

Governor had the constitutional power to disapprove such items. Opinion of the Justices, 384 Mass. 820, 820 (1981) . . . The Court's affirmative answer was issued on September 2, 1981. On September 15, 1981, the House voted 149 to 0 to sustain the Governor's disapproval of Section 99, Supplement, No. 409 (1981). No Senate vote occurred concerning the veto. The story ends, or so it ought to.¹⁰¹⁰

V. INSTITUTIONAL RELUCTANCE TO ACCEPT OVERSIGHT

A. CONGRESSIONAL OVERSIGHT

It is hard to understand why it was so difficult to conduct a thorough investigation of the FBI's use of informants in New England. In hindsight, a statement made by a senior FBI official provides a glimpse of what may have been happening. In early 2001, just as the Committee was beginning to focus on the FBI's use of informants in New England, Charles Prouty—then the Special Agent in Charge of the Boston office—made the following statements about the Deegan case: “The FBI was forthcoming. We didn't conceal the information. We didn't attempt to frame anyone.”¹⁰¹¹ In retrospect, Prouty's assertion appears ill-considered. Indeed, its contrast with a statement made by FBI Director Louis Freeh just a few months later is stark. Freeh stated that the case is “obviously a great travesty, a great failure, disgraceful to the extent that my agency or any other law enforcement agency contributed to that.”¹⁰¹²

In support of his statement, Prouty cited a document created just after the Deegan murder was committed. A memorandum from the Director of the FBI to the Special Agent in Charge, dated just four days after the Deegan murder, states: “You should advise appropriate authorities of the identities of the possible perpetrators of the murders of Sacrimone and Deegan.”¹⁰¹³ A handwritten annotation on one copy of this document indicates that information regarding the Deegan murder was provided to “Renfrew Chelsea PD” on March 15, 1965.¹⁰¹⁴

The Committee has searched for other indications that the FBI provided exculpatory evidence to the Deegan prosecutors. Thus far, none has been located. Suffice it to say, however, that local prosecutors were never made aware of significant exculpatory information. For example:

- Local prosecutors were not aware that Joseph Barboza and Jimmy Flemmi went to Patriarca to request permission to murder Deegan just days before the crime occurred. Furthermore, they were not aware that the source of this information was microphone surveillance, a form of information more reliable than most informant information.

¹⁰¹⁰ *Id.*

¹⁰¹¹ Shelley Murphy, *FBI Says Documents Clear It of Wrongdoing in '65 Case*, BOSTON GLOBE, Feb. 15, 2001.

¹⁰¹² *Hearing Before the House Appropriations Subcommittee on Commerce, Justice, State and Judiciary*, 107th Cong. 47 (testimony of Louis Freeh) (2001 WL 518397).

¹⁰¹³ Airtel from J. Edgar Hoover, Director, FBI, to Special Agent in Charge, Boston FBI Field Office (Mar. 16, 1965) (Exhibit 83).

¹⁰¹⁴ *Id.*; FBI Boston Gangland Murders Report by John F. Kehoe, Jr., Special Agent, Boston FBI Field Office (Jan. 14, 1966) (Exhibit 116); Memorandum from H. Paul Rico, Special Agent, to Special Agent in Charge, [Redacted] (Mar. 15, 1965) (Exhibit 82).

- Local prosecutors were not aware that the FBI had evidence that Jimmy Flemmi had a motive for killing Deegan, and that this motive conflicted with the motive Barboza provided in sworn testimony.
- Local prosecutors were not aware that Barboza had told federal law enforcement personnel that he would not provide information that would allow Jimmy Flemmi to “fry.”
- Local prosecutors were not aware that both Jimmy Flemmi and Stephen Flemmi were government informants.

At a minimum, the FBI failed to provide exculpatory evidence in a death penalty case. More important, however, is the likelihood that the FBI shared information when there was no reason to keep it covered up, but, at a time when Barboza was readying himself to tell a story that benefited the goals of federal law enforcement, federal officials kept exculpatory information from state law enforcement officials.

At the outset of its investigation, the Committee requested that it be permitted to speak with the head of a Justice Department task force investigating many of the same matters of interest to the Committee. The stated purpose of this proposed line of communication was to ensure that Congress was receiving everything it was entitled to receive and to help the Committee refrain from taking steps that might harm ongoing criminal prosecutions. The Justice Department did not accede to this request. The Committee also made a request to speak to the Department about the identities of certain informants and the significance of information provided by these informants. It took well over one year for a meeting on this subject to be arranged. On December 2, 2002, almost two years into the Committee’s investigation, the Justice Department did convene a meeting to address the Committee’s request about informants. This meeting was of particular significance for three reasons. First, it became clear that critical documents had been withheld from Congress. Second, the Justice Department simply refused to provide Congress with essential information about informants, including information that had previously been made available to civil litigants during *U.S. v. Salemmme*. Finally, the meeting confirmed the general sense that the Justice Department has failed to understand the seriousness of the Committee’s investigation.

While it is true that the Department has assigned people of unimpeachable integrity to spearhead its own investigation, it also appears true that it has failed to understand that Congress has not only a legitimate right to investigate the matters covered in this report, but that Congress also has a right to expect the Justice Department to do everything in its power to ensure that Congress is able to discharge its own constitutional responsibilities.

Unfortunately, the relationship between the executive branch and the legislative branch—particularly where oversight is concerned—is often more adversarial than collegial. This has proved to be the case during the Committee’s investigation of the Justice Department’s use of informants in New England. Congress cannot discharge its responsibilities if information is not provided or dilatory tactics are employed.

Throughout the Committee's investigation, it encountered an institutional reluctance to accept oversight. Executive privilege was claimed over certain documents, redactions were used in such a way that it was difficult to understand the significance of information, and some categories of documents that should have been turned over to Congress were withheld. Indeed, the Committee was left with the general sense that the specter of a subpoena or the threat of compelled testimony was necessary to make any progress at all.

The following three examples provide a sense of why the Committee has concluded that the Justice Department failed to take its responsibilities to assist Congress as seriously as it should have.

1. The Patriarca Microphone Surveillance Logs

The single most important category of information needed by the Committee to conduct its investigation of the use of Joseph Barboza as a cooperating witness was that derived from microphone surveillance of Raymond Patriarca. On June 5, 2001, the Committee asked the Justice Department to produce "all audiotape recordings, telephone wiretaps, other audio interceptions and transcripts relating to Raymond Patriarca from January 1, 1962, to December 31, 1968." Because Barboza and Flemmi traveled to Rhode Island to get Patriarca's permission to kill Teddy Deegan, and because there was microphone surveillance capturing conversations, documents pertaining to this request were of paramount importance to the Committee. Indeed, the Justice Department was aware of the importance attributed by the Committee to these records. A few months after the initial request, the Justice Department indicated that the Committee had received all documents relevant to the Patriarca microphone surveillance. However, on December 2, 2002, one and a half years after the Committee's initial request, Task Force supervisor John Durham indicated that contemporaneous handwritten logs had been prepared by FBI Special Agents as conversations picked up by the microphone surveillance were monitored. These logs were finally produced to the Committee, although legible copies of the most important pages were not received until March 25, 2003. The handwritten logs contained significant information that had not previously been provided to Congress.

2. Documents Pertaining to Robert Daddeico

Robert Daddeico participated in a number of criminal activities in the 1960s. He was close to Stephen Flemmi and was used as a cooperating government witness in the car bombing of attorney John Fitzgerald. He also had first hand knowledge of the William Bennett murder.

The Committee requested documents pertaining to Daddeico on April 16, 2002. Four months later, on August 20, 2002, Committee staff were told that the Justice Department needed more information to be able to identify "Robert Daddeico" in Justice Department files. This statement was particularly curious. There are five clear reasons why the Justice Department should have had no trouble deciding which "Robert Daddeico" the Committee was interested in: (1) a Justice Department employee contacted Daddeico to inform

him that the Committee wanted to interview him;¹⁰¹⁵ (2) a few days before the Committee interviewed Daddeico the FBI offered him a payment of \$15,000;¹⁰¹⁶ (3) a number of currently employed Justice Department personnel have personally interviewed Daddeico;¹⁰¹⁷ (4) in the last few years Daddeico has been in personal contact with the FBI's former number two official;¹⁰¹⁸ and, finally, (5) Daddeico has been living for 30 years under an assumed name known to the government and he had maintained frequent contact with FBI officials.¹⁰¹⁹ It is hardly unreasonable for the Committee to expect prompt production of documents related to Robert Daddeico, and it is hard to believe, given all of these facts, that the Justice Department was uncertain which "Robert Daddeico" the Committee was interested in.¹⁰²⁰ The failure to produce this information in a timely fashion is inexcusable.

3. U.S. Attorney's Office Gangland Murder Summaries

On March 30, 2001, the Committee requested "all records relating to the March 12, 1965, murder of Edward 'Teddy' Deegan." On December 2, 2002, Justice Department Task Force Supervisor John Durham mentioned a January 14, 1966, memorandum which discusses gangland murders. This document was prepared for the Boston U.S. Attorney's Office and discusses the Deegan murder. It had not been provided to the Committee.

On December 9, 2002, Justice Department officials indicated that although the document was not responsive to Committee requests, it would be produced. Based on the description of the document provided by John Durham, it is difficult to understand how it was not responsive to a request for documents relating to the Deegan murder.

On December 16, 2002, the Justice Department finally produced this document to the Committee. The fact that this document was not provided to the Committee earlier is significant for a number of reasons. First, it could not be used in Committee hearings or most interviews. Second, it leads to the concern that there are other significant documents that have been withheld from the Committee. Additionally, this document is of particular interest because it is a document prepared for prosecutors, and it potentially shifts blame for what happened in the Deegan prosecution towards prosecutors.

Although the Justice Department has provided many documents from the files of the FBI, it has been reluctant to shed light on the possible misconduct of its prosecutors. This was first seen in the claim of executive privilege over prosecution memoranda, and it appears to have resurfaced with the gangland murders summary. It was also particularly apparent when the Committee staff asked for a list of Boston U.S. Attorneys from the 1960s until the present.

¹⁰¹⁵ Robert Daddeico Agreement (Oct. 1, 2001) and Message (Sept. 13, 2001) (Exhibit 950).

¹⁰¹⁶ *Id.*

¹⁰¹⁷ Interview with Robert Daddeico (Oct. 17–18, 2001).

¹⁰¹⁸ *Id.*

¹⁰¹⁹ *Id.*

¹⁰²⁰ Daddeico also provided the Committee with a check from a local prosecutor for \$500. This check, drawn on a personal bank account, was allegedly provided at a time when the FBI was contacting Daddeico to assist in an ongoing investigation. Daddeico claims that the individual who provided this check once attempted to coach him to provide false testimony in the trial for the car bombing of attorney John Fitzgerald.

Although a staff member of the Executive Office of United States Attorneys indicated the information was readily available, a list was never provided to the Committee.

B. INSTITUTIONAL OVERSIGHT

The FBI's office of Professional Responsibility ("OPR") conducted its own investigation of possible improper law enforcement conduct in 1997.¹⁰²¹ This investigation "uncovered no evidence that any potentially criminal acts were part of a continuing crime which would bring the acts within the statute of limitations."¹⁰²² Thus, former FBI Special Agent John Connolly—now serving a ten year sentence in federal prison—was given a free pass by internal investigators. The investigation did, however find "a number of violations of FBI rules and regulations which would have warranted administrative action if those employees were still employed by the FBI."¹⁰²³ The investigation also determined that "no current FBI employees . . . [were] in violation of FBI policies."¹⁰²⁴

One conclusion reached by the OPR investigation, however, should be considered in light of information obtained by the Committee. The OPR report on its investigation states:

We also looked for instances in which [James "Whitey"] Bulger and [Stephen] Flemmi were under investigation by a law enforcement agency and in which the USAO or DOJ exercised prosecutorial discretion in their favor due to the value of information provided by Bulger and Flemmi. There is no evidence that prosecutorial discretion was exercised on behalf of Bulger and/or Flemmi.¹⁰²⁵

This conclusion is troubling in light of a document obtained by the Committee. After a protracted battle with the executive branch over specific documents—during which the President claimed executive privilege over the documents sought—the Committee ultimately was able to determine that prosecutorial discretion had been exercised on behalf of Bulger and Flemmi.

A memorandum dated January 29, 1979, from Boston federal prosecutor Gerald E. McDowell to supervisors in Washington, and also brought to the attention of then-United States Attorney Jeremiah O'Sullivan, recommends prosecution of 21 individuals for a major conspiracy to fix the outcomes of more than 200 horse racing contests, in over five states, with profits in excess of two million dollars.¹⁰²⁶ At the center of the criminal activity were both Stephen Flemmi and James "Whitey" Bulger.

¹⁰²¹ FBI Office of Professional Responsibility Report by Joshua Hochberg and Charles S. Prouty (Aug. 13, 1997) (Appendix II).

¹⁰²² *Id.* at 2; see also "Justice Department Misconduct in Boston: Are Legislative Solutions Required?," *Hearing Before the Comm. on Govt. Reform*, 107th Cong. 641–747 (Feb. 27, 2002) (discussing proposed changes to the statute of limitations).

¹⁰²³ FBI Office of Professional Responsibility Report by Joshua Hochberg and Charles S. Prouty (Aug. 13, 1997) at 2 (Exhibit 887).

¹⁰²⁴ *Id.*

¹⁰²⁵ *Id.* at 13. In reaching this conclusion, the OPR report states that "all reasonable and apparent leads have been covered." *Id.* at 3.

¹⁰²⁶ Gerald E. McDowell, Attorney in Charge, and Jeremiah T. O'Sullivan, Prosecutor, Organized Crime & Racketeering Section, Boston U.S. Dept. of Justice Field Office, to Gerald T. McGuire, Deputy Chief, Organized Crime & Racketeering Section, U.S. Dept. of Justice (Jan. 29, 1979) (document is retained by the Justice Department).

Notwithstanding the knowledge that Bulger and Flemmi were involved, and notwithstanding the fact that the government had a cooperating witness prepared to testify against Bulger and Flemmi, the memorandum specifically indicates that the two would not be prosecuted with 21 other co-conspirators. The memorandum indicates that Bulger and Flemmi would not be prosecuted because “the cases against them rest, in most instances, solely on the testimony of Anthony Ciulla.”¹⁰²⁷

Two points are worth noting. First, the use of the term “in most instances.” A close reading of the memorandum indicates that there was other evidence against Bulger and Flemmi. Thus, it is inexplicable, given the details provided by the memorandum, that Bulger and Flemmi were not prosecuted, while others who were less involved in the criminal enterprise were prosecuted. Second, others were indicted solely on the testimony of Ciulla. For example, the memorandum states: “James L. Sims—The case against Sims rests solely on Ciulla’s testimony.”¹⁰²⁸ Sims was subsequently indicted and convicted. Thus, Bulger and Flemmi did receive preferential treatment.

When former U.S. Attorney Jeremiah O’Sullivan was asked specifically about whether Bulger and Flemmi benefited from prosecutorial discretion, he stated clearly that they had.¹⁰²⁹ It is, therefore, troubling that the FBI’s OPR investigation failed to develop this information. Perhaps more troubling, however, is the concern that the Justice Department attempted to keep such an important piece of information from the Committee. Indeed, it appears that Justice Department investigators had failed to pursue this line of inquiry prior to the Committee’s request. But for the Committee’s perseverance, the final word on prosecutorial discretion pertaining to Stephen Flemmi and James Bulger would have been the incorrect 1997 OPR report.

C. THE CLAIM OF EXECUTIVE PRIVILEGE OVER KEY DOCUMENTS

The Committee’s investigation was delayed for months by President Bush’s assertion of executive privilege over a number of key documents. While the Committee was ultimately able to obtain access to the documents it needed, the President’s privilege claim was regrettable and unnecessary.

1. *The Committee’s Request for the Documents*

On September 6, 2001, the Committee issued a subpoena for a number of prosecution and declination memoranda relating to the Committee’s investigation of the handling of confidential informants in New England.¹⁰³⁰ The Justice Department made it clear that it would not comply with the Committee’s subpoena. Senior Administration personnel, including the White House Counsel, the Attorney General, and two Assistant Attorneys General, explained to the Chairman and Committee staff that the Administration

¹⁰²⁷ *Id.* at 62.

¹⁰²⁸ *Id.* at 55.

¹⁰²⁹ “The Justice Department’s Use of Informants in New England,” *Hearings Before the Comm. on Govt. Reform*, 107th Cong. 308, 335 (Dec. 5, 2002) (testimony of Jeremiah O’Sullivan).

¹⁰³⁰ Also included in this subpoena were requests related to the Committee’s campaign finance investigation.

wished to establish an inflexible policy to withhold from Congress all deliberative prosecutorial documents. The Committee scheduled a hearing for September 13, 2001, and invited the Attorney General to testify at this hearing to explain his refusal to provide the subpoenaed documents to the Committee. Of course, just two days before the scheduled hearings, terrorists launched the September 11 attacks. The Committee canceled the hearing and postponed any discussion of the subpoena for several months.

2. The President's Claim of Executive Privilege

In December 2001, the Committee renewed its request for the subpoenaed documents, and called as a witness Michael Horowitz, the Chief of Staff for the Justice Department's Criminal Division. On December 12, 2001, the day before the Committee's hearing, President Bush invoked executive privilege over the subpoenaed documents. In a memorandum to Attorney General Ashcroft, President Bush stated that disclosure of the documents to Congress would:

Inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions. Moreover, I am concerned that congressional access to prosecutorial decisionmaking documents of this kind threatens to politicize the criminal justice process. . . . Because I believe that congressional access to these documents would be contrary to the national interest, I have decided to assert executive privilege with respect to the documents and to instruct you not to release them or otherwise make them available to the Committee.¹⁰³¹

The President's claim of privilege was a surprise in that during the three months between the Committee's issuance of the subpoena for the prosecutorial memoranda and the President's claim of executive privilege, the Justice Department had never had a single discussion with the Committee regarding the Committee's need for the documents. Therefore, the claim could not have relied upon any consideration of the Committee's need for the documents. Given the Committee's previous discussions with the White House and Justice department officials and the assertion of privilege without consideration of the Committee's need for the documents, it was clear that the Administration sought to establish a new restrictive policy regarding prosecutorial documents and that no demonstration of need by the Committee would be sufficient for the Justice Department to produce the documents.

3. The Justice Department's Shifting Explanations

In the weeks following the President's claim of executive privilege, the Administration made a number of attempts to explain the President's actions to a skeptical Committee and public. In Committee hearings and in correspondence with the Committee, the Justice Department and the White House frequently distorted the facts to try to justify the President's claim of privilege. These state-

¹⁰³¹Memorandum from President George W. Bush to John Ashcroft, Attorney General, U.S. Dept. of Justice (Dec. 12, 2001) (Appendix I).

ments had the effect of prolonging the negotiations with the Committee and delaying the resolution of this dispute.

i. The Administration's Denial that it Was Creating an Inflexible Policy

Immediately after the President's claim of privilege, the Justice Department began to move away from its earlier assertions that it was attempting to implement an inflexible new policy regarding Congressional access to deliberative prosecutorial documents. Certainly, prior to the President's claim of privilege, this fact was plain enough. In separate meetings with Chairman Burton, Attorney General Ashcroft, and White House Counsel Gonzales announced such a policy. However, the Justice Department's witness at the first hearing regarding the claim of executive privilege, Michael Horowitz, denied that the Department was implementing such a policy at all. Rather, he claimed that the Department was using a case-by-case analysis which weighed the Congressional need for the documents against the Administration's need to keep the documents secret. However, as a number of members at the hearing pointed out, the claims of a case-by-case analysis were seriously undermined by the fact that the Justice Department had never had a discussion with the Committee about the Committee's need for the documents. If the Department did not understand the Committee's need for the documents, it could hardly weigh that need against the need to keep the documents secret.

ii. The Administration's Failure to Compromise with the Committee

A second and related point which was raised by the December 13, 2001, hearing was the failure of the Justice Department to engage in a reasonable process of compromise with the Committee. Before the Committee had even issued its subpoena for the Boston-related prosecution and declination memoranda, it was clear that the Justice Department was intent on establishing a restrictive new document policy. It was not until January—four months after the issuance of the subpoena—that the Administration even offered a compromise to the Committee. On January 10, 2002, White House Counsel Alberto Gonzales wrote to offer to have Justice Department staff brief the Committee staff regarding the contents of the deliberative memoranda. Chairman Burton responded to Judge Gonzales's offer by stating that he would be pleased to receive a briefing regarding the documents, but only in conjunction with a review of the documents by Committee staff. This offer was initially rejected by the Justice Department.

iii. The Administration's Misrepresentations Regarding Historical Precedent

The third issue which was raised at the December 13, 2001, hearing was the fact that there was little precedent for the President's decision to withhold the subpoenaed documents. Michael Horowitz asserted that the executive privilege claim was consistent with longstanding Justice Department policy, and in a letter shortly after the hearing, White House Counsel Alberto Gonzales made much the same claim:

Absent unusual circumstances, the Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure. This traditional Executive Branch practice is based on the compelling need to protect both the candor of the deliberative processes by which the Department of Justice decides to prosecute individuals and the privacy interests and reputations of uncharged individuals named in such documents.¹⁰³²

Despite these and a number of other similar assertions, the President's claim of executive privilege was a drastic departure from the longstanding history of Congressional access to precisely the types of documents sought by the Committee. In fact, at a hearing of the Committee on February 6, 2002, Assistant Attorney General Dan Bryant acknowledged that Congress had been given access to these types of documents on multiple occasions. In one letter leading up to the February 6 hearing, Bryant stated that "the Department has often provided Congress with access to deliberative documents of one sort or another. Consequently, it would be impossible to catalogue all of the occasions in which that has occurred."¹⁰³³

In short, over a period of six months, the Justice Department's position had retracted its claim that Congress had never received prosecution and declination memoranda prior to the Clinton Administration and replaced it with the claim that it happened so frequently that it is impossible to provide an accurate number. At the Committee's February 6, 2002, hearing, the Committee established that on dozens of occasions over the previous eighty years, Congress had received access to documents precisely like those sought by the Committee. It was also clear that the Committee's need for the documents under subpoena was at least as great as Congress's need for the documents in any of those other cases.

4. The Justice Department Finally Provided the Committee with Access to the Subpoenaed Documents

The five-month stalemate over the subpoenaed documents finally broke when the Committee scheduled a hearing to hear testimony from Judge Edward Harrington. When the Justice Department learned that Judge Harrington was scheduled to testify, Justice Department personnel informed the Committee that one of the documents sought by the Committee was a prosecution memorandum drafted by then-Assistant U.S. Attorney Harrington which contained information about the Deegan murder. Chairman Burton wrote to the Department and demanded access to the Harrington memorandum:

Judge Harrington is testifying before the Committee on February 14, and the Committee has a great interest in knowing what Judge Harrington knew about the evidence in the Deegan murder case, including, but not limited to,

¹⁰³² Letter from Alberto Gonzales, Counsel to the President, to the Honorable Dan Burton, Chairman, Comm. on Govt. Reform (Jan. 10, 2002) (Appendix I).

¹⁰³³ Letter from Daniel J. Bryant, Assistant Attorney General, U.S. Dept. of Justice, to the Honorable Dan Burton, Chairman, Comm. on Govt. Reform (Feb. 1, 2002) (Appendix I).

the evidence in the case, the reliability of witnesses in the case, and whether key witnesses in the case were government informants. Perhaps as important, Judge Harrington was a prosecutor in a 1968 trial of Raymond Patriarca, and it is important to understand the facts pertaining to this prosecution as well. It appears that the Justice Department agrees that it is essential that the Committee receive the Harrington memorandum in advance of the February 14 hearing, and that the Committee can clearly meet even the high threshold of proof being demanded (inappropriately, in my view) by the Justice Department. If that is the case, please provide the Committee with access to the document now, without a briefing.

While I appreciate the fact that the Justice Department has admitted that one of the 10 withheld documents has great relevance to the Committee's upcoming hearing, the Department's admission reveals the flaws with its approach to this entire matter. The Justice Department only recognized the importance of the Harrington document once the Committee announced that Judge Harrington was testifying at an upcoming hearing. The Department did not know that Committee staff interviewed Judge Harrington almost two months ago, and did not have the benefit of the Harrington memorandum for that interview. The other nine memoranda being withheld by the Justice Department likely have just as much relevance to the Committee's investigation as the Harrington memorandum, except that the Justice Department is unwilling to recognize that fact.

I believe that the Committee's investigation of Justice Department corruption in Boston is far too important to be wasting time with procedural gamesmanship. Rather than seeing this as an opportunity to establish precedents to place roadblocks in the way of Congressional oversight, the Justice Department should see this case as an opportunity to come clean and right past wrongs. I hope you will agree, and that you will provide the Committee with access to the subpoenaed Boston documents.¹⁰³⁴

The following day, Assistant Attorney General Bryant wrote that the Committee had "demonstrated a particular and critical need for access to the one Harrington memorandum sufficient to satisfy constitutional standards and we are prepared to meet with you and make it available for your review in advance of the hearing."¹⁰³⁵ Of course, the Committee did not provide any additional information to the Department which it had not provided months earlier. Informing the Justice Department that Judge Harrington had once been a federal prosecutor and that the Committee was requesting

¹⁰³⁴ Letter from the Honorable Dan Burton, Chairman, Comm. on Govt. Reform, to John Ashcroft, Attorney General, U.S. Dept. of Justice (Feb. 12, 2002) (Appendix I).

¹⁰³⁵ Letter from Daniel J. Bryant, Assistant Attorney General, U.S. Dept. of Justice, to the Honorable Dan Burton, Chairman, Comm. on Govt. Reform (Feb. 13, 2002) (Appendix I).

his testimony at an upcoming hearing hardly constituted demonstration of “a particular and critical need.”

On February 26, 2002, Committee staff met with Assistant Attorney General Michael Chertoff to discuss Committee access to the remaining memoranda being withheld under the President’s claim of executive privilege. Assistant Attorney General Chertoff described the documents, and Committee staff agreed that four of the subpoenaed memoranda were not relevant to the Committee’s investigation. Assistant Attorney General Chertoff agreed to provide the Committee with access to the remaining five memoranda. Committee staff reviewed the memoranda, took notes regarding their contents, and used the memoranda to question witnesses in interviews and public hearings.

5. The Documents Which Were Withheld Contained Vital Information

The documents withheld from the Committee for over five months contained vital information. The President’s claim of executive privilege delayed the Committee’s investigation, and distracted the Committee from pursuing a number of issues relating to the use of confidential informants. The following is a summary of some of the key information which was contained in the memoranda withheld from the Committee:

- The 1967 Marfeo prosecution memorandum contains information about the murder of Teddy Deegan. According to Judge Harrington’s testimony, the information was deemed reliable and included in the memorandum to show that Joseph Barboza was a reliable witness because it proved his contention that he had access to Raymond Patriarca. This is significant because the following year, in a capital murder trial, Barboza did not provide the information that had been considered so important by federal prosecutors. This raises the possibility that federal prosecutors were aware that Barboza was committing perjury in the Deegan murder prosecution. Indeed, there are two fundamentally incompatible facts:
 1. Barboza’s credibility in the eyes of federal personnel was bolstered by microphone surveillance evidence of the request made by Flemmi and Barboza to murder Teddy Deegan.
 2. Barboza was considered credible even though he omitted the evidence about the request to murder Deegan, and even though this was the foundation of his being considered credible in the first place.

These two contradictory facts simply cannot be reconciled.

- The 1967 Marfeo prosecution memorandum states that the electronic surveillance of Barboza proves that “his testimony is true[,]” and this is “of special significance.” Thus, federal prosecutors were convinced that the microphone surveillance provided accurate information. This weakens their claims that his Deegan testimony was unremarkable.
- The 1967 Marfeo prosecution memorandum states that “[Barboza’s] testimony will be corroborated in certain parts by

Patrick Fabiano's testimony with respect to the fact that [Barboza] had been well acquainted with Tameleo prior to the offenses charged here and that both Tameleo and [Barboza] had conferred together on numerous occasions at the Ebb Tide Club in Revere, Massachusetts." This is potentially significant because three months earlier FBI Director Hoover's office had been informed that, in order to save himself, Barboza "may try to intimidate Fabiano into testifying to something he may not be a witness to."¹⁰³⁶ This information appears to have been left out of the prosecution memorandum.

- The 1979 Ciulla race-fixing prosecution memorandum provides extremely important information about how prosecutorial discretion was exercised to benefit FBI informants James "Whitey" Bulger and Stephen Flemmi. It demonstrates that former U.S. Attorney Jeremiah O'Sullivan's testimony before the Committee is subject to question. Perhaps more important, it shows that a 1997 FBI Office of Professional Responsibility conclusion that prosecutorial discretion had never been exercised by the federal government on behalf of James Bulger and Stephen Flemmi was not correct.

As these observations make clear, these documents have been very important to the Committee's investigation. It is regrettable that the Committee's good faith effort to investigate Justice Department corruption in New England was impeded by the Justice Department's refusal to negotiate over these documents.

VI. CONCLUSIONS AND RECOMMENDATIONS

Democracy succeeds in the United States when the rule of law is respected. When the government strays from the rule of law, the harm outweighs the benefit. In Boston, this is what happened. As a result, men died in prison—and spent their lives in prison—for crimes they did not commit. A number of men were murdered because they came to the government with information incriminating informants. Government officials also became corrupted. The legacy of the Justice Department's use of informants in New England is a lack of confidence in those charged with administering our laws, families torn apart by a government that permitted murders and unjust prison terms, and exposure of the government to civil liability that could amount to billions of dollars.

The Committee on Government Reform is committed to ensuring that these abuses are not repeated. As a result of the Committee's investigation, the Committee has received numerous letters and other materials alleging misconduct by the FBI. The Committee intends to examine these allegations closely to determine whether the FBI handled them appropriately and to consider whether further investigation is warranted.

The Committee also recommends further review of the FBI's human source program. The Committee has been informed by the FBI that following the revelations regarding the misuse of informants, FBI Director Robert Mueller has undertaken re-engineering

¹⁰³⁶ Memorandum from Special Agent in Charge, Boston FBI Field Office, to J. Edgar Hoover, Director, FBI (Mar. 28, 1967) (Exhibit 134).