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House Oversight and Government Reform Committee Holds Hearing the Justice Department Response to Congressional Subpoenas

LIST OF PANEL MEMBERS AND WITNESSES

ISSA:

The committee will come to order.

Today's hearing is on obstruction of justice: Does the Justice Department have to respond to lawfully issued and valid congressional subpoenas?

The Oversight Committee mission statement is: "We exist to secure two fundamental principles. First, Americans have a right to know that the money Washington takes from them is well spent. And second, Americans deserve an efficient, effective government that works for them."

Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers, because taxpayers have a right to know what they get from their government.

We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the bureaucracy.

Today's hearing in specific is on the question of the powers and execution between the co-equal branches of government and the constitutional role of Congress to maintain and check on the

executive branch. As the principal investigative committee of the United States House of Representatives, this committee serves to protect the right of the American people to know what their government is doing.

The compulsory authority of this committee is an essential tool of transparency and accountability of the federal bureaucracy. Without it, the executive branch would be free from any oversight, shielded from the vigilant eye of the American people and their elected representatives, and prone to more waste, more fraud and more abuse than the nation has ever seen.

No administration, not the last one I served under nor this one, likes congressional oversight. And we often are accused of doing it for partisan reasons or because of a particular administration. For the most part, we do it because administrations come and go, but the bureaucracy goes on and outlasts any president and any cabinet officer.

Every administration needs oversight. This administration has had more money and more challenges to deal with that are fiscal in nature than most. However, the checks and balances on the Constitution are to a great extent what we are dealing with here today.

The administration has not yet come to recognize the role that this committee plays in preserving the rule of law eliminating waste and fraud and abuse in the federal government. The United States Supreme Court has long held the power of the Congress to conduct investigations is inherent in the legislative process.

Moreover, the court has recognized that this power is broad. Since first learning of the controversial program "Operation Fast and Furious," I have worked closely with Senator Chuck Grassley to get to the bottom of the strategy by the Federal Bureau of Alcohol, Tobacco and Firearms to allow heavy duty arms to traffic into the hands of Mexican drug cartels.

ATF field agents opposed this reckless program, which has been responsible for the deaths of innocent civilians in Mexico and even responsible for the death of a 40-year-old border patrol agent named Brian Terry. Together with Senator Grassley, I have sent 16 letters to the Department of Justice and ATF requesting information on this program. After giving the administration enough time to respond to a formal request, it has become clear that the compulsory process was needed.

On March 31st, I authorized a subpoena for material documents needed to conduct thorough investigations in to this matter. To date, the administration has provided only a handful of documents, all of which -- I repeat, all of which were already publicly available on the Internet, while withholding those that provide real answers.

Our committee was asked whether we would come for an in-camera interview or in-camera observation of additional documents. We went, only to find out that those documents were so redacted as to be useless even for in-camera review.

Since that time, as many as 31 Democratic members of Congress have expressed their serious concerns about the administration's response to this committee's investigation. These members noted that the American people deserve prompt and complete answers to the questions surrounding this operation.

Moreover, these Democratic members do not believe that the DOJ investigation should curtail the ability of Congress to fulfill it's oversight duties.

Today's hearing is not -- I repeat, not about the facts of Fast and Furious program. On Wednesday, the committee will have ample opportunity to hear about the program and how it has affected the lives of people living on both sides of our shared Mexican border.

Rather, today's hearing is about a constitutional question. It is about whether the administration is legally bound to respond to a lawfully

issued and valid congressional subpoena. To obstruct a congressional investigation in this way is a serious matter. This is not the first administration to flirt with this breach of the public trust and it will probably not be the last.

But on our watch, and this is our watch, this Congress will not shrink from its constitutional responsibility and this committee will leverage every power at its disposal to enforce the rule of law.

Today's witnesses will help the committee as we wade through the constitutional waters and I look forward to a vigorous debate among our members. I might note that this -- this hearing is one of the most important because it may in fact be the one that sets a course for whether we work together in a bipartisan fashion to do our constitutional obligations of oversight.

With that, I recognize the ranking member for his opening statement.

CUMMINGS:

Thank you very much, Mr. Chairman.

And I welcome our panel of distinguished witnesses. We have a valuable opportunity today to examine not only Congress' authority to conduct investigations, but also the historical precedent of committees in exercising that authority.

Today's hearing is being held in a broader context of investigations currently being conducted by two different branches of government. On one hand, the Department of Justice is prosecuting dozens of individuals in federal court, including defendants accused of murdering border patrol Agent Brian Terry in Arizona on December the 14th, as well as 20 other defendants indicted for firearms trafficking and other crimes involving international drug cartels.

On the one hand -- on the other hand, in March, this committee launched an investigation into allegations that mismanagement and abuse in ATF gun trafficking investigations may have enabled some of the same crimes. The allegations made to date are very troubling and new information we obtained raises additional concerns about the role of various actors involved in these incidents.

I believe that the executive branch and Congress can and must achieve both of these objectives. The department's interest in prosecuting these crimes and the committee's interest in investigating the management of ATF programs are not -- and I repeat, not mutually exclusive. I'm particularly mindful that Agent Terry's family has lost someone they held very dear. They deserve not only for the killers and gun traffickers to be brought to justice after the fact, but they also deserve direct and straightforward answers from their government about whether more could have been done to prevent his murder.

CUMMINGS:

To answer the question posed by the title of today's hearing, yes -- and I repeat, yes, I do believe the department must respond to the committee's subpoena, even though it was issued unilaterally without committee debate only 15 days after the chairman's original request for documents. I believe this -- this committee has both the authority and the ability to play a constructive role in investigating these matters.

But there's a second question the hearing title should have posed: Does the committee have an obligation -- and I -- and I want the witnesses to listen to me carefully -- to proceed responsibly to avoid irreparable damage to ongoing prosecutions?

Again, I believe the answer to that question is yes. Historically, Congress has taken great care to ensure that its investigations do not harm ongoing criminal cases. In most instances committees

have tailored the scope of their inquiries to avoid impairing open cases.

Committees have been meticulous in providing the department with opportunities to warn them if information they obtain is under seal, relates to grand jury information, identifies cooperating witnesses, may endanger someone's safety, or would impair ongoing criminal investigations if released publicly.

I hope the witnesses will address that question also.

No member of this committee wants to risk compromising criminal prosecutions involving alleged murderers and gun traffickers for international drug cartels. That is why these types of reasonable accommodations protect not only the integrity of the criminal investigation, but the integrity of the committee.

Reckless disclosures could complicate a trial and cast a cloud over the committee's current and future investigations. I believe that both the executive branch and Congress have an obligation to help the other achieve their constitutional responsibilities rather than manufacturing unnecessary conflict.

For the benefit of our witnesses, let me note that the department has now asserted executive privilege -- has not asserted executive privilege to withhold documents to date. It has produced or made available for review more than 1,300 pages, some public and some not.

The department and the committee have agreed on search terms for electronic searches of responsive e-mails, which are now being conducted for 19 officials approved by committee staff. Last week the committee conducted a six-hour interview of the special agent in charge of ATF's Phoenix office and we have scheduled an interview of his supervisor, the ATF deputy assistant director.

These actions demonstrate good faith. At the same time the department has expressed serious and legitimate concerns about the scope of the documents encompassed by Chairman Issa's subpoena, including records that identify individuals who are assisting in the investigation, that identify sources and investigative techniques, that present risks to individual safety, and that prematurely inform subjects and targets about our investigation in a manner that permits them to evade and obstruct our prosecutorial efforts.

Finally, it is in this area that the committee stands to benefit most from the expertise of our witnesses. I look forward to hearing about the ways other committees have conducted their investigations to obtain the information they need -- they needed -- while accommodating the department's legitimate interests, and I trust that the -- that our panelists will not only address the first question, but address the second question, too, that I just posed.

Thank you.

Thank you, Mr. Chairman.

ISSA:

I thank the ranking member.

All members will have seven days to submit opening statements and extraneous material for the record.

We now recognize our panel of witnesses. Mr. Morton Rosenberg is a fellow at the Constitution Project here in Washington, D.C. Mr. Todd Tatelman is a legislative attorney in the Congressional Research Service American Law Division. Certainly someone we rely on constantly. Mr. Louis Fisher is specialist in constitutional law at the law library of the Library of Congress.

I'm sorry. Mr. Fisher, did I get something wrong?

FISHER:

Yeah, I retired about a year ago. I'm with the Constitution Project also.

ISSA:

OK. You're with the Constitution Project, but your tenure at the Library of Congress is also appreciated, even if slightly in the rear-view mirror.

And Professor Charles Tiefer is a constitution -- is a commissioner serving on the Commission on Wartime Contracting along with our former member, Mr. Shays, I gather.

Gentlemen, you -- you'll all have five minutes. Pursuant -- each, plus or minus and then we'll have a round of questioning. Pursuant to the committee rules, all witnesses here are to be sworn. Would you please rise to take the oath and raise your right hands.

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

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

Again, we don't have an extremely busy dais here, although we may have many more members flying in, in the next few minutes. So try to summarize your written statements in five minutes. Understand that your entire written statement will be put into the record.

We first recognize Mr. Rosenberg for five minutes.

ROSENBERG:

Members of the committee, I want to thank you for affording me the opportunity of appearing here today to talk about these important and interesting issues.

A little over nine years ago I appeared here with my friend and fellow panelist Charles Tiefer when this committee was successfully investigating the bizarre cover-up of over 20 murders by informants with the knowledge of their FBI handlers and the likely acquiescence of their FBI and Department of Justice superiors. That case, to get into Mr. Cummings' question, involved open investigations that were going on at that particular time.

Charles remarked to me before today's hearing that the committee could have saved a lot of type and effort by playing a video of the 2002 hearing, but as I will briefly detail, though our conclusions with respect to what we found in 2002 are the same, that law and history require the Justice Department to comply with your lawfully issued and valid subpoenas, there are differences here that need to be thought about and perhaps addressed.

I have a sense that is expressed by -- I'm sorry -- that was expressed Conan Doyle's Sherlock Holmes in "The Hound of the Baskervilles" that there is a dog here that has not yet barked.

When I first began working in this area in the mid-1970s, the mere threat of a subpoena was usually sufficient to get compliance. The only exception was when the target was a Cabinet-level official, and that tended to require a subpoena followed by a threat of a contempt citation, and sometimes a subcommittee vote on contempt.

When the executive pushback began in the early '70s, the investigative world changed. A subpoena became virtually always necessary, and threats and actual votes of subpoenas were frequent and were countered by direct executive claims of presidential privilege.

By 2008 there had been 12 votes of contempt against Cabinet-level officials, three by votes on the full House. All ultimately resulted in substantial and complete compliance with congressional informational demands and all relied on the established case law of

-- on investigative authority, starting with McGrain v. Daugherty, which dealt with the Justice Department, and Sinclair v. the United States, which also dealt with the important question -- and settled the important question, I think -- that an ongoing Department of Justice trial doesn't stop Congress from getting witnesses to talk.

But the true key to those successes was evidenced in the will of those investigating committees, an aspect of inquiry that may be severely tested in this and in future investigations.

One of the differences that I have alluded to is that in 2002 the president expressly asserted executive privilege, but the rationale given for invoking the privilege then was exactly the same as is now being urged by DOJ: the longstanding policy of the department that it never shares information with congressional committees about open or closed criminal, civil -- criminal or civil litigation or investigations because either it would undermine the independence and effectiveness of its law enforcement mission, damage pretrial -- by pretrial publicity, reveal identities of informants, disclosing government strategies, methods and operational weaknesses, chilling the exercise of prosecutorial discretion by DOJ attorneys, and, most important, interfering with the president's constitutional duty to faithfully execute the laws.

To me, that's the same dress with a different coat. They are setting up a possible claim that is very interesting. But I'll get to that. That's the dog.

A second difference is that the law respecting executive privilege, more particularly the presidential communications privilege, has dramatically changed over the last 15 or 20 years.

ROSENBERG:

As I indicated in my -- in my written testimony, the Supreme Court's 1988 ruling in Morrison v. Olson cast a significant doubt as to whether prosecutorial discretion was a core presidential power over

which executive privilege may be asserted. And that doubt was magnified by two D.C. Court of Appeals opinions dealing with Espy and Judicial Watch in 1997 and in 2004.

Taken together with previous high court decisions, it is now the law of the circuit most likely to rule on privilege in disputes that an assertion of presidential communications privilege will be held to be limited to the quintessential power and nondelegations of presidential power.

And those are the core functions in -- in the Constitution, and one of the core functions is not prosecutorial discretion.

The third difference emanates from the important 2008 district court ruling in House Judiciary Committee v. Miers. That case arose out of the removal and replacement of nine U.S. attorneys in 2006.

The White House counsel, Harriet Miers, and chief of staff, Josh Bolton, were subpoenaed by the committee for testimony and documents. But at the direction of the president they refused to comply and were ordered not to even appear on the return date, on the ground that the claim of privilege by the president gave them absolute immunity from committee process.

Both were held in contempt of Congress, but the attorney general ordered the United States attorney not to present the citation to a grand jury as is required by the congressional contempt statute.

By resolution of this House, the committee filed a civil enforcement action. The Department of Justice contested the validity of the authorizing resolution and defended the notion of absolute immunity.

The court upheld the validity of the authorizing resolution finding that the long-standing Supreme Court recognition of implied power to investigate and to compel production of information including --

included an implied cause of action to redress the institutional injury caused by the deprivation of the information that was being sought.

It also rejected out of hand the absolute immunity claim of the president. The Miers case, I believe, is the dog that hasn't barked.

It is a two-edged sword. While it recognizes the House's right to seek judicial assistance to vindicate its constitutionally based institutional right to secure information from the executive and refutes the notion that the president can cloak subordinate -- a subordinate official with absolute immunity from compulsory process, it leaves open a door for executive judicialization of the congressional subpoena enforcement power.

Current DOJ dogma is that it is unconstitutional for either house of Congress to use the criminal contempt statute or the inherent contempt power to punish presidential appointees for following presidential orders to withhold information from Congress.

DOJ currently has the potential power to string out your investigation, to refuse to obey it, and then when the time for contempt comes, can say, "No, you can't go to court for criminal contempt. You can't use your inherent contempt power. All you can do is to bring a civil action," and a civil action will extend and delay your constitutional ability to enforce what the case law and what the many examples that we have shown in our -- you know, in our papers about your powers.

ISSA:

Thank you.

Mr. Tatelman?

TATELMAN:

Thank you, Mr. Chairman, and Ranking Member Cummings. I appreciate the opportunity for CRS to be invited here to testify. And

on behalf of that institution, we thank you for all of the work that you do for us. And we hope that we can continue to be of service to the committee as we move forward.

Like my colleague, or former colleague, Mort Rosenberg, I want to focus a little bit more on sort of the traditional history and sort of lay the groundwork for the congressional prerogative here and the constitutional basis for the power that the committee is asserting to exercise.

It's important to note, and I think that all of our written testimonies do so note, that there is a long and consistent practice of legislative oversight of the other branches of government, be they either executive branches or in some cases judicial branch and oversight of the courts.

That history goes all the way back to the British Parliament and rights of the Parliament against the crown. It was confirmed and further practiced by the various colonial legislatures in the preconstitutional era.

The early Congresses made absolutely no hesitation -- and I'll go through an example here in a moment -- about their ability to conduct extensive inquiry and oversight into actions of the executive branch.

State courts and ultimately the United States Supreme Court have consistently and overwhelmingly affirmed Congress' constitutional authority to conduct almost exclusive oversight of the executive branch, broad oversight of private persons and parties, and investigations into any and all areas in which Congress feels there is a legitimate legislative purpose.

Probably the best and most persuasive example that I can find for you is, in fact, Congress' own actions early on during the constitutional era. Back in 1792, the 2nd Congress instituted an investigation and started an inquiry to determine the cause of more

than 1,000 American casualties in the Ohio Valley at the hand of some Indian tribes, involving the actions of Major General Arthur Sinclair and his military exploits in that era.

Initially after Congress found out about the issue, there was a motion on the floor of the House of Representatives to pass a resolution calling for the president or the executive branch to conduct the inquiry into Sinclair's defeat all on its own. This was completely rejected on a -- by a floor vote on the House of 35 to 21.

A second motion was subsequently found to create a select committee of members of the House of Representatives and to vest that committee with the power to call for all persons, papers,and records as may be necessary to assist the committee in its inquiries.

This resolution passed 44-10 with an illuminary, such as James Madison both voting against the presidential investigation and for the formation of a congressional select committee.

What's even more interesting, however, and more of note and relevant here is the response that they got from the executive branch, which also included many framers and founders who had been present at the Constitutional Convention, including President Washington and then-Secretary of the Treasury Alexander Hamilton.

According to notes from Thomas Jefferson, after the committee was formed and sent its inquiry to Secretary of War Henry Knox asking for the presidential papers related to Sinclair's expedition, the Cabinet met in President Washington's study and agreed that the House had a legitimate right and interest in both conducting the inquiry and in requesting the papers and documents.

They also agreed that the information should be given over to the -- to the Congress unless there would be injury to the public, and absent a showing of that injury to the public, the documents were to be disclosed.

And, in fact, several days later, Mr. Knox made the documents available to the committee.

I think what's most relevant and important about this early example is that not only the participation of those who helped draft the founding documents that attorneys and specialists in the Constitution, like this panel, are currently interpreting today, but also the consistency with which all of the people, whether they be in the Congress or in the executive branch, viewed the House's prerogative to both create the committee of inquiry, demand the papers, and receive them from the executive branch, who obviously had a vested interest in performing its own investigation of the events that had occurred.

I want to briefly jump forward about 200 years or a little less than 200 years to McGrain v. Daugherty, which is, as Mort mentioned, the seminal case that sets forth the Supreme Court's opinion of Congress' oversight and investigatory power.

As most of you probably are aware, McGrain v. Daugherty was ultimately a spinoff of what was then the Teapot Dome investigation into the oil leases that the executive branch was engaged in. Specifically, it was an investigation into then-Attorney General Daugherty's failure to prosecute and bring certain causes of action against various people who had participated in that scandal.

There was a committee subpoena to one Malley Daugherty (ph), who was the attorney general's brother. He was located in Ohio as president of a bank out there.

He ultimately was subpoenaed both to appear before the Senate and testify as well as to provide records and papers. He refused and remained in Ohio.

The Congress passed a resolution issuing a warrant for his arrest, and that he be brought before the bar of the Senate for an inherent contempt trial. When he was arrested in Ohio, he immediately

applied for a writ of habeas corpus from a district court in Cincinnati. That writ was granted and subsequently appealed by the United States government to the Supreme Court.

The Supreme Court reversed unanimously, and described, as Chairman Issa quoted, the power of inquiry of Congress as, quote, an essential and appropriate auxiliary to the legislative function.

TATELMAN:

McGrain's rationale and theory has been picked up and cited extensively by Supreme Courts since then. Courts such as the Supreme Court in Watson v. the United States, quote, said, "The power of 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.

Moreover, in 1975 the Supreme Court, in a case called Eastland v. United States Servicemen's Fund, again relying on the precedent set by McGrain and ultimately Sinclair and Watkins, said, quote, "The scope of Congress's power of inquiry is as penetrating, as far-reaching as the power to enact and appropriate funds under the Constitution."

In sum, Mr. Chairman and Mr. Ranking Member, there is very little question that Congress's constitutional authority vested under Article I is sufficiently broad to encompass the inquiry that the committee is trying to seek.

That is not to say, however, that Congress' power is unlimited or not subject to certain constraints. The question really is whether or not any of those constraints are legally based or politically based.

Legally based constraints would include, say, for example, the power not to conduct unlawful searches and seizures or require that

people at the direction of this House, such as the Capitol Police or the sergeant-at-arms engage in violations of the fourth amendment.

Another example would be compelling witness testimony when it might be contrary to their fifth amendment rights against self-incrimination.

And yet a third legal possibility would be a legitimate and valid claim of executive privilege or presidential communications privilege, which the court, in The United States v. Nixon in 1973, recognized as constitutionally based.

On the other side of that coin are the concerns Ranking Member Cummings raised, which I term as political, which is not to say they're illegitimate, but meaning they're not legally or constitutionally based, which gets into questions such as whether or not this is a responsible course of action or whether or not the committee has any sort of an interest in seeing the prosecution successfully completed or not interfering with the Justice Department's internal investigations or processes.

Those are completely legitimate questions for this committee to consider, but they're ultimately for this committee to determine whether or not they are proper or proper exercises of this committee's power.

The Constitution makes no such limitations or restrictions and places no such limitations or requirements that Congress overcome those. Merely, those are left for the political branches to negotiate and work out amongst themselves. And with that, I'll turn it over to (inaudible).

ISSA:

Thank you.

Mr. Fisher?

FISHER:

Thank you very much. A very important hearing to explore this.

When committees ask for documents from the administration, they are typically told initially that you can't have them; it's part of the deliberative process; it's part of the active litigation file; it has to do with either pending or ongoing investigations.

That's just the opening statement by the administration. And, as you know, at that time, it all falls back to a committee as to how determined you are of your understanding of your constitutional duties.

I refer in my statement to a study in 1949 by an attorney who worked at the Justice Department who said that, when Congress and the administration collide, the administration prevails every time. Of course, that wasn't true in 1949 or before or after. It's much more complicated, and you have to have each branch understand its limits and each understand its duties.

I think a much better explanation of what Congress can get through its constitutional duties comes from another attorney who worked at the Justice Department, and his name, Antonin Scalia. And he testified in 1975 before a Senate committee. And at that time he was the head of the Office of Legal Counsel.

And he said, and I think his words are quite good, that when there is an impasse between the two branches -- his language -- "the answer is likely to lie in the hurly-burly, the give and take of the political process between the legislative and the executive."

Then he said, "When it comes to an impasse, the Congress has the means at its disposal to have its will prevail."

Now, on these clashes, it may be tempting to think that there's a winner and a loser. I think, when Congress does not push its constitutional powers and gets the document it needs for a thorough

investigation, that there is a loser and the loser is the public; it's the constitutional government; and it's the system of checks and balances.

In 1982 President Reagan, I think, set a good framework for these document fights. He said, "Historically, good-faith negotiations between Congress and the executive branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the branches."

At the present time, you have a subpoena, and as you said in your opening statement, subpoena is not satisfied when you have to have committee staff travel to the Justice Department to sit in camera and look at documents that are heavily redacted. There's no way the committee can -- can satisfy its constitutional duties.

In 1981 Attorney General William French Smith said that, "When Congress is going after documents, it has a better chance of getting it when it's pursuant to legislation rather than pursuant to oversight."

I don't think there's anything to that distinction at all. You have as much right to oversee the laws as you do to enact them. And if there is anything to that distinction, every time you do an oversight here, you could just introduce legislation. So it doesn't make any sense to me.

As far as getting access to documents in cases of ongoing criminal investigations, Mort talked about the FBI corruption case. That was on that. My statement goes into a good deal of detail into the (inaudible) matter, again, active criminal investigations and Congress got the documents it needed.

Finally, your success in getting documents, I think, depends a lot on bipartisan support. A committee acting in a bipartisan manner is much stronger. In this case, I think it's even stronger when two chambers of Congress are after the same documents.

If -- if you do not get the documents you want, there's always the next step after subpoena is not satisfied, to go toward contempt. And my statement gives a lot of examples where that has come about in the past. And through the contempt procedure, Congress can get the information it needs to satisfy its constitutional duties.

Thank you very much.

ISSA:

Thank you.

Professor Tiefer?

TIEFER:

Thank you, Mr. Chairman and Ranking Minority Member.

For 15 years I was counsel to Congress, four years as assistant Senate legal counsel and 11 years as deputy general counsel and general counsel of the House of Representatives.

During that time I worked on a very large number of investigations like this of the Justice Department or of enforcement agencies, and I reviewed the extensive history that my colleagues on the panel have talked about.

I want to briefly point out the similarities of those instances before focusing on today. In 2002, as Mort Rosenberg has described, I gave full-length written and oral testimony to this committee about a similar issue during the Bush administration involving an FBI informant program. And as was laid out in my full-length memo at that time, which I am including as an appendix to my testimony today, this showed that this particular committee has the full right to be obtain the documents it needs for oversight over enforcement programs, then FBI, today ATF.

In 1992 I worked with a House subcommittee investigating the Rocky Flats matter. That was a grand jury matter, and the same extreme arguments made by the Justice Department that Congress can't go anywhere near grand jury investigations were raised then, and the committee succeeded nevertheless in getting the evidence that it sought.

In 1987 I was special deputy chief counsel on the House Iran-Contra committee, and I want to point out some similarities of the arguments raised today and then, points that were correctly raised by Mr. Cummings. And I will talk about the two sides, both that these are not arguments that disable the committee from going ahead, merely that call for it to follow an orderly process as it is following today and as it should follow down the road.

Were there cooperating witnesses at that time who were called before congressional committees after deliberation? Yes. Robert McFarlane, former national security adviser, a co-conspirator of -- of Oliver North and John Poindexter, who were the key defendants, was called and questioned, even with the risk that would create lines of his testimony that could be used to say, look, he's saying one thing in one place and a different thing in another place.

TIEFER:

Was there a possibility that the congressional investigation could endanger ongoing investigations or could complicate the trial? Absolutely. Oliver North was called as a witness. John Poindexter was called as a witness.

They were shown the documents that would be used against them. They were shown the most persuasive arguments and most persuasive questions, the most persuasive things that could be used to show that they had engaged in illegal conspiracy. And in a way, they got a preliminary view of what the trial would consist of for them.

I -- I would say that that doesn't mean one drives roughshod over the Justice Department. One starts, as this committee is doing today and as its predecessors have done, as I have testified, and for that matter, 30 years ago when I was just starting in this business, I came to a House subcommittee and heard people who are the age that I am now talk about Watergate and the struggles they had during Watergate with getting evidence.

So it's a -- it's a live progression. It's not just in books up on a shelf with dust on them. It's live committee chairmen dealing with real issues like the ones you have today.

What's the way the Justice Department should make its points? Well, first of all, it should provide most of the important documents. It doesn't start by withholding. It starts by providing.

Secondly, for anything that it doesn't deliver right off the bat, it should issue an invitation for them to be viewed by members and staff. I heard the chairman describe that an inadequate invitation had been made, heavily redacted documents under circumstances they couldn't be viewed. That's not the right way to proceed.

And finally, if they do say, "we're going to withhold some documents because they're highly prejudicial in a concrete way to an open case," then they have to provide a privilege log so that the committee itself can decide what should be withheld.

I might say that during the recent litigation over the U.S. attorneys' terminations in the previous administration, one of the arguments that prevailed in court on behalf of the congressional inquiry was that the administration had not provided that privilege log. A document-withholding claim is not valid unless a privilege log is provided.

And I thank -- I thank the committee.

ISSA:

Thank you.

And I recognize myself for five minute to get started here.

Mr. Tiefer, you mentioned Ollie North and Iran-Contra. In Iran-Contra, Ollie North was a participant in the Iran-Contra and ultimately was charged, convicted and then overturned to a certain extent because of congressional activity, meaning we, the Congress, granted some partial immunity. That immunity led to a decision that the inevitable discovery wasn't met; that that discovery was based on, if you will, his testimony.

Is that roughly your understanding?

TIEFER:

That's well stated, Mr. Chairman.

ISSA:

So this would be a classic example of what we have to avoid. We must avoid providing immunity to somebody that we believe is guilty of a crime, unless we understand right off the bat that that immunity is essential to further discovery and that this individual is, by definition, not the perpetrator. The worst thing to do is to get the kingpin and let them off.

And I'm not trying to disparage Colonel North, but it does appear as though he was to a great extent at the center, ultimately the target, and he got off.

Well, to that extent, let's get to the current case, even though I -- all of you were talking in great terms of Watergate and Teapot Dome and all of which I've reviewed in preparation for today. In this case, if I understand correctly, Fast and Furious starts off with charges against a murderer who shot and killed Brian Terry, the people involved.

The weapons that happened to have been weapons that were allowed to walk under Fast and Furious, is there any conceivable way, if we're not talking to the murder suspects or people involved, that we're touching that investigation? Do you believe that we're, by not not looking at that at all, but rather looking at the actions of high-ranking federal officials, mostly here in Washington at ATF and Justice, that we in any way are close to allowing a murderer of a law enforcement agent to walk?

If you see, and I'm not asking you to see something that isn't there, but do you see any way that we're -- that we -- or any line that we shouldn't cross in relation to that since we don't intend to?

Mr. Fisher?

FISHER:

Yes, I think you can conduct your investigation without going across that line.

I just wanted to add on Iran-Contra, Charles and I were on the House Iran-Contra Committee, and the independent counsel at the time met with us, and he certainly was going to prosecution, and he said that Congress as a -- as a coequal body has a right to conduct an investigation, even if it complicated his prosecution. So that -- that's a constitutional judgment by a prosecutor at that time.

ISSA:

OK. Well, one thing that I can assure this -- the members on the dais is I want the people involved in killing Brian Terry to be tried and convicted. I do not want to in any way come anywhere close to that. And that's something I'll be communicating steadily to Justice.

On the other hand, what I'd like questions answered here, it's become this committee's view that the decision process leading to many of the actions taken under Fast and Furious, well above the level of the Phoenix District Office of the U.S. attorney there, is in

fact what we believe is flawed, ill-conceived and covered -- and potentially covered up. And that's what we're investigating.

That would seem to be the question for all of you. They -- they -- and I want to get your answer -- they've asserted that, you know, we're in the way of some meth addicts who got $200 a gun who are being charged, and a murderer, and they're saying that our investigation of their decision process in Fast and Furious -- we're talking about officials here in Washington involved -- that the two are connected.

Do you see any connection, Mr. Rosenberg?

ROSENBERG:

I think that what you are doing is looking at their strategy, their methods, their operational weaknesses. And this is well within the investigative authority of -- of committees. That's what they're supposed to do. You fund these programs, empower them, do those sorts of things.

And what you're looking at now is right in the wheel-house of -- of McGrain, look at how they defined, you know, what it was that was being looked at and what was appropriate. How they were operating? What decisions they made? Were the decisions good or bad?

And at that particular point, there is nothing that would exculpate or, you know, taint those -- what went on. It's -- it's very much like what you looked at in 2002, Mr. Burton looked at in 2002. We're trying to find out who knew what, how high it went, and how we can change it.

Another, you know, investigation that I helped out on was John Dingell's investigation of the Environmental Crimes Section of DOJ between 1992 and 1994. They involved a centralization of environmental crimes prosecution decisions in Main Justice, when

at the same time they were decentralizing almost all other criminal investigations at that time.

And the committee looked at that, was strenuously opposed by not only the Justice Department, but groups outside, former attorneys general. But zeroing in on what was going on, what was the effect of those kinds of decisions, organizational decisions, ultimately won the day.

The policy was reversed. Many of the -- of the people in the Environmental Crimes Section had to resign or were fired. And everything was put right.

ISSA:

Thank you.

Mr. Cummings?

CUMMINGS:

I want to thank all of you. This is, as a lawyer, I tell you, this is a very interesting discussion. And as an officer of the court, I wholeheartedly agree with the chairman that I, too, and I think everybody on this side of the aisle, wants to make sure that anyone who is responsible for Brian Kelly's (sic) death should be prosecuted. I think it would be a sin and a shame if that did not happen.

CUMMINGS:

And it is in that vein that I am posing these questions.

Now, Professor Tiefer, I've contended that both the executive branch and Congress have legitimate interests. The Justice Department -- Justice Department is trying to prosecute alleged murderers and gun traffickers. As a matter of fact, come June 17th, someone will be on trial with regard to the murder of Brian Kelly --

Terry, I'm sorry. And we are trying to investigate allegations of abuse and mismanagement within the same agencies.

I think we should be able to achieve both goals. And I think that you talked about negotiations and I just think we have an interest in achieving both. I agree that Congress has the authority to investigate. We can issue subpoenas, we can demand documents and we can conduct depositions. But we have to exercise that authority responsibly, especially when these are -- and there are open criminal cases ongoing.

I'd like to ask you about some steps other committees have taken in the past to avoid compromising ongoing prosecutions.

First, the department has raised serious questions with some of the documents covered by the committee's subpoena. According to the department, they may include records that -- and this is the department now -- they say that may identify individuals who are assisting in the investigation, that identify sources and investigative techniques, that present risk to individuals' safety, and that prematurely inform subjects and targets about their investigation in a manner that permits them to evade and obstruct our prosecutorial efforts.

My question is not whether we have a right to these documents. We already have some of them. My question is whether we should entertain a request from the department to talk to them before we release them publicly, assuming they have not been released already publicly.

TIEFER:

Thank you for your question, Mr. Cummings.

By the way, a slight detour. I mentioned mostly chairs when I talked about these past investigations. The House Iran-Contra ranking

minority member was Dick Cheney. I don't know if you quite see him as your sort of model but I will say that...

ISSA:

I do.

(LAUGHTER)

CUMMINGS:

I'll remain silent on that one.

TIEFER:

Anyway. At the -- I gave the Iran-Contra committee as an example of a congressional committee going full speed ahead.

At the other end, I cited the Abscam committee in my memo, and that was a committee which said, "We need to be extremely cautious, we don't want to get in the way, we are going to be asking for nerve center testimony at the heart of the..." and so they held off. They had the discussions you're talking about and they decided with the Justice Department behaving properly and respectfully toward the committee, telling it what there was, they decided that they would wait until the trials were over.

I mention that because that was an FBI informant investigation, because of the way Abscam had been done, and just like the ATF investigation, it was something important for Congress to do.

I have said that what I think the Justice Department should be starting by providing more documents, allowing better in camera examination and privilege logs, and I think then the discussion that you're saying is very important before things are released would be on a basis that the committee should pursue. Should pursue.

CUMMINGS:

Let me ask you this, because I only have a limited amount of time. Again, assuming that the decision to release these documents ultimately rests with the committee, do you think it would be prudent to give the department an opportunity to warn us if a public release could put people in danger or impair their investigation?

Let me make it clear here, and I made a mistake earlier and said Brian Kelly and I meant Brian Terry. But go ahead.

TIEFER:

I'll be brief given the time limit.

Yes, it is prudent in an open criminal case situation for the committee to hear from the Justice Department before making things public.

CUMMINGS:

You know, as I listen to you, it seems like I'm always reminded of this book, "The Speed of Trust," and it talks about how it is -- by Covey (ph) -- and he talks about how important it is to establish a trusting relationship.

And I take -- it sounds like what you're saying is you almost have to have some trust going on here to get to the point of negotiations. That is, between the committee and the Justice Department.

Is that a reasonable conclusion?

TIEFER:

I certainly think the Justice Department should try harder to earn the committee's trust. But, yes, it has to be a relationship of trust.

CUMMINGS:

And just one more question, Mr. Chairman.

I just don't see any harm in taking this step. We retain the authority to make the final decision. But our decision is better informed.

In the past, have other committees consulted with the department before releasing documents publicly?

TIEFER:

Very much so.

CUMMINGS:

I'm sorry, I didn't hear you.

TIEFER:

Yes. Before releasing documents publicly, if there's a stated Justice Department concern, there has been this consultation about how the committee, which has the authority to decide, should exercise that authority. Yes.

CUMMINGS:

I see my time has expired. Thank you.

ISSA:

No problem.

The gentleman from Utah, Mr. Chaffetz, is recognized for five minutes.

CHAFFETZ:

Thank you, Mr. Chairman.

And thank you all for being here.

If a president and/or an attorney general states that mistakes were potentially made, that something went awry, does that give the committee an added need or imperative to pursue these documents? Does that add weight to the idea that they should be producing these documents?

Yes, Mr. Fisher.

FISHER:

I think when the -- when you look at the departments of government, Interior, all the other -- Commerce -- departments, can be looked at by the Justice Department. Who looks after the Justice Department?

I think when you have reason to believe there's mismanagement inside the Justice Department, to leave that to the Justice Department is not acceptable to me.

So I think that's been the concern. If there's one -- there's one department where you do not want mismanagement and abuse, it's the Justice Department. And I think your committee has every right to find out exactly what the conditions are.

CHAFFETZ:

And so -- but is that heightened from the fact that if the attorney general and/or the president were to state that, yes, something went awry there, does that give us more imperative to pursue those documents and comply with...

(CROSSTALK)

FISHER:

I think -- I think those better justify your inquiry, yes.

CHAFFETZ:

Yes, Mr. Tatelman?

TATELMAN:

Congressman, if I -- not to completely disagree with Mr. Fisher, but I think the concern that at least one could envision in a situation like that and the way I would answer your question is no, I don't think it changes the calculus one iota, in either direction.

Which is to say, you do not want to find the committee's position where they start to set a standard, where you begin to suggest that only in circumstances there's been an admission does Congress' right kick in or only -- and one I hear very commonly in my work CRS -- is, isn't it true that Congress can only investigate waste, fraud and abuse?

No, you're not limited under those circumstances in that way, at least not from a legal perspective. I can understand the question from a -- from perhaps a political one, which is might have an easier time selling the committee's actions publicly or justifying the committee's time in a public setting under those circumstances.

But I would caution against anybody thinking that it changes your legal rights or authorities in any direction (ph).

CHAFFETZ:

But that doesn't diminish them at all. But...

(CROSSTALK)

TATELMAN:

Absolutely not.

CHAFFETZ:

OK.

What is the remedy? I mean, if Department of Justice just says, "No, no, we're not gonna do this," what's the remedy, what's the next step?

Mr. Fisher? Go ahead, Mr. Fisher.

(CROSSTALK)

FISHER:

... not gonna turn over documents?

CHAFFETZ:

Yeah. If they just decided, "We're not gonna do this," they continue to refuse to comply with a subpoena, what's the remedy?

FISHER:

Next step, and it's taken many times, of course is the contempt citation. And has to go to the floor of either chamber. And not too many people like to be held in contempt of Congress, and that's -- the administration should do everything it can to avoid that step.

But already, because of your experience with your subpoena, you're thinking in that direction. But that's the -- that's the last step.

CHAFFETZ:

Anybody else care to comment on that?

TATELMAN:

Well, I think it's exactly that, the other remedy is further negotiations or, you know, further...

(CROSSTALK)

CHAFFETZ:

Well, why should -- why should a committee have to negotiate with the...

TATELMAN:

I think contempt is a -- is a big escalation and a big step forward, both politically and, I think, definitely legally. I mean, it involves, as Lou mentioned...

(CROSSTALK)

CHAFFETZ:

You just argued that we should -- we didn't have a diminished right. So, I mean, the right, in your...

TATELMAN:

Agreed, Congressman, it's not a rights question, but escalating it to the level of holding an executive branch official in contempt, which in this case I think it would be the acting director of ATF, who's officially the person under subpoena, if I -- if I understood the chairman's documents, that has only happened 12 times in the history of this country and only three times has it gone to the full floor of the House of Representatives. The other nine have only been committee or subcommittee votes.

TATELMAN:

That is a pretty big escalation by the House against an executive branch official. It's certainly a justifiable one, but it is a big one.

ROSENBERG:

Let me give an example. It may help you in your -- in your question.

In one of the iterations of Whitewater, this committee once again -- I think the chairman was Mr. Clinger -- went after the White House

counsel, Jack Quinn, who was the holder of the -- who was the custodian of the documents that the committee was going after.

And the president never claimed executive privilege but alluded to it and kept putting it off, and then at one point made a conditional claim of executive privilege, depending on X, Y or Z.

Well, the committee and Clinger got fed up and what they did was schedule -- schedule a contempt vote for two weeks hence. No, actually, they had already contempted Quinn but scheduled the vote on the floor of the House for two weeks hence.

And within that two-week period, the documents were all turned over. So that kind of -- that kind of an opportunity -- it's what we call a staged process, which I believe that investigative oversight is. You go from one point of persuasion and -- and to the next, to the next, to the next.

Now, what's happened over the last 15, 20 years is you skipped threats of -- of -- you know, of a subpoena and then subpoenaing and we're up to threats of contempt and then holding contempt over somebody's head.

Well, Jack Quinn did not want to be held in contempt. That's what I understand.

CHAFFETZ:

And, Mr. Chairman, my time has expired, but let me just -- from my vantage point, nobody wants to have to go to this step, but here you have, in this particular case, a president and an attorney general who are both claiming to be (inaudible) to what was going on, which I think weighs in on the issue of executive privilege. But both have...

ROSENBERG:

That's what the recent case law says, that...

CHAFFETZ:

... but have also...

ISSA:

And the gentleman's time is expired.

CHAFFETZ:

... have -- and I'll yield back.

ISSA:

I thank the gentleman. The gentleman from Virginia, Mr. Connolly.

There will be a second round for those who can stay. Mr. Connolly?

CONNOLLY:

Thank you, Mr. Chairman. And thank you for having this hearing. It really is actually an intellectual feast because this is where the tectonic plates between the two branches come together. And we either collide or we gently subside, but -- so it's a fascinating topic.

Let me ask, Mr. Tatelman, is it your view that Congress has an unfettered right to access to information it requires or believes it requires, irrespective of the judicial consequences?

If something's under adjudication, litigation or a criminal trial, that's all fascinating, but that has nothing to do with the exercise of -- of Congress's absolute right to access information it seeks -- is that your position?

TATELMAN:

Absent some countervailing constitutionally based claim, yes.

CONNOLLY:

An absolute right?

TATELMAN:

Yes.

CONNOLLY:

Is that your position, Professor Tiefer?

TIEFER:

I -- I find, in the Supreme Court opinions, that what the persuasive opinion of Justice Brennan in Hutchinson v. United States said was that, if there was an immediate pending trial, that he would hope that there would be some -- something other than an interference with that trial by the congressional committee.

So, in other words, the judicial position is that there should be some -- I'm hesitant to use the word "accommodation," but there should be other than the congressional committee proceeding full-speed ahead without thinking about the consequences.

CONNOLLY:

But, to his credit, Mr. Tatelman?

TATELMAN:

Tatelman.

CONNOLLY:

Tatelman -- excuse me. Mr. Tatelman does not quibble it's an absolute right, as he reads the Constitution; while the late Supreme Court Justice Brennan may wish for consideration on our part, the Constitution doesn't mandate it.

As a matter of fact, Mr. Tatelman's reading of the Constitution is that's all in the fine print. But we can, if we wish, choose to ignore the consequences even if it's pending litigation or criminal trial.

Is that your reading as well? Or do you believe that ruling or that opinion by Mr. Brennan puts some check and balance on the otherwise unfettered right of Congress to seek information from the executive branch?

TIEFER:

I think what's being said is that the court would do what it was -- was within its power if the Congress ran roughshod over the -- in the case of an immediately -- that's the phrase in the case -- "immediately pending trial."

CONNOLLY:

Well, let me -- thank you. Let me ask -- let's deal with a hypothetical here. Well, let's actually not deal with a hypothetical. Let's deal with the example the chairman gave you about Oliver North.

Now, refresh my memory, but if the sequence is right, Oliver North was indicted and convicted in a court of law of a crime.

TIEFER:

Correct.

CONNOLLY:

And that conviction he appealed, and subsequently the appeal was successful in part because of what was perceived to be compromised testimony here in the Congress. Is that correct?

TIEFER:

Well, I would more narrowly -- and I think the statement by the chairman was correct on this point -- on the issue of immunity, the obtaining of a court immunity order, that was the basis on which the appeal was successful.

CONNOLLY:

Yes. But -- OK, fair enough. But here's my hypothetical. What if somebody in Congress or a whole bunch of people in Congress at that time decided willfully to taint his testimony in order to ensure subsequently that he could not be found guilty or that an appeal would be successful, that that was a deliberate strategy here in the Congress?

If Mr. Tatelman is correct in his interpretation of the Constitution, even though you and I might agree that would be wrong morally, it is nonetheless the right of Congress to do that. Is that your opinion?

TIEFER:

Not to do that. I don't think -- well, I won't talk for...

CONNOLLY:

Well, but I'm just -- I'm just following the logic here.

FISHER (?):

There is law out there that...

CONNOLLY:

Excuse me. This is my time, sir.

If we have, as Mr. Tatelman says, an unfettered absolute right to information from the executive branch irrespective of the consequences, what is to stop an unbridled Congress, not like this

one, but one that might be more politically motivated, to deliberately taint the outcome of a pending criminal trial?

You look like you're ready to answer, Mr. Fisher.

FISHER:

I would say, on the absolute right, I think there are -- you have to establish in the committee that you have legitimate inquiry, and I think you do. There are some inquiries which I don't think would be legitimate, perhaps going into some individual employee in the executive branch private file and so forth. So you have to establish some legitimate business here.

CONNOLLY:

Mr. Chairman, I know that I'm going to have another chance, and thank you. I would simply say to you, though, the Constitution does not say that. It doesn't talk about legitimate and illegitimate. We'll come back to it in my next round. Thank you.

ISSA:

I look forward to it. The gentlelady from New York?

BUERKLE:

Thank you, Mr. Chairman. And thank you for calling this hearing. Thank you this afternoon to our panelists for being here. Congress and the American people have the right to know how their money is being spent. And one of the panelists mentioned that the American people lose when we don't get the information that we are seeking. So this is a very important inquiry.

I just have one question and then I'm going to yield my time back to the chairman for any further questions he might have.

I'd like to ask each one of the panelists, if you look at the circumstances in this case, is there any reason why the Department of Justice should not comply with our request?

I'll start with Mr. Rosenberg and we can go right down. And I think that's just a yes or no answer.

ROSENBERG:

From all that I know, what's in the papers that I received in looking at it, there's nothing yet that would dissuade me from saying that they should comply.

BUERKLE:

Thank you. Mr. Tatelman?

TATELMAN:

I would be even more cautious than that. I think, when you phrase the question as you have, Congresswoman, it's complicated. I think there may be some -- in other words, we don't know enough as members of the public or based on what we've seen thus far. I mean, I wouldn't feel comfortable answering that question either way. I simply don't have enough information to know for sure whether there's something lurking out there that might give them a more legitimate reason.

Based on what they've asserted thus far, it's arguable, but there may be things out there and may be other information that we're just simply not aware of yet.

BUERKLE:

Thank you. Dr. Fisher?

FISHER:

Yeah, you're just getting into some documents, some access, so you don't have a full picture.

But you have enough of a picture, I believe, that there is at least concern about mismanagement and possible abuse. And I think that the Department of Justice would be very wise to work with your committee. Otherwise, it can be easily interpreted as some kind of an obstruction to make sure that embarrassing information does not come to light.

BUERKLE:

Thank you, Dr. Fisher.

Professor?

TIEFER:

As things stand now, they owe you the documents. It's their job to make a record that would support keeping anything back, and so far they haven't set out to make sure a case.

BUERKLE:

Thank you.

And I yield my time back to the chairman.

ISSA:

Thank you.

Professor Tiefer, you sort of gave the answer I was hoping I might follow up on. What you said earlier, and I think what you've repeated here, I want you to elaborate on. When we ask a question, we can in fact be unreasonable in our broadness. It can happen because we don't know what we don't know.

Ultimately, the negotiation that I think we were talking about earlier is about telling us why our discovery is overly broad, making the case for what we don't need or we may consider narrowing. And then, as I think you're saying, make the case for what's not being delivered for some specific reason, either it's imprudent, which is our decision, or it's constitutionally protected, which is -- is their decision and their responsibility to assert.

Would that sort of summarize your position?

TIEFER:

Yes, Mr. Chairman.

ISSA:

Well, I want to go quickly to Mr. Connolly's statement, though, which I think Mr. Tatelman, you got the -- you got the bullet on. The 27th Amendment exists because at the founding of our country, they were very afraid that Congress would raid the treasury. Isn't that true? That's why we're not allowed to raise our own pay arbitrarily during a term.

TATELMAN:

In part, yes, absolutely.

ISSA:

Now, the reason it got passed 200 years later was that the American people objected to a pay raise that Congress gave itself enough to put it over the top, having sort of lingered out there for all those years. Isn't that your recollection?

TATELMAN:

Yes, I believe it was the state of Michigan that finally came around and provided the -- the necessary last votes, yes.

ISSA:

And by the way, I approve of that amendment, albeit the last.

But let's -- let's go back to Mr. Connolly's statement. If in fact we were arbitrary, capricious. Let's just say that we were trying to cover up Joe Smith, a congressman's wrongdoing by interfering with the actual prosecution; defend our speaker, John Smith. Wouldn't the court reasonably take an objection from the administration, from the attorney general, and consider it as its obligation to balance us, every bit as much as it would balance the executive branch wrongful assertions? Isn't that the role of the court?

TATELMAN:

Yes, Mr. Chairman, but also more so it's the role of all of your respective constituents. If they believe that the Congress has gone far beyond what is reasonable or what is prudent, as you put it...

(CROSSTALK)

ISSA:

But that relief is only granted every two years.

TATELMAN:

Correct, but in the particular case at hand, yes, it's -- in part, it's the court's duty and balance, but in part it's also, you know, Congress and the executive, all three branches in some sense, working together. I think the question that I was responding to was narrowly phrased with respect to Congress' right, which I think is...

(CROSSTALK)

ISSA:

And I agree.

Mr. Fisher, if you could respond, and then out time's up.

FISHER:

Yes, you mentioned how a court would decide. I think it's in the interest of your committee and Congress and the administration not to go in that direction because no one knows what a court will do. You don't know who's going to be selected. You don't know what the result is.

So I think both branches should figure out politically what accommodation meets your mutual interest.

ISSA:

I agree with you that it's better to rely on case law than to try to make it.

With that, we recognize the gentleman from Oklahoma for five minutes.

LANKFORD:

Thank you very much.

And thanks for being here to be able to have this testimony. It's very important to us.

Operation Fast and Furious utilized a lot of components of the DOJ, including domestic intelligence operations, Public Integrity Section, and its Office of Personnel Responsibility. Historically, congressional investigations have covered all levels of DOJ officials and employees, from the attorney general down to subordinate line personnel.

What has been the scope of past congressional inquiries into the DOJ? Can you just define out what we've done? Are we within the scope at all to be able to ask questions of DOJ? And is there a

legitimate reason for DOJ to withhold documents and information from this information, in your own personal perspective?

And anyone can answer that. I'll let you just jump in as you choose to.

TIEFER:

Well, I -- if we could point to even one single House investigation, it was called the Superfund investigation, 1982, 1983, in which the House did overcome a claim of executive privilege for an investigation of the Justice Department. And was -- there was a follow-up House Judiciary Committee investigation. It looked at the Criminal Division. It looked at the Civil Division and it looked at the Lands Division.

I don't think that there is an office -- this committee held the attorney general herself, Janet Reno, in contempt. Nothing is off limits.

LANKFORD:

OK. Thank you.

FISHER:

I would agree that the Justice Department is not immune from these investigations at all. I think all of us have given examples in our statements that are fairly detailed on that.

LANKFORD:

Thank you.

On a separate issue...

ROSENBERG:

Look at Ruby -- look at Ruby Ridge, which dealt with the killings that were investigated and the investigations of four or five different

agencies, including Justice Department, with regard to whether there was inappropriate, you know, activity with respect to the rules of engagement et cetera. And a Senate committee got all those documents and exposed them. And this is the most sensitive part of DOJ, you know, the Office of...

(CROSSTALK)

LANKFORD:

Right. Yes, we understand all these things are very sensitive and obviously very delicate, but there is a reasonable role for oversight in this committee to be able to engage in the oversight.

Let me ask in a separate way under this. Under the Privacy Act exception for congressional committees, do you know of any reason that DOJ can't voluntarily produce documents to a congressional committee if they chose to? So not necessarily from a subpoena or us to push them, but just to be able to say can they voluntarily disclose these things and say, "You know, there's a letter that's been given; I want to engage in this to be able to help in every way that I can."

Do you know of any reason they couldn't just voluntarily do this?

ROSENBERG:

The Privacy Act says that documents -- that privacy- covered documents shall be available to all joint committees, committees, and subcommittees. I don't see why giving it to a joint committee, committee or subcommittee can't be done voluntarily.

LANKFORD:

Thank you.

Anyone else want to make a comment on that?

TIEFER:

Yes. There are some narrowly limited grounds in which the Justice Department can't on its own provide documents. Grand jury documents, they'd have to have a court order for. Income tax returns, there's some very narrow specifications about what can be provided.

Outside of those narrow grounds, the answer is they can provide it voluntarily.

LANKFORD:

OK.

All right, with that, I would yield back to the chairman.

ISSA:

Thank you.

You know, earlier there was a discussion about the U.S. attorneys' case, the firing of the U.S. attorneys. I sat on Judiciary and here, so I remember it very well. I want to get into that for just a moment.

The administration claimed that it had an absolute right to hire and fire U.S. attorneys and that was in fact confirmed. And yet we went forward with an investigation because we were trying to get to the bottom of whether or not one or more of those individuals was fired for reasons related to the performance of their doing (sic); in other wards, to thwart prosecutions, to protect political friends of the administration and so on.

Wouldn't that be the best example of legitimate overseeing not just of the U.S. attorneys and the attorney general, but even of the administration, because they questioned the president as to whether or not he had the authority to fire without a review of

whether that firing was for some other reason other than his constitutional right?

Yes, Mr. Fisher?

FISHER:

Yes, I think that was a very powerful case because I can't imagine anything more dangerous than for the Justice Department to use U.S. attorneys in a partisan way, and that was the issue. So that -- that was a terrifying moment and Congress had every right to find out. I don't think Congress ever got as much information as was needed to understand what actually went on. And there was no accountability from the president to the A.G. on down. No one seemed to know exactly who did what.

ISSA:

Professor Tiefer, did you have anything else on that?

TIEFER:

That was, indeed, a very strong, strong reason to do that oversight.

ISSA:

OK. With that, I think we're ready for a second round. Since I just talked, I'll -- I'll hold mine for a moment and go to the ranking member.

CUMMINGS:

Thank you very much, Mr. Chairman.

I'd like to ask the witnesses about the status of the committee's investigation to see how it compares to other historical precedents.

On March 16th, 2011, Chairman Issa initiated this committee's investigation by writing to ATF to request a wide range of documents. He certainly had the right to do so.

These included memoranda, reports, e-mails and other communications relating to the death of Agent Terry, Operation Fast and Furious, and other related topics. The letter requested that all documents be produced in just two weeks, by March 30th, 2011.

When that did -- when he did not receive the documents, the chairman issued a unilateral subpoena for these documents the next day, on March the 31st, 2011. There was no committee business meeting or debate or vote on the subpoena.

Professor Tiefer, before today, were you aware that the Chairman Issa's subpoena came only 15 days after his original request for documents? Were you aware of that?

TIEFER:

The answer is no, I hadn't gotten the details.

CUMMINGS:

And the majority staff memo for this hearing states that after the subpoena was issued, and I quote, "DOJ subsequently refused to produce documents responsive to the subpoena," but the department in fact had produced to the committee or made available to the committee staff for review approximately 1,336 pages of subpoenaed documents to date.

Professor Tiefer, were you aware of that fact?

TIEFER:

My sense is that to say they produced documents responsive is impliedly to say they didn't produce other documents responsive,

and that was my sense, yes, there was a mixture of including the withholding of important documents.

And so, Professor Tiefer, your testimony seems to assume that the department has asserted executive privilege to withhold documents. Before today, you were aware that the department has not asserted any kind of executive privilege to withhold any documents from the committee. Is that right?

TIEFER:

I -- I don't -- that is correct, and I would expand on that. I believe in as much interplay, not just negotiating but frankly finding, between the committee and the Justice Department before taking the ultimate step.

CUMMINGS:

All right.

TIEFER:

One of the steps is to force -- and this has worked in the past, and the people at this table have been with me in this -- force the Justice -- force the executive branch to say we're going to claim executive privilege or we're not going to claim executive privilege.

And at this point, they haven't been put to that.

CUMMINGS:

Now, if they are still -- let's say we have a situation where Justice is trying to pull together the documents and gather responsive documents based on search protocols agreed to by the committee, but have not completed that process and is acting in good faith, a little earlier you talked about a privilege log.

At what point does that log come up? I mean, if they are still trying to get the documents, at what point does the log come up? Does it -- is that a little premature? Because it seems to me you've got to figure out what you have in response to the -- to the request -- the subpoena, and then it seems to me that then you've got to make a list of documents that, you know, you don't think should be submitted and tell why.

And that's basically what the log is all about, right?

TIEFER:

On the one hand, that's -- that's certainly been the way the Justice Department has done it in the past, and our efforts to wean it off of that process haven't succeeded.

I have often wished that instead they would turn over the things that aren't privileged as they come across them and only log the things that they're withholding.

But you're right, the usual process has been the way you're saying. They want to have them all before they decide what they're going to claim privilege on.

CUMMINGS:

So -- so let me make sure I understand this. Are you saying you think they should just turn over all the documents and then say "Look -- don't" you know, "give us back these"?

That's not what you're saying, is it? The ones we think are privileged? Is that what you're saying?

TIEFER:

Well, let me put it this way, because I was at both ends of this process. I represented the House of Representatives when we had incoming subpoenas from them, and they weren't willing to sit there

and wait while we went through all the documents. They wanted right away the important ones we couldn't claim privilege on.

But when it's on -- when the shoe's on their foot, then they want to count all the documents before they decide which to claim privilege on. And that has been their traditional way through all administrations.

CUMMINGS:

So right now, I guess you're aware that the department is now conducting these searches for 19 officials approved by the committee staff. You were aware of that, right?

TIEFER:

I believe it. They'd be -- having gotten a subpoena, they'd be in big trouble if they weren't.

CUMMINGS:

But you -- you really -- you said something very interesting. You said that you believe there has to be a fight. Is that what you said? You don't usually hear that word in this committee.

TIEFER:

Yes. Yes. There has to be a fight. Yes. This is not a lovemaking process.

(LAUGHTER)

ISSA:

Well, we're doing real well there, Elijah. Finally I found out that we're doing our job just right up here.

CUMMINGS:

Thank you, Mr. Chairman.

ISSA:

Thank you.

Mr. Lankford?

LANKFORD:

Thank you. I have one quick statement. I'd like to be able to yield some time to the chairman after that.

But my statement would be that the Justice Department informed our committee on May the 2nd that they'd make 400 pages of documents available.

When the staff went to go view those documents, they were heavily redacted.

Is it appropriate, and I'm going to ask this to Dr. Fisher, is it appropriate for DOJ to redact documents, sometimes heavily, page after page after page, in response to a subpoena?

FISHER:

I don't think it's appropriate, and I think it sends the wrong signal that it looks like there are some things they don't want you to see. So if they're trying to establish their bona fides, that's not a good way to do it.

LANKFORD:

Right. Hundreds of pages of documents don't help to be able to count that they've turned over hundreds of pages when they're all heavily redacted at that point.

With that, I will yield back to the chairman.

ISSA:

Thank you. I'm going to follow up on that good line of questioning.

You know, as all of you I think know, the only discovery that's been literally handed over to us was all 100 percent available on the Internet, so it was public record. And I know sometimes even public record can be sensitive, but not in this case.

However, the question, I think, for everyone's edification up here, in camera review is historically in most criminal cases and civil cases so that people can see with no redaction. Of course, they don't get to take it with them.

Is that your understanding of what is normally appropriate when you don't deliver something and yet you bring them in for a briefing and in camera review, so you can then decide how to Solomon-esque split the baby in half?

FISHER (?):

Yeah, I think It's inconsistent. If it's in camera, you should be able to see the documents.

ISSA:

I guess I'm getting pretty much yesses from everyone.

Professor Tiefer, you -- you talked about the long history you have of knowing how Justice does business, both sides.

I certainly remember when they raided William Jefferson's office without notice and took at gun point everything they wanted, that certainly was -- was not showing any -- any deference or negotiation with the speaker or with our constitutional separation.

Are we doing something similar here, from what you can see?

TIEFER:

I -- I think there was no deference whatsoever in that process, that it was a serious affront to the separation of powers, and that one can argue at the margins here about whether the proper process could be stretched out a little more or not, but there's no comparison.

You are respecting the separation of powers much more than they did in the Jefferson raid.

ISSA:

Now, for the record, I'd like to mention that Ranking Member Grassley, Senator Grassley, had been requesting these documents. And we had in our possession a letter saying they wouldn't give it to him because he wasn't the chairman. And he had been requesting them since January or even before but certainly formally since January.

So I just want to be on the record that yes, we did, Mr. Cummings, we did only allow two weeks, but we allowed two weeks because they basically said we have the documents, we just won't give them to you, because you're not entitled. Chairman Leahy would have had to request them.

And so, I figured, well, Chairman Issa, Chairman Leahy, we're -- we're somewhat similar. And I had an expectation we'd get something.

Professor Tiefer, I wanted to follow up on something, though. You talked in terms of the history of A.G. and their operations, Justice.

Rolling discovery, isn't that the norm in most other discovery that this committee does, where people say it's voluminous, and they start giving you them as they get to them, if you're working with Department of Interior, most of the other areas, from your knowledge?

TIEFER:

Yes. It does vary from office to office. I think they have a problem here because some of the best evidence is e-mails and it's not so easy to do rolling discovery of e-mails. But as far as documents and categories of documents, yes. That would be the normal practice.

ISSA:

Mr. Tatelman, same thing, that you're used to seeing information come out in dribs and drabs, even -- even when we're asking for legislative language or research, we ask you for something and then you get additional.

ISSA:

And just for the record, that's -- my experience with everybody else is you get what's easy and then you end up with what's very hard at the end.

I do want to set the record straight on one thing. I was off last week in my district and so I was not aware DOJ has produced 80 pages of nonpublic documents as of last Friday, and I look forward to reading those.

And with that, I recognize the gentleman from Virginia for five minutes.

CONNOLLY:

Thank you again, Mr. Chairman.

And, Mr. Rosenberg, I want to give you -- I know you were chomping at the bit, and I didn't mean to cut you off, but I was running out of time.

Where we left off, Mr. Tatelman, was you agreed with the assertion that Congress, as you read the Constitution, has an unfettered,

absolute right to seek information, irrespective of the judicial consequences, from the executive branch.

Subsequently to the chairman's question, I think you indicated that, but, of course, a court -- a court ultimately adjudicates the dispute, should there be a dispute, between the two branches.

Am I reading you correctly?

TATELMAN:

Your question, Congressman, was whether or not Congress has the right to access the information. And the answer to that question, I'll stand by my original answer, was they had absolutely a right, subject to countervailing constitutional privileges being asserted...

CONNOLLY:

Yes.

TATELMAN:

... but that there may be reasons, either political or otherwise, why Congress may choose not to assert that.

CONNOLLY:

Yes. Yes. No, I heard that. I was just trying to establish what your view was.

But you would agree that in the event of a dispute, the ultimate arbiter of a dispute is a court of law?

TATELMAN:

Not necessarily in a dispute between the legislative and executive branches. Mr. Issa's -- Chairman Issa's hypothetical involved a criminal trial with which there is a judicial role to play there, but if you eliminate that part of the situation, no, not necessarily. I think

Congress and the executive branch can and often do resolve these disputes over their rights and privileges and prerogatives without involving courts of law quite frequently.

CONNOLLY:

But what if they don't? What if they can't?

TATELMAN:

Well, there's certainly precedent to establish the fact that the courts are routinely cautious and very hesitant to get involved. You have the two AT&T cases in the late 1970s where the court, the D.C. Circuit Court on two occasions refused to rule on the merits. Even the Myers (ph) situation, Congressman, the court doesn't rule on the merits of that dispute. It ruled Congress had a right to bring the case, it had standing to pursue it, it had a right to the information, but it didn't rule on the merits.

(CROSSTALK)

CONNOLLY:

Mr. Tatelman, I have a limited amount of time. I get your point. Thank you.

But let me pose this question. If the -- does the -- does the executive branch have a legitimate right to be concerned about the protection of FBI informants?

TATELMAN:

Yes.

CONNOLLY:

And if Congress were seeking, even in camera, unredacted documents that would reveal the identity of those informants, might

the FBI and the executive branch by extension have legitimate reason nonetheless to fear, wittingly or unwittingly, the revelation of such information?

TATELMAN:

They have a legitimate reason to fear that, not a legal reason to withhold it.

CONNOLLY:

No legal reason to withhold it.

TATELMAN:

None that I'm aware of.

CONNOLLY:

All of you agree with that?

Mr. Fisher?

FISHER:

I wouldn't put it that way. I think you raise a nice question because both sides have to make judgments about whether their course of action is not only legitimate but plays well in the public. So any effort by Congress to say, "We want the names of some informants or we want the name of the chief of staff at some CIA," you don't do that. You're going to get injured. I think the executive branch has to worry that it doesn't injure itself also.

So everyone makes, on both sides, some judgments.

CONNOLLY:

Would you -- well, Mr. Rosenberg, I want to give you a chance, because I, sadly, had to cut you off. But you were reacting to the

discussion about, well, what if we had a Congress that deliberately as a strategy sought this information in fact to negatively influence the outcome of a pending trial.

ROSENBERG:

I think a question would be raised at that point.

CONNOLLY:

I'm sorry?

ROSENBERG:

Congress' powers to upset and to, you know, screw up a particular trial is certainly there, but there is a particular line that I think I'm aware of in the case law that if there is an attempt to interfere with or to help convict or, you know, someone, that that would raise serious due process questions.

CONNOLLY:

OK. So there are inherently or, you know, some limits on Congress' otherwise unfettered right to seek access to information from the executive branch. This might be one of those cases.

ROSENBERG:

Very rare.

CONNOLLY:

Very rare. But is it not also relatively infrequent that Congress seeks this kind of information when there in fact is a pending investigation or a criminal trial? is it frequent that Congress brushes that aside and seeks to subpoena information nonetheless?

Mr. Fisher?

FISHER:

The question again, please?

CONNOLLY:

Well, how frequent is it that Congress chooses, even when there's a pending investigation, ongoing criminal open investigation, nonetheless to subpoena documents that may be related to that investigation?

I'm under the impression Congress has always shown -- I'm sorry, has mostly shown historically some restraint under those circumstances.

FISHER:

Well, it can show restraint, but if the -- what you're just saying has to be done to fulfill a legislative purpose, then I think you have to go ahead.

CONNOLLY:

That's a different question. My question, Mr. Fisher, was, how frequent is it that Congress brushes aside those concerns and pursues the subpoena nonetheless?

FISHER:

I don't think Congress brushes aside, but it is frequent that Congress does go after the kind of information you're asking. It is frequent.

CONNOLLY:

When there's an open criminal investigation?

FISHER:

Yes.

CONNOLLY:

Professor Tiefer, is that your...

ISSA:

I'd ask the gentleman have an additional 30 seconds.

CONNOLLY:

Oh, I think the chair. I'm sorry. I was unmindful of time.

ISSA:

No, no, you're doing -- you're doing fine. Another 30 seconds.

TIEFER:

If we broaden it because the same argument is made for open cases of other kinds, environmental enforcement and so forth, our memos show a number of times, a number of times. And for criminal ones, the most famous instances in history, like Teapot Dome, but especially Watergate and Iran-Contra, are criminal cases.

Does it happen often? No. Does it happen? Yes.

ROSENBERG (?):

(inaudible) enough so that we can take it that it is a prerogative of Congress to do it.

CONNOLLY:

Yeah. I would just remind Professor Tiefer that in the case of the investigations here in Congress, the Watergate hearings, they proceeded before criminal investigations were under way. The Irwin

(sic) hearings proceeded a full year before those criminal investigations.

I yield back.

ISSA:

Thank you. I guess the professor stands corrected here.

I would ask unanimous consent that the statement delivered to us by the Department of Justice on today's hearing be entered into the record. Without objection, so ordered.

I am going to follow up on that line of questioning.

Mr. Rosenberg, in the Bulger case, weren't we dealing with informants? Wasn't the whole case about informants who were committing crimes under the protection of Department of Justice?

ROSENBERG:

Absolutely.

ISSA:

And didn't -- I guess it would have been Clinger and then Burton, didn't they basically, you know, pursue that in spite of initial pushback by DOJ?

ROSENBERG:

There was -- there were claims that there were ongoing investigations, there were ongoing litigation. Part of -- one of the litigations was members of the families of some of the 20 or 25 victims who were bringing tort claim suits.

ISSA:

So just following up on that line from the gentleman from Virginia, it's for us to decide whether or not it's appropriate to hold back, that that ultimately has to be something in which we see enough to know that it may be prudent to delay or in some other way explore. It can't be unilateral by the executive branch. Isn't that what case law shows?

ROSENBERG:

Yes.

ISSA:

And do some of you remember a Congressman who now works down the hall, Mr. Waxman, weren't there criminal cases and civil cases going in the Fallujah Four and in the Pat Tillman case, weren't both of those when the chairman of this committee brought both of those before the Congress, including testimony, weren't those -- didn't they both have other activities going on, anyone remember? I mean, I do, but I want to make sure I'm remembering correctly.

(UNKNOWN)

For Pat Tillman, I remember that, yes.

ISSA:

OK. So it seems like we do have a strong issue.

I think Mr. Fisher, at one point you had talked in terms of the political, and I think Mr. Tatelman did, too, political versus legal and political versus constitutional.

Our investigation about whether the policy, including a 20-year- old policy or 22-year-old policy at ATF that is been asserted to say that it's OK for guns to walk, it's OK for deadly weapons to get in the

hands of people who then could kill a federal agent or some other innocent bystander.

ISSA:

That -- questioning that policy which is at the heart of this investigation, should we wait while that ATF rule is still in place, while there still may in fact be guns or explosives or drugs walking?

That's the real question here, is is the balance of prosecutions versus the balance of this policy, is that a legitimate question for this committee to explore sooner rather than later?

Mr. Rosenberg?

ROSENBERG:

Absolutely. And you're right to do it. And that, as I -- as I mentioned the Dingell investigation of the environmental crimes unit was exactly that, a policy of centralizing the prosecutorial decisions in Washington as opposed to any other kinds of prosecutorial decisions was one that was ongoing.

And the point of the ongoingness was disturbing in that it made for a perhaps discriminatory kinds of decisions being made not on the ground, not by the people who were investigating them, but from -- from Washington itself.

And it took two and a half years and there was a voluntary rescission of that particular policy.

But -- but to wait around until they, you know, talked about it and discussed it, it would seem to Mr. Dingell at the time to be, you know, unquestionable, that they had to go after it.

ISSA:

Well, you're in rarefied and good company if your being -- if your investigation is compared even in a small way to Chairman Dingell's.

Mr. Fisher?

FISHER:

It uses the two words, political and legal, I think the way you described it, the two words come together, because you have a political concern about this ATF policy in place for a long time and you have legitimate legal concerns.

This is something that you have to investigate to make sure it doesn't continue.

ISSA:

Well, with that, I'm going to do something unusual. I'm going to yield back my own time and thank all four of our panelists for probably the most -- I hope if C-SPAN watchers are watching this, that they appreciate that compared -- except for possibly with Thomas Jefferson alone in his study, we haven't brought this much intellectual capital to a hearing in a very, very long time.

I thank you for your testimonies. And we stand adjourned.

Thank you.

CQ Transcriptions, June 13, 2011

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