely,

Janet Reno

Janet Reno
Attorney General

cc: The Honorable Henry A. Waxman
Ranking Minority Member

DAN BURTON, INDIANA
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
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ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

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BERNARD SANDERS, VERMONT
INDEPENDENT

December 5, 1997

The Honorable Janet Reno
Attorney General
United States Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear General Reno:

I am in receipt of your December 5, 1997 letter declining to provide the Committee with a copy of Director Freeh's recent memorandum (hereinafter "Freeh memo") which reportedly recommended the appointment of an Independent Counsel in the campaign finance investigation. *See* Letter from Attorney General Janet Reno to Chairman Dan Burton ("Reno Letter") (December 4, 1997). I respectfully request that you reconsider your decision. Congress has a constitutional obligation to review whether officials of the executive branch faithfully execute the nation's laws and the Freeh memo will assist us in that endeavor.

It is highly unusual that the Attorney General and the Director of the FBI would disagree on a matter which is so wide ranging and is of great national significance. The investigation by the DOJ task force involves issues of great national policy and has potentially serious national security implications. The public must be assured that the investigation is thorough, vigorous, and not tainted by politics. These are the reported reasons why Director Freeh urged you to apply for the appointment of the Independent Counsel.

The public has a right to know why the Director of the FBI is concerned about the progress of the investigation. It has the right to now whether it is effective or not. It has the right to know whether it is a competent investigation or whether the Department is institutionally incapable of conducting this investigation in the appropriate way. Concerns about over compartmentalization, micro management and delay have been reported by the media. The American people deserve to know the truth about the investigation.

In your letter you recognized "the Committee's oversight responsibilities in this area and [the Department of Justice] is committed to seeking to satisfy the Committee's legitimate needs for information." Reno Letter. As you know, the Committee is reviewing many of the same issues that your campaign fund-raising task force is investigating, including determining whether an independent counsel should be appointed to investigate the multitude of matters and questions

raised. You would be doing the American people a service by turning over to the Committee the Freeh memo. The memo and some of its contents have already been extensively reported and confirmed by various government sources. The Committee needs the memorandum to fully carry out its oversight function.

Such disclosure to a congressional committee is far from being unprecedented. The attached memorandum from the nonpartisan Congressional Research Service outlines some of the instances in which the Justice Department disclosed information regarding pending criminal investigations. I will not restate them all here; however, I would like to point out the following notable examples.

- Rocky Flats Environmental Crimes Plea Bargain.--In 1992, the Department turned over to the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology, FBI field investigative reports and interview summaries, witness interview transcripts, documents submitted to the grand jury not subject to Rule 6(e) of the Federal Rules of Criminal Procedure, and other materials relating to the proceeding.

- Iran-Contra.--In the late 1980's, the Iran-Contra committees overruled the Department's claim that providing certain documents would prejudice the pending or anticipated litigation by the Independent Counsel. DOJ eventually turned over all Justice Department Documents needed for their inquiry.

- EPA Documents.--The House Commerce Committee in the early 1980's, then chaired by Congressman John Dingell, demanded that DOJ turn over certain EPA documents that were being withheld by DOJ. DOJ responded that it would not provide the Committee with access to ongoing criminal files consistent with the longstanding practice of the Department. After a period of negotiation, all of the documents were turned over to the Dingell Committee.

In your letter, you explained that you would not disclose the Freeh memorandum to the Committee because it is "the longstanding Department policy of declining to provide congressional committees with access to open law enforcement files." You quoted at length from a 1986 Office of Legal Counsel opinion which reiterated the basic position of the Department articulated in 1941 by Attorney General Robert H. Jackson. 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. Notwithstanding the "policy" of the Department, which does not have the force and effect of law, the Supreme Court and lower courts have held

time and again 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. *E.g., McGrain v. Daugherty*, 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1950); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); see also, *United States v. A.T.& T.*, 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 121 (D.C. Cir. 1977).

In *Eastland* 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.'" *Id.* at 504, n. 15 (quoting *Barenblatt, supra*, 360 U.S. at 111). In *Watkins* the Court further described the breadth of the power of inquiry: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." 354 U.S. at 187. "[T]he first Congresses" held "inquiries dealing with suspected corruption or mismanagement of government officials." *Id.* at 182. In a series of Supreme Court cases, "[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." *Id.* at 194-95. 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." *Id.* at 200 n. 33.

The foundation cases establishing Congress' broad power to probe arose out of the Teapot Dome investigations, the 1920's scandal regarding oil company payoffs to officials in the Harding Administration. A major concern of the Congressional oversight investigation was the failure of Attorney General Harry M. Daugherty's Justice Department to prosecute the alleged government malefactors. When Congressional committees attempting to investigate came up against refusals to provide information, the issue went to the Supreme Court and provided the Court with the opportunity to issue a seminal decision describing the constitutional basis and reach of congressional oversight. In *McGrain v. Daugherty*, 273 U.S. 135, 151 (1927), the Supreme Court focused specifically on Congress's authority to study "charges of misfeasance and nonfeasance in the Department of Justice." The Supreme Court noted with approval that "the subject to be investigated" by the Congressional committee "**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.* at 177 (emphasis added). In its decision, the Supreme Court sustained the contempt arrest of the Attorney General's brother for withholding information from Congress, since Congress "would be materially aided by the information which the investigation was calculated to elicit." *Id.* Thus, the Supreme Court unequivocally precluded any blanket claim by the Executive that oversight could be barred regarding "whether the Attorney General and his assistants were performing or neglecting their

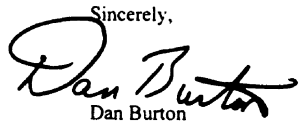
duties in respect of the institution and prosecution of proceedings."

More instructive, and illuminating, is a review of the history of important precedents over the last 70 years regarding oversight of the Justice Department itself. The attached memorandum from the Congressional Research Service demonstrates 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 involved Executive claims that committee demands for agency documents and testimony were precluded on the basis of constitutional or common law privilege or policy.

In the majority of instances reviewed, investigating committees were provided with documents respecting open or closed cases that 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 suspects, and documents presented to grand juries, among other similar "sensitive" materials. The instances of DOJ oversight reviewed, which are not exhaustive of such inquiries, occurred both before and after the 1941 Jackson opinion and the Office of Legal Counsel opinion so heavily relied on by you in your letter.

Unless you can articulate a countervailing constitutionally based privilege or identify a specific provision of law which overcomes this Committee's right to obtain the Freeh memo, I request that you deliver a copy of the memo to the Committee's offices no later than 12 noon, Monday, December 8. Thank you for your consideration of this important request.

Sincerely,



Dan Burton
Chairman

Enclosure

Subpena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To U.S. Deprartment of Justice SERVE: The Honorable Janet Reno

You are hereby commanded to produce the things identified on the attached schedule before the full Committee on Government Reform and Oversight 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 Monday, Dec. 8, 1997, at the hour of 12:00p.m.

To Judy McCoy or U.S. 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 5th day of December, 1997

Dan Burton
Chairman

Attest: Robin H Carle
Clerk

SCHEDULE A

Subpoena Duces Tecum
Committee on Government Reform and Oversight
United States House of Representatives

Attorney General Janet Reno
Serve: Mr. Andrew Fois or Ms. Faith Burton
U.S. Department of Justice
United States Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Committee hereby subpoenas certain records. If you have any questions, please contact the Committee's Chief Counsel Mr. Richard D. Bennett at (202) 225-5074.

Subpoenaed Items

Please provide the Committee with the November 1997 memorandum from FBI Director Louis J. Freeh to the Attorney General relating to the Attorney General's decision not to seek the appointment of an Independent Counsel in the matters being investigated by the Department of Justice campaign finance task force.

Office of the Attorney General
Washington, D. C. 20530

December 8, 1997

Honorable Dan Burton
Chairman
Committee on Government
Reform and Oversight
House of Representatives
Washington, D.C. 20515
Dear Mr. Chairman:

We are writing in response to your December 5th letter and subpoenas seeking a copy of the Director's recent memorandum to the Attorney General. The memorandum expresses the Director's views about whether the Attorney General should request the appointment of an independent counsel and about other matters relating to the pending campaign finance investigation.

We remain quite concerned that releasing the Director's memorandum to Congress would compromise the Department's ability to discharge its responsibilities for the fair administration of justice. As a general matter, we feel strongly that the Attorney General's decisionmaking on prosecutorial matters must have the benefit of candid and confidential advice and recommendations from the Director and other Department officials and employees. More specifically, we believe that both the integrity of the criminal justice process and the Government's ability to prevail in particular prosecutions could be threatened by acceding to the Committee's demand.

Public and judicial confidence in the criminal justice process would be undermined by congressional intrusion into an ongoing criminal investigation. Access to the confidential details of an ongoing investigation would place Members of Congress in a position to exert pressure or attempt to influence the prosecution of specific cases, irreparably damaging enforcement efforts.

Moreover, the disclosure of this memorandum could provide a "road map" of our investigation. The document, or information contained therein, could come into the possession of the targets

of the investigation through inadvertence or deliberate act on the part of someone having access to the documents. The investigation could thereby be seriously prejudiced by the revelation of the direction of the investigation or information about the evidence we possess. In addition, the reputation of individuals mentioned in a document like this could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution.

Finally, the Department has reviewed the precedents cited in your letter and in the accompanying Congressional Research Service memorandum. It is unprecedented for a Congressional committee to demand internal decisionmaking memoranda generated during an ongoing criminal investigation. None of the cited examples are to the contrary. In particular, the three prior matters that you highlighted in your letter did not involve ongoing criminal investigations and, therefore, are not relevant precedents.

We have decided for the foregoing reasons that we must respectfully continue to decline your request for the memorandum. We will be prepared at tomorrow's Committee hearing to respond to your questions to the fullest extent we can, consistent with our law enforcement responsibilities. We are hopeful that our participation in the hearing will respond to your concerns. If questions remain after the hearing, we would be willing to discuss them further in a manner that properly accommodates both legislative and executive branch interests.

Sincerely,

Janet Reno
Attorney General

Louis J. Freeh, Director
Federal Bureau of Investigation

cc: The Honorable Henry A. Waxman
Ranking Minority Member

DAN BURTON, INDIANA
J. DENNIS HASTERT, ILLINOIS
CONSTANCE A. MORELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
STEVEN SCHIFF, NEW MEXICO
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VINCE SNOWBARGER, KANSAS
BOB BARR, GEORGIA
ROB PORTMAN, OHIO

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051
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HENRY A. WAXMAN, CALIFORNIA
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BERNARD SANDERS, VERMONT
INDEPENDENT

July 23, 1998

The Honorable Janet Reno
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Madam Attorney General:

Pursuant to Rule X, clauses 2(b)(1) and 2(b)(2) of the Rules of the House of Representatives, the Committee on Government Reform and Oversight is conducting an investigation into political fundraising improprieties and possible violations of law. Under these auspices, I respectfully request that you provide the Committee with copies of the following documents:

- A copy of the memo or report that you reportedly received this month from Charles LaBella, the chief prosecutor on the Campaign Finance Task Force, regarding the status of the investigation and the need for an independent counsel.

- A copy of the memo you received from FBI Director Louis Freeh in November 1997 in which he recommended appointment of an independent counsel.

As you may be aware, I have asked Mr. LaBella, Director Freeh, and Special Agent James Desarno to testify before the Committee next Thursday. The Committee needs to have these memos prior to next week's hearing in order to make it as productive as possible. Therefore, I ask you to please provide the memos by 5:00 p.m. on Monday, July 27. I would also request that you please confirm to the Committee by 1:00 p.m. on Friday, July 24, your intention to comply with this request. In the absence of such confirmation, I will be compelled to issue a subpoena for the documents.

Please have these documents delivered to the Committee's offices at 2157 Rayburn House Office Building. If you have any questions, please have your staff contact my Chief Counsel, Barbara Comstock, at 202-225-5074. Thank you for your assistance in this matter.

Sincerely,

Dan Burton
Chairman

cc: The Honorable Henry Waxman
Ranking Minority Member

Subpena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To Attorney General Janet Reno

You are hereby commanded to produce the things identified on the attached schedule before the full Committee on Government Reform and Oversight 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 House Office Building, in the city of Washington, on July 27, 1998, at the hour of 5:00 p.m.

To Judy McCoy or U.S. Marshal's 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 24th day of July, 19 98

Dan Burton
Chairman.

Attest:

Robin H Carle
Clerk.

SCHEDULE A

Subpoena Duces Tecum
Committee on Government Reform and Oversight
United States House of Representatives

Attorney General Janet Reno
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Committee hereby subpoenas certain records. If you have any questions, please contact the Committee's Chief Counsel Barbara J. Comstock at (202) 225-5074.

Subpoenaed Items

Please provide the Committee with the following records. Please redact any information in these records subject to Rule 6(e) of the Federal Rules of Criminal Procedure.

1. November 1997 memorandum and/or report from FBI Director Louis J. Freeh to Attorney General Reno relating to the appointment of an Independent Counsel in the campaign finance investigation.

2. July 1998 memorandum and/or report from Charles G. LaBella to Attorney General Janet Reno relating to the appointment of an Independent Counsel in the campaign finance investigation.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 27, 1998

The Honorable Dan Burton
Chairman
Committee on Government
Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter of July 23, and subpoena of July 24, seeking copies of a recent memorandum to the Attorney General from Charles LaBella and a November 1997 memorandum to the Attorney General from FBI Director Freeh.

We would be happy to meet with your staff at their earliest convenience to discuss ways to accommodate the Committee's information needs to the fullest extent that we can, consistent with our law enforcement responsibilities. Because of the ongoing criminal investigation into the matters that are the subject of the memoranda, we are unable to provide the documents that you request at this time. Our position is based principally on the longstanding Department policy of declining to provide congressional committees with access to nonpublic information on open law enforcement investigations. We will provide to the Committee a detailed statement of our position tomorrow.

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Henry A. Waxman
Ranking Minority Member

Office of the Attorney General
Washington, D. C. 20530

July 28, 1998

The Honorable Dan Burton
Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter of July 23, and subpoena of July 24, seeking copies of a recent memorandum to the Attorney General from Charles La Bella and a November 1997 memorandum to the Attorney General from FBI Director Freeh. You previously requested the latter document and, in a joint letter to you of December 8, 1997, we explained why, as Attorney General and FBI Director, we were strongly opposed to releasing the Freeh memorandum to Congress. We continue to hold that position regarding the Freeh memorandum, and our reasoning applies with even greater force to the La Bella memorandum. As was stated then and is discussed below, we are prepared to work with the Committee, as we did in connection with the Freeh memorandum, to accommodate legitimate oversight and law enforcement concerns.

As stated in the Attorney General's letter to you of December 4, our position is based principally on the longstanding Department policy of declining to provide congressional committees with access to open law enforcement files. The rationale for this important policy is set forth in a 1986 memorandum by Charles J. Cooper, Assistant Attorney General for the Office of Legal Counsel during the Reagan Administration, which is quoted at length in the December 4 letter. Mr. Cooper was not the first to articulate this policy. Indeed, as Mr. Cooper notes in his memorandum, over fifty years ago Attorney General Robert H. Jackson informed Congress that:

> It is the position of the Department . . . that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest . . .

40 Op. Att'y Gen. 45, 46 (1941). Moreover, Attorney General Jackson's position was not new. His letter cited prior Attorney General letters taking the position that dated back to the beginning of the century (id. at 47-48).

The disclosure of these memoranda could provide a "road map" of the Department's investigation. The documents, or information that they contain, could come into the possession

of the targets of the investigation through inadvertence or deliberate act on the part of someone having access to them. The investigation could be seriously prejudiced by the revelation of the direction of the investigation, information about the evidence that the prosecutors have obtained, and assessments of the strengths and weaknesses of various aspects of the investigation. Indeed, disclosure of information such as is contained in this report could significantly impede the Task Force's criminal investigation and could conceivably preclude prosecution of some individuals. In addition, the reputation of individuals mentioned in a document like this could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution. As Attorney General Jackson observed:

> Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

Mr. Cooper's memorandum also noted that providing a congressional committee with confidential details about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecutions of criminal cases. Congress could second-guess tactical and strategic decisions, question witness interview schedules, debate conflicting internal recommendations, and generally attempt to influence the outcome of the criminal investigation. Such a practice would damage law enforcement efforts significantly and shake public confidence in the criminal justice system; decisions about the course of a criminal investigation must be made without reference to political considerations. As one Justice Department official noted,

> the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.

Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Submission of Open CID Investigation Files 2 (Dec. 19, 1969), quoted in Cooper memorandum, 10 Op. O.L.C. at 76.

Finally, both memoranda are confidential assessments of the evidence gathered during an ongoing criminal investigation and the application of the law to that evidence. Each memorandum expresses the author's personal views and analysis of the law and facts. We strongly believe that this Attorney General, and all future Attorneys General, must have the benefit of the candid, confidential recommendations of the FBI Director and Department attorneys in order to discharge their duties effectively. If those who write such memoranda

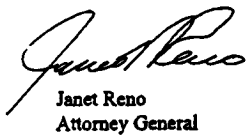
believe that their advice and recommendations could be disclosed to Congress or the public, they will be reluctant to set forth their true views or to make such recommendations at all.

These concerns are particularly acute since the Attorney General is currently evaluating the La Bella memorandum. To provide these documents to Congress could create an unavoidable and unacceptable perception that the Congress is seeking to influence law enforcement decisions for political reasons.

We also note, as your subpoena anticipates, that the La Bella memorandum and sections of the Freeh memorandum rely heavily on information obtained by the grand jury during the criminal investigation which, as you know, we are prohibited from disclosing under Rule 6(e) of the Federal Rules of Criminal Procedure. The Rule 6(e) information in the memoranda is closely intertwined with other material.

We remain committed to seeking to accommodate the Committee's oversight responsibilities and information needs to the fullest extent that we can, consistent with our law enforcement responsibilities. We are prepared to make the same accommodation that the Committee agreed to last year with respect to the Freeh memorandum and, after the Attorney General has completed her evaluation of Mr. La Bella's recommendation, provide a confidential briefing on appropriate portions of the La Bella memorandum.

Sincerely,



Janet Reno
Attorney General

Louis J. Freeh, Director
Federal Bureau of Investigation

Enclosures

cc: The Honorable Henry A. Waxman
Ranking Minority Member

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CHAIRMAN

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ONE HUNDRED FIFTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

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WASHINGTON, DC 20515–6143

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JIM TURNER, TEXAS
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BERNARD SANDERS, VERMONT
INDEPENDENT

August 3, 1998

The Honorable Janet Reno
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Reno:

I am writing in response to the July 28, 1998 letter from you in which you indicated you will not comply with the Committee subpoena served upon you on July 24, 1998, returnable on July 27, 1998. I also write to address issues raised in our meeting with you and Director Freeh on July 31, 1998.

I am disappointed in the letter response of July 28, 1998. As you know, we have subpoenaed the Freeh and La Bella memoranda, both of which reportedly outline the strong legal and factual reasons why the appointment of an independent counsel in the campaign finance investigation is essential. According to news reports, both of these memos from your top two law enforcement officials in charge of this investigation indicate you are not following the law in this matter. Our own investigation in this matter has led the majority of the members of this committee to the same conclusions. This is a very serious issue.

While you claim that your July 28 letter responds to the Committee's subpoena, it does not. This Committee cannot accept a recitation of policy arguments and a recapitulation of points made in correspondence many months ago in the place of compliance with its subpoena. Furthermore, no privilege claims have been asserted in withholding the memoranda.

Your letter relies heavily on the opinion drafted by Assistant Attorney General Charles Cooper. However, as that opinion makes perfectly clear, the only potentially

valid ground for refusing to comply with a Congressional subpoena is a claim of executive privilege:

> [executive] privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to an informal congressional request for information, the Executive Branch is not necessarily bound by the limits of executive privilege.
>
> Memorandum for the Attorney General from Charles J. Cooper, Response to Congressional Requests for Information Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 75 (1986).

Your letter cites a number of concerns about providing the subpoenaed documents to the Committee. You state in your response that "disclosure of information such as is contained in this report could significantly impede the Task Force's criminal investigation[.]" However, in this case, it appears that your own actions are far more prejudicial to the activities of the Task Force. The hopeless conflicts inherent in your continued investigation of these matters undermines public confidence in this investigation both within and outside of the Department. The bureaucratic infighting between those who think this would be handled by an outside counsel free of any political appointees' meddling must certainly have daily impact upon the investigation.

Both Mr. La Bella's and Mr. Freeh's memoranda already have been discussed extensively in the media. It is particularly troubling that the Department would give the media greater access to information the Department claims is sensitive than it would to elected Members of Congress charged with oversight responsibilities. Sunday's Washington Post reports additional troubling information which suggests you have not followed the appropriate procedures in having Mr. La Bella's report reviewed under the 30 day review process for new information.

Your letter also claims that the Freeh and La Bella memoranda rely heavily on grand jury information. First, as you acknowledge, the Committee's subpoena does not call for any grand jury information. Second, in our meeting on July 31, Director Freeh stated that 6(e) information was "a very small part" of both memoranda. In addition, you yourself, indicated that you have widely disseminated the La Bella memorandum throughout the Department, thus, increasing the likelihood that any "road map" to the investigation is widely known to many Department officials – including many political appointees.

The Committee is sensitive to the concerns raised in your letter, but this is an extraordinary case, and those concerns must yield to this Committee's legitimate oversight role. The Committee has already attempted to accommodate your concerns, and for seven months, has withheld from enforcing its earlier subpoena for Mr. Freeh's memorandum. But now, in light of the fact that Mr. La Bella has reached the same

conclusion as Mr. Freeh, this Committee must take action and assert its proper oversight functions.

More important than the issues you have cited is the concern of this Committee, and the American people at large, that you have disregarded the advice of your two most senior people working on the campaign finance investigation regarding both the facts of the case and the interpretation of the Independent Counsel statute. The Independent Counsel statute was designed explicitly because the Attorney General was perceived to have a potential conflict of interest in matters involving wrongdoing by high-level executive officials. In your own testimony supporting the reauthorization of the independent counsel statute in May 1993, you quoted Archibald Cox on the importance of the statute in order to avoid conflicting loyalties of political appointees:

> The pressure, the divided loyalty, are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.

Upon reading that quote, you added, "Now, nearly two decades later, I could not state it more clearly, and it is this point that the Act's critics most often ignore." Now, it appears it is you who is ignoring this guidance.

It would be inconsistent with Congress' core oversight responsibilities to simply accept your assurances that you have adequately considered the recommendations of your advisors without looking beneath the surface of those assurances. Our investigation of the Department's nonfeasance in this case is consistent with Congress' oversight duties. In the past, precisely this kind of oversight has uncovered serious wrongdoing in the Department of Justice.

Moreover, while your letter is concerned with the policy arguments against complying with the Committee's subpoena, it fails to address the numerous precedents for the Committee's action. As I pointed out in our correspondence of December 1997, Congressional committees have often demanded and received precisely this type of information from the Department of Justice. In your letter to me dated December 8, 1997, you made the assertion that "[i]t is unprecedented for a Congressional committee to demand internal decisionmaking memoranda generated during an ongoing criminal investigation." This is simply inaccurate. There are a number of cases where Congressional committees have not only demanded, but also received exactly this type of information. In cases dating from the 1920s, Congressional committees have demanded and received investigative memoranda, records, and other documents relating to open investigations.

In one of the earliest examples of this type of request, in the Teapot Dome scandal, a Congressional committee demanded and received access to a wide range of DOJ materials, including prosecutorial memoranda regarding open cases. See McGrain

v. Daugherty, 273 U.S. 135, 151 (1927). A more recent example of similar Justice Department compliance with Congressional requests, was in the Iran-Contra matter, where the Department furnished investigating committees with DOJ investigative materials regarding an open investigation. 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). In the Iran-Contra example, the Department even made a number of its top officials, including the Attorney General, available for depositions regarding the adequacy of its investigation. These two cases are representative of a number of cases, ranging from the Palmer Raids in the 1920s, to the Rocky Flats investigation, where Congressional committees have obtained internal decisionmaking material from the Department. The Committee's present request is consistent with these precedents, and this Committee deserves an equal degree of compliance with its request.

Therefore, I have considered and rejected all of the objections raised in your letter of July 28, 1998. As you have failed to provide the subpoenaed documents or assert a valid claim of privilege, I have recommended that the Committee continue to assert its constitutional oversight responsibilities in pursuing these matters.

Sincerely,

Dan Burton
Chairman

Congressional Research Service • The Library of Congress • Washington, D.C. 20540-7000

December 5, 1997

TO : House Committee on Government Reform and Oversight
Attention: Will Moschella

FROM : American Law Division

SUBJECT : Selected Congressional Investigations of the Department of Justice Since 1920

You have asked that we compile instances of congressional investigations of the Department of Justice which involved both open and closed investigations in which the Department agreed to supply documents pertaining to those investigations, including litigation memoranda and correspondence, and to provide Department line attorneys and investigative personnel for staff interviews and for testimony before committees. In response, we submit the following.

In addition, due to the short deadline for this request, we were unable to include in the compilation a summary of the most significant recent investigation of the Department, by the House Committee on Energy and Commerce between 1992 and 1994 involving the Department's Enviromental Crimes Section, during which numerous investigative material and line attorneys and other investigative personnel were provided to the Committee. A full recounting of the history and accomplishments of that inquiry may be found in "Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Enviromental Crimes Program", Staff Report for the House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (Committee Print No. 103-T, December 1994).

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, 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 was not 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 gave 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. *Id.* 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 General to the Department attorney that had been sent to St. Louis. *Id.*

(continued...)

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

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[1](...continued)
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.

895-964. The subcommittee was granted access to all of the documentation collected in the case, with the exception of confidential FBI reports which the subcommittee had agreed not to seek. However, certain FBI 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 has 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.

Department witnesses included a former Attorney General, several present and former Assistant Attorneys General, as well as other Department attorneys and FBI agents. *Id.* at 25-294. The substance of earlier meetings between Department officials and the New York City Police Commissioner in which this arrangement was allegedly agreed to was probed in depth. Although questions concerning the merits of specific cases were avoided, the subcommittee obtained from these witnesses a chronology of the Department's actions in a number of cases. The subcommittee received Department memoranda and correspondence, as well as telephone transcripts of the intradepartmental conversations of a United States Attorney. *Id.* at 62-63, 233-34, 239-41, 258-59, 262, 269-73.

Investigation of Consent Decree Program

In 1957 and 1958, the Antitrust Subcommittee of the House Judiciary Committee conducted an inquiry into the negotiation and enforcement of consent decrees by the Antitrust Division, and their competitive effect, with particular emphasis on consent decrees that had been recently entered into with the oil-pipeline industry and AT&T. See Consent Degree Program of the Department of Justice: Hearings before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary, parts I & II, 85th Cong., 1st & 2d Sess. (1957-58)(hereafter "Consent Decree Hearings"); Antitrust Subcomm. (Subcomm. No. 5), 86th Cong., 1st Sess., Report on Consent Decree Program of the Department of Justice (Comm. Print 1959)(hereafter "Consent Decree Report"). The subcommittee developed a 4492 page hearing record, holding seventeen days of hearings on the AT&T consent decree and four days of hearings on the oil pipeline consent decree.

The subcommittee experienced what it viewed as a lack of cooperation from the Department throughout its investigation, stating that "[t]he extent to which the Department of Justice went to withhold information from the committee in this investigation is unparalleled in the committee's experience." Consent

Decree Report at xiii. With respect to the AT&T consent decree, DOJ unconditionally refused to make available to the subcommittee information from its files of that case. The subcommittee's chairman initially had written the Attorney General, requesting that he make available "all files in the Department of Justice relating to the negotiations for, and signing of, a consent decree in this case." Consent Decree Hearings at 1674.

Deputy Attorney General William P. Rogers asserted two grounds to support the Department's refusal to provide the subcommittee with such access. First, that the files contained information voluntarily submitted by AT&T in the course of consent decree negotiations. Rogers wrote the subcommittee chairman that "[w]ere [the files] made available to your subcommittee, this Department would violate the confidential nature of settlement negotiations and, in the process, discourage defendants, present and future, from entering into such negotiations." *Id.* at 1674-75. In a later letter, the head of the Antitrust Division, Victor Hansen, added that "[t]hose considerations which require that the Department treat on a confidential basis communications with a defendant during consent decree negotiations also apply to the enforcement of a decree." *Id.* at 3706.

The second reason given by Rogers for the Department's refusal to provide the subcommittee access to the AT&T files was that they contained memoranda and recommendations prepared by staff of the Antitrust Division, and the "essential process of full and flexible exchange might be seriously endangered were staff members hampered by the knowledge they might at some later date be forced to explain before Congress intermediate positions taken." *Id.* at 1675. Rogers stated that this action was being taken in accordance with in 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 the "Attorney General refused access to the files of the Department of Justice primarily in order to

prevent disclosure of facts that might prove embarrassing to the Department." Consent Decree Report at 42. The subcommittee further concluded that such withholding had "materially hampered the committee's investigation." However, it may be noted that the subcommittee was ultimately able to obtain much of the material concerning the AT&T consent decree that DOJ refused to provide directly from AT&T itself. *Id.*

The Department was, however, somewhat more forthcoming in permitting testimony of its attorneys about the AT&T consent decree. For example, the head of the Antitrust Division instructed two Division attorneys who had dissented from the decision to enter into the AT&T consent decree and had been called to testify before the subcommittee that "we do not at the present time think it appropriate...to...assert any privilege on behalf of the Department with regard to any information within [your] knowledge which is relevant to the negotiations of the decree in the Western Electric case." Consent Decree Hearings at 3647. These two attorneys later testified about those negotiations, including their reasons for differing with the Department's decision to enter into the consent decree. *Id.* at 3711-44.

Cointelpro and Related Investigations of FBI-DOJ Misconduct

Over the period 1974-1978, Senate and House committees examined the intelligence operations of a number of federal agencies, including the domestic intelligence operations of the FBI and various units of the Justice Department such as the Interdivision Information Unit. See S. Rep. No. 755, Books 1-3, 94th Cong., 2d Sess. (1976)(hereafter "Senate Intelligence Report"); Intelligence Activities, Senate Resolution 21: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, vols. 1-6, 94th Cong., 1st Sess. (1975)(hereafter "Senate Intelligence Hearings"); FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. of the Judiciary, parts 1-3, 94th Cong., 1st & 2d Sess. (1975-1976), parts 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), par 5 2, at 1-2. In an attempt to analyze current FBI practices, the GAO chose ten FBI offices involved in varying levels of domestic intelligence activity, and randomly selected for review 899 cases (ultimately reduced to 797) in those offices that were acted on that year. *Id.* at 3.

The FBI agreed to GAO's proposal to have FBI agents prepare a summary of the information contained in the files of each of the selected cases. These summaries described the information that led to opening the investigation, methods and sources of collecting of information for the case, instructions from FBI Headquarters, and a brief summary of each document in the file. After reviewing the summaries, GAO staff held interviews with the FBI agents involved with the cases, as well as the agents who prepared the summaries. *Id.* at 3-4.

These hearings were continued in 1977 to hear the results of a similar GAO review of the FBI's domestic intelligence operations under new domestic security guidelines established by the Attorney General in 1976. In its follow-up investigation GAO reviewed 319 additional randomly selected cases. As in its earlier review, GAO utilized FBI case summaries followed by agent interviews. This time, however, the Department also granted GAO access to copies of selected documents for verification purposes, with the names of informers and other sensitive data excised. House FBI Oversight Hearings (95th Congress), part 1, at 103.

White Collar Crime In The Oil Industry

In 1979, joint hearings were held by the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Crime of the House Judiciary Committee to conduct an inquiry into allegations of fraudulent pricing of fuel in the oil industry and the failure of the Department of Energy and DOJ to effectively investigate and prosecute alleged criminality. See, White Collar Crime In the Oil Industry: Joint Hearings before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce and the Subcommittee on

Crime of the House Commerce on the Judiciary, 96th Cong., 1st Sess. (1979)(hereinafter "White Collar Crime Hearings). During the course of the hearing testimony and evidence were received in closed hearings regarding open cases in which indictments were pending and criminal proceedings were in progressing. In addition, 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. The Department agreed to turn over documents regarding the determination not to prosecute and acknowledged they could be made public if "the committee has some compelling need." White Collar Crime Hearings at 157.

The hearing record evidenced the sensitivity of the subcommittees to the due process implications of their inquiry and the acquiescence of the Department in the manner in which the subcommittees received and handled the open-case criminal and civil materials. 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 effected 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." *Id.* at 2. DOJ's Deputy Attorney General, Criminal Division, praised the Chairmen 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. At the time, Mr. Civiletti was the Attorney General.

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. I-III, 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, totalling 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 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 could use and publicly disclose information derived from the confidential documents and 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 grant 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 and 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, 484. However, the committee ultimately concluded that it was able to adequately perform its mandate with the materials it had obtained pursuant to the access agreement, and thus did not attempt to obtain additional documents by subpoena or litigation. *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 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 in July 1983. 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 since the committee's initial request, the Department produced those two categories of materials. *Id.* at 1270.

Iran-Contra

Even more recently, 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 overruled 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 NSC staff in late November, 1987. As the Iran-Contra Committees found, this so-called inquiry had the effect that by their questioning, the NSC staff was forewarned to shred their records and fix upon an agreed false story, and by the Meese Team's methods was foreclosed the last vital opportunity to uncover the obscured aspects of the scandal. The Congressional investigation uncovered extensive 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 even 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, and then the Attorney General gave his press conference of November 25, 1986, with an account that in key respect 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").

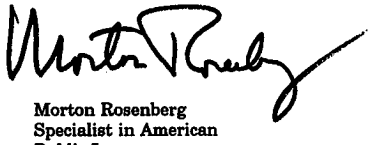
The settlement was a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA's National Enforcement Investigation Centers, and the DOE Inspector 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). *E.g.*, 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. Faced with the imminent adjournment of the Congress, 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. (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.



Morton Rosenberg
Specialist in American
Public Law

House Calendar No. 51

105TH CONGRESS
1ST SESSION

H. RES. 167

[Report No. 105–139]

Providing special investigative authorities for the Committee on Government Reform and Oversight.

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 1997

Mr. SOLOMON submitted the following resolution; which was referred to the Committee on Rules

JUNE 19, 1997

Referred to the House Calendar and ordered to be printed

RESOLUTION

Providing special investigative authorities for the Committee on Government Reform and Oversight.

Resolved,

SECTION 1. APPLICATION.

This resolution shall apply to the investigation by the Committee on Government Reform and Oversight of political fundraising improprieties and possible violations of law.

1 **SEC. 2. HANDLING OF INFORMATION.**

2 Information obtained under the authority of this res-
3 olution shall be—

4 (1) considered as taken by the Committee on
5 Government Reform and Oversight in the District of
6 Columbia, as well as at the location actually taken;
7 and

8 (2) considered as taken in executive session.

9 **SEC. 3. DEPOSITIONS AND INTERROGATORIES.**

10 The chairman of the Committee on Government Re-
11 form and Oversight, after consultation with the ranking
12 minority member of the committee, may—

13 (1) order the taking of depositions or interrog-
14 atories anywhere within the United States, under
15 oath and pursuant to notice or subpoena; and

16 (2) designate a member of the committee or an
17 attorney on the staff of the committee to conduct
18 any such proceeding.

19 **SEC. 4. INTERNATIONAL AUTHORITIES.**

20 The chairman of the Committee on Government Re-
21 form and Oversight, after consultation with the ranking
22 minority member of the committee, may—

23 (1) order the taking of depositions and other
24 testimony under oath anywhere outside the United
25 States; and

1 (2) make application for issuance of letters rog-
2 atory, and request, through appropriate channels,
3 other means of international assistance, as appro-
4 priate.

House Calendar No. 51

105TH CONGRESS
1ST SESSION

H. RES. 167

[Report No. 105–139]

RESOLUTION

Providing special investigative authorities for the Committee on Government Reform and Oversight.

JUNE 19, 1997

Referred to the House Calendar and ordered to be printed

ADDITIONAL VIEWS OF HON. DAN BURTON

I write to address several issues that have arisen since the main portion of the contempt report was prepared. Together, these events have had the effect of confirming my views regarding the need for the Committee's action. First, during the week leading up to the Committee's vote approving the contempt report, I was disappointed that the Attorney General seemed to behave in a partisan manner, working with the Committee minority in a political fashion rather than seeking ways to comply with the Committee's subpoena. The Independent Counsel Act was designed to shield the Attorney General from precisely these kinds of political battles. Second, these views address some of the arguments regarding the allegedly "unprecedented" nature of the Committee's action. Critics of the Committee's action have continued to repeat this charge, despite the fact that it is demonstrably false. Finally, I address the concern of many parties that the subpoenaed documents would be made public upon their receipt by the Committee. During the Committee's August 4 hearing and August 6 business meeting on this issue, I and other Members expressed our strong interest in receiving this material in executive session. The majority members clearly indicated at the hearing and business meeting that we seek these documents so that we can evaluate the Attorney General's decisionmaking process and carry out our oversight responsibilities, not to disseminate sensitive information to the public.

I. The Attorney General's Conduct

In the days since the contempt report was drafted, the Committee has had a number of contacts with Attorney General Reno which have only confirmed my strong concerns regarding the Attorney General's ability to conduct an independent investigation. Rather than seeking compromise on this serious matter, she has repeatedly confronted the members of the Committee in what appears to be a partisan manner.

On August 4, 1998, the Committee held a hearing on the need for the appointment of an independent counsel to investigate campaign finance matters. The Committee heard from FBI Director Louis Freeh, the former head of the Justice Department's Campaign Finance Task Force, Charles La Bella and the FBI agent in charge of the Task Force, James DeSarno. Before the witnesses began their testimony, the Committee took the formal action of ratifying my letter to the Attorney General dated August 3, 1998. In that letter, I considered and rejected all of the Attorney General's objections to producing the subpoenaed memoranda. By ratifying my letter, the Committee affirmed the fact that it, as a body, rejected the reasons put forth by the Attorney General for her failure to comply with the Committee's subpoena. Despite this clear indication of the Committee's resolve, the Attorney General still did

not offer any reasonable accommodation, and still refused to comply with the Committee's subpoena.

Fifteen minutes before the Committee's August 4 hearing, the Attorney General called me and asked if she could testify at the hearing. The Attorney General had already spoken with Representative Waxman.[1] I told her that it would be inappropriate for her to appear at the hearing without giving the Members notice and an opportunity to prepare for her appearance. She had never indicated previously that she wanted to testify at the hearing, including at my meeting with her the previous week. Less than an hour after I spoke with the Attorney General, she sent a four-page letter to me detailing her position. This letter was received by the Committee minority before I had ever seen it. In fact, the first time I heard of it was when Representative Lantos read it into the hearing record.

The letter itself contained little of consequence. Rather, it consisted of a reiteration of the same arguments made by the Justice Department in correspondence dating back to December 1997. All of those same arguments had already been rejected by the Committee when it ratified my August 3, 1998, letter to the Attorney General. The Attorney General still failed to invoke executive privilege or any other valid legal privilege in response to the Committee's subpoena. As pointed out in the main body of this report, only a claim of executive privilege is a valid defense to the Committee's subpoena. This fact is succinctly stated in the 1986 Office of Legal Counsel [OLC] memorandum by Charles Cooper which was repeatedly cited by the Attorney General. During his questioning of Director Freeh and Mr. La Bella, the Vice Chairman of the Committee, Representative Cox, demonstrated that the Attorney General has not even discussed a claim of executive privilege with Director Freeh or Mr. La Bella:

> Representative COX. . . . And so I will ask each of the three of you whether you are aware of any effort made to appropriately under this OLC opinion to fail to respond to the subpoena issued by this Committee. . . .
>
> Mr. LA BELLA. You are asking me if I am aware of anybody asserting executive privilege with respect to this memo?
>
> Rep. COX. Whether, according to this OLC memorandum, the process it sets out is being followed in this case.
>
> Mr. LA BELLA. I am not aware of anything in the Department.
>
> Rep. COX. Director Freeh.
>
> Director FREEH. Not aware of it, sir.
>
> Mr. DESARNO. Nor am I aware of it, sir.
>
> Rep. COX. Do you have any reason to disagree, since this was the subject of your testimony today, disagree with the 1986 OLC memo that the Attorney General cites?
>
> Director FREEH. No.

[1] Business meeting, Consideration of Contempt Citation Against Attorney General Janet Reno, Committee on Government Reform and Oversight, Aug. 6, 1998. In that hearing, Mr. Waxman stated "She called the Chairman before that hearing. She called me first and said 'I'm going to call the Chairman. I want to come in. I feel strongly about it. How should I handle it.' And I said 'Well, you ought to call the Chairman first.'"

Mr. LA BELLA. No.

Rep. COX. So may we expect, then, that at least insofar as you are concerned, that the Justice Department will appropriately adhere to that precedent?

Director FREEH. I think the—I think the fact that the Attorney General cites that indicates that that is the opinion by which she is being guided in this manner. As to the specific decisions or developments from here on in, I certainly can't predict.[2]

While the Attorney General still views the 1986 Cooper memorandum as controlling precedent for her actions in this case, she did not follow this legal authority and claim executive privilege. Instead, the Attorney General simply refused to comply with the Committee's subpoena.

In the days leading up to the Committee's vote to hold the Attorney General in contempt, the Justice Department failed to engage in meaningful discussions with the Committee on how to comply with the subpoena, and instead began a wide-ranging lobbying effort with the members of this Committee. Members of the Attorney General's staff, including the Deputy Attorney General, called Republican Members, and lobbied them to vote against the contempt report.

Finally, the day of the Committee's contempt vote, the Attorney General called and made what she claimed was a "compromise offer." In reality though, what she suggested was a step backwards from her earlier proposals. She recommended that in 3 weeks, when she had completed her review, she would come and give a public briefing to the members of the Committee. However, since the briefing would be public, it would contain little if any of the content of the memoranda. If the Attorney General's prior public briefings, such as that before this Committee on December 9, 1997, are any indication, it would be practically useless. Nevertheless, before the Committee held its business meeting, I presented the Attorney General's "offer" to the majority members of the Committee, who unanimously rejected it. At that time, I called the Attorney General's office to inform her that the majority of the Committee considered this offer unacceptable. I also noted that a claim of executive privilege—the only basis for withholding a subpoenaed document from Congress—had not been asserted. The Attorney General had gone to a meeting at the White House, and I left this message with her staff.

Since the Committee's contempt vote, I have not received any communication from the Justice Department. The Attorney General has not engaged in any meaningful attempt to reach an accommodation with the Committee. While I have not been surprised by the Attorney General's failure to negotiate with the Committee meaningfully, I am surprised by what she has told the public. In her press briefing on August 13, 1998, when asked if she had had any discussions with the Committee since the contempt vote, the Attorney General stated "I can't remember the timing as to wheth-

[2] Hearing, The Need for an Independent Counsel in the Campaign Finance Investigation, Committee on Government Reform and Oversight, Aug. 4, 1998.

er I had any further discussions or not."[3] The fact is that there have been no discussions since the contempt vote, and there were no meaningful offers from the Justice Department even before the contempt vote.

Since this Committee subpoenaed Director Freeh's and Mr. La Bella's memoranda, the Attorney General appears to have taken sides in what has amounted to a partisan debate in this Committee. The entire debate has revolved around whether the Attorney General has the ability to investigate independently and completely her superior, the President. The Independent Counsel Act is designed to protect the Attorney General from these very questions, and it is intended to keep her out of the partisan fray. It was created in part, to offer Attorneys General a way to recuse themselves from investigations of their superiors in the Administration, so that they remained free of even the appearance of a conflict of interest.

II. Historical Precedent for the Committee's Action

During the August 4 hearing and the August 6 business meeting, the Committee minority often made the argument that the Committee's action in subpoenaing the Freeh and La Bella memoranda was unprecedented. This complaint was also frequently echoed by the Attorney General. In correspondence with the Attorney General, I pointed out the numerous precedents for the Committee's action. However, in her August 4 letter, she claimed that "we have analyzed your examples, and none of them deal with the demand you have made: to turn over law enforcement sensitive documents during a pending criminal investigation."[4] The Attorney General repeated this claim during her press conference of August 4. However, the Attorney General did not provide any further explanation for her conclusory argument.

As explained in the main body of this report, there are a number of precedents for the Committee's action. While the Attorney General never attempted to distinguish these precedents from the Committee's action, the Committee minority did attempt to do so during the August 6 business meeting where the contempt report was approved. Representative Tierney attempted to distinguish the cases cited in the report in a number of ways. However, the distinctions he cited are either meaningless, or they fail to alter the fundamental fact that the Committee's action is supported by a number of historical precedents.

For example, Mr. Tierney took issue with our citation of the Palmer Raids case, claiming that the example was inapplicable because the trials had been concluded before the prosecution memos at issue were reviewed. However, Mr. Tierney failed to point out that the Palmer Raids cases were under appeal, and by their very definition were still open. Mr. Tierney also claimed that the Teapot Dome example was inapplicable because Congress received "not a prosecution memorandum, but a report of an accountant working on the investigation."[5] Again, this claim is simply mistaken. During the Teapot Dome investigation, Congressional committees re-

[3] Reuters Transcript, Weekly Press Briefing of Attorney General Janet Reno, Aug. 13, 1998.
[4] Letter from Attorney General Janet Reno to Chairman Dan Burton, Aug. 4, 1998.
[5] Business meeting, Consideration of Contempt Citation Against Attorney General Janet Reno, Committee on Government Reform and Oversight, Aug. 6, 1998.

ceived access to a wide range of Justice Department information, including prosecution memos and Justice Department investigative reports, regarding open cases. The Committees also did receive the referenced accountant's report, but by no means was that the only Justice Department information received. Among other cases, Mr. Tierney also took exception with our reference to the Iran-Contra case. While his comments did not clearly state why the Iran-Contra case was inapplicable, a review of the facts will show that it is one of the closest analogies to the present situation. In Iran-Contra, Congressional committees received extensive internal Justice Department investigative documents while Independent Counsel Lawrence Walsh was pursuing his case against various Iran-Contra defendants.[6] The fact that it was an independent counsel, rather than the Justice Department pursuing the case, has no bearing on the fact that investigating congressional committees received internal Justice Department documents relating to open criminal cases.

Similarly, Representative Waxman claimed that the Attorney General "stands on long precedent," and that "[t]here is not a single case where the information from an ongoing investigation has ever been turned over to Congress."[7] Again, Mr. Waxman is just wrong. It is this Committee that stands on long precedent, not the Attorney General. Mr. Waxman should be familiar with those precedents from his time serving on the Oversight and Investigations Subcommittee of the Committee on Energy and Commerce. In 1993–1994, that Subcommittee conducted an investigation of the Department of Justice that demanded and received a number of internal decisionmaking documents from the Department, and also received testimony from line attorneys at the Department of Justice. The report from that investigation, "Damaging Disarray," was endorsed by Mr. Waxman, as a member of the Subcommittee. The report cites with approval all of the precedents cited in this contempt report.[8] Those precedents make it clear that Congressional committees have demanded and received information like these memoranda from the Justice Department regarding open cases.

It is frustrating that the debate regarding the Committee's action is fraught with so many misrepresentations. Starting with correspondence in December 1997, and again in the Committee's August 4 hearing, August 6 meeting, and in the Attorney General's subsequent correspondence and press conferences, we have heard repeatedly that the Committee's action is unprecedented. As I have just pointed out, this is not true. Fortunately, not every party involved in the debate has disregarded the facts. Like the Attorney General, FBI Director Freeh believes that the Committee should not seek to obtain the Freeh and La Bella memoranda. However,

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[6] The Iran-Contra investigating committees took a day-long deposition of Attorney General Meese, and even received his hand-written notes regarding his investigation of the Iran-Contra matter. The Iran-Contra precedent provides support for the receipt of materials far beyond anything that the Committee is currently seeking.

[7] *Id.*

[8] *See* Damaging Disarray, staff report, Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, December 1994, at 333. The Damaging Disarray report contains a memorandum prepared by the Congressional Research Service containing a number of precedents for the Committee's action. The memorandum is practically identical to the CRS memorandum contained in this contempt report. In the "Damaging Disarray" case, the Subcommittee was investigating only closed cases. However, it cited for support all of the same precedents we have cited. Many of those same cases show that Congress has consistently reserved the right to subpoena documents regarding open Justice Department cases.

in his appearance before the Committee, he did not dispute the Committee's right to obtain the documents. He stated that "[y]our subpoena is not an unprecedented one, but it is extraordinary."[9] He also agreed with the Committee's analysis about the Attorney General's failure to claim a privilege in response to the subpoena, stating "the arguments that you make are cogent with respect to privileges and the lack of a privilege."[10] The FBI Director clearly indicated that the Committee has a legal right to receive the documents. I can only reiterate that the Attorney General's extraordinary refusal to comply with a lawful subpoena has required the Committee to take extraordinary action.

III. The Freeh and La Bella Memoranda Will Be Received in Executive Session

The one theme that has been consistent in all of the arguments raised by the Committee minority and the Justice Department is that the memoranda would somehow be released publicly and would cause harm to the Department's investigation. The main body of this report addresses these arguments, and in a letter to the Attorney General dated August 3, 1998, the Committee rejected these arguments. However, several obvious facts regarding the subpoenaed documents should be pointed out.

First, the subpoenaed memoranda would be received by the Committee in executive session, and could be released only through a vote of the Committee. The Committee has never considered receiving these sensitive documents and then immediately releasing them publicly. During the August 4 hearing and the August 6 contempt vote, I and a number of Republican Members committed to refrain from releasing any sensitive information in the memoranda.

The Committee takes seriously its obligation to make sure confidential documents stay that way. The Committee Chief Counsel and I received a briefing regarding the Freeh memo in December 1997, and not a word about that memo was shared with anyone even on the Committee staff. In his appearance before the Committee, the FBI Director stated that "I would also like to thank the Committee, everyone on the Committee and your staff, for handling a lot of the very sensitive and classified information that we have provided to you over the last few months, and particularly the briefing which we provided which summarized the memo at issue."[11]

The record shows that the leaks regarding the Freeh and La Bella memoranda have come from the Department of Justice, not this Committee. During the August 4 hearing, Representative Kanjorski spoke at length regarding the fact that both of these memoranda has leaked from the Justice Department, even suggesting that the Department of Justice be renamed the "Department of Sieve."[12] In his testimony before the Committee, Charles La Bella stated that he made only three copies of his report, one for himself, one for the FBI Director, and one for the Attorney General. How-

[9] Hearing, The Need for an Independent Counsel in the Campaign Finance Investigation, Committee on Government Reform and Oversight, Aug. 4, 1998.
[10] *Id.*
[11] *Id.*
[12] *Id.*

ever, the Attorney General promptly made at least nine copies of the report and distributed it to a number of advisors including political appointees. The Attorney General has argued that if she complies with the Committee's subpoena, it will leak out and provide a "road map" of the investigation to targets of the probe. However, the reality as described by Mr. La Bella and Director Freeh is very different. It shows that the leaks clearly come from the Department of Justice. It also suggests that the real concern should be that the "road map" to the Task Force's investigation is being shared with a number of political appointees, and that someone at the Justice Department has already leaked information.[13]

The arguments of the Justice Department and the minority are based upon an assumption that this Committee would publicly release the subpoenaed documents. However, the Committee has indicated that it will receive the documents in executive session, and during the August 6 business meeting, the Members stated a strong desire not to release the information if such action would impact upon pending criminal cases.

CONCLUSION

The issue before the Committee is a simple one. The Attorney General was served with a valid subpoena, and she has refused to honor that subpoena. She has not cited any valid legal privileges—she has simply failed to respond. It is regrettable, but not surprising, that the Committee minority would turn what should be a bipartisan issue about Congressional prerogatives into a partisan debate. In similar circumstances during the 104th Congress, when this Committee approved a contempt resolution against White House Counsel Jack Quinn, Representative Shays noted:

> I have never voted against any effort by the then majority Democrats for a subpoena, and, as God is my witness, I would never oppose a motion to hold someone in contempt who didn't honor that subpoena.
>
> * * * * *
>
> This institution has stood together when the executive branch took action and contempt of our constitutional responsibilities. This is neither a Republican or a Democrat issue. It is an issue of the authority of the House of Representatives to perform oversight over the executive branch. That is the charge of the Government Reform and Oversight Committee as the primary oversight committee in the House of Representatives.
>
> The actions of the current White House to ignore these subpoenas, if allowed to stand without any action by this body, will set a precedent for all future Congresses, and I might add someday we will be in the minority, and you

[13] At the hearing, Mr. La Bella testified that one of the recipients of his report was Robert Litt. It should be noted that Mr. Litt gave $1,000 to the Clinton-Gore campaign, and $500 to the Democratic Congressional Campaign Committee, and is a political appointee. *See* Sam Skolnik, The Right's Punching Bag, Legal Times, Aug. 10, 1998, at 1.

> will regret that, and will inhibit all our ability to perform our constitutionally mandated role of oversight.[14]

Representative Shays' words were not heeded by the minority in 1996, and unfortunately, similar sentiments have been ignored by the minority at this time as well. However, Representative Shays' comments stand as a reminder that the fundamental issue before this Committee is an institutional one, upon which all Members should agree. A valid Congressional subpoena seeking relevant records should not be ignored by the Attorney General, the highest law enforcement officer in the land.

The actions of this Committee are consistent with the law and with sound policy. Senator Fred Thompson, who himself has faced with similar stonewalling from the Administration in his campaign finance investigation, has stated that:

> [t]he Burton Committee stands on sound legal ground. It has offered to let all sensitive investigative matters to be deleted from the report. The Justice Department has become so used to offering "ongoing criminal investigation" as a reason for withholding materials from Congress that they apparently assume that there is a legal justification for it.
>
> There is not.
>
> Contempt is an unusual proceeding but these are unusual circumstances—circumstances the Attorney General and the Justice Department have created.[15]

The events of the past week confirm what Senator Thompson has observed - that this contempt report is the Attorney General's doing. By refusing to comply with the Committee's subpoena, by making no effort to reach a reasonable accommodation, and by refusing to follow the law, the Attorney General has brought the Committee to this point. The Committee is obligated to assert its institutional rights to conduct oversight in this matter where the Attorney General's own top aides state that she is not following the law.

HON. DAN BURTON.

[Supporting documentation follows:]

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[14] Business meeting, Proceedings Against John M. Quinn, David Watkins, and Matthew Moore, Committee on Government Reform and Oversight, May 9, 1996, at 47.

[15] Statement of Senator Fred Thompson, Aug. 6, 1998. Similarly, Senator Hatch, Chairman of the Senate Judiciary Committee, has publicly stated that he does not oppose the Committee's action, and has noted that his statements have been misrepresented by the minority. *See* statement of Senator Orrin Hatch regarding contempt citation, Aug. 7, 1998.

Office of the Attorney General
Washington, D.C. 20530

August 4, 1998

The Honorable Dan Burton
Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

After reviewing your letter of August 3 and the press statements by members of your staff over the weekend, it is clear that the Committee's primary focus is my decisionmaking on the question of the appointment of an independent counsel. That is why I called you this morning and requested an opportunity to be heard at the Committee's hearing.

In light of your rejection of my request to be heard, let me explain the points I would have made had you permitted me to testify this morning.

I greatly respect the system of checks and balances that our founding fathers established. They wisely assigned each branch of government a distinct and limited role. One of Congress's most important roles is to oversee the work of the Executive Branch in order to better carry out its legislative duties. Among our most important functions are prosecuting criminals, making sure innocent people are not charged, and punishing wrongdoing.

When there is disagreement between the branches, our task as public servants is to find solutions that permit both branches to do their jobs. That is why I offered to testify this morning and why Director Freeh and I came up to visit with you last week -- to try to reach an accommodation with the Committee which allows you to pursue your oversight responsibilities while minimizing any interference with our ongoing criminal investigation.

As you know, the Department of Justice is conducting an investigation into allegations of criminal activity surrounding the financing of the 1996 presidential election. That investigation has charged 11 persons, and is still very much ongoing. We have more leads to run down, more evidence to obtain and analyze, and more work to do. More than 120 dedicated prosecutors, agents and staff are working on this investigation every day. And many targets, suspects and defense lawyers are watching our every move, hoping for clues that will tip them off and help them escape the law's reach.

Mr. Chairman, you have demanded that I provide two memoranda to the Committee. One was written by Director Freeh last fall, the other by Mr. La Bella and Mr. DeSarno. We have reviewed your request very seriously. Our concerns are set forth in the letter Director Freeh and I sent to you on July 28.

Last week, Director Freeh and I again offered an accommodation that we believe protects both your oversight role and our prosecutorial responsibilities. We explained that this memo is extensive, that I need to review it carefully and thoroughly, and that when I finish my review, I may or may not decide to trigger the Independent Counsel Act. The Justice Department is willing to provide the leadership of the Committee with a confidential briefing on appropriate portions of the La Bella memorandum after I have had an opportunity to evaluate it fully, in approximately three weeks.

According to Director Freeh, these memoranda offer a road map to confidential, ongoing criminal investigations. Even excluding grand jury information -- which you are not seeking -- such documents lay out the thinking, theories and strategies of our prosecutors and investigators, and the strengths and weaknesses of our cases. They talk about leads that need further investigation, and places where we've reached dead ends. Criminals, targets and defense lawyers alike can all agree on one thing -- they would love to have a prosecutor's plans.

Mr. La Bella's memorandum provides an overview of the investigation at this time. I am reviewing it with an open mind. If I do make a decision to appoint an independent counsel after you have taken an internal memo still under review, how will anyone believe that my decision was independent -- as the law requires? Indeed, to provide this memorandum to the Committee would be a grave disservice to an independent counsel if one were appointed and could undermine his or her ability to carry out an effective criminal investigation.

There are sound public policy reasons as well as law enforcement reasons why we cannot provide this document to the Committee. Suppose, for example, a Congressional committee wants to stop us from prosecuting someone the committee supports. What's to stop the committee from threatening Department lawyers with contempt, forcing them to produce their internal memos and making them public to everyone including the defendant's legal team? To demand the prosecutor's documents while the case is in progress would irreversibly taint our principles of justice and could harm the reputations of innocent people or even place witnesses in danger of retaliation. Such policies also would subject every prosecution decision to second-guessing and accusations that Congressional pressure affected the Justice Department's decisionmaking.

Even when conducting vigorous oversight, Congress has respected the principle that law enforcement must be free from even the appearance of partisan political tampering. And the Justice Department has adhered to this position for the better part of a century, under presidents from Teddy Roosevelt to Ronald Reagan–and under FBI Directors from J. Edgar Hoover to Louis Freeh.

More than 50 years after they were written, I ask you to consider the words of Attorney General Robert H. Jackson, who later served on the Supreme Court:

> It is the position of the Department...that all investigative reports are confidential documents of the executive department of the government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Twelve years ago, the head of the Justice Department's Legal Counsel during President Reagan's administration, Charles J. Cooper added other concerns, including:

> ...well founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.

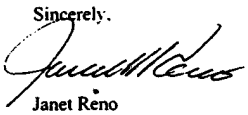
I know that you have cited several examples that you believe contradict these longstanding opinions. But we have analyzed your examples, and none of them deal with the demand you have made: to turn over law enforcement sensitive documents during a pending criminal investigation.

Mr. Chairman, we have worked very hard to respond to Congressional oversight requests. Since I became Attorney General, I and many other members of this Department have testified dozens of times, turned over thousands of documents, answered thousands of letters and provided countless briefings on matters large and small. As our campaign finance investigation has progressed, we have made every effort and taken extraordinary steps to accommodate your Committee's needs while protecting the integrity of the investigation. We have provided extensive testimony and briefings, including private briefings this winter about the contents of an internal memo by FBI Director Louis Freeh.

If future Attorneys General know that the innermost thinking behind their toughest law enforcement decisions will become fodder for partisan debate, then we risk creating a Justice Department and an FBI that tacks to political winds instead of following the facts and the law wherever they lead. If future law enforcement professionals cannot provide advice that is candid and confidential, we will have a government of "yes" men who advocate what is popular instead of what is right. And if future Congresses can poll the Attorney General's advisors or line attorneys in order to ferret out and promote opinions they approve of, then every controversial law enforcement decision will be tainted in the public's eyes. All of these concerns are most acute when Congress demands information and seeks to pressure me on a sensitive law enforcement matter that I have not yet made.

Given the importance of this matter. I would appreciate your including this letter in the hearing record. Thank you.

Sincerely,



Janet Reno

cc: The Honorable Henry Waxman
Ranking Minority Member

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ONE HUNDRED FIFTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

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BERNARD SANDERS, VERMONT
INDEPENDENT

August 13, 1998

The Honorable Janet Reno
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Reno:

I write to correct a misimpression that you and your staff appear to be laboring under. In conjunction with Representative Waxman, you suggest that the subpoena sent by the Committee on Government Reform and Oversight to obtain the Freeh and La Bella memoranda is directed at forcing you to appoint an Independent Counsel for campaign finance-related scandals. While it is certainly true that I have said on many occasions that I believe an Independent Counsel should be appointed, it is also true that I and a majority of the members of this Committee have serious concerns over your handling of this matter and issued the subpoena in order to review the memoranda of the two top officials who have recommended an Independent Counsel. Evidence is mounting that suggests your decisionmaking is subject either to unacceptable political considerations, or serious misreading of the law for inexplicable reasons. Therefore, it is incumbent on this Committee -- following its mandate to conduct oversight of your agency -- to investigate the Department of Justice's response to campaign finance crimes committed in the last two Presidential election cycles.

Because it appears that the Department's campaign finance decisionmaking has been deeply flawed, I have legitimate concerns that Congress should examine the decisionmaking process. With this in mind, the only way to determine whether an Attorney General has behaved improperly with respect to declining to appoint an Independent Counsel -- or in declining to prosecute any case -- is to evaluate the underlying deliberative memoranda and compare them with the final decision. There is simply no other way for Congress to perform its legitimate oversight role when it is addressing an issue of potential malfeasance.

In the campaign finance investigation, I have balanced your concerns -- and those of the Director of the FBI and Mr. La Bella -- against the oversight requirement that Congress be satisfied that the Department of Justice is being administered properly and that all matters are being decided free from inappropriate considerations. Proper administration of the law is the paramount concern of Congress, and in situations where it appears that there is misfeasance at the Department of Justice, Congress must step in. The following are a few examples that have led to my concern:

- In April, 1998, this Committee held hearings on conduit contributions made by the Castro family of Venezuela. In the course of our investigation, it became clear that a case supported by the New York District Attorney's office and individuals in the U.S. Attorneys office in Miami was taken over by your Public Integrity Section in Washington, D.C. Notwithstanding documentary evidence that a high-level Democratic contributor was involved in unlawful conduct in the 1992 election cycle, the Department failed to take action. Prosecutors from the Manhattan District Attorney's office testified that they were so frustrated with the Department's inaction that they even considered taking the Castro case back to prosecute it themselves. When your Department cannot bring a simple case such as the Castro/Intriago case, how can the public have confidence that complex cases will be handled appropriately? Furthermore, the prosecutor who failed to follow up on this case is Lee Radek, the head of the Public Integrity Section and reportedly an opponent of the appointment of an Independent Counsel. An exchange from this Committee's April, 1998, hearing between a Committee counsel and a prosecutor from the Manhattan District Attorney's office provides a clear example of the type of conduct that raises questions regarding the Department's ability to supervise the campaign finance cases:

  Q: Now, Mr. Preiss, did you try and have a conversation with Mr. Radek?
  A: Yes.
  Q: What was the result?
  A: I was not put through to him.
  Q: Now it's my understanding -- correct me if I'm wrong -- that you were told that Mr. Radek would not speak to anyone unless they had a referral number for the case, correct?
  A: That's correct.
  Q: And do you know whether Mr. Castro's lawyer had such a referral number?
  A: If he did, he didn't give it to me.
  Q: Did anybody ever give you a referral number for this case?
  A: No, I don't think we were ever given a referral number. I don't think anybody had a referral number. Maybe there was a referral number inside the Department of Justice, but, again I wouldn't be privy to that, so I don't know.
  Q: Right, but Mr. Castro's attorney was not an employee of the Department of Justice, so he had the same status as you.
  A: No he was not an employee of the Department of Justice.

Q: Okay. And I don't know whether this is a question you can answer or not, but were you concerned at the time that Mr. Castro's attorney was given more attentive treatment at the highest levels of the Department of Justice than you?

A: Well, I thought at the time, I think I said in the conversation that I couldn't understand why the defense attorney's phone call could be taken the day before, but mine couln't be and I was the prosecutor and he was the defense lawyer. I think that's what I said to the person who answered the phone. *See Attachment A.*

Given the clear problems associated with the failure at the Department to investigate Orlando Castro Llanes and Charles Intriago, I request that you make Assistant United States Attorney Richard Gregorie available to be interviewed by staff from this Committee. It is my belief that Mr. Gregorie will be able to shed some light on the facts known to the Department prior to the Public Integrity Section's decision to refrain from prosecuting this case.

- I believe that you attempted to mislead this Committee on at least one occasion. In a letter dated December 8, 1997, you stated: "It is unprecedented for a Congressional Committee to demand internal decisionmaking memoranda generated during an ongoing criminal investigation." *See Attachment B.* This false statement has been used publicly by Department of Justice spokespersons to discredit this Committee and make the current request for the La Bella and Freeh memoranda -- and the previous request for the Freeh memorandum -- seem unprecedented. Director Freeh testified on August 4, 1998, that there were examples of Congress asking for such memoranda and that this action was not unprecedented, but you have refused -- even though this matter has been pointed out to your staff -- to amend your representation. I believe there is no excuse to mislead Congress in search of a good soundbite, and it is troubling that such basic matters are subject to misrepresentation.

- One of your principal advisers has stated in official correspondence that: "We have concluded that the officials of the Clinton/Gore 1996 Reelection Campaign against whom allegations have been made [Terry McAuliffe and Laura Hartigan] are not "covered persons" within the meaning of the Independent Counsel Act." *See Attachment C -- Letter from Lee J. Radek to Bradley T. Raymond, November 4, 1997.* In a letter drafted less than four months later, Assistant Attorney General Andrew Fois took the following position: "DNC officials are not covered by the Act. . . . In contrast, the chairman and treasurer of the presidential campaign committee are covered." *See Attachment D -- Letter from Assistant Attorney General Andrew Fois to The Honorable Michael Pappas, February 25, 1998.* This conflicting interpretation raises grave concerns regarding the direction of the Campaign Task Force at the Department of Justice.

- Mr. Radek made the following statement on July 6, 1997: "Institutionally, the Independent Counsel statute is an insult. It's a clear enunciation by the legislative branch that we cannot be trusted on certain species of cases." *See Attachment E -- Lee A. Radek,*

The New York Times Magazine, July 6, 1997. Given Lee Radek's election to use the power and place of his office to belittle the Independent Counsel statute, it is hard to avoid the conclusion that the reason he feels no need to speak with the Director of the FBI and Charles La Bella about the La Bella memorandum is that his heart is not in enforcing the law. As Mr. La Bella and Director Freeh testified in our August 4, 1998, hearing, Mr. Radek is one of your key advisers on the Independent Counsel matter.

- In his testimony on August 4, 1998, Director Freeh stated that his memorandum makes the point that there has been an inconsistent application of the Independent Counsel statute. This is a matter of serious concern to this Committee, and the American people have the right to know whether you are treating all cases before you in an evenhanded manner. Again, even if you were to appoint an Independent Counsel tomorrow, that would not change the fact that you may have failed to act in an evenhanded manner. This Committee has a right to be informed of Mr. Freeh's concerns, and to come to its own conclusion as to whether this case has been handled appropriately.

- The testimony of both Mr. La Bella and Director Freeh made it very clear that both thought that the mandatory provision of the Independent Counsel statute had been triggered. Furthermore, they both indicated that you had failed to talk to Mr. La Bella about his own memorandum, that Director Freeh had not been asked for his views on the La Bella memorandum, that La Bella, Freeh and James Desarno had not been included in <u>any</u> meetings about the La Bella memorandum, and that Lee Radek has asked neither La Bella nor Freeh for their views on the La Bella memorandum. Given Mr. Radek's conclusion that senior members of the Clinton/Gore 1996 campaign were not covered by the Independent Counsel statute, and given his failure to act in the Intriago investigation, it is of concern that he did not seek to have an exchange with Mr. La Bella. This raises the question of whether your advisers are taking Mr. La Bella's arguments seriously.

  I find it extraordinary that both you and Mr. Radek failed to obtain the input of Mr. La Bella and Director Freeh as soon as the La Bella memorandum was distributed. Testifying last week, Mr. La Bella indicated the first thing he would do if he were looking at this case would be to <u>talk</u> to him [La Bella], and the second thing he would do would be to read the memorandum that he wrote.

- Mr. La Bella explained that he originally made three copies of his memorandum, and that he is now aware of nine additional copies having been made. Regardless of the extremely limited number of copies, *The Wall Street Journal* and the *The Washington Post* appear to be privy to confidential information contained in the La Bella memorandum. You, however, have failed to make a single statement about the damage done by your own Department. You speculate that the information that would be provided to the Committee members would be injurious to the investigation, while at the same time *The Wall Street Journal* discusses the focus of the La Bella memorandum on Harold Ickes. Director Freeh complimented the members of this Committee "on the way in which [we

have] handled very sensitive information, including briefings, which [included] classified materials." Based on recent leaks of sensitive information from your Department, it appears that you have more to be concerned about within your own house than within Congress.

- At our meeting on July 28, 1998, you asked for additional time to consider the La Bella memorandum. I was certainly concerned by what I perceived to be yet another delaying tactic. Upon reflection, however, I am concerned that you are attempting to avoid your legal obligation under the Independent Counsel statute. The statute requires that you determine whether there are grounds to investigate within 30 days of receiving specific information from a credible source. Mr. La Bella's information seems to fit that description. However, the thirty day review period does not seem to have been triggered until only recently if last week's news reports are accurate. Again, this is a matter of concern.

  Given Mr. Freeh's clear testimony that he was able to understand the points made in the La Bella memorandum, and given the clear testimony that La Bella, Freeh and Desarno have not even been consulted, these dilatory tactics are troublesome.

- Your recently-departed Deputy Chief of Staff, Kent Markus, was Chief of Staff at the Democratic National Committee at a time during which some of the conduct under investigation occurred. Has Mr. Markus been privy to any discussion or decisionmaking pertaining to any of the matters related to the Campaign Task Force's deliberations? Given the possible proximity of this individual to the deliberative process involving the refusal to appoint an Independent Counsel, I am concerned that you are oblivious to the appearance of conflict of interest that is the fundamental rationale for the Independent Counsel statute.

- Given your reliance on advice not to appoint an Independent Counsel, I am concerned that the advisers on whom you rely now have a vested interest in the status quo. Given the importance of this matter, it is human nature that your advisers would be reluctant to have an Independent Counsel review their work product and come to different conclusions. That you would allow those under you to be placed in this position is another troubling aspect of this investigation.

- It should not be forgotten that for much of your professional career you have been an elected Democratic politician, and your recent conduct raises a number of issues. On the morning of Tuesday, August 4, 1998, you informed me that you would like an opportunity to testify at the scheduled hearing. Aside from the fact that you had many days to make this request and only provided 15 minutes notice, it appears that you discussed this request with Minority members prior to making the request of the Chairman of the Committee. It also appears that the media were contacted prior to your telephone call to me. Following this chain of events, you provided a lengthy letter to the

Minority to be read into the record. This letter was never transmitted directly from the Department of Justice to either myself or to any other Majority member, and given the length and complexity of the letter, it does not appear that it was drafted after your telephone conversation with me, but rather before.

Suffice it to say that something appears to be very wrong at the Department of Justice. Last week, at a press conference, you made the following statement: "The Department cannot do its duty if it is subjected to a process that can only shake public confidence in our ability to make law enforcement decisions free from political pressure." This sounds perilously close to an argument that you are above the law and that you are above scrutiny. As has been observed by many across the ideological spectrum, it is you who has politicized this process by failing to understand the obvious conflicts inherent in investigating your own boss. It is precisely this type of situation that resulted in the original push for an Independent Counsel statute.

For this reason, my request for the Freeh and La Bella memoranda is directed at coming to an informed conclusion as to whether there should be additional scrutiny of conduct at the Department of Justice regarding its performance during the campaign finance investigation.

Sincerely,

Dan Burton
Chairman

cc: Hon. Henry A. Waxman

ATTACHMENT

VENEZUELAN MONEY AND THE PRESIDENTIAL ELECTION

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

APRIL 30, 1998

Serial No. 105–125

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after the case was taken from the Florida prosecutors and lodged at the Department of Justice. Is that correct?

Mr. PREISS. That's correct. That's what Mr. Castro's lawyer told me.

Mr. WILSON. And we're speaking of Mr. Lee Radek, who is the head of the Public Integrity Section.

Mr. PREISS. That's who he told me he spoke to.

Mr. WILSON. Now, Mr. Preiss, did you try and have a conversation with Mr. Radek?

Mr. PREISS. Yes.

Mr. WILSON. What was the result?

Mr. PREISS. I was not put through to him.

Mr. WILSON. Now it's my understanding—correct me if I'm wrong—that you were told that Mr. Radek would not speak to anyone unless they had a referral number for the case, correct?

Mr. PREISS. That's correct.

Mr. WILSON. And do you know whether Mr. Castro's lawyer had such a referral number?

Mr. PREISS. If he did, he didn't give it to me.

Mr. WILSON. Did anybody ever give you a referral number for this case?

Mr. PREISS. No, I don't think we were ever given a referral number. I don't think anybody had a referral number. Maybe there was a referral number inside the Department of Justice, but, again, I wouldn't be privy to that, so I don't know.

Mr. WILSON. Right, but Mr. Castro's attorney was not an employee of the Department of Justice, so he had the same status as you.

Mr. PREISS. No, he was not an employee of the Department of Justice.

Mr. WILSON. OK. And I don't know whether this is a question you can answer or not, but were you concerned at the time that Mr. Castro's attorney was given more attentive treatment at the highest levels of the Department of Justice than you?

Mr. PREISS. Well, I thought that. At the time, I think I said in the conversation that I couldn't understand why the defense attorney's phone call could be taken the day before, but mine couldn't be, and I was the prosecutor and he was the defense lawyer. I think that's what I said to the person who answered the phone.

Mr. WILSON. Fair enough; I think that speaks for itself. I'll finish my first 20 minutes now with one other question. Mr. Preiss, or Mr. Dawson, do you know whether any of the Castro family attorneys—and bear in mind for anybody watching today that there were three Castro family members who were under investigation and ultimately convicted—do you know whether any of the Castro family attorneys, such as Judge Tyler in New York, were given meetings at the Department of Justice prior to the decision to drop the case?

Mr. DAWSON. That is a very difficult question to answer depending on how you limit the time. Are you talking back in 1988, 1990, 1992, or are you talking between the time of the conviction and the time of the sentencing?

Mr. WILSON. Actually, just limit it from the time of the conviction until the time Mr. Radek wrote a letter addressed to Mr. Preiss.

ATTACHMENT B

Office of the Attorney General
Washington, D. C. 20530

December 8, 1997

Honorable Dan Burton
Chairman
Committee on Government
Reform and Oversight
House of Representatives
Washington, D.C. 20515
Dear Mr. Chairman:

We are writing in response to your December 5th letter and subpoenas seeking a copy of the Director's recent memorandum to the Attorney General. The memorandum expresses the Director's views about whether the Attorney General should request the appointment of an independent counsel and about other matters relating to the pending campaign finance investigation.

We remain quite concerned that releasing the Director's memorandum to Congress would compromise the Department's ability to discharge its responsibilities for the fair administration of justice. As a general matter, we feel strongly that the Attorney General's decisionmaking on prosecutorial matters must have the benefit of candid and confidential advice and recommendations from the Director and other Department officials and employees. More specifically, we believe that both the integrity of the criminal justice process and the Government's ability to prevail in particular prosecutions could be threatened by acceding to the Committee's demand.

Public and judicial confidence in the criminal justice process would be undermined by congressional intrusion into an ongoing criminal investigation. Access to the confidential details of an ongoing investigation would place Members of Congress in a position to exert pressure or attempt to influence the prosecution of specific cases, irreparably damaging enforcement efforts.

Moreover, the disclosure of this memorandum could provide a "road map" of our investigation. The document, or information contained therein, could come into the possession of the targets

of the investigation through inadvertence or deliberate act on the part of someone having access to the documents. The investigation could thereby be seriously prejudiced by the revelation of the direction of the investigation or information about the evidence we possess. In addition, the reputation of individuals mentioned in a document like this could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution.

Finally, the Department has reviewed the precedents cited in your letter and in the accompanying Congressional Research Service memorandum. It is unprecedented for a Congressional committee to demand internal decisionmaking memoranda generated during an ongoing criminal investigation. None of the cited examples are to the contrary. In particular, the three prior matters that you highlighted in your letter did not involve ongoing criminal investigations and, therefore, are not relevant precedents.

We have decided for the foregoing reasons that we must respectfully continue to decline your request for the memorandum. We will be prepared at tomorrow's Committee hearing to respond to your questions to the fullest extent we can, consistent with our law enforcement responsibilities. We are hopeful that our participation in the hearing will respond to your concerns. If questions remain after the hearing, we would be willing to discuss them further in a manner that properly accommodates both legislative and executive branch interests.

Sincerely,

Janet Reno
Attorney General

Louis J. Freeh, Director
Federal Bureau of Investigation

cc: The Honorable Henry A. Waxman
Ranking Minority Member

ATTACHMENT C

U. S. Department of Justice

Washington, D.C. 20530

NOV 0 4 1997

Mr. Bradley T. Raymond
Finkel, Whitefield, Selik, Raymond,
Ferrara & Feldman, P.C.
32300 Northwestern Highway, Suite 200
Farmington Hills, MI 48334-1567

Dear Mr. Raymond:

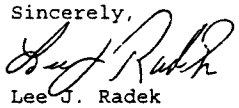
This is in response to your September 12 and October 6, 1997 letters to United States Attorney General Reno. Your letters were referred to the Public Integrity Section of the Department of Justice, which is the part of the Criminal Division responsible for the investigation and prosecution of corrupt public officials, and for evaluation of the application of the Independent Counsel Act.

We have carefully assessed the application of the Independent Counsel Act to the allegations of misconduct by officials of the Democratic National Committee and the International Brotherhood of Teamsters which you referred. We have concluded that the officials of the Clinton/Gore 1996 Reelection Campaign against whom allegations have been made are not "covered persons" within the meaning of the Independent Counsel Act. As such, at this time there is no basis for the appointment of an Independent Counsel in this matter.

As the press articles you enclose make clear, this matter is being thoroughly investigated. The United States Attorney's Office for the Southern District of New York is handling the federal investigation, and any additional information you have which might assist in clarifying the issues involved in that investigation should be directed to that office, or to the Federal Bureau of Investigation.

We appreciate your interest in this matter, and thank you for whatever cooperation you are able to provide to the federal investigation.

Sincerely,



Lee J. Radek
Chief
Public Integrity Section
Criminal Division

cc: (with enclosures)
The Honorable Mary Jo White
United States Attorney

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

ATTACHMENT D

February 25, 1998

The Honorable Michael Pappas
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Pappas:

This letter responds to the questions you posed to the Attorney General at the oversight hearing concerning the Department's conclusion that individuals involved in an ongoing investigation being conducted by the United States Attorney's Office for the Southern District of New York are not covered by the Independent Counsel Act.

Some individuals whose names have surfaced with respect to various aspects of that matter are connected to the Democratic National Committee (DNC) or the 1996 Clinton/Gore Reelection Campaign Committee. The Department has reviewed the status of individuals identified to date in connection with that investigation and has concluded that none are covered persons under the Act.

DNC officials are not covered by the Act. See, 28 U.S.C. § 591. In contrast, the chairman and treasurer of the presidential campaign committee are covered, 28 U.S.C. § 591(b)(6), as are other campaign "officers" who "exercise authority at the national level." When a campaign staffer is involved in a criminal investigation, the Department is required to conduct an intensive inquiry into his or her title, role and function in the campaign in order to determine coverage. In the case of the individuals involved in the Teamster matter mentioned by you, an examination of their roles and responsibilities led to the conclusion that they were not "officers" within the established meaning of that word, or did not "exercise authority at the national level," and thus were not covered persons under the Act.

I hope this information is of assistance to you. Thank you for your interest in this matter, and if I can be of any further assistance with respect to this or any other matter, do not hesitate to contact me.

Sincerely,

Andrew Fois
Assistant Attorney General

cc: The Honorable Dan Burton
Chairman
Committee on Government Reform and Oversight

The Honorable Henry A. Waxman
Ranking Minority Member
Committee on Government Reform and Oversight

The New York Times Magazine · JULY 8, 1997 ATTACHMENT E

What Is Janet Reno Thinking?

The Attorney General is at her happiest and best outside the Beltway, but time and again she has been forced to investigate alleged wrongdoings in her boss's Administration. Now, with calls to appoint a special prosecutor to explore campaign finance, she faces her most agonizing decision – and a threat to her own reputation. **By Jeffrey Goldberg**

IN MAY 1993, THE CLINTON WHITE HOUSE SENT JANET RENO TO THE Senate in order to call for the reinstatement of a law, the independent counsel statute, that Reno's predecessor as Attorney General, the Bush appointee William Barr, had tried enthusiastically to kill. The statute, which allows for the appointment of an independent prosecutor in cases of high-level executive-branch wrongdoing, had long been anathema to Republicans, who felt it was used as a nightstick against them during the Reagan and Bush years. The Democrats, of course, had grown quite fond of the statute, which was drawn up in the wake of Watergate, and hoped to revive it.

"Bernie Nussbaum came to see me during the transition," Barr said recently, referring to Clinton's first White House counsel. "I told him, don't breathe new life into the statute. As a Republican, I said, nothing would please me more than seeing you guys live under it. As an American, I think it makes life in the executive branch miserable. But he said that the President and he were committed to run an Administration at the highest ethical standards" — Nussbaum denies that this exchange took place — "and I said, be my guest."

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It fell to Reno, then in her third month as the nation's top law enforcement official, to make the case for the reauthorization, and she did so with alacrity. "It is absolutely essential for the public, in the process of the criminal justice system, to have confidence in the system," Reno told the Senate Governmental Affairs Committee, "and you cannot do that when there is conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor." The statute was soon reauthorized by Congress.

Four years later, Reno finds herself in an unhappy predicament. During Clinton's first term she was quite liberal in the use of the statute, asking for independent prosecutors to investigate Mike Espy, then Secretary of Agriculture; Henry Cisneros, then Housing and Urban Development Secretary; Ron Brown, then Commerce Secretary; and, at the President's public urging, the Whitewater affair. But now, several months into her second term as Attorney General — a second term that, by some accounts, the President granted her only with great reluctance — she is under considerable pressure to seek the appointment of yet another independent prosecutor to investigate yet another Clinton scandal, the fund-raising practices of the President's re-election campaign.

The President has expressed no desire to see an independent counsel appointed to investigate the charge that he knowingly and flagrantly violated campaign finance laws, and Reno has been, in the eyes of most Repub-

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licans, many editorial writers and even some Democrats, suspiciously agreeable. House Speaker Newt Gingrich has compared Reno to the felonious Nixon Attorney General, John Mitchell, and asked if she were "the protector of the President or the enforcer of the law." (Washington being Washington, Gingrich made these statements even as he was tidying up his own ethics mess.) Janet Reno has been called many unkind things during her four tumultuous years as Attorney General — unfit to lead, myopic, unintelligent and, more frequently, too odd for Washington. But her integrity has never been seriously challenged, until now.

That the attacks on Reno's integrity stem from a case involving the alleged misdeeds of others may seem paradoxical, but so is the nature of the job. The Attorney General is the President's loyal aide when forging policy on issues of crime and justice, yet she is also responsible for enforcing Federal law as head of the Justice Department, even as those laws apply to the Administration she works for.

There is something paradoxical, too, in the new, intensified relationship Reno has with the President. She is a woman who came to Washington and immediately found herself relegated to the outermost circle of Clinton advisers. Now she has moved to center stage — not because of policy matters but because of the alleged sins of the White House she works for.

The campaign finance scandal — Senate hearings on which are scheduled to begin this week — comes at an unfortunate moment for Reno, because it has obscured the fact that she finally seems comfortable in her job, and is in it for the duration, despite the early-stage Parkinson's disease that now afflicts her. If she had the personality of a Rudolph Giuliani (or a Bill Clinton), she would be seizing credit for the dramatic dip in national crime rates — not rightfully, necessarily, though she would certainly be blamed if crime were going up. Moreover, her department has scored some high-profile prosecutorial victories, most recently in the case of Timothy McVeigh. And though hers is a largely symbolic generalship, she has had significant success from the bully pulpit, preaching about volunteerism and early childhood development and greatly expanding the rhetorical possibilities of the office — imagine Dick Thornburgh, or for that matter John Mitchell, making "deadbeat dads" into a policy centerpiece, or talking up the importance of prenatal care as a key to crime prevention.

Such advocacy has helped secure respect for her outside Washington. This reputation partly explains why she has felt no need to defend herself against the charge, inside the Beltway, that she's protecting the President. She has explained, apparently to her own satisfaction, the reasons she thinks it unnecessary to remove a Justice Department task force from the investigation of campaign fund-raising and hand it over to an independent counsel. In a letter she sent in April to the chairman of the Senate Judiciary Committee, the Utah Republican Orrin Hatch, Reno maintained she would need "specific and credible" evidence that a person covered by the statute — one of about two dozen high Administration officials, including the President — may have committed a crime and, barring that, she wrote that she would remove herself from the investigation only if she concluded that "there is a potential for an actual conflict of interest, rather than merely an appearance of a conflict of interest." The fact that she had once advocated the independent counsel statute as necessary precisely *because* even the appearance of a conflict of interest can undermine confidence in the system presented still another paradox, at least to those who are now convinced Washington has finally got to Reno.

SINCE THE RELEASE OF THE LETTER TO HATCH, RENO HAS UTTERED barely a newsworthy word on campaign finance, even as it has continued to rivet the capital. Reno is not the most forthcoming high official, in any case. Her weekly news briefing is a fascinating ritual in which she invites reporters to ask her anything they want and then manages to say nothing at all. Nor is this just a problem she has at the office. Even her close friend Walter Dellinger, the acting Solicitor General, acknowledges, "She is not the easiest person to chat up."

This is not to say that she is ungracious. She is courtly and solicitous, quite the opposite of the crazed Amazon portrayed on the "Saturday Night Live" skit "Janet Reno's Dance Party." She is, however, as tall as "Saturday Night Live" would have her.

'There is tremendous pressure on her,' Senator Orrin Hatch said recently. 'She knows she

In his pocket? Reno's critics claim that she is protecting the President, but she and Clinton have never been very close. They meet here with Bill Lann Lee, an Assistant Attorney General.

In her office at the Justice Department one morning not long ago, she smiled serenely when the subject of the independent counsel statute was raised. Did she still support the statute as written?

"I think it's best while this issue is pending not to comment," she replied.

I then read aloud her comment to the Senate committee in 1993 about the necessity to trigger the statute even when there is the mere appearance of a conflict of interest. Did she still stand by this language?

"I think Congress has tried to address it," she said, carefully, "because in a situation with respect to a covered person, Congress has in effect

PHOTOGRAPH BY STEPHEN CROWLEY/THE NEW YORK TIMES

said what it thinks is the scope of an appearance of conflict, and then gives an additional part to it, and as I have said, I have not found specific and credible evidence with respect to a covered person."

I tried again, asking if the alleged campaign finance abuses might fit into the category of an appearance of conflict of interest. I mentioned the memos written by Harold Ickes, the former White House deputy chief of staff, that detail the President's hands-on involvement in raising "soft money" that may have then been used not for Democratic Party matters but, illegally, for Clinton's campaign advertising.

"It's very important when you look to make sure you don't jump to conclusions," Reno replied. "I think Congress said, Here are the covered people. I think it is generally correct where whether there is a conflict or not, there may be by the relationship an appearance and then you have got to look at everything and make sure that you're judging on facts and not innuendo and that's what we're trying to do."

I then asked her to define the word "appearance."

"I think you have to take every case on a case-by-case basis and look at the evidence," she said.

the more obfuscatory members of the D.C. bar. Nowhere was this more in evidence than at a Senate Judiciary Committee oversight hearing at the end of April, shortly after Reno rejected, for the fourth time, calls for her to seek the appointment of an independent counsel to look into the President's '96 campaign. One question at the center of the controversy is whether the Clinton campaign erased the line between soft money and hard money. So-called soft money is raised, without limits, for the ostensible purpose of "party building." "Hard" money, on which limits are placed, is raised to elect candidates. Soft money may be spent to create "issues advocacy" advertisements, which are meant to educate voters, but it cannot be spent on "express advocacy" advertisements, which are designed to win votes for political candidates.

Deep into the afternoon session of the hearing, Reno was asked a seemingly simple question by the Pennsylvania Republican Arlen Specter, a former prosecutor who knows how to handle a witness. Specter first read to Reno the text of a television advertisement from last year's campaign, which states, in part: "Head Start, student loans, toxic clean-up, extra police, anti-drug programs. Dole-Gingrich wanted them

serves this Administration and **she knows that the President gave her this opportunity.'**

I asked again if she stood by her 1993 statement on the appearance of conflict.

"Mmm-hmmm," she affirmed, barely.

Having hit a 6-foot-2 stone wall, I tried a bit of indirection.

"Is it true," I asked, "that you are Janet, Queen of the Bunny Planet?"

Reno laughed — guffawed, really, and said, "It's a wonderful children's book, isn't it?" Two weeks before, Jamie Gorelick, who was Deputy Attorney General during Reno's first term, had mentioned that Reno is especially enamored of a children's book series called "Voyage to the Bunny Planet." It tells stories of little boy and girl bunnies who, having terrible, miserable days, dream of a place "far beyond the moon and stars, 20 light years south of Mars," where "spins the gentle Bunny Planet, and the Bunny Queen is Janet." Queen Janet then takes the little bunnies on a tour of the day as it should be.

Gorelick, the mother of two small children, introduced the Attorney General to the Bunny Planet series, and Reno now reads the books during story hours at a Washington elementary school she has "adopted."

Among Reno's aides, the Bunny Planet has become a running gag, but Gorelick sees deeper meaning in Reno's attraction to the character of Queen Janet. "It's not a joke," says Gorelick, who is now an official at the Federal National Mortgage Association. "It's not just the similarity of the names. The Bunny Queen tries to make the world a better place for kids. It's really her vision of a better world for children."

Reno admitted that her goal is to make the world a little better place, but waved off Gorelick's analysis. "It's just the magic of the words," she said.

Still, Gorelick may be on to something. Reno is among the Administration's foremost advocates for children, a surprising role for the chief Federal law enforcement officer to adopt. She is also an advocate for volunteerism, and drug treatment on demand, and gives speeches that could just as easily be delivered by a Surgeon General rather than an Attorney General. It is her populist oratory, her unusual willingness to accept blame and her reputation for straight talk when she is speaking with citizens groups or law enforcement people — she possesses naturally what every congenitally inauthentic politician yearns for, sincerity and plain-spokenness — that has made her a figure of great appeal, at least outside Washington.

But here's the mystery. Throughout the independent counsel controversy, Janet Reno, the straight-talking prosecutor from the Everglades, has been contorting and bending her words in ways that would do proud

cut. ... Dole-Gingrich: deadlock, gridlock, shutdowns. The President's plan: finish the job, balance the budget, reform welfare, cut taxes, protect Medicare. President Clinton gets it done."

Specter then asked the Attorney General the following question: "Could that possibly be language, taken as a whole, that says anything other than urge the election expressly of President Clinton?"

It seemed clear enough that the advertisement was designed not to educate the voting public about, say, the dangers of toxic waste. Here is how Reno saw it, however:

"I think it is important again to consider the whole framework by which we have to judge that and the fact that the elections commission is in place to look at these decisions, to look at the message, to render advisory commission opinions. At this point the whole area is so murky, we cannot find clear and specific and credible evidence that the law has been violated."

Specter: "Well, Attorney General Reno, if that is express advocacy the law has been violated. So the question is: Can you say to us that it is your legal judgment that that is not express advocacy?"

Reno: "Based on the processes that have been established by the Department of Justice, the MOU" — memorandum of understanding — "with the elections commission, this is a situation in which we would not find specific and credible evidence that a crime had been committed that would justify triggering the statute."

After the hearing, I asked Specter what he thought of Reno's answer.

"I do not want to use the word gobbledygook," he said, by way of using the word gobbledygook. "But it was unintelligible."

Was she intentionally unintelligible?

"I do not want to impugn motives," he said.

Later, in her office, I asked Reno about her answers to Specter.

"What the issue there is that it was one of the most complicated issues," she said. "As he asked that particular question — that's an easy question to answer, or could be, but in terms of the law it's a much more complicated issue, and so I may have not been as articulate as I could have been. And also, just the context of that oversight hearing on soft-money issues, hard-money issues — it is one of the most difficult areas I have to deal with."

But how would she have ill served the American people if she had simply said that the ad sounded like a campaign ad for Bill Clinton?

"Because," she answered, "I did have to go back and describe what the Federal Election Commission has done and go into details and again,

that's what we're trying to do in terms of responding to everybody. Just lay it all out so they can understand the whole history."

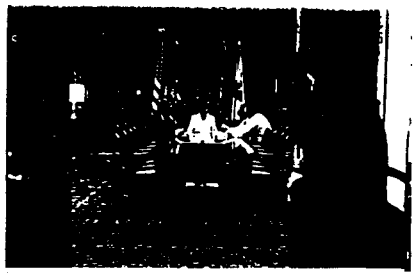
Earlier, Reno's chief of staff, a straight-talking ex-Miami prosecutor named John Hogan, had told me that, when it comes to Federal election [illegible] by being plain-spoken you can mislead." He went on to say, "Any [illegible] phrases they talk about can be overdefined," and then immediately, and wistfully, noted the looking-glass quality of his observation.

When I mentioned Hogan's statement to Reno, she said that he "has a point." She added, "One of the things I have tried my level-best to do is when I'm confronted with a major issue I've got to explain — I say, 'Go tell somebody to put that in plain English.' This one is very, very difficult to explain."

But, I asked, "if the American people can't understand the system, and the system can't be explained, is something then rotten with system?"

I immediately realized my mistake. Bluntness was not going to be lightly forgiven.

"I'm not going to comment because you're using inflammatory language," she said, "and that probably gives us a good point to say that this is a pending matter and I shall not comment."



Reno with the Justice attorneys (above), who may be the real key to her actions on campaign finance. They are (at right): Lee Radek, Laura Ingersoll, Paul Fishman and Mark Richard.

THE QUESTION THAT GOES UNASKED IS THIS: WHY WOULD Reno, who presumably values her reputation for straight talk and integrity, contort her words and evade questions, all the while bringing down scorn on her head, when she has the discretionary power to ask, this very second, for an independent counsel?

There are any number of answers to that question. Hers, of course, is that she is exactly right on the law, even if she has been suddenly dispossessed of her ability to explain herself plainly. Another possible answer is that she is using her office to protect the President.

If Janet Reno were a close friend of President Clinton, say, in a relationship like that between Ronald Reagan and Edwin Meese, the pressure on her to trigger the statute would have long ago grown unbearable. But because it is well known that she is not close to the President, she can still seem credible when she decides against triggering the statute. In other words, she provides the President cover by not providing him with cover.

But that is much different than accusing Reno of engaging in a Watergate-[illegible] cover-up. To borrow language from the independent counsel debate, there is no specific and credible evidence that Reno agreed to stonewall Congress on appointing an independent counsel in exchange for a second term as Attorney General. There are important Republicans who do maintain, however, that she is not wholly immune to pressure from the White House.

"There is tremendous pressure on her," Senator Hatch told me. "She knows she serves this Administration and she knows that the President gave her this opportunity. There should be a natural tendency for her to want to protect the President."

But Reno never promised to protect the President. According to John Hogan, Reno's chief of staff, the President told Reno when he was first interviewing her for the job in early 1993 that he'd heard she was not a "team player." Hogan recalls that Reno told the President that she would be a fine team player, unless he did anything "illegal or unethical." The President, Hogan says, laughed out loud at her answer and appointed her later, a testament to either his desperation, his true innocence or a level of political sophistication so sublime that he could predict that Reno's reputation for independence would one day provide him with political cover.

Reno didn't provide much cover early on. At one point during Clinton's first term, 3 of the other 13 Cabinet members Reno would meet at Cabinet meetings were under investigation by independent counsels she had requested, and she gained the enmity of much of the White House staff for creating the appearance of an Administration drowning in scandal. Particularly critical were those working to get Clinton re-elected last year.

"The last thing she cared about was whether Clinton was re-elected or not," Dick Morris, the President's former political strategist, told me. He then inadvertently paid Reno a compliment: "Sometimes I thought she didn't realize she would lose her job if Clinton lost."

Reno is, of course, the accidental Attorney General. The Clintons (Hillary played an active role in Justice Department staffing) had decided to name a woman to the job, but their first choice, Zoë Baird, and then their second, Kimba Wood, were done in by what became known as "Nannygate." Reno, a self-described "old maid," had no problems with immigrant domestics and taxes, and that's mainly what interested the White House.

"I called the President and said, 'Here's somebody who won't have these personal difficulties,'" says Senator Bob Graham, the Florida Democrat who attended Harvard Law School with Reno and who is also a friend of Clinton's. "She is single, yes, but Janet is just a very careful person in her personal life, particularly in regard to her standards of conduct."

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What also comforted the White House was that she was the only one of the three original candidates to have been vetted by voters, who had returned her repeatedly to the top prosecutor's job in Dade County.

Reno did not have any easy go of it during the first term. Along with the independent counsel investigations of other Cabinet members, there was the debacle at Waco, the worst moment of her career, in which, trusting the deeply flawed advice of the F.B.I., she ordered the gas attack on the Branch Davidians, which led members of the cult to set fire to their compound, resulting in the deaths of an estimated 80 people. And there was the perception in the White House that she was more social worker than prosecutor. Even today, the social-worker epithet rankles Reno. This is the woman, after all, who was the chief prosecutor in Dade County during its "Miami Vice" heyday. "I've probably asked for the death penalty far more often than people who call me a social worker," she told me. John Hogan, her chief of staff, is more explicit: "I don't know how many people Dick Morris has ever sent to the electric chair."

Morris, who attacks Reno in his memoir for trying to block many of President Clinton's crime initiatives, seems to have misinterpreted Reno's record. In truth she has been, as she promised the President, the model of an Administration team player on issues of policy. She has abandoned, or at least shelved, many of her liberal beliefs, in order to support Clinton's get-

20 PHOTOGRAPHS BY STEPHEN CROWLEY/THE NEW YORK TIMES

tough approach to crime. Early in the term, she was critical of mandatory minimum sentencing for nonviolent drug offenders, but she soon learned the White House game plan: never expose Clinton's right flank on crime.

"I think anybody who is going to function in government has to realize that you can't get everything you want," Reno says.

Friends say this has been difficult for her. Talbot D'Alemberte, a former president of the American Bar Association and Reno's mentor, says, "She's taken some grief from friends about the way things are going on crime policy." He clearly counts himself as one of those friends. "I think some of the policies I've seen are silly," he says. "I'm not a fan of the death penalty, and adding new death penalties contributes nothing. . . . I'm really sorry that the Administration has not picked up Janet's rhetoric on programs that can prevent crime."

It is an open secret that crime policy, which has traditionally been set at the Justice Department, was taken over by the White House staff, under

the direction of Rahm Emanuel, now the President's senior adviser. "Her willingness to have us develop policy is a sign of strength, not weakness," Emanuel says. Despite her deference to the White House on most issues of policy, Reno has never become a friend, or even much of a sounding board, for the President.

"I doubt the two of them ever met alone in the two years I was at the White House," Morris says. "He felt she was outside his Administration, almost kind of an auditor. He was very critical of her. It was almost like dealing with a foreign country."

Unlike other Cabinet members, including her friend Donna Shalala, the master networker who runs the Department of Health and Human Services, Reno seldom if ever drops by the White House in the early evening to work the halls, or have coffee with the President.

"She and the President have respect for each other, but for whatever reason, they've never been able to develop the kind of personal relationship that other Presidents had with their Attorneys General," says John Schmidt, who served during Clinton's first term as Associate Attorney General and is now a candidate for governor in Illinois.

There is another aspect, insiders say, to Reno's problems within the Administration, one she shares with other senior Administration women.

"I do think women have a slightly tougher time at the upper levels because the men assume that the women don't understand politics," Shalala says. "It took me a very long time to make the White House understand that. The White House has at least caught up with me." Shalala recalled parties given by senior Administration women during the first term at which the talk turned to sexism. "I can't say to you that Reno was telling the stories," Shalala said. "But she wasn't in the corner, and she giggled along with everybody else."

Shortly after Clinton won re-election last November, articles began appearing that suggested that the President would rather start the new term with a new Attorney General. On different occasions, the President was presented with the opportunity to say kind things about Reno, and didn't. Reno doesn't respond to subtlety, however. She stated publicly her desire to stay, which would have forced the White House to very publicly remove her. But at the same time, when leaders of national police and law enforcement groups called up offering their lobbying help to keep Reno in the job — she has developed quite a constituency among national policing groups — she told her aides to decline all help. "She said, 'The President has a right to make his decision without pressure,'" one aide, Nicholas Gess, the director of intergovernmental affairs, said.

When I asked Reno how she felt about the pressures during the transition period, and about the unkind talk that had apparently been emanating from the White House, she said she just "chuckled about it." And from the White House now, all is butter. "Janet Reno, outside of Madeleine Albright, is one of the most respected officials in America," Rahm Emanuel says magnanimously. "She is highly respected here." Emanuel has not always been so sweetly complimentary of Reno, Justice Department officials say. When asked if he has ever been critical of the Attorney General, he replied, "There hasn't been a single Cabinet officer in history about whom someone in the White House hasn't said, 'Goddammit, what's going on there?'"

What exactly transpired between Clinton and Reno as his second term began no one can or will say. The President would not discuss it. All he would say, in a written statement, is: "Janet Reno is an invaluable asset to my Administration. As Attorney General, she has exhibited the highest standards of integrity and professionalism, a deep understanding of the needs of law enforcement and a personal commitment to our nation's young people. She is an integral part of my Administration's efforts to fight crime, improve our juvenile justice system and protect our environment."

Those who know Reno best are convinced that she remains her own person. "The thing about Janet is that if she discovers evidence adverse to the President, she won't hesitate to use it," D'Alemberte says. "I doubt the President feels very protected by her."

SO IF SHE'S NOT PROTECTING HER PRESIDENT, THEN WHY DOES SHE have such a difficult time explaining her decision? Her critics say it is because her position is defensible only in the most narrow, overly legalistic terms. Her defenders, however, say that by its nature, Federal election law is arcane and confusing.

"I think you ought to give a prize to anyone who can succinctly and plainly explain the Federal campaign and contribution laws," says Benjamin Civiletti, who served as Attorney General under Jimmy Carter.

Just because Reno can't explain herself, in other words, doesn't mean her decision not to trigger the statute is wrong. What might be happening now, Justice Department officials say, is that the complexity and confusion of the case — and of the statute — is causing people to throw up their hands and call for an independent counsel to straighten everything out.

But Lee Radek, the chief of the Justice Department's public integrity section and the man overseeing the campaign fi- *Continued on page 39*

'Sometimes I thought **she didn't realize she would lose her job** if Clinton lost.'

RENO

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nance investigation, says, "Nowhere in the statute does it say you can have an independent counsel because it's all a big mess."

Radek says that Reno has guidelines to follow when considering whether to take the investigation away from him and turn it over to an independent counsel. "In order to trigger, no matter what, you've got to have a specific and credible allegation that a person has committed a crime," Radek explained. "Now you look at two questions. Is he a covered person? If he is, then you go for an independent counsel. But if he isn't a covered person, then you look to see if there is a conflict of interest. If there's a conflict of interest, then the Attorney General has the discretion to trigger the statute."

A key question is whether the Clinton campaign, under the direct coordination and control of the President, the most important covered person, knowingly flouted the laws governing campaign spending by turning the Democratic National Committee, a party organization, into a soft-money collection-and-advertising front for the campaign. The President's critics hold that money raised by Clinton during those famous "coffees" at the White House was funneled, in the main and illegally, to the D.N.C. Justice Department officials say privately that the violations of election law the President is alleged to have committed are of the type never prosecuted criminally, if only because the regulations are, in effect, a patchwork of laws and court orders that sometimes contradict one another.

"Frequently when the Federal Election Commission tries to regulate something, the courts say they've gone too far, under the First Amendment," says Robert S. Litt, a Deputy Assistant Attorney General in the criminal division.

The real crime, some officials say, is that election law is loophole-filled and invites abuse by unscrupulous campaigns. Even if the President directed the spending of soft money for hard-money purposes, the argument goes, it is not at all clear that any law has been broken. "The law in this area is complicated and in flux," Litt said.

No it isn't, says Reno's first Deputy Attorney General, Philip Heymann, now a professor at Harvard Law School. He says, in essence, that the Justice Department is buying into a fiction scripted by the White House — that is, just because you call it soft money doesn't make it soft money.

"They maintain that whatever money is paid into the D.N.C. is automatically soft money," he said. "But the people who donate it plainly intend to give it to the President because they want his approval, so if the President raises the money and puts it in my bank account with the understanding that he has a right to control it and spend it, then it's not my money at all, but his. What the Justice Department is saying is that candidates can always avoid the law by this most easy of charades. I want them to say this is a violation of the Federal Election Campaign Act, and if they don't want to treat it as criminal, let them stand up and say that."

RENO'S RELUCTANCE to appoint an independent counsel may have nothing to do with the White House and everything to do with her loyalty to her investigators inside the Justice Department. They maintain they can do the job, and what she is essentially doing, as some see it, is giving them the chance. When Reno arrived in Washington, she arrived without friends, without a cadre of aides to install all along the fifth floor corridor at Main Justice. She had joined the Administration relatively late, and the White House had already stacked the halls with its own people — Webster Hubbell as Associate Attorney General, for one. Reno forged friendships, though, among the ranks of the career prosecutors. And especially because the department is currently so bereft of top political appointees — the criminal division, under which the campaign finance investigation is being run, has been without a permanent head for nearly two years — she has listened to the career people, and the career people want to investigate campaign fund-raising.

"She's doing this because the career people, every which way short of sophistry, are trying to keep the case," Joseph diGenova says. He is a former U.S. Attorney, a Republican who was independent counsel in the Bush passport affair. "I do not believe for one moment that Reno or anybody in the department is motivated to protect the President. They are in this to show that the career people can do it, and she backs them."

Radek, a bluff, cheerful man of 54, was unwilling to discuss details of the ongoing investigation when I spoke to him, but he was happy to defend the Justice Department's ability to investigate the executive branch. The independent counsel law has always felt like a knife in the back to top Justice Department professionals like him. "Institutionally, the independent counsel statute is an insult," Radek said. "It's a clear enunciation by the legislative branch that we cannot be trusted on certain species of cases."

But Radek also denied that Reno is reflexively beholden to the career prosecutors. "She does not always do what the career people tell her to do," he said. "There is nothing passive about the way she makes decisions. It is so discouraging to see her exonerated for doing what she always does, which is call it as she sees it." Radek went on to say that the independent counsel statute places his prosecutors in a no-win situation. "If we do very well in our investigation, we have to turn the case over to an independent counsel. If we don't find anything, then we're criticized for not making the case.

"The fact is, through the history of the public integrity section, and its observation of and consultation with U.S. Attorneys, I've never seen a problem with a prosecution going easy on the party of the administration in power," he added. "In fact, the opposite is often true — prosecutors are motivated to go the extra mile. They're often more strict with the incumbent administration to avoid the appearance of favoritism."

Over and over again in the halls of the Justice Department, career prosecutors — and political appointees, too — point to the conviction of Representative Dan Rostenkowski three years ago on corruption charges as proof the department will prosecute without political interference. At the time of his conviction, Rostenkowski was a key figure in the effort by the Clinton Administration to move its health care package through Congress, and Republicans feared that the Clinton Justice Department would go easy on Rostenkowski in order to assure that he remained as chairman of the House Ways and Means Committee. Newt Gingrich, then the House minority whip, said at the time he worried that there would be "some kind of rigged deal where 15 or 20 felony counts magically get reduced to a misdemeanor to allow him to stay in charge of health care."

That didn't happen; Rostenkowski was indicted on multiple felony counts, and is now in jail, and the Clinton health care initiative failed. And what happened to Eric Holder, the U.S. attorney for the District of Columbia, who brought the case against Rostenkowski? At this writing, he is the Administration's nominee to replace Jamie Gorelick as Deputy Attorney General, the No. 2 position at Justice.

The Rostenkowski case should confirm to the world, Justice officials say, that the Department is fully capable, in theory, of handling the investigation into campaign fund-raising, even if it reaches all the way to the top, and that Clinton should not take undue comfort in the fact that the investigation is still in the hands of the Justice Department.

"An independent counsel would almost be a better break than what Clinton's going to get from the career Justice people," Dick Morris says. "There's a fetish for independence that is manifested there."

Morris's views are not widely shared in the White House, though. Most of the President's advisers would still rather have the investigation in the hands of the Justice Department, if only because Federal prosecutors under Reno will not end the case by declaiming from the Federal courthouse steps about the corrupt nature of the entire fund-raising process. The Justice Department prosecutors might very well bring the exact same charges in the matter that an independent counsel would bring, but they are bound by rules of discretion that simply do not bind a wildly ambitious or highly partisan independent counsel.

FEW PEOPLE IN WASHington, even those partisans who wield the independent counsel statute like a club, profess to like it. Critics say the politicized and public nature of the statute has made the appointment of independent counsels tantamount to in-

dictment. "When an independent counsel is appointed now, the whole presumption of guilt shifts," says Lloyd Cutler, former White House counsel to Presidents Carter and Clinton.

Others argue that there is something inherently unfair when a prosecutor is handed unlimited time and unlimited resources to investigate a single individual. "Too much unreviewable power in the hands of a prosecutor is a dangerous thing," says Joseph diGenova, who led a three-year independent counsel investigation into accusations that Bush Administration officials rifled State Department passport files for incriminating information on Bill Clinton. "To only have one case to work on is a dangerous thing, because when a prosecutor has an array of cases, there is a kind of Darwinian case selection." In other words, prosecutors drop weaker cases in favor of stronger ones. "That doesn't come into play with an independent counsel because of the single-natured purpose of the statute," diGenova says.

That said, by di Genova's reading, the campaign finance mess does qualify for an independent counsel. "It is a miserable statute, but it's the law," he says. "If there's ever a case that qualifies for an independent counsel, it's this one."

ALL THIS BANGING just makes her more stubborn," says Talbot D'Alemberte. "Just look at the way her jaw line sets."

If it is true that Reno's reluctance to trigger the independent counsel statute has made her look bad, at least to some, it is also true that few officials in Washington care less about spin than Reno. "There's a feeling that we're getting her into trouble with the press and with Congress," Radek says. "But to her great credit, she never brings that up. It doesn't concern her."

Tom Fiedler, the political editor of The Miami Herald who has reported about her since the 1970's, said re-

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RENO

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:ently: "Washington is a culture that values responding to consensus. You can't be stiff-necked. You have to shed responsibility and bend to the prevailing winds. People in Washington get frustrated with her because she's supposed to bend to their whims. . . . The harder you push, the more dug in she'll get."

This is behavior that is seen as odd in compromise-driven Washington, but wouldn't necessarily be understood as such anywhere else. Reno never goes off the record with reporters; she never dishes Cabinet gossip; she stands awkwardly, and often alone, at the few receptions she attends.

"I don't think she cares about Washington," says Rahm Emanuel, who does. "She might have one of the world's greatest poker faces, but I really don't think she cares."

To hear Reno tell it, she has never much cared what people think about her, ever since she was a gangly girl at her first cotillion in Miami. "I was 5-11½ when I was 11 years old and I had to go to cotillion when I was 12," she recalled. "Our cotillion teacher was a wonderful, wonderful lady. She was my P.E. teacher in elementary school and she was incredible — she taught me how to shoot baskets.

"But she was basically a dance teacher. I can remember walking into cotillion and young men coming to my waist, and I guess I felt a little bit like an odd duck. And Mrs. Nowakowski was 5-8 and a very striking woman, and as I would slump, she would make me stand up straight. And after I had two years of cotillion, I think after that I never felt like an odd duck again, that I always had the capacity to look out from me and have the sense —." She stops suddenly.

"She was a wonderful person. She died about a year or so ago, and they read a letter that I wrote to her —." Reno stops, choking up, and begins crying behind her big, square glasses.

"She made you feel like you were special," she went on. "When I won my first election, she sent me a note that just said, 'Attagirl.' . . . I think I've always felt kind of awkward and knobby-kneed, and as my mother said, knock-kneed, and I've oftentimes felt like I was all arms and legs, but after Mrs. Nowakowski, it didn't bother me."

The point of the story, of course, is that not much has bothered her since. Reno is often described as the most inner-directed official in Washington, which is why she seems at peace, even though it could reasonably be assumed that in some respects she is a lonely woman. And decisions on such questions as the independent counsel statutes could certainly be lonely ones.

When I asked her once what she liked about Washington, the conversation turned to her solitary pursuits — her exploration by canoe of wetlands, her long walks down the towpath of the C&O Canal. "A lot of the people that I've come to regard as friends for the rest of my life are centered around the Department of Justice, and one of the ways I keep my perspective on things is to have breaks from what I do all day long," she says. "What I enjoy doing is not going to socialize with people on a casual basis. It's not relaxing."

HER OBSTINACY, AND HER aloneness, separate her from Washington. They keep her from playing Washington games, but they also might keep her from responding to reasonable opinion and advice, especially when that opinion and advice comes from Capitol Hill or the press. It is a theory Senator Hatch has considered. Having failed to change Reno's mind so far on the independent counsel matter, Hatch is "moving to give her a little bit of leeway here," he told me recently. "She doesn't want to appear that she's caving into Congress. I want to give her a little room."

Reno has spoken movingly about how important it is for the public to have faith in the justice system. Yet this faith is being tested each time a new revelation about Clinton's campaign fund-raising emerges, and each time Reno responds by refusing requests to ask for an independent counsel. And this faith is tested, whether she likes it or not, not just by conflicts of interest, but also by the simple appearance of a conflict.

There has been little sign of a shift in her thinking. Her prosecutors have constructed a narrow argument against triggering the statute, and she continues, at increasing cost to her reputation and to that of the Justice Department, to defend it. "There's a lot of sniping at her that she isn't a hands-on administrator, that she's a terrible Attorney General," says William Barr, her Republican predecessor. "I say, hands-on, shmands-on, that's a nice thing. But aren't you looking for an Attorney General who will do the right thing? I think she has acted with integrity, until now."

To her way of thinking, Reno is doing the right thing, and she presumably believes that she, and her reputation, will prevail. But when the Senate hearings on campaign finance commence, the belief that Reno is protecting the President may well harden, and spread beyond the Beltway. If that happens, she is likely to confront just how alone an official can be. ■

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Congress of the United States
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COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

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BERNARD SANDERS, VERMONT
INDEPENDENT

August 13, 1998

The Honorable Henry Waxman
Ranking Minority Member
House Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, DC 20515

Dear Henry:

I write in response to the claims in your letter of July 24, 1998, which were again repeated in the Committee's business meeting of August 6, 1998, regarding the validity of the Committee's subpoena to Attorney General Reno.

As you know, the Committee carefully followed all applicable procedures in issuing this subpoena. I informed you on July 23, 1998, that I intended to issue a subpoena to the Attorney General for the memoranda prepared by FBI Director Freeh and Charles La Bella. Later that day, your staff informed my staff that you objected to the issuance of the subpoena. Pursuant to the Committee Document Protocol, I then convened a meeting of the Subpoena Working Group. Mr. Cox, Mr. Lantos, you, and I, all met at 9:30 a.m. on July 24, 1998, to discuss the subpoena. As you know, Mr. Hastert was not able to attend this meeting because he was managing a bill on the House floor. We had a productive debate of a half-hour regarding the subpoena, but could not reach a consensus. However, at the end of the meeting, you abruptly moved for a vote on the subpoena. I pointed out that under the Document Protocol, only I could call for a vote of the Working Group. I told you that I felt that the Working Group should reconvene later that day when Mr. Hastert was able to join us and participate in the debate. While I had already discussed this matter with Mr. Hastert, and he was familiar with the facts and supportive of the subpoena to the Attorney General, I suggested that we should all be present to discuss this matter. I therefore scheduled another meeting in the Capitol building to be held immediately after the next floor vote.

Immediately after the next floor vote, approximately one hour later, Mr. Cox, Mr. Hastert, and I, all met in the Capitol building in the Majority Leader's room.

We waited for approximately 10 minutes before you arrived. When you finally did arrive, you had an opportunity to express your opposition to the subpoena to Mr. Hastert. Since Mr. Hastert had to go back to the floor to manage the bill at that time, I felt that it was best to conduct the vote of the Working Group. As allowed by the Document Protocol, I moved that the members render their vote. Mr. Cox, Mr. Hastert, and I all voted in favor of issuing the subpoena, and you voted against it. Mr. Lantos did not attend this meeting. After the Working Group rendered its vote, pursuant to Committee rules, I signed the subpoena to the Attorney General, which was served later that day.

Your claims that the Working Group did not deliberate in good faith are clearly false. The Working Group deliberated for a half hour, and we had a productive debate regarding the subpoena. I tried my best to ensure that all members of the Working Group, including Mr. Hastert, had an opportunity to participate in the debate, by scheduling a second meeting of the Working Group. Your letter of July 24 complains that I "did not allow [you] an opportunity to present [your] concerns to Mr. Hastert or to engage in any meaningful discussion with him." However, you attempted to move that the Working Group render a vote during the initial meeting when Mr. Hastert was not even present. It appears that your interest in having a meaningful discussion with Mr. Hastert did not develop until after the subpoena was approved by the Working Group and was issued.

Having reviewed the chronology of the issuance of the subpoena to the Attorney General, I have concluded that your claims regarding the validity of the Committee's subpoena are false. Even a cursory review of the facts shows that the subpoena was issued in full compliance with the Committee Document Protocol, Committee rules, and House rules.

Sincerely,

Dan Burton
Chairman

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BERNARD SANDERS, VERMONT
INDEPENDENT

August 13, 1998

The Honorable Janet Reno
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Reno:

I write to correct a misimpression that you and your staff appear to be laboring under. In conjunction with Representative Waxman, you suggest that the subpoena sent by the Committee on Government Reform and Oversight to obtain the Freeh and La Bella memoranda is directed at forcing you to appoint an Independent Counsel for campaign finance-related scandals. While it is certainly true that I have said on many occasions that I believe an Independent Counsel should be appointed, it is also true that I and a majority of the members of this Committee have serious concerns over your handling of this matter and issued the subpoena in order to review the memoranda of the two top officials who have recommended an Independent Counsel. Evidence is mounting that suggests your decisionmaking is subject either to unacceptable political considerations, or serious misreading of the law for inexplicable reasons. Therefore, it is incumbent on this Committee -- following its mandate to conduct oversight of your agency -- to investigate the Department of Justice's response to campaign finance crimes committed in the last two Presidential election cycles.

Because it appears that the Department's campaign finance decisionmaking has been deeply flawed, I have legitimate concerns that Congress should examine the decisionmaking process. With this in mind, the only way to determine whether an Attorney General has behaved improperly with respect to declining to appoint an Independent Counsel -- or in declining to prosecute any case -- is to evaluate the underlying deliberative memoranda and compare them with the final decision. There is simply no other way for Congress to perform its legitimate oversight role when it is addressing an issue of potential malfeasance.

In the campaign finance investigation, I have balanced your concerns -- and those of the Director of the FBI and Mr. La Bella -- against the oversight requirement that Congress be satisfied that the Department of Justice is being administered properly and that all matters are being decided free from inappropriate considerations. Proper administration of the law is the paramount concern of Congress, and in situations where it appears that there is misfeasance at the Department of Justice, Congress must step in. The following are a few examples that have led to my concern:

In April, 1998, this Committee held hearings on conduit contributions made by the Castro family of Venezuela. In the course of our investigation, it became clear that a case supported by the New York District Attorney's office and individuals in the U.S. Attorneys office in Miami was taken over by your Public Integrity Section in Washington, D.C. Notwithstanding documentary evidence that a high-level Democratic contributor was involved in unlawful conduct in the 1992 election cycle, the Department failed to take action. Prosecutors from the Manhattan District Attorney's office testified that they were so frustrated with the Department's inaction that they even considered taking the Castro case back to prosecute it themselves. When your Department cannot bring a simple case such as the Castro/Intriago case, how can the public have confidence that complex cases will be handled appropriately? Furthermore, the prosecutor who failed to follow up on this case is Lee Radek, the head of the Public Integrity Section and reportedly an opponent of the appointment of an Independent Counsel. An exchange from this Committee's April, 1998, hearing between a Committee counsel and a prosecutor from the Manhattan District Attorney's office provides a clear example of the type of conduct that raises questions regarding the Department's ability to supervise the campaign finance cases:

Q: Now, Mr. Preiss, did you try and have a conversation with Mr. Radek?
A: Yes.
Q: What was the result?
A: I was not put through to him.
Q: Now it's my understanding -- correct me if I'm wrong -- that you were told that Mr. Radek would not speak to anyone unless they had a referral number for the case, correct?
A: That's correct.
Q: And do you know whether Mr. Castro's lawyer had such a referral number?
A: If he did, he didn't give it to me.
Q: Did anybody ever give you a referral number for this case?
A: No, I don't think we were ever given a referral number. I don't think anybody had a referral number. Maybe there was a referral number inside the Department of Justice, but, again I wouldn't be privy to that, so I don't know.
Q: Right, but Mr. Castro's attorney was not an employee of the Department of Justice, so he had the same status as you.
A: No he was not an employee of the Department of Justice.

Q: Okay. And I don't know whether this is a question you can answer or not, but were you concerned at the time that Mr. Castro's attorney was given more attentive treatment at the highest levels of the Department of Justice than you?

A: Well, I thought at the time, I think I said in the conversation that I couldn't understand why the defense attorney's phone call could be taken the day before, but mine couln't be and I was the prosecutor and he was the defense lawyer. I think that's what I said to the person who answered the phone. *See Attachment A.*

Given the clear problems associated with the failure at the Department to investigate Orlando Castro Llanes and Charles Intriago, I request that you make Assistant United States Attorney Richard Gregorie available to be interviewed by staff from this Committee. It is my belief that Mr. Gregorie will be able to shed some light on the facts known to the Department prior to the Public Integrity Section's decision to refrain from prosecuting this case.

- I believe that you attempted to mislead this Committee on at least one occasion. In a letter dated December 8, 1997, you stated: "It is unprecedented for a Congressional Committee to demand internal decisionmaking memoranda generated during an ongoing criminal investigation." *See Attachment B.* This false statement has been used publicly by Department of Justice spokespersons to discredit this Committee and make the current request for the La Bella and Freeh memoranda -- and the previous request for the Freeh memorandum -- seem unprecedented. Director Freeh testified on August 4, 1998, that there were examples of Congress asking for such memoranda and that this action was not unprecedented, but you have refused -- even though this matter has been pointed out to your staff -- to amend your representation. I believe there is no excuse to mislead Congress in search of a good soundbite, and it is troubling that such basic matters are subject to misrepresentation.

- One of your principal advisers has stated in official correspondence that: "We have concluded that the officials of the Clinton/Gore 1996 Reelection Campaign against whom allegations have been made [Terry McAuliffe and Laura Hartigan] are not "covered persons" within the meaning of the Independent Counsel Act." *See Attachment C -- Letter from Lee J. Radek to Bradley T. Raymond, November 4, 1997.* In a letter drafted less than four months later, Assistant Attorney General Andrew Fois took the following position: "DNC officials are not covered by the Act. . . . In contrast, the chairman and treasurer of the presidential campaign committee are covered." *See Attachment D -- Letter from Assistant Attorney General Andrew Fois to The Honorable Michael Pappas, February 25, 1998.* This conflicting interpretation raises grave concerns regarding the direction of the Campaign Task Force at the Department of Justice.

- Mr. Radek made the following statement on July 6, 1997: "Institutionally, the Independent Counsel statute is an insult. It's a clear enunciation by the legislative branch that we cannot be trusted on certain species of cases." *See Attachment E -- Lee A. Radek,*

The New York Times Magazine, July 6, 1997. Given Lee Radek's election to use the power and place of his office to belittle the Independent Counsel statute, it is hard to avoid the conclusion that the reason he feels no need to speak with the Director of the FBI and Charles La Bella about the La Bella memorandum is that his heart is not in enforcing the law. As Mr. La Bella and Director Freeh testified in our August 4, 1998, hearing, Mr. Radek is one of your key advisers on the Independent Counsel matter.

- In his testimony on August 4, 1998, Director Freeh stated that his memorandum makes the point that there has been an inconsistent application of the Independent Counsel statute. This is a matter of serious concern to this Committee, and the American people have the right to know whether you are treating all cases before you in an evenhanded manner. Again, even if you were to appoint an Independent Counsel tomorrow, that would not change the fact that you may have failed to act in an evenhanded manner. This Committee has a right to be informed of Mr. Freeh's concerns, and to come to its own conclusion as to whether this case has been handled appropriately.

- The testimony of both Mr. La Bella and Director Freeh made it very clear that both thought that the mandatory provision of the Independent Counsel statute had been triggered. Furthermore, they both indicated that you had failed to talk to Mr. La Bella about his own memorandum, that Director Freeh had not been asked for his views on the La Bella memorandum, that La Bella, Freeh and James Desarno had not been included in <u>any</u> meetings about the La Bella memorandum, and that Lee Radek has asked neither La Bella nor Freeh for their views on the La Bella memorandum. Given Mr. Radek's conclusion that senior members of the Clinton/Gore 1996 campaign were not covered by the Independent Counsel statute, and given his failure to act in the Intriago investigation, it is of concern that he did not seek to have an exchange with Mr. La Bella. This raises the question of whether your advisers are taking Mr. La Bella's arguments seriously.

  I find it extraordinary that both you and Mr. Radek failed to obtain the input of Mr. La Bella and Director Freeh as soon as the La Bella memorandum was distributed. Testifying last week, Mr. La Bella indicated the first thing he would do if he were looking at this case would be to <u>talk</u> to him [La Bella], and the second thing he would do would be to read the memorandum that he wrote.

- Mr. La Bella explained that he originally made three copies of his memorandum, and that he is now aware of nine additional copies having been made. Regardless of the extremely limited number of copies, *The Wall Street Journal* and the *The Washington Post* appear to be privy to confidential information contained in the La Bella memorandum. You, however, have failed to make a single statement about the damage done by your own Department. You speculate that the information that would be provided to the Committee members would be injurious to the investigation, while at the same time *The Wall Street Journal* discusses the focus of the La Bella memorandum on Harold Ickes. Director Freeh complimented the members of this Committee "on the way in which [we

have] handled very sensitive information, including briefings, which [included] classified materials." Based on recent leaks of sensitive information from your Department, it appears that you have more to be concerned about within your own house than within Congress.

- At our meeting on July 28, 1998, you asked for additional time to consider the La Bella memorandum. I was certainly concerned by what I perceived to be yet another delaying tactic. Upon reflection, however, I am concerned that you are attempting to avoid your legal obligation under the Independent Counsel statute. The statute requires that you determine whether there are grounds to investigate within 30 days of receiving specific information from a credible source. Mr. La Bella's information seems to fit that description. However, the thirty day review period does not seem to have been triggered until only recently if last week's news reports are accurate. Again, this is a matter of concern.

  Given Mr. Freeh's clear testimony that he was able to understand the points made in the La Bella memorandum, and given the clear testimony that La Bella, Freeh and Desarno have not even been consulted, these dilatory tactics are troublesome.

- Your recently-departed Deputy Chief of Staff, Kent Markus, was Chief of Staff at the Democratic National Committee at a time during which some of the conduct under investigation occurred. Has Mr. Markus been privy to any discussion or decisionmaking pertaining to any of the matters related to the Campaign Task Force's deliberations? Given the possible proximity of this individual to the deliberative process involving the refusal to appoint an Independent Counsel, I am concerned that you are oblivious to the appearance of conflict of interest that is the fundamental rationale for the Independent Counsel statute.

- Given your reliance on advice not to appoint an Independent Counsel, I am concerned that the advisers on whom you rely now have a vested interest in the status quo. Given the importance of this matter, it is human nature that your advisers would be reluctant to have an Independent Counsel review their work product and come to different conclusions. That you would allow those under you to be placed in this position is another troubling aspect of this investigation.

- It should not be forgotten that for much of your professional career you have been an elected Democratic politician, and your recent conduct raises a number of issues. On the morning of Tuesday, August 4, 1998, you informed me that you would like an opportunity to testify at the scheduled hearing. Aside from the fact that you had many days to make this request and only provided 15 minutes notice, it appears that you discussed this request with Minority members prior to making the request of the Chairman of the Committee. It also appears that the media were contacted prior to your telephone call to me. Following this chain of events, you provided a lengthy letter to the

Minority to be read into the record. This letter was never transmitted directly from the Department of Justice to either myself or to any other Majority member, and given the length and complexity of the letter, it does not appear that it was drafted after your telephone conversation with me, but rather before.

Suffice it to say that something appears to be very wrong at the Department of Justice. Last week, at a press conference, you made the following statement: "The Department cannot do its duty if it is subjected to a process that can only shake public confidence in our ability to make law enforcement decisions free from political pressure." This sounds perilously close to an argument that you are above the law and that you are above scrutiny. As has been observed by many across the ideological spectrum, it is you who has politicized this process by failing to understand the obvious conflicts inherent in investigating your own boss. It is precisely this type of situation that resulted in the original push for an Independent Counsel statute.

For this reason, my request for the Freeh and La Bella memoranda is directed at coming to an informed conclusion as to whether there should be additional scrutiny of conduct at the Department of Justice regarding its performance during the campaign finance investigation.

Sincerely,

Dan Burton

Dan Burton
Chairman

cc: Hon. Henry A. Waxman

MINORITY VIEWS OF HON. HENRY A. WAXMAN, HON. TOM LANTOS, HON. ROBERT E. WISE, JR., HON. MAJOR R. OWENS, HON. EDOLPHUS TOWNS, HON. PAUL E. KANJORSKI, HON. BERNARD SANDERS, HON. CAROLYN B. MALONEY, HON. ELEANOR HOLMES NORTON, HON. CHAKA FATTAH, HON. ELIJAH E. CUMMINGS, HON. DENNIS J. KUCINICH, HON. ROD R. BLAGOJEVICH, HON. DANNY K. DAVIS, HON. THOMAS H. ALLEN, AND HON. HAROLD E. FORD, JR.

INTRODUCTION

On August 6, 1998, the Committee on Government Reform and Oversight voted on party lines (24 to 19) to cite Attorney General Janet Reno for contempt of Congress. This action constituted an abuse of the contempt power, which is the most coercive and rarely invoked power of Congress. It follows nearly 2 years of mishaps and systematic abuses of power by the majority. As Norman Ornstein, congressional expert with the conservative American Enterprise Institute, has observed, "I think the Burton investigation is going to be remembered as a case study in how not to do a congressional investigation." [1]

There was no reasonable basis for proceeding with the contempt citation. The Attorney General was cited for contempt because she did not give the Committee memoranda written by Louis B. Freeh, the Director of the FBI, and Charles G. La Bella, the former head of the Department of Justice's investigative task force on campaign finance. These memoranda contain prosecution recommendations and other sensitive and detailed information regarding the Department's largest ongoing criminal investigation. The Attorney General's refusal to turn over this information was consistent with 100 years of precedent in which both Republican and Democratic administrations have refused to provide Congress with prosecution memoranda in ongoing criminal investigations. The Committee's contempt vote occurred just 2 days after Director Freeh, Mr. La Bella, and the lead FBI agent in the investigation, James V. Desarno, Jr., testified that releasing the memoranda would provide a "road map" of the investigation to criminal defendants and be "devastating" to future prosecutions.

Further, the contempt proceeding itself has questionable legal merit because the subpoena calling for the Freeh and La Bella memoranda was not validly issued. The Chairman violated Committee rules in issuing the subpoena because the Working Group that is supposed to evaluate such subpoenas did not make a "good faith" effort to reach a consensus. It is doubtful that a court would uphold this subpoena.

[1] *House Probe of Campaign Fund-Raising Uncovers Little,* Los Angeles Times (May 2, 1998).

The Attorney General made every effort to reach an accommodation with the Committee, including offering to brief the Chairman and Ranking Minority Member on the contents of the memoranda and testify before the full Committee at a public hearing. She requested only that before taking these steps, she be given three weeks to complete her review of the LaBella memorandum and make her decisions free of political influence. The Chairman rejected every attempt at accommodation.

The Committee proceeded with the contempt citation in an apparent effort to intimidate the Attorney General. The Committee appears to want to force her to choose between seeking the appointment of an independent counsel to investigate the President or going to prison for contempt of Congress. In fact, in a meeting with the Attorney General in his office on July 31, Chairman Burton explicitly linked his efforts to hold the Attorney General in contempt to her decision on an independent counsel. As the Washington Post wrote in an editorial after the Committee vote, "Mr. Burton's approach to the matter has been nothing less than thuggish. . . . [Ms. Reno] is right in her refusal to be bullied."[2]

Unfortunately, the Committee's irresponsible vote to hold the Attorney General in contempt adds to a long history of misconduct by the Committee in the campaign fund-raising investigation. The vote follows nearly 2 years of mistakes, partisanship, and raw abuses of power by the majority. These actions have thoroughly discredited the investigation and reduced it to irrelevancy.

This report details the minority's views on the August 6 contempt finding. It is organized as follows:

I. The Attorney General is justified in not turning over the Freeh and La Bella memoranda to Congress

A. Release of the memoranda would "devastate" the Justice Department's ongoing investigation

B. Release of the memoranda would improperly inject politics into prosecutorial decisions

C. Release of the memoranda would have a "chilling effect" on the Attorney General's ability to receive confidential advice

D. A century of precedent supports the Attorney General's position not to produce the memoranda

II. The contempt proceeding is an apparent attempt to intimidate the Attorney General

A. There is a tradition of accommodation between the executive and legislative branches of government

B. The Attorney General has made "extraordinary" efforts to accommodate the Committee

C. Chairman Burton should have followed Senator Hatch's example and accepted the Attorney General's proposals

D. The Committee is apparently seeking to intimidate the Attorney General

III. The contempt citation will bring the Committee into further disrepute

[2] *Mr. Burton and Ms. Reno,* Washington Post, A24 (Aug. 7, 1998).

A. The majority has a lengthy record of mishaps and abuses of power
B. The contempt citation has produced a new round of public criticism
IV. The contempt citation is legally flawed and would not be upheld by a court
V. The majority's arguments are not persuasive
A. The precedents cited by the majority are inapplicable
B. The majority's pledge of confidentiality cannot be relied upon
C. Redaction of grand jury material is not sufficient
D. An assertion of a claim of executive privilege is not necessary
E. Former Attorneys General do not support the contempt citation

I. The Attorney General is Justified in Not Turning Over the Freeh and La Bella Memoranda to Congress

A. Release of the Memoranda Would "Devastate" the Justice Department's Ongoing Investigation

The partisan nature of the Committee's action is illustrated by its approach to the advice offered by Director Freeh, Mr. La Bella, and Mr. Desarno. When the issue is whether an independent counsel should be appointed, Republican Members laud these three men's credentials and rely on their professional advice. For instance, Chairman Burton has called them "outstanding figures in law enforcement" and "the three most senior people in the investigation, who have the greatest knowledge of the facts."[3]

But when the issue is whether their memoranda should be released to the Committee, the professional opinions of Director Freeh, Mr. La Bella, and Mr. Desarno are conveniently overlooked. Each of these officials strongly cautioned the Committee against seeking the memoranda because of the adverse consequences that release of the memoranda could have on the Justice Department's investigation. Yet the majority simply disregarded this advice.

The Committee's decision to ignore the recommendations of the senior law enforcement officials involved in the Justice Department's campaign finance investigation poses great peril for that investigation. Although the majority claims to want a thorough investigation by an independent counsel, its insistence on obtaining the memoranda could undermine any investigation that an independent counsel might bring. The Miami Herald succinctly described the situation in an editorial written on the day of the Committee vote:

> If you want to rid your house of rats, one extremely effective way is to burn down the house. That's essentially what U.S. Rep. Dan Burton seems willing to do by threatening Attorney General Janet Reno with contempt of Congress. . . . Mr. Burton's request is . . . bereft of any sign

[3] Press releases from Chairman Burton (July 23, 1998; July 27, 1998).

> that he has weighed what these memos, if leaked, could do to the Justice Department's own investigation.[4]

In arguing against the release of these memoranda, Attorney General Reno stated: "The disclosure of these memoranda could provide a 'road map' of the Department's investigation. . . . The investigation could be seriously prejudiced."[5] Moreover, according to the Attorney General: "Criminals, targets and defense lawyers alike can all agree on one thing—they would love to have a prosecutor's plans."[6]

The Attorney General's warnings were echoed by Director Freeh, Mr. La Bella, and Mr. Desarno when they testified before the Committee on August 4, 1998. In his written opening statement, Director Freeh explained: "The need for confidentiality is especially important during an ongoing criminal investigation. . . . As the chief investigator, I am most reluctant to publicly provide a 'road map' to potential subjects and witnesses."[7]

Mr. La Bella went even further and expressed his opposition to release of his memorandum several times during the Committee's hearing:

> *The last thing in the world that I want to see as the prosecutor heading this task force is that this memo ever get disclosed. . . . I don't think it should ever see the light of day because this, in my judgment, would be devastating to the investigations* that the men and women of the task force are working on right now, and that I've put my blood, sweat, and tears into, and I don't want to see that jeopardized. I would even be stronger than the Director. I can't see a set of circumstances under which this report should see the light of day.
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> It is my opinion, my considered opinion, that this could hurt the investigators and the investigation in a hundred different ways. You don't make a white collar case by going to the target, tapping him or her on the shoulder, and say "confess, please." You make them by inches, sometimes centimeters. You get a document. You go after a witness. You crack that witness. You go up the ladder. You crack that witness. You go up. You crack the next witness. That's how you make these cases. And those witnesses, wherever they are on the ladder, are important. . . . I think it is important that no one who is within the range, whether they are covered, non-covered, within the range of our criminal investigation, be given access to this information.[8]

Similarly, when Mr. Desarno was asked about the impact of producing the La Bella memorandum to Congress, he agreed with Mr.

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[4] *Tell Him No, Ms. Reno! Don't Yield to Burton,* Miami Herald (Aug. 6, 1998).
[5] Letter from Attorney General Reno and Louis B. Freeh to Chairman Burton (July 28, 1998).
[6] Letter from Attorney General Reno to Chairman Burton (Aug. 4, 1998).
[7] Opening statement of Louis B. Freeh before the House Committee on Government Reform and Oversight (Aug. 4, 1998).
[8] Testimony of Charles G. La Bella before the House Committee on Government Reform and Oversight (Aug. 4, 1998) (emphasis added).

La Bella's assessment: "Yes, I think it would be devastating if that report were to be made public."[9]

Clearly, the prudent course for Congress to follow is to defer to the assessments of "the three most senior people in the investigation, who have the greatest knowledge of the facts."[10] The campaign finance investigation is the largest ongoing criminal investigation in the Department of Justice, with more than 120 agents and attorneys working on the investigation. Congress should not blindly follow a course that could irreparably damage this investigation.

B. RELEASE OF THE MEMORANDA WOULD IMPROPERLY INJECT POLITICS INTO PROSECUTORIAL DECISIONS

Not only would release of the memoranda be damaging to the Justice Department's ongoing investigation, it also would improperly inject partisan political pressures into the work of the Justice Department. Historically, both Republican and Democratic Attorneys General have strived to ensure that prosecutorial decisions are based solely on the facts and the law, not partisan political pressures from Congress.

On August 4, 1998, Attorney General Reno wrote to Chairman Burton about the importance of preserving the independence of the Department of Justice. Her letter stated: "Even when conducting vigorous oversight, Congress has respected the principle that law enforcement must be free from even the appearance of partisan political tampering. And the Justice Department has adhered to this position for the better part of a century, under presidents from Teddy Roosevelt to Ronald Reagan—and under FBI Directors from J. Edgar Hoover to Louis Freeh."[11]

The Attorney General's position is the same as the position taken by the Justice Department during the Reagan administration. In 1986, Assistant Attorney General Charles J. Cooper explained that "the Department of Justice has an obligation flowing from the Due Process Clause to ensure that the fairness of the decision making with respect to the prosecutorial function is not compromised by excessive congressional pressure."[12]

The Attorney General's position is also supported by many of her other predecessors. Former Attorney General Nicholas deB. Katzenbach, for example, wrote Representative Waxman that "it is hard to imagine a less appropriate subject for a subpoena or one more calculated to politicize the Department. . . . For Congress to attack her independent judgment by use of subpoena and contempt is simply the wrong way to resolve a disagreement of this kind and would do great damage to the integrity of the Department."[13] As the Washington Post reported in an editorial on August 9, and as is further discussed *infra* in part V.E., most other former Attorneys General share the same view.

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[9] Testimony of James V. Desarno, Jr., before the House Committee on Government Reform and Oversight (Aug. 4, 1998).

[10] *See supra* note 3.

[11] Letter from Attorney General Reno to Chairman Burton (Aug. 4, 1998) (attached).

[12] Charles J. Cooper, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 Op. O.L.C. 68 (Apr. 28, 1986).

[13] Letter from Nicholas deB. Katzenbach to Representative Waxman (Aug. 5, 1998).

The Committee's decision to hold the Attorney General in contempt ignores these principles. The Committee is seeking sensitive prosecution memoranda from the Attorney General before the Attorney General has even completed her review of one of the memorandum. If the Attorney General succumbed to the Committee's pressure and allowed Congress to interject itself in this way in her decisionmaking process, public confidence in the integrity and independence of Federal prosecutors would be destroyed.

C. RELEASE OF THE MEMORANDA WOULD HAVE A "CHILLING EFFECT" ON THE ATTORNEY GENERAL'S ABILITY TO RECEIVE CONFIDENTIAL ADVICE

The Committee's attempt to obtain these memoranda also disregards the impact such congressional oversight would have on sensitive deliberations within the Justice Department. During his testimony before the Committee on August 4, 1998, Director Freeh repeatedly emphasized this point. For example, he stated: "If we were to set . . . an unnecessary precedent where prosecution memos—and these are in effect prosecution memos—are disclosed and publicly discussed, the chilling effect that that would have on prosecutors, assistant U.S. attorneys and investigators in my professional judgment would be very severe." [14]

At another point during the hearing, Director Freeh described a discussion he had recently had with a prosecutor as follows:

> One of the attorneys who is working in the task force just the other day expressed a concern about whether or not he should put into writing a recommendation that he was about to make, and his concern stemmed directly from the fact that he was unsure whether that recommendation would later be discovered and subpoenaed, and something that would require him to appear here today and discuss or explain.[15]

Director Freeh's anecdote is a vivid illustration of the negative impact that political pressure can have on sensitive decisions within the Justice Department. If the confidentiality of prosecution memoranda is lost through congressional interference, Justice Department prosecutors may frequently be unwilling to provide their candid views and recommendations in written memoranda. The result will be to deny the Attorney General exactly the kind of advice she most needs. As the Los Angeles Times wrote in an editorial on the day of the Committee vote: "The precedent Rep. Burton seeks could make the executive branch a ground for all sorts of witch hunts by those who second-guess motives and judgments of decision makers." [16]

Director Freeh's view mirrors the position taken by President Reagan's Justice Department. A 1986 legal opinion by the Department stated that "[e]mployees of the Department would likely be reluctant to express candidly their views and recommendations on controversial and sensitive matters if those views could be exposed

[14] Testimony of Louis B. Freeh before the House Committee on Government Reform and Oversight (Aug. 4, 1998).
[15] *Id.*
[16] *Buck Stops With Reno,* Los Angeles Times (Aug. 6, 1998).

to public scrutiny by Congress on request."[17] Former Attorney General Griffin B. Bell, who served under President Carter, expressed the same view in a letter to Mr. Waxman, stating: "I believe it is of paramount importance to preserve the confidentiality of internal communications between the Attorney General and advisors or investigators in order to ensure that such advisors feel free to render candid advice that is not swayed by public opinion or fear of future disclosure to Congress."[18] Similarly, William H. Webster, who served as FBI Director and CIA Director under Democratic and Republican administrations, wrote in a New York Times opinion: "Intrusive Congressional demands to see such reports and recommendations could keep decision makers from seeking the best available advice."[19]

Prior to the Committee's vote, there had been a bipartisan understanding that congressional oversight into politically sensitive criminal investigations must not be so intrusive that it significantly impairs the functioning of the Justice Department. Regrettably, the Committee has chosen to disregard this understanding.

D. A CENTURY OF PRECEDENT SUPPORTS THE ATTORNEY GENERAL'S POSITION NOT TO PRODUCE THE MEMORANDA

In deciding not to turn over the Freeh and La Bella memoranda, Attorney General Reno is relying on a long history of Justice Department precedents. Without exception, these precedents support her refusal not to turn over prosecution memoranda to Congress. The strength of these precedents was summarized by Charles J. Cooper, Assistant Attorney General during the Reagan administration, in a 1986 legal opinion:

> This policy [of not turning over investigative materials] was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. *No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files.*[20]

As the following discussion demonstrates, Justice Departments under administrations of both parties have refused to turn over to Congress the very type of materials that the Committee is now seeking.

1. Theodore Roosevelt Administration

In January 1909, the Senate requested that the administration provide information as to why no legal proceedings were being instituted against U.S. Steel. President Roosevelt instructed his Attorney General "not to respond to that part of the [Senate] resolution which calls for a statement of his reasons for nonaction . . . because I do not conceive it to be within the authority of the Senate

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[17] Charles J. Cooper, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 Op. O.L.C. 68 (April 28, 1986).

[18] Letter from Griffin Bell to Representative Waxman (Aug. 6, 1998).

[19] William H. Webster, *Congress Exceeds its Reach,* New York Times (Aug. 11, 1998).

[20] Charles J. Cooper, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 Op. O.L.C. (Apr. 28, 1996) (emphasis added).

to give directions of this character to the head of an executive department, or to demand from him reasons for his action."[21]

2. Franklin Roosevelt Administration

In 1941, a House committee requested all Justice Department investigative materials relating to labor strikes involving naval contractors. Attorney General Robert H. Jackson refused to provide the information, stating: "[A]ll investigative reports are confidential documents of the executive department of the Government [and] congressional or public access to them would not be in the public interest."[22]

3. Eisenhower Administration

In 1956, a House committee requested that the Justice Department provide all files relating to a consent decree between the government and AT&T. The Justice Department declined, stating: "Department policy does not permit disclosure of staff memoranda or recommendations."[23]

4. Nixon Administration

In 1969, during a House committee investigation into the My Lai massacre, the Army was asked to provide all materials from its ongoing investigation into the incident. On behalf of the Army, Thomas Kauper, Deputy Assistant Attorney General, refused to provide the materials, stating: "If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."[24]

5. Ford Administration

In 1976, Congresswoman Bella Abzug, who chaired a subcommittee of the Government Operations Committee, requested FBI investigative files concerning domestic intelligence matters. Deputy Attorney General Harold R. Tyler, Jr., refused to provide the information, stating: "[I]f the Department changes its policy and discloses investigative information, we could do serious damage to the Department's ability to prosecute prospective defendants and to the FBI's ability to detect and investigate violations of criminal law."[25]

6. Reagan Administration

In 1986, the Justice Department's Office of Legal Counsel was asked to provide its opinion on whether the Attorney General could disclose to Congress the contents of reports filed with a court pursuant to the Independent Counsel Act. Assistant Attorney General Charles J. Cooper concluded that such materials could not be provided, because "the executive . . . has the exclusive authority to enforce the laws adopted by Congress, and neither the judicial nor legislative branches may directly interfere with the prosecutorial

[21] 43 Congressional Record 528 (1909).
[22] Opinion of Attorney General Robert H. Jackson (1941).
[23] Letter from Dept. of Justice to House Judiciary Committee (July 13, 1956).
[24] Thomas E. Kauper, *Submission of Open CID Investigation Files* (Dec. 19, 1969).
[25] Letter from Harold R. Tyler, Jr., to Representative Bella Abzug (Feb. 26, 1976).

discretion of the Executive Branch by directing the executive to prosecute particular individuals."[26]

7. Bush Administration

In 1989, the Justice Department's Office of Legal Counsel was asked to provide its opinion on whether agency inspectors general were required to provide information to Congress about open criminal investigations. Assistant Attorney General Douglas W. Kmiec concluded that there was no obligation to provide such confidential law enforcement information, stating: "[T]he executive branch has generally declined to make any accommodation for congressional committees with respect to open cases: that is, it has consistently refused to provide confidential information."[27]

8. The Majority's Arguments

The majority has stated that these precedents are inapplicable and that the Justice Department has turned over investigative materials to Congress in the past. The majority's arguments on this point are inaccurate, as is discussed in part V. What the historical record in fact shows is that the Committee's contempt citation departs from 100 years of bipartisan consensus about the need to preserve the confidentiality of prosecution memoranda in ongoing criminal investigations.

II. The Contempt Proceeding is an Apparent Attempt to Intimidate the Attorney General

Article II of the Constitution vests the power to execute and enforce the laws of the United States in the executive branch.[28] The courts have long recognized that criminal prosecution is exclusively the province of the executive branch.[29] By statute, moreover, the responsibility and authority to recommend appointment of an independent counsel rests exclusively with the Attorney General.[30] Nevertheless, under the pretext of the Committee's generalized responsibility to oversee the activities of the executive branch, Chairman Burton appears to be using the extraordinary power of criminal contempt to intimidate the Attorney General into making a discretionary decision of his liking.

A. THERE IS A TRADITION OF ACCOMMODATION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT

The Committee's decision to seek contempt against Attorney General Reno is contrary to the spirit of accommodation that has long characterized disputes between the executive and legislative branches. As the D.C. Circuit Court of Appeals has observed, "[t]he framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in a manner most

[26] Charles J. Cooper, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 Op. O.L.C. 68 (Apr. 28, 1996).
[27] Douglas W. Kmiec, *Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations,* 13 Op. O.L.C. 93 (Mar. 24, 1989).
[28] U.S. Const. Art. II, §§ 1, 3.
[29] *E.g. Heckler* v. *Chaney,* 470 U.S. 821, 832 (1985).
[30] *See* 28 U.S.C. § 592 (1998).

likely to result in efficient and effective functioning of our governmental system."[31] For this reason, "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[32]

Similarly, Attorney General William French Smith, who served under President Reagan, observed that "[t]he accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch."[33]

Unfortunately, the Committee's refusal to consider any alternatives offered by the Attorney General, and its failure to offer any constructive alternatives of its own, have needlessly and irresponsibly precipitated a constitutional confrontation between coordinate branches of government.

B. THE ATTORNEY GENERAL HAS MADE "EXTRAORDINARY" EFFORTS TO ACCOMMODATE THE COMMITTEE

In keeping with her obligation to try to accommodate the legitimate needs of the Committee, Attorney General Reno offered several measures to provide information about the Freeh and La Bella memoranda to the Committee without compromising her decision-making under the Independent Counsel Act or the integrity of the ongoing task force investigations. Chairman Burton, however, rejected every offer by the Attorney General.

In a letter dated July 28, 1998, Attorney General Reno and Director Freeh expressed their concern over the production of the Freeh and La Bella memoranda. Explaining the long standing policy of refusing to turn over such documents during the pendency of criminal investigations, the damage that disclosure of such materials could cause to the ongoing work of the campaign finance task force, and the chilling effect the production would have on the provision of candid advice within the Department of Justice, Attorney General Reno and Director Freeh nonetheless made an offer of accommodation. They wrote:

> We remain committed to seeking to accommodate the committee's oversight responsibilities and information needs to the fullest extent that we can, consistent with our law enforcement responsibilities. We are prepared to make the same accommodation that the Committee agreed to last year with respect to the Freeh memorandum and, after the Attorney General has completed her evaluation of Mr. La Bella's recommendation, provide a confidential briefing on appropriate portions of the La Bella memorandum.[34]

On July 31, Attorney General Reno and Director Freeh requested a meeting with Chairman Burton and Mr. Waxman to make another attempt at accommodation. In a letter to the Attorney Gen-

[31] *United States* v. *AT&T,* 567 F.2d 121, 127 (D.C. Cir. 1977).
[32] *Id.*
[33] 5 Op. O.L.C. 27, 31 (1981).
[34] Letter from Attorney General Reno and FBI Director Freeh (July 28, 1998) (attached).

eral recounting the events of the July 31 meeting, Mr. Waxman observed:

> During the meeting, you proposed an alterative to Mr. Burton. You said that you were still considering the La Bella memorandum, that you wanted other lawyers in the Department to review the memorandum, and that you wanted to make the best decision possible. You stated that your review of the issues would take you about three weeks to complete. You offered to meet with Mr. Burton and me after you had made your decision to explain your decision. You indicated that you would be prepared to discuss the contents of the La Bella memorandum with Mr. Burton at that time, but that it would be inappropriate to do so before a decision was made.[35]

Unfortunately, Chairman Burton did not accept these offers. On August 3, Chairman Burton responded in writing to the Attorney General's July 28 letter, indicating that he had considered and rejected all of her attempts at accommodation.[36] Resting his decision on the Committee's power to obtain the memoranda, rather than the prudence of exercising that power, Chairman Burton wrote: "This Committee cannot accept a recitation of policy arguments and a recapitulation of points made in correspondence many months ago in the place of compliance with its subpoena."[37] Chairman Burton offered no compromise or indication that an accommodation would be possible.

The next day, the Attorney General asked Chairman Burton for permission to testify at the Committee's August 4 hearing, so that she could explain her position in person to the full Committee. Chairman Burton rejected even this request, however. Having been denied the opportunity to address the Committee, the Attorney General wrote again to the Chairman to reiterate her interest in reaching an accommodation with the Chairman. She wrote:

> Last week, Director Freeh and I again offered an accommodation that we believe protects both your oversight role and prosecutorial responsibilities. We explained that this memo is extensive, that I need to review it carefully and thoroughly, and then when I finish my review, I may or may not decide to trigger the Independent Counsel Act. The Justice Department is willing to provide the leadership of the Committee with a confidential briefing on appropriate portions of the La Bella Memorandum after I have had an opportunity to evaluate it fully, in approximately three weeks.[38]

Director Freeh was asked about the Attorney General's efforts to reach an accommodation during the August 4 Committee hearing. In an exchange with Representative Barr, he called the Attorney General's efforts "extraordinary":

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[35] Letter from Representative Waxman to Attorney General Reno (July 31, 1998) (attached).
[36] Letter from Chairman Burton to Attorney General Reno (Aug. 3, 1998).
[37] *Id.*
[38] Letter from Attorney General Reno to Chairman Burton (Aug. 4, 1998) (attached).

> Mr. BARR. Is there not some way that some of the essence of what we're trying to get at here could be conveyed to us——
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> Mr. FREEH. There's a very good way. And with all due respect we did this last year in agreement with the chairman and Mr. Waxman and the Attorney General. . . . And having discussed it with her, she's offering a very extraordinary presentation, from my point of view, which is a briefing to the committee [chairman and ranking member] on the document once she's had the opportunity to make a decision.
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> And I think that's just a very good opportunity for everybody to compromise on an issue that avoids a constitutional confrontation.[39]

Despite these extraordinary efforts on behalf of the Attorney General, Chairman Burton continued to resist any attempt to reach an accommodation. He observed:

> There's been no offer whatsoever, other than you'll get together with me and the Minority, Ranking Minority Member to discuss this. And that's not going to be sufficient. We have a lot of Members who want to be informed about this, because it's been leaked to the papers.[40]

On August 6, the Attorney General contacted Chairman Burton by telephone and once again made an attempt at accommodation. In response to the Chairman's statement that all members of the Committee should be briefed about the contents of the memoranda, Attorney General Reno said that after she had reviewed the La Bella memorandum, she would be willing to appear before the full Committee and, to the extent that it would not prejudice the ongoing criminal investigation, explain Mr. La Bella's legal rationale.

At the August 6 Committee meeting, however, Chairman Burton rejected even this offer at accommodation:

> The Attorney General has not budged an inch from the position she took last week. She wants to do a partial briefing for only two members of the committee, myself and Mr. Waxman, a month from now. She wants to deny any information whatsoever to the other 42 members of the committee. Given the serious nature of what we're looking into, that's unacceptable.[41]

In his very next sentence, however, Chairman Burton acknowledged that the Attorney General had more than "budged" from her previous position and, in fact, had met Chairman Burton's demand that she provide information to all Committee members. Nonetheless, Chairman Burton continued to reject her offer:

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[39] Testimony of Louis B. Freeh before the House Committee on Government Reform and Oversight (Aug. 4, 1998).

[40] Remarks of Chairman Burton, House Committee on Government Reform and Oversight (Aug. 4, 1998).

[41] Remarks of Chairman Burton, House Committee on Government Reform and Oversight (Aug. 6, 1998).

> This morning, she made another offer which was also unacceptable, which I presented to our committee members, and that was that we would wait until we came back in September and in open forum she would express some of the reasons why Mr. La Bella and Mr. Freeh said there should be an independent counsel. But in an open forum, there's no doubt in any of our minds that the guts of the reasons would not be able to be made available to us.[42]

C. CHAIRMAN BURTON SHOULD HAVE FOLLOWED SENATOR HATCH'S EXAMPLE AND ACCEPTED THE ATTORNEY GENERAL'S PROPOSALS

The proposals that the Attorney General made were reasonable ones that would not have impeded the work of the Committee. In essence, what Attorney General Reno requested was a 2-week delay from the date the Committee voted to cite her for contempt of Congress to allow her to finish her consideration of the La Bella memorandum free from congressional interference. After that, she said she would be willing to brief Chairman Burton and Mr. Waxman in private or to testify to the full Committee in open session. Given that the House departed for its month-long August recess the day after the Committee voted to cite the Attorney General for contempt, it is difficult to understand how Chairman Burton or the Committee could possibly have been prejudiced by the brief delay requested by the Attorney General.

The unreasonableness of the Committee's position is underscored when it is compared to the position being taken by the House and Senate Judiciary Committees—neither of which are demanding the memoranda prior to the a final decision by the Attorney General. In contrast to Chairman Burton, Senator Orrin G. Hatch, Chairman of the Senate Judiciary Committee, agreed to give the Attorney General the time she requested to review thoroughly Mr. La Bella's memorandum. In fact, Senator Hatch said on national television that he was "happy to give her that time."[43] He told NBC's Tim Russert that he plans to sit down with Chairman Hyde and the Attorney General after she has had time to study La Bella's report, probably at the end of August. At that point they will discuss the memorandum and her position on the appointment of an independent counsel. According to Senator Hatch, only after that discussion would he consider issuing a subpoena for the memorandum.[44]

This is a very different approach from the one taken by this Committee. Chairman Burton issued the subpoena to the Attorney General on July 24, 1998, only 1 week after Mr. La Bella gave his memorandum to the Attorney General. He then proceeded to reject each of the many attempts at accommodation initiated by the Attorney General. At no point did Chairman Burton or the Committee make any serious effort to accommodate the many legitimate concerns raised by Attorney General Reno, Director Freeh, Mr. La Bella, and Mr. Desarno about the impact of releasing the memoranda.

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[42] *Id.*
[43] NBC's Meet the Press (Aug. 2, 1998).
[44] *Id.*

D. THE COMMITTEE IS APPARENTLY SEEKING TO INTIMIDATE THE ATTORNEY GENERAL

There is an explanation for why Chairman Burton and the Committee rejected each of the Attorney General's attempts at accommodation. The Chairman and the Committee do not want to reach a reasonable understanding with the Attorney General. Instead, they appear to be pursuing contempt charges as a means of improperly pressuring the Attorney General to seek the appointment of an independent counsel. Their goal seems to be to force the Attorney General to choose between seeking the appointment of an independent counsel or facing the $1,000 fine and year of imprisonment that are the criminal penalties for being held contempt of Congress.

Chairman Burton made these intentions explicit during the July 31 meeting requested by the Attorney General and the FBI Director. During this meeting, the Chairman told the Attorney General that he would drop his efforts to seek contempt if she would seek the appointment of an independent counsel. As Mr. Waxman wrote to the Attorney General after the meeting:

> The Chairman's remarks were a blatant attempt to influence your decision. You were told that you could avoid being held in contempt of Congress if you acceded to Mr. Burton's demands that you seek appointment of an Independent Counsel. Conditioning a contempt citation on your willingness to appoint an Independent Counsel is clearly coercive.
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>
> Mr. Burton's tactics are not subtle. He knows that you cannot turn over the La Bella memorandum. . . . Thus, Mr. Burton is seeking to place you in an untenable position. In effect, he has given you only two choices: (1) become the first Attorney General in history to be held in contempt of Congress because you cannot turn over the La Bella memorandum or (2) appoint the Independent Counsel that he demands.[45]

The Chairman's spokesman, Will Dwyer, confirmed the Chairman's intent. As reported in the Washington Post on August 1, Mr. Dwyer conceded that "[t]he only one real objective here is getting an independent counsel, as these documents advise her to do. . . . If she follows that advice, there will be no need for the documents."[46]

Attorney General Reno has properly resisted these efforts at intimidation. As she explained on August 4: "Chairman Burton told me Friday that if I triggered the appointment of an independent counsel, I would not have to produce the memos. If I give in to that suggestion, then I risk Congress turning all decisions to prosecute into a political football."[47]

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[45] Letter from Representative Waxman to Attorney General Janet Reno (July 31, 1998).

[46] *Democrats Say Burton Made Threat Against Reno,* the Washington Post, A1 (Aug. 1, 1998).

[47] Press conference of Attorney General Reno, unofficial transcript (LEXIS, "Scripts") (Aug. 4, 1998).

III. The Contempt Citation Will Bring the Committee into Further Disrepute

The Committee's decision to hold Attorney General Reno in contempt of Congress is only the latest in a continuing series of events that has subjected the Committee to criticism and even ridicule from across the country. Since the investigation began in January 1997, dozens of editorials from across the Nation have condemned the Committee's investigation as partisan, wasteful, and inept. Many have called for the resignation of Chairman Burton.

Unfortunately, the Committee's vote to hold the Attorney General in contempt will only add to the disdain with which the Committee's campaign finance investigation is already regarded.

A. The Majority Has a Lengthy Record of Mishaps and Abuses of Power

From the outset of the investigation in January 1997, the Committee's investigation has been characterized by mishaps and abuses of power. The Committee has issued subpoenas to the wrong witnesses,[48] staked out the home of an innocent individual,[49] released the President's private fax number,[50] falsely accused the White House of altering videotapes of fundraising events,[51] and caused an international incident on a trip to Taiwan.[52]

Even Republican Members and staff have called the investigation "a big disaster,"[53] "incompetent,"[54] "unprofessional,"[55] and "an embarrassment, like Keystone Cops."[56] According to one former senior Republican investigator, Charles Little, "[n]inety percent of the staff doesn't have a clue as to how to conduct an investigation."[57]

Virtually every power that has been given to the Committee has been abused. From the McCarthy era through 1994, no Democratic Chairman ever issued a subpoena unilaterally without either the consent of the Ranking Minority Member or a Committee vote. Since the beginning of the Committee's campaign finance investigation, however, Chairman Burton has issued 684 unilateral subpoenas—675 (over 99%) of these subpoenas have been targeted at Democrats.

The Committee's deposition authority has been similarly abused. As documented in detail in letters from Mr. Waxman to Chairman Burton, the Committee has abused the deposition power by harassing witnesses during depositions and using depositions as

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[48] *See Investigators Issue Subpoena to Wrong DNC Donor,* the Los Angeles Times (Apr. 15, 1997).

[49] *See Burton's Men Nailed Wrong Ma,* the Washington Post (Sept. 12, 1997).

[50] *See House Panel Posts Clinton's Fax Line On Internet,* Associated Press (Nov. 20, 1998).

[51] *See* Representative Dan Burton, CBS's Face the Nation (Oct. 19, 1997); letter from Representative Waxman to Chairman Burton (Oct. 30, 1997).

[52] *See Burton's Campaign-Finance Probe Is Drawing Criticism for Mounting Costs and Slow Progress,* the Wall Street Journal (Mar. 27, 1998).

[53] *GOP Memo Targets 3 N.E. Congressman to Co-Opt Democrats,* the Boston Globe (May 6, 1998).

[54] *Cox Leads Defeat of Burton, Waxman Agreement,* Roll Call (Sept. 29, 1997).

[55] *Burton Tape Fiasco Pitted Panel's Pros Vs. Pols,* the Hill (May 13, 1998).

[56] CNN's Inside Politics (Sept. 16, 1997).

[57] *Burton Tape Fiasco Pitted Panel's Pros Vs. Pols,* the Hill (May 13, 1998).

fishing expeditions.[58] In total, 160 witnesses have been called for over 700 hours of depositions, but only 14 of these witnesses have ever been asked to testify in a public hearing. In one case, a witness who serves in the Clinton administration but has been accused of no wrongdoing has been forced to appear for 5 separate days of depositions spanning more than 21 hours.[59]

The Committee has also abused its power to confer immunity. Due to errors committed by the majority staff, one of the first witnesses given immunity by the Committee unexpectedly testified to potentially serious tax and immigration violations, thereby receiving an unintended "immunity bath." The testimony the Committee received from this witness in exchange for the grant of immunity turned out to be demonstrably false.[60]

Even the Committee's power to release documents has been abused. Under the Committee's Document Protocol, the Chairman was given the unilateral authority to release confidential records received by the Committee during the investigation. Chairman Burton then used this power to release doctored transcripts of the Webster Hubbell prison tapes. This action misled the public because exculpatory statements were systematically edited out of the transcripts.[61] It also violated Mr. Hubbell's rights to privacy, because the tapes released by Chairman Burton contained intimate conversations between Mr. Hubbell and his wife and family.

The majority's first chief counsel, John Rowley, resigned in protest over the Committee's abuses. In his letter of resignation, Mr. Rowley stated that he had "been unable to implement the standards of professional conduct I have been accustomed to at the U.S. Attorney's office."[62] Ten months later, Speaker Newt Gingrich forced Chairman Burton to fire his chief investigator, David Bossie. At a closed-door meeting of the Republican Conference, Speaker Gingrich said to Chairman Burton, "I'm embarrassed for you, I'm embarrassed for myself, and I'm embarrassed for the conference at the circus that went on at your committee."[63]

At one point in the investigation, Chairman Burton even called President Clinton "a scumbag." He went on to say, "That's why I'm after him."[64]

These mistakes and abuses have led to widespread criticism of the Committee's campaign finance investigation and its Chairman, Dan Burton. The headlines in editorials across the Nation speak for themselves:

> *"Ethically Comprised Inquisitor"*[65]
> *"Reining In Dan Burton"*[66]

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[58] *See, e.g.,* letter from Representative Waxman to Chairman Burton (Sept. 10, 1997).

[59] *See* letter from Representative Waxman to Chairman Burton (Apr. 1, 1998); letter from Representative Waxman to Chairman Burton (Apr. 3, 1998).

[60] *See* Committee on Government Reform and Oversight Minority Staff Report, at 1, 5–6 (Oct. 9, 1997). *See also* letter from Representative Waxman to Chairman Burton (Oct. 22, 1997).

[61] *See Republican Congressman Comes Under Attack for Releasing Hubbell Transcripts,* the New York Times (May 4, 1998); *Democrats Hit Burton Over Tapes Of Hubbell,* the Washington Post (May 4, 1998); *Portions of Hubbell Prison Tapes Released,* the Los Angeles Times (May 5, 1998).

[62] Letter from John P. Rowley III to Chairman Burton (July 1, 1997).

[63] *Burton Apologizes to GOP,* Washington Post (May 5, 1998).

[64] *Dan Burton's Dogged Pursuit of the President,* the Indianapolis Star (Apr. 16, 1998).

[65] Hartford Courant (Mar. 11, 1997).

[66] New York Times (Mar. 20, 1997).

"Mr. Burton Should Step Aside"[67]
"Millstone of Partisanship; House Campaign Finance Inquiry Appears Short on Credibility"[68]
"A House Investigation Travesty"[69]
"A Chairman Without Credibility"[70]
"A Disintegrating House Inquiry"[71]
"Reno Roast Embarrasses Nobody But Congress; Grilling Of Attorney General Is A Sorry Partisan Spectacle"[72]
"Soap Opera"[73]
"A Chairman Out of Control"[74]
"What Is Dan Burton Thinking?"[75]
"Burton's Vendetta"[76]
"Dan, Go to Your Room"[77]
"Dan Burton Is a Loose Cannon"[78]
"Congressman Plays Dirty with Tapes"[79]
"Rep. Burton Goes Too Far"[80]
"Abuse of Privacy; Burton Should Be Censured"[81]
"Give Dan Burton the Gate"[82]
"Headcase"[83]
"Burton Bumbles in Bad Faith"[84]
"Wild Card: Chairman's Rampage Demeans Entire House"[85]
"Remove Burton From Money Probe"[86]
"Out of Control"[87]
"The Dan Burton Problem"[88]
"Burton Unfit to Lead Clinton Probe"[89]
"Mistakes Were Made: Burton Inquiry Can't Reach a Credible Conclusion"[90]

Prior to the Committee's efforts to cite the Attorney General for contempt, at least 40 newspapers around the country had criticized the Committee's investigation in over 60 editorials. Some, like the New York Times and the Washington Post, had written five or six editorials each lambasting the investigation.[91]

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[67] Washington Post (Mar. 20, 1997).
[68] Los Angeles Times (Apr. 11, 1997).
[69] New York Times (Apr. 12, 1997).
[70] San Francisco Chronicle (Apr. 14, 1997).
[71] New York Times (July 12, 1997).
[72] Los Angeles Times (Dec. 10, 1997).
[73] Roll Call (Apr. 17, 1998).
[74] The Hill (Apr. 29, 1998).
[75] Minneapolis Star Tribune (May 5, 1998).
[76] Boston Globe (May 5, 1998).
[77] Boston Herald (May 5, 1998).
[78] Hartford Courant (May 5, 1998).
[79] Allentown Morning Call (May 5, 1998).
[80] The Times Union (Albany, NY) (May 5, 1998).
[81] Harrisburg Patriot-News (May 5, 1998).
[82] Chicago Tribune (May 6, 1998).
[83] New York Daily News (May 6, 1998).
[84] San Antonio Express-News (May 6, 1998).
[85] Fayetteville Observer-Times (May 6, 1998).
[86] Seattle Post-Intelligencer (May 7, 1998).
[87] Roll Call (May 7, 1998).
[88] New York Times (May 8, 1998).
[89] Milwaukee Journal-Sentinel (May 8, 1998).
[90] Sacramento Bee (May 11, 1998).
[91] New York Times editorials included: *Reining In Dan Burton* (Mar. 20, 1997); *A House Investigation Travesty* (Apr. 12, 1997); *The Bipartisan Subpoena Squeeze* (May 13, 1997); *A Disintegrating House Inquiry* (July 12, 1997); and *The Dan Burton Problem* (May 8, 1998). Washington

Continued

B. THE CONTEMPT CITATION HAS PRODUCED A NEW ROUND OF PUBLIC CRITICISM

It is unfortunate that the Committee would compound its record of mishaps and abuses by seeking to hold the Attorney General in contempt of Congress for simply doing her job. Yet this is exactly what has happened. The result has been a new round of public criticism of the investigation.

Since August 8, 1998, Chairman Burton and the Committee have been criticized for their attempt to cite the Attorney General in contempt in newspapers from New York to Los Angeles and from Chicago to Miami. Examples of these editorials include the following:

- *Mr. Burton and Ms. Reno,* Washington Post (August 7, 1998): "The House Government Reform and Oversight Committee's vote yesterday to cite the attorney general for contempt of Congress is a dangerous political interference in a law enforcement decision that threatens to undermine the Justice Department's campaign finance investigation—an interference, ironically, by the same people who purport to want a vigorous investigation. . . . Mr. Burton's approach to the matter has been nothing less than thuggish."
- *Buck Stops With Reno,* Los Angeles Times (August 6, 1998): "Congress has no business threatening Reno with contempt charges. . . . This is a fishing expedition by Chairman Dan Burton. . . . The precedent Rep. Burton seeks could make the executive branch a ground for all sorts of witch hunts by those who second-guess motives and judgments of decisionmakers."
- *Tell Him No, Ms. Reno! Don't Yield to Burton,* Miami Herald (August 6, 1998): "If you want to rid your house of rats, one extremely effective way is to burn down the house. That's essentially what U.S. Rep. Dan Burton seems willing to do by threatening Attorney General Janet Reno with contempt of Congress. . . . Mr. Burton's request is dangerous. It's more than laced with his palpable political motives. Worse, it's also bereft of any sign that he has weighed what these memos, if leaked, could do to the Justice Department's own investigation."
- *The Foolish Threat Against Reno,* Chicago Tribune (August 6, 1998): "Given their professed desire to see that the law is enforced, you would think Burton and his GOP colleagues would be leery of any step that might hinder prosecutors. The threat of contempt citation makes sense only if their real purpose is to embarrass the administration."
- *Giving Ms. Reno Time To Study,* New York Times (August 6, 1998): "[W]e think it is better to give [Attorney General Reno] the time than to hold her in contempt of Congress, as proposed by Representative Dan Burton. . . . Two wiser students of the Democratic campaign abuses, Senator Orrin Hatch and Representative Henry Hyde, favor giving Ms. Reno the requested time so she can think her way through this. . . . [A]

Post editorials included: *Mr. Burton Should Step Aside* (Mar. 20, 1997); *Faking It On Campaign Finance* (May 30, 1997); *Will the House Do It Again?* (June 26, 1997); *A Touch of Civility* (July 1, 1997); *The Hubbell Tapes* (May 3, 1998); and *Mr. Burton's Transcripts* (May 6, 1998).

confrontation over the reports would be unsound on legal grounds and counterproductive."

- *Do It Justice, Appoint An Independent Counsel in the Campaign Finance Mess But Hold on to the Memos,* New York Newsday (August 6, 1998): "This is sheer pigheadedness on Burton's part."

In short, by needlessly citing Attorney General Reno for contempt and provoking a constitutional crisis, Chairman Burton and the Republican majority on the Committee have once again brought the actions of the Committee into widespread public disrepute.

IV. The Contempt Citation is Legally Flawed and Would not be Upheld by a Court

In issuing the subpoena for the memoranda written by Director Freeh and Mr. La Bella, Chairman Burton failed to follow the basic procedures required by the Committee's Document Protocol. As a result, the contempt citation is legally flawed. Even if the full House votes to approve the contempt citation, it is doubtful that any reviewing court would uphold the contempt citation.

Under the Committee's Document Protocol, if the Ranking Minority Member of the Committee objects to the issuance of a subpoena, the Chairman must present the subpoenas to a five-member "Working Group" comprised of the Chairman, the Ranking Minority Member, the Vice Chairman, a minority member chosen by the Ranking Minority Member, and another majority member chosen by the Chairman. The Protocol requires that "[t]he Working Group shall endeavor in good faith to reach consensus." The Working Group is supposed to vote on subpoenas only if it fails to reach a consensus after a good faith effort.[92]

On July 23, 1998, Chairman Burton notified the minority that he intended to issue the subpoena. Mr. Waxman indicated to him that he would object to the issuance of this subpoena, and the Chairman scheduled a meeting of the Working Group. On July 24, the Chairman convened a meeting of the Working Group attended by Representatives Lantos, Cox, and Waxman, but the four Members deadlocked on the merits of the subpoena. The Chairman, not having the majority vote, stated the group would reconvene later near the House floor so that Representative Hastert could attend the meeting.

Four Members—the Chairman and Messrs. Waxman, Cox, and Hastert—were present when the Working Group reconvened. The Chairman did not allow Mr. Waxman to present his views to Mr. Hastert or engage in any meaningful discussion with him. Instead, he rushed to a vote of the Working Group after less than 5 minutes of cursory discussion. This process directly contradicted the Protocol's mandate that the Working Group make a "good faith" effort to "reach consensus."

As Mr. Waxman wrote to Chairman Burton in protesting this action:

> Last month, when you were seeking the minority's support for immunity for four witnesses, you stated that "[w]e

[92] House Committee on Government Reform and Oversight, *Protocol for Documents,* part A(2)(a) (June 23, 1998).

> have offered to make our five-Member working group meet to vote on any subpoenas that you oppose, and I have pledged to abide by the working group's decisions." You also assured me that "[t]hese are not cosmetic changes." Unfortunately, your conduct today conflicts with these assurances. A process that denies the minority the opportunity to present its views is simply a sham process.[93]

Supreme Court precedent holds that legislative committees must follow their own rules, and the Court has reversed a contempt conviction where a congressional committee failed to observe its rules.[94] The U.S. Court of Appeals for the District of Columbia also has reversed contempt convictions of witnesses, where these witnesses were compelled to appear before a Senate subcommittee by subpoenas issued in violation of a Senate resolution.[95] In one case, a subpoena was issued to a witness by the subcommittee's Chairman after conferring with his chief counsel and at most only one other subcommittee member. Because the entire subcommittee had not decided or even considered whether the witness should be compelled to testify, the subpoena was invalid and the witness's contempt conviction did not stand.[96]

In light of the precedent reversing contempt convictions where committees have violated their own rules, this Committee's failure to observe the Protocol in issuing the subpoena to Attorney General Reno undermines the legal merits of the contempt proceeding against her. It is doubtful that the House will ever act on the Committee's contempt citation. But even if it does, no court is likely to uphold a contempt citation based on a subpoena that was issued without the good faith effort to reach a consensus that is required under the Committee rules.

V. The Majority's Arguments are not Persuasive

In the draft report and during the Committee debate on August 6, several arguments were made by the majority in support of the contempt citation. These arguments, however, are not persuasive and do not withstand careful scrutiny.

A. THE PRECEDENTS CITED BY THE MAJORITY ARE INAPPLICABLE

The majority has cited several precedents in its draft contempt report in support of its demand for the Freeh and La Bella memoranda. None of these precedents, however, resembles the fact situation currently before the Committee. In particular, none of the precedents involves a congressional attempt to obtain a prosecution memorandum during an open criminal investigation.

1. Palmer Raids Investigation

The majority cites the fact that, in the course of congressional investigations into the deportation of suspected Communists in 1920–1921, the Justice Department produced a "memorandum of com-

[93] Letter from Representative Waxman to Chairman Burton (July 24, 1998).
[94] *See Yellin* v. *United States,* 374 U.S. 109, 114 (1963).
[95] *See Liveright* v. *United States,* 347 F.2d 473 (D.C. Cir. 1965); *Shelton* v. *United States,* 327 F.2d 601 (D.C. Cir. 1963).
[96] *Liveright* v. *United States,* 347 F.2d 473, 474–75.

ments and analysis" by a Justice Department lawyer of a trial court opinion that was under appeal.

The Palmer Raids case is distinguishable from the current circumstances for at least two important reasons, however. First, in the Palmer Raids investigation, the trial had ended. Second, the document produced was not a prosecution memorandum, but rather simply a legal analysis of a trial court opinion.

2. Teapot Dome Scandal

The majority claims that the Senate Committee that investigated the Teapot Dome scandal in 1920's received documents related to ongoing criminal investigations.

In fact, the circumstances surrounding Teapot Dome are fundamentally different than those surrounding the Freeh and La Bella memoranda. At the time the Justice Department produced documents to Congress, it had finished investigating the matter and had finished considering legal action. Moreover, the primary document produced was not a prosecution memorandum, but the report of an accountant working on the investigation.

3. White Collar Crime in the Oil Industry

The majority cites as precedent a 1979 congressional investigation into the Justice Department's alleged failure to prosecute fraudulent pricing in the oil industry. During this investigation, the Justice Department discussed, mostly in closed hearings, the reasons for not going forward with certain cases.

This case is also significantly different from the current circumstances. In the oil industry investigation, it appears that the Justice Department did not turn over documents relating to open criminal cases. In fact, the Chairman of the House Subcommittee on Energy and Power stated: "We know indictments are outstanding. We do not wish to interfere with the rights of any parties to a fair trial. . . . Evidence and comments on specific cases must be left to the prosecutors in the cases they bring to trial."

4. Gorsuch/EPA Investigation

The majority also cites as precedent a 1983 investigation in which House Judiciary Chairman Rodino requested and received documents relating to the Environmental Protection Agency's enforcement of hazardous waste cleanup laws.

This case is distinguishable, however, because the documents that were produced by the Justice Department were documents generated by EPA, not the Justice Department. Moreover, the documents related to civil, not criminal, enforcement of the Superfund statute.

5. Iran-Contra

The majority cites the Iran-Contra investigation as a recent example in which sensitive law enforcement documents were given to Congress by the Justice Department.

In the Iran-Contra investigation, however, the documents produced to Congress were not generated as part of a criminal investigation by the Justice Department. Rather, they related to an internal administration review, led by Attorney General Meese, that

was designed to determine why different agencies in the Reagan administration were making conflicting public statements regarding Iran-Contra. This civil investigation was completed before the Department's criminal investigation, which was conducted by the Department's criminal division, had even begun. Moreover, the civil investigation was completed before the documents were produced to Congress.

6. Rocky Flats Case; Other Environmental Crimes Cases

These investigations are distinguishable because, as the majority acknowledges in its draft report, these investigations involved cases that were closed at the time the documents were produced to Congress. For example, in the Rocky Flats matter, the criminal case was closed and a plea had been obtained when the Justice Department provided Congress with access to certain documents.

7. Watergate

The majority draft report discusses Watergate as "another notable example of the scope and need for Congressional oversight of the Justice Department." However, the majority does not allege that the Justice Department turned over documents relating to an ongoing criminal investigation during Watergate.

B. THE MAJORITY'S PLEDGE OF CONFIDENTIALITY CANNOT BE RELIED UPON

During the August 6 Committee meeting, the majority argued that production of the Freeh and La Bella memoranda would not jeopardize the Department's criminal investigation because the Committee could be trusted to keep the memoranda confidential, as if received in "executive session" of the Committee.

This contention was properly rejected by the Justice Department. The majority's argument overlooks the fact that executive session material can be released upon a majority vote of the Committee at any time. The Committee has an unfortunate record on voting to release documents despite objections by the Justice Department. For example, the Committee voted on August 4 to release certain checks relating to Charlie Trie despite having received a letter from the Acting Assistant Attorney General Mark Richard which stated:

> I am writing to request that the checks not be released at this time. . . . Certain facts surrounding the travelers checks are under active investigation and are crucial to our determination whether additional crimes are charged. Release of the checks now would inevitably compromise our ability to develop new evidence by alerting witnesses and conspirators about the nature and direction of the investigations.[97]

Moreover, there is ample reason to doubt that the majority would succeed in preventing the contents of the memoranda from being leaked. Since the beginning of the campaign finance investigation, the Committee has been the source of many documents leaked for

[97] Letter from Mark M. Richard to Chairman Burton (July 30, 1998).

political gain—without regard for the impact of those leaks on the Committee, criminal investigations, or the rights of private citizens.

In November 1996, even before Mr. Burton was elected Chairman, the first leaks occurred. As Roll Call reported, "Burton confirmed that . . . one of his top aides leaked the confidential phone logs of former Commerce Department official John Huang . . . to the media." [98]

On February 21, 1997, two senior majority staff interviewed businesswoman Vivian Mannerud at her place of business and without her counsel present. The staff assured her that her interview would be used only for official business. On April 4, 1998, however, the New York Times, citing "congressional investigators," published a front-page story about contributions Ms. Mannerud allegedly solicited for Democrats from a convicted drug smuggler.[99]

Around August 1997, Chairman Burton or his staff appear to have leaked documents subpoenaed by the Committee to the plaintiffs suing the Federal Government to overturn the Interior Department's decision to deny a casino application in Hudson, WI. DNC employee David Mercer testified under oath at his deposition that he was contacted by a Milwaukee reporter and asked about certain documents in the Committee's possession. When Mr. Mercer asked how the reporter got the documents, the reporter told him that "investigators had released documents from the House committee to lawyers in the litigation, and then the lawyers in the litigation released it to the press." [100]

On February 27, 1998, Chairman Burton released his staff's notes of an interview with former Senate aide Steven Clemons even though his staff assured Mr. Clemons that the notes would not be made public without his consent. Following the release, Mr. Clemons issued a statement which said that "the notes have significant inaccuracies and misrepresentations about the important matters which were discussed." [101]

The most well publicized leak occurred when Chairman Burton released subpoenaed Bureau of Prisons tape recordings of Webster Hubbell's private phone conversations. At the time the tapes were produced to the Committee, the Justice Department wrote Chairman Burton that "[m]any of these audiotapes may implicate the personal privacy interests of Mr. Hubbell and other individuals. . . . We understand that the Committee appreciates the sensitivity of these audiotapes and will safeguard them accordingly." [102] Chairman Burton, however, ignored these warnings and leaked excerpts of the tapes to the media.

The content of the tapes were first leaked to the Wall Street Journal, which ran a story on them on March 19, 1998.[103] The leaked excerpts of conversations between Mr. Hubbell and his wife concerned family matters such as what Mrs. Hubbell should pre-

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[98] *Burton Admits Aide Leaked Huang Record,* Roll Call (Nov. 25, 1996).

[99] Letter from Representative Waxman to Chairman Burton (June 4, 1997).

[100] House Government Reform and Oversight Committee, Deposition of David Mercer, at 150 (Aug. 26, 1997).

[101] Steven Clemons, *Press Release* (Feb. 25, 1998).

[102] Letter from Assistant Attorney General Andrew Fois to Chairman Burton (July 2, 1997).

[103] Glenn R. Simpson, *As He Wasted Away, the Prisoner Had But One Thing On His Mind,* Wall Street Journal (Mar. 19, 1998).

pare for dinner—not criminal conduct nor any other matters relevant to the Committee's campaign finance investigation. After Mr. Waxman wrote to Chairman Burton to protest this leak of Committee documents,[104] Chairman Burton acknowledged being the source of the tapes, but claimed to have authorization from the Committee.[105] In fact, no such authorization had been granted to the Chairman.[106]

To compound the problem, Chairman Burton released selectively edited transcripts of additional conversations to the media on April 30, 1998. The excerpts omitted crucial portions of the conversations—including exculpatory statements—while highlighting damaging statements taken out of context. As Mr. Waxman wrote Chairman Burton, this second release of information from the Hubbell tapes also violated the Committee's Document Protocol.[107] Chairman Burton responded to criticism about this second release by releasing the tapes in their entirety, without regard for Mr. Hubbell's legitimate privacy concerns.

Finally, even if the Committee could provide credible assurance that the Freeh and La Bella memoranda would not be leaked, it would still be improper to provide the memoranda to the Committee. As discussed in part I.B., Congress has no role interjecting itself into prosecutorial decisions. These decisions should be made on the merits, without interference from congressional oversight committees. Allowing the Committee to obtain the memoranda before the Attorney General has completed her review would violate this important principle of separation of powers.

C. REDACTION OF GRAND JURY MATERIAL IS NOT SUFFICIENT

The majority claims that production of the prosecution memoranda is proper because the Committee will agree to allow the Justice Department to redact material that is derived from grand jury testimony. This is hardly a concession, since disclosure by the Justice Department of such material is prohibited by Federal Rule of Criminal Procedure 6(e). Such redactions, however, do not make disclosure of the memoranda proper.

Disclosure of non-6(e) information may be difficult in a memorandum that combines grand jury material with other information. Moreover, contrary to the majority's assertion, disclosure of non-6(e) information may be just as damaging to the Justice Department's investigation as disclosure of 6(e) material. As Attorney General Reno explained in a letter to Chairman Burton:

> According to Director Freeh, these memoranda offer a road map to confidential, ongoing criminal investigations. *Even excluding grand jury information—which you are not*

[104] Letter from Representative Waxman to Chairman Burton (Mar. 20, 1998).

[105] Letter from Chairman Burton to Representative Waxman (Mar. 27, 1998).

[106] Letter from Representative Waxman to Chairman Burton (Apr. 2, 1998). Chairman Burton initially claimed that the tapes were entered into the Committee records on Dec. 10, 1997. However, there is no reference to such tapes in the transcript of the Committee hearing on that date. Chairman Burton later claimed that the tapes were entered into the record on Dec. 9, 1997. Though certain records relating to payments to Mr. Hubbell were entered into the record on that date, the hearing transcript does not refer to the tapes and cannot reasonably be interpreted to include tape recordings of Mr. Hubbell's private conversations, such as those released in March. *See* letter from Representative Waxman and Representative Lantos to Chairman Burton (Apr. 27, 1998).

[107] Letter from Representative Waxman to Chairman Burton (May 3, 1998).

seeking—such documents lay out the thinking, theories and strategies of our prosecutors and investigators, and the strengths and weaknesses of our cases.[108]

D. AN ASSERTION OF A CLAIM OF EXECUTIVE PRIVILEGE IS NOT NECESSARY

The majority has argued that it would not have voted for contempt if the President had invoked a claim of "executive privilege" over the prosecution memoranda. There was no reason, however, to insist on a claim of executive privilege in this case. As discussed in part II.B., the Attorney General made extraordinary efforts to accommodate the Committee. The Committee has a parallel obligation to seek to accommodate the legitimate law enforcement needs of the Attorney General. Regrettably, no such efforts were made in this case.

Moreover, it was entirely proper for Attorney General Reno to avoid a claim of executive privilege. The matters in the Freeh and La Bella memoranda may concern the President and persons associated with him. When the administration makes a claim of executive privilege, the person who retains the authority to support or overrule the assertion is the President. If the Attorney General had asserted executive privilege and the President did not overrule her, the President would have been accused by the majority of "covering up" evidence of his own potential wrongdoing. Moreover, the Attorney General could have been accused of jeopardizing the investigation by discussing the memoranda with the President or his counsel. Invoking executive privilege in this matter would have only inflamed this dispute.

E. FORMER ATTORNEYS GENERAL DO NOT SUPPORT THE CONTEMPT CITATION

At the Committee's August 4 hearing, Chairman Burton claimed that he and his staff had "talked to former attorneys general who concur with the actions we're taking."[109] When Mr. Waxman requested that the Chairman identify which former attorneys general support the Committee's subpoena for the prosecution memoranda, Chairman Burton refused, stating only that "my staff talked to at least three and I'm not going to divulge their names."[110]

After the August 4 hearing, the minority staff contacted former attorneys general for their opinions, and three of them—Griffin Bell, Nicholas Katzenbach, and Ramsey Clark—responded with letters stating their opposition to the Committee's actions.[111] A fourth, Elliot Richardson, stated his opposition in a voice mail message for the minority staff. After the Committee vote, when contacted by the media, two other former Attorneys General—Ben-

[108] Letter from Attorney General Reno to Chairman Burton (Aug. 4, 1998) (emphasis added).

[109] Remarks of Chairman Burton at hearing before House Committee on Government Reform and Oversight (Aug. 4, 1998).

[110] *Id.*

[111] Letter from Griffin B. Bell to Representative Waxman (Aug. 6, 1998); letter from Ramsey Clark to Representative Waxman (Aug. 5, 1998); letter from Nicholas deB. Katzenbach (Aug. 5, 1998) (all attached).

jamin Civiletti and Richard Thornburgh—publicly stated their opposition to forcing Ms. Reno to turn over the memoranda.[112]

The fact that no former attorneys general have publicly supported the Committee's actions is indicative of the tenuousness of the majority's position. As the Washington Post concluded in an August 10 editorial: "[T]he separation of powers is real, and Congress should not try to force the executive branch to yield these sensitive materials. And if it does so, Ms. Reno has an obligation to protect pending law enforcement investigations even at the cost of hindering Mr. Burton's oversight of her conduct. Mr. Burton's comments notwithstanding, our past attorneys general don't, by and large, seem to doubt that."[113]

HON. HENRY A. WAXMAN.
HON. TOM LANTOS.
HON. ROBERT E. WISE, JR.
HON. MAJOR R. OWENS.
HON. EDOLPHUS TOWNS.
HON. PAUL E. KANJORSKI.
HON. BERNARD SANDERS.
HON. CAROLYN B. MALONEY.
HON. ELEANOR HOLMES NORTON.
HON. CHAKA FATTAH.
HON. ELIJAH E. CUMMINGS.
HON. DENNIS J. KUCINICH.
HON. ROD R. BLAGOJEVICH.
HON. DANNY K. DAVIS.
HON. THOMAS H. ALLEN.
HON. HAROLD E. FORD, JR.

[Supporting documentation follows:]

[112] *Former Attorneys General,* Washington Post (Aug. 9, 1998).
[113] *Id.*

Office of the Attorney General
Washington, D. C. 20530

July 28, 1998

The Honorable Dan Burton
Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter of July 23, and subpoena of July 24, seeking copies of a recent memorandum to the Attorney General from Charles La Bella and a November 1997 memorandum to the Attorney General from FBI Director Freeh. You previously requested the latter document and, in a joint letter to you of December 8, 1997, we explained why, as Attorney General and FBI Director, we were strongly opposed to releasing the Freeh memorandum to Congress. We continue to hold that position regarding the Freeh memorandum, and our reasoning applies with even greater force to the La Bella memorandum. As was stated then and is discussed below, we are prepared to work with the Committee, as we did in connection with the Freeh memorandum, to accommodate legitimate oversight and law enforcement concerns.

As stated in the Attorney General's letter to you of December 4, our position is based principally on the longstanding Department policy of declining to provide congressional committees with access to open law enforcement files. The rationale for this important policy is set forth in a 1986 memorandum by Charles J. Cooper, Assistant Attorney General for the Office of Legal Counsel during the Reagan Administration, which is quoted at length in the December 4 letter. Mr. Cooper was not the first to articulate this policy. Indeed, as Mr. Cooper notes in his memorandum, over fifty years ago Attorney General Robert H. Jackson informed Congress that:

> It is the position of the Department . . . that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest . . .

40 Op. Att'y Gen. 45, 46 (1941). Moreover, Attorney General Jackson's position was not new. His letter cited prior Attorney General letters taking the position that dated back to the beginning of the century (id. at 47-48).

The disclosure of these memoranda could provide a "road map" of the Department's investigation. The documents, or information that they contain, could come into the possession

of the targets of the investigation through inadvertence or deliberate act on the part of someone having access to them. The investigation could be seriously prejudiced by the revelation of the direction of the investigation, information about the evidence that the prosecutors have obtained, and assessments of the strengths and weaknesses of various aspects of the investigation. Indeed, disclosure of information such as is contained in this report could significantly impede the Task Force's criminal investigation and could conceivably preclude prosecution of some individuals. In addition, the reputation of individuals mentioned in a document like this could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution. As Attorney General Jackson observed:

> Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

Mr. Cooper's memorandum also noted that providing a congressional committee with confidential details about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecutions of criminal cases. Congress could second-guess tactical and strategic decisions, question witness interview schedules, debate conflicting internal recommendations, and generally attempt to influence the outcome of the criminal investigation. Such a practice would damage law enforcement efforts significantly and shake public confidence in the criminal justice system; decisions about the course of a criminal investigation must be made without reference to political considerations. As one Justice Department official noted,

> the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.

Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Submission of Open CID Investigation Files 2 (Dec. 19, 1969), quoted in Cooper memorandum, 10 Op. O.L.C. at 76.

Finally, both memoranda are confidential assessments of the evidence gathered during an ongoing criminal investigation and the application of the law to that evidence. Each memorandum expresses the author's personal views and analysis of the law and facts. We strongly believe that this Attorney General, and all future Attorneys General, must have the benefit of the candid, confidential recommendations of the FBI Director and Department attorneys in order to discharge their duties effectively. If those who write such memoranda

believe that their advice and recommendations could be disclosed to Congress or the public, they will be reluctant to set forth their true views or to make such recommendations at all.

These concerns are particularly acute since the Attorney General is currently evaluating the La Bella memorandum. To provide these documents to Congress could create an unavoidable and unacceptable perception that the Congress is seeking to influence law enforcement decisions for political reasons.

We also note, as your subpoena anticipates, that the La Bella memorandum and sections of the Freeh memorandum rely heavily on information obtained by the grand jury during the criminal investigation which, as you know, we are prohibited from disclosing under Rule 6(e) of the Federal Rules of Criminal Procedure. The Rule 6(e) information in the memoranda is closely intertwined with other material.

We remain committed to seeking to accommodate the Committee's oversight responsibilities and information needs to the fullest extent that we can, consistent with our law enforcement responsibilities. We are prepared to make the same accommodation that the Committee agreed to last year with respect to the Freeh memorandum and, after the Attorney General has completed her evaluation of Mr. La Bella's recommendation, provide a confidential briefing on appropriate portions of the La Bella memorandum.

Sincerely,

Janet Reno
Attorney General

Louis J. Freeh, Director
Federal Bureau of Investigation

Enclosures

cc: The Honorable Henry A. Waxman
Ranking Minority Member

DAN BURTON, INDIANA
CHAIRMAN

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DAN MILLER, FLORIDA
RON LEWIS, KENTUCKY

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

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HAROLD E. FORD, JR., TENNESSEE

BERNARD SANDERS, VERMONT
INDEPENDENT

July 31, 1998

The Honorable Janet Reno
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Madame Attorney General:

I am writing regarding the meeting you, FBI Director Freeh, and I attended today in Chairman Burton's office. During this meeting, Mr. Burton told you that he would not seek to hold you in contempt of Congress if you sought the appointment of an Independent Counsel to investigate the President. I was concerned by Mr. Burton's comments and believe that they should not be allowed to taint your decision making process.

As you know, you and FBI Director Freeh requested a meeting with Mr. Burton and me today to discuss Mr. Burton's threat to hold you in contempt of Congress unless you turn over the memorandum written by Charles La Bella, the out-going head of the Justice Department campaign finance task force. At the meeting, you and Director Freeh explained that you opposed turning over the memorandum because of the damage it would do to your criminal investigation and the chilling effect it would have on future criminal prosecutions.

Mr. Burton informed you that he disagreed with your decision not to appoint an Independent Counsel and that he thought you were trying to protect the President. He stated that if you do not turn over the memorandum, he would hold a Committee meeting next week at which he would seek to have you held in contempt of Congress. He said that he was sure he would have the votes to prevail at the Committee level. He also said that he would ask the full House of Representatives to vote on the Committee's contempt recommendation when the House reconvenes in September after the August recess.

During the meeting, you proposed an alternative to Mr. Burton. You said that you were still considering the La Bella memorandum, that you wanted other lawyers in the Department to review the memorandum, and that you wanted to make the best decision possible. You stated that your review of the issues would take you about three weeks to complete. You offered to meet with Mr. Burton and me after you had made your decision to explain your decision. You

indicated that you would be prepared to discuss the contents of the La Bella memorandum with Mr. Burton at that time, but that it would be inappropriate to do so before a decision was made.

I stated my view that the Committee should not ask Mr. La Bella and Director Freeh to testify at the scheduled hearing on August 3 and that Mr. Burton should not seek to hold you in contempt next week. Instead, I urged him to wait for three weeks to allow you to make your decision about whether to appoint an Independent Counsel on the merits.

Mr. Burton rejected these proposals. He reiterated that the Committee would vote next week to hold you in contempt and that the full House would consider the matter in September. He then expressly stated that he would not insist on seeing the La Bella memorandum and would not seek a House vote on contempt if you decided to seek appointment of an Independent Counsel before the House reconvenes in September.

It is obviously inappropriate -- and at a minimum a clear violation of the House ethics rules -- for a member of Congress to seek to coerce an executive branch official to reach a predetermined conclusion on a discretionary matter. But that is exactly what happened today.

The Chairman's remarks were a blatant attempt to influence your decision. You were told that you could avoid being held in contempt of Congress if you acceded to Mr. Burton's demands that you seek appointment of an Independent Counsel. Conditioning a contempt citation on your willingness to appoint an Independent Counsel is clearly coercive -- and I urge you not to be influenced by the Chairman's threat.

The ethics rules of the House provide unambiguous guidance. The opinions of the Committee on Standards of Official Conduct state that in communicating with the Executive Branch: "Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role."[1] In this case, Mr. Burton made a direct statement that he would cease his efforts to hold you in contempt if you appointed the Independent Counsel he seeks. As the ethics opinion indicates, this is an unacceptable abuse of power.

Mr. Burton's tactics are not subtle. He knows that you cannot turn over the La Bella memorandum. For the last 100 years, the consistent precedent of the Department of Justice has been to refuse congressional requests for internal memoranda that contain the recommendations of federal prosecutors. As the Reagan Justice Department wrote, "the Department of Justice has an obligation flowing from the Due Process Clause to ensure that the fairness of the decision making with respect to the prosecutorial function is not compromised by excessive congressional

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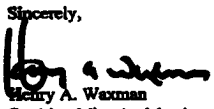
[1]Committee on Standards of Official Conduct, Advisory Opinion No. 1 (Jan. 26, 1970).

pressure."[3] This fundamental obligation would be violated if members of Congress were briefed and consulted about prosecutorial decisions before these decisions are made. Moreover, if you violated the longstanding Justice Department precedent in this instance, you and future Attorneys General would be compelled to do so in countless future cases.

Thus, Mr. Burton is seeking to place you in an untenable position. In effect, he has given you only two choices: (1) become the first Attorney General in history to be held in contempt of Congress because you cannot turn over the La Bella memorandum or (2) appoint the Independent Counsel that he demands.

I do not know whether you should appoint an Independent Counsel or not. Early last year, as your investigation was just beginning, I called upon you to appoint an Independent Counsel. Because I am not privy to the extensive evidence you have gathered since then, I do not know whether it is still appropriate to do so. But what I do know is that your decision should be made on the merits -- not tainted by intimidation from Chairman Burton.

Sincerely,



Henry A. Waxman
Ranking Minority Member

cc: The Honorable Dan Burton
The Honorable Louis J. Freeh
Members of the Committee on Government Reform and Oversight

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[3]Opinion of Assistant Attorney General Cooper (Apr. 28, 1986).

Office of the Attorney General
Washington, D.C. 20530

August 4, 1998

The Honorable Dan Burton
Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

After reviewing your letter of August 3 and the press statements by members of your staff over the weekend, it is clear that the Committee's primary focus is my decisionmaking on the question of the appointment of an independent counsel. That is why I called you this morning and requested an opportunity to be heard at the Committee's hearing.

In light of your rejection of my request to be heard, let me explain the points I would have made had you permitted me to testify this morning.

I greatly respect the system of checks and balances that our founding fathers established. They wisely assigned each branch of government a distinct and limited role. One of Congress's most important roles is to oversee the work of the Executive Branch in order to better carry out its legislative duties. Among our most important functions are prosecuting criminals, making sure innocent people are not charged, and punishing wrongdoing.

When there is disagreement between the branches, our task as public servants is to find solutions that permit both branches to do their jobs. That is why I offered to testify this morning and why Director Freeh and I came up to visit with you last week -- to try to reach an accommodation with the Committee which allows you to pursue your oversight responsibilities while minimizing any interference with our ongoing criminal investigation.

As you know, the Department of Justice is conducting an investigation into allegations of criminal activity surrounding the financing of the 1996 presidential election. That investigation has charged 11 persons, and is still very much ongoing. We have more leads to run down, more evidence to obtain and analyze, and more work to do. More than 120 dedicated prosecutors, agents and staff are working on this investigation every day. And many targets, suspects and defense lawyers are watching our every move, hoping for clues that will tip them off and help them escape the law's reach.

Mr. Chairman, you have demanded that I provide two memoranda to the Committee. One was written by Director Freeh last fall, the other by Mr. La Bella and Mr. DeSarno. We have reviewed your request very seriously. Our concerns are set forth in the letter Director Freeh and I sent to you on July 28.

Last week, Director Freeh and I again offered an accommodation that we believe protects both your oversight role and our prosecutorial responsibilities. We explained that this memo is extensive, that I need to review it carefully and thoroughly, and that when I finish my review, I may or may not decide to trigger the Independent Counsel Act. The Justice Department is willing to provide the leadership of the Committee with a confidential briefing on appropriate portions of the La Bella memorandum after I have had an opportunity to evaluate it fully, in approximately three weeks.

According to Director Freeh, these memoranda offer a road map to confidential, ongoing criminal investigations. Even excluding grand jury information -- which you are not seeking -- such documents lay out the thinking, theories and strategies of our prosecutors and investigators, and the strengths and weaknesses of our cases. They talk about leads that need further investigation, and places where we've reached dead ends. Criminals, targets and defense lawyers alike can all agree on one thing -- they would love to have a prosecutor's plans.

Mr. La Bella's memorandum provides an overview of the investigation at this time. I am reviewing it with an open mind. If I do make a decision to appoint an independent counsel after you have taken an internal memo still under review, how will anyone believe that my decision was independent -- as the law requires? Indeed, to provide this memorandum to the Committee would be a grave disservice to an independent counsel if one were appointed and could undermine his or her ability to carry out an effective criminal investigation.

There are sound public policy reasons as well as law enforcement reasons why we cannot provide this document to the Committee. Suppose, for example, a Congressional committee wants to stop us from prosecuting someone the committee supports. What's to stop the committee from threatening Department lawyers with contempt, forcing them to produce their internal memos and making them public to everyone including the defendant's legal team? To demand the prosecutor's documents while the case is in progress would irreversibly taint our principles of justice and could harm the reputations of innocent people or even place witnesses in danger of retaliation. Such policies also would subject every prosecution decision to second-guessing and accusations that Congressional pressure affected the Justice Department's decisionmaking.

Even when conducting vigorous oversight, Congress has respected the principle that law enforcement must be free from even the appearance of partisan political tampering. And the Justice Department has adhered to this position for the better part of a century, under presidents from Teddy Roosevelt to Ronald Reagan–and under FBI Directors from J. Edgar Hoover to Louis Freeh.

More than 50 years after they were written, I ask you to consider the words of Attorney General Robert H. Jackson, who later served on the Supreme Court:

> It is the position of the Department...that all investigative reports are confidential documents of the executive department of the government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Twelve years ago, the head of the Justice Department's Legal Counsel during President Reagan's administration, Charles J. Cooper added other concerns, including:

> ...well founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.

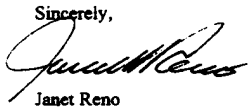
I know that you have cited several examples that you believe contradict these longstanding opinions. But we have analyzed your examples, and none of them deal with the demand you have made: to turn over law enforcement sensitive documents during a pending criminal investigation.

Mr. Chairman, we have worked very hard to respond to Congressional oversight requests. Since I became Attorney General, I and many other members of this Department have testified dozens of times, turned over thousands of documents, answered thousands of letters and provided countless briefings on matters large and small. As our campaign finance investigation has progressed, we have made every effort and taken extraordinary steps to accommodate your Committee's needs while protecting the integrity of the investigation. We have provided extensive testimony and briefings, including private briefings this winter about the contents of an internal memo by FBI Director Louis Freeh.

If future Attorneys General know that the innermost thinking behind their toughest law enforcement decisions will become fodder for partisan debate, then we risk creating a Justice Department and an FBI that tacks to political winds instead of following the facts and the law wherever they lead. If future law enforcement professionals cannot provide advice that is candid and confidential, we will have a government of "yes" men who advocate what is popular instead of what is right. And if future Congresses can poll the Attorney General's advisors or line attorneys in order to ferret out and promote opinions they approve of, then every controversial law enforcement decision will be tainted in the public's eyes. All of these concerns are most acute when Congress demands information and seeks to pressure me on a sensitive law enforcement matter that I have not yet made.

Given the importance of this matter, I would appreciate your including this letter in the hearing record. Thank you.

Sincerely,



Janet Reno

cc: The Honorable Henry Waxman
Ranking Minority Member

NICHOLAS DEB. KATZENBACH

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Hon. Henry Waxman
House Committee on Government
Reform and Oversight
U.S. House of Representatives
Washington, D. C.

August 5, 1998

Dear Congressman:

You have asked my opinion as to whether the House can properly subpoena internal investigative reports, or advice from subordinates of the Attorney General based upon such reports, from the Department of Justice. The answer is clearly not. Indeed, it is hard to imagine a less appropriate subject for a subpoena or one more calculated to politicize the Department. History is replete with instances where Congress has disagreed with the Attorney General as to the law. But disagreement as to the law is scarcely a justification for abuse of the subpoena process or threats of contempt..

I happen to agree with General Reno as to the law on the facts publicly known. But whether she is right or wrong is not relevant, and certainly it is not the Attorney General's job simply to agree with the recommendations of subordinates. For Congress to attack her independent judgment by use of subpoena and contempt is simply the wrong way to resolve a disagreement of this kind and would do great damage to the integrity of the Department.

Respectfully

Nicholas deB Katzenbach

RAMSEY CLARK
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August 5, 1998

Hon. Henry A. Waxman
Committee on Government
Reform and Oversight
511 Ford House Office Building
Washington, DC 20515

BY FAX 202 226-3348

Dear Congressman Waxman,

It would create a serious threat to constitutional government, the rule of law and individual rights for Congress to hold the Attorney General of the United States in contempt of Congress for refusing to turn over to the Congress investigative materials and departmental recommendations based on them in an ongoing Department of Justice investigation.

If Constitutional separation of powers, integrity and effectiveness in the execution of the laws and the individual rights of witnesses, investigative staffs, their supervisors and persons under investigation, or whose names come up in connection with investigations are to be protected, Congress must let the Attorney General perform the duties of that office without demanding investigative materials, or staff recommendations in an ongoing investigation.

Sincerely,

Ramsey Clark

Ramsey Clark

KING & SPALDING

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August 6, 1998

VIA FAX

Honorable Henry A. Waxman
Chair, House Government Reform
and Oversight Committee
2204 Rayburn House Office Building
Washington, D.C. 20515-0529

Dear Congressman Waxman:

As a former Attorney General, I would like to go on record as being opposed to Congress holding Attorney General Reno in contempt for not producing memoranda sent to her from FBI Director Louis Freeh and Justice Department prosecutor Charles LaBella.

I believe it is of paramount importance to preserve the confidentiality of internal communications between the Attorney General and advisors or investigators in order to ensure that such advisors feel free to render candid advice that is not swayed by public opinion or fear of future disclosure to Congress.

Congress has oversight power, but it should not be used to explore prosecutorial data, including memoranda which underlie theAttorney General's exercise of the discretion delegated to her under the President's constitutional duty and power to faithfully execute the law. This was my unfailing position while serving as Attorney General.

Yours sincerely,

Griffin B. Bell

GBB/bk

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FACSIMILE 713/751-3290

** TOTAL PAGE.02 **

ADDITIONAL VIEWS OF HON. THOMAS M. BARRETT

I agree with views presented in sections I through III of the minority report.

HON. THOMAS M. BARRETT.