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**DEPARTMENT OF JUSTICE AUTHORIZATION FOR
APPROPRIATIONS, FISCAL YEAR 1992**

HEARINGS
BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

—
JULY 11 AND 18, 1991
—

Serial No. 12



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DEPARTMENT OF JUSTICE AUTHORIZATION FOR APPROPRIATIONS, FISCAL YEAR 1992

THURSDAY, JULY 11, 1991

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 11:20 a.m., in room 2141, Rayburn House Office Building, Hon. Jack Brooks (chairman of the committee) presiding.

Present: Representatives Jack Brooks, Don Edwards, William J. Hughes, Patricia Schroeder, Barney Frank, John Reed, Hamilton Fish, Jr., Carlos J. Moorhead, Henry J. Hyde, F. James Sensenbrenner, Jr., George W. Gekas, Howard Coble, Lamar S. Smith, Craig T. James, and Jim Ramstad.

Also present: Jonathan R. Yarowsky, general counsel; Robert H. Brink, deputy general counsel; James E. Lewin, Jr., chief investigator; Daniel M. Freeman, counsel; Ellen L. Jones, clerk; and Alan F. Coffey, Jr., minority chief counsel.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. BROOKS. The committee will come to order.

Today we begin the first of 2 days of oversight and authorization hearings on the Department of Justice. We will be receiving testimony from various congressional and GAO witnesses who have experienced problems with the way the Department has carried out its responsibilities under the law.

You will notice a recurring message throughout the hearing; namely, that Department officials have repeatedly attempted to resist meaningful outside review of their activities by refusing to cooperate with GAO and congressional investigations. Yet, oversight of executive branch policy and activity is at the heart of the congressional mandate.

Equally troubling, it appears that the Justice Department has become increasingly aggressive in the pursuit of controversial theories of executive privilege and power in order to cloak its activities in even more secrecy.

Last year, the Attorney General refused to provide the committee with a copy of a legal opinion, issued to him by the Office of Legal Counsel [OLC] regarding the authority of the FBI to kidnap or detain people overseas. The Attorney General claimed that the Department not only had a right, but a duty to keep "confidential executive branch information" from the Congress. And yet, that

opinion was directly cited by the President as the basis of an Executive policy directive.

This year, the Attorney General has taken his previous position one step further. In response to my request that the committee be given a list of OLC opinions related to the issuance and implementation of national security decision directives, the Attorney General not only refused to provide the list but also refused even to acknowledge the existence of such opinions.

The Attorney General's position in these matters is a cause of concern because it raises the specter of a secret government operating without oversight and accountability to Congress and the American people. The constitutional system of checks and balances was not an afterthought of the Founding Fathers; it was and remains the fundamental architecture of our entire constitutional system of government.

In another important matter, I am concerned about the Department's recent attacks on the GAO bid protest provisions of the Competition in Contracting Act. Once again, we have an Attorney General claiming that the Department has the authority unilaterally to declare acts of Congress unconstitutional and just refuse to abide by the law. Former Attorney General Meese took the same radical position with respect to the act in 1985. He suffered embarrassing losses in court on this issue before giving up.

Why the Department feels compelled to attack a statute that is designed to stop Government bid rigging and sweetheart contracts remains a mystery to me. The GAO bid protest process gives Government contractors an honest forum in which to seek equitable relief when they believe agency officials have improperly prevented them from competing for Government business. It is a good law and the Department should be using its limited resources to go after drug lords and savings and loan crooks, not the GAO.

I look forward to hearing what our witnesses today have to say about these and other matters.

I would recognize the distinguished ranking member, Mr. Fish from New York.

Mr. FISH. Thank you, Mr. Chairman.

I, too, am pleased to welcome our distinguished witnesses, particularly my colleague from New York, to this first of two full committee hearings on the fiscal year 1992 authorization for the Department of Justice.

Two weeks ago our subcommittee had the opportunity to hear the testimony of Congressman Bob Wise and Milton Socolar at a hearing that focused on automated data processing acquisition and management.

Last December, Steven Ross and Charles Tiefer testified before the Economic and Commercial Law Subcommittee at a hearing on committee access to Department of Justice documents—in the context of litigation involving the Department of Justice and a computer software company, INSLAW. Milton Socolar also testified at that time on information technology management.

The members of the full committee appreciate the willingness of our witnesses to return to a familiar room to assist us with our broader review today of the Department of Justice activities.

Both the Committee on Government Operations Subcommittee on Government Information, Justice, and Agriculture and the General Accounting Office have conducted numerous studies of DOJ activities and prepared detailed reports. Members of this committee are interested in your insights on problems the Department of Justice confronts in the carrying out of its law enforcement functions. We also look forward to hearing from you today—and Attorney General Thornburgh next week—about recent management initiatives at the Department of Justice.

Today's hearing is expected to give substantial attention to inter-branch conflicts over GAO and Judiciary Committee access to Department of Justice documents. Steven Ross and Charles Tiefer will provide the perspective of litigators on behalf of the House. Next week, Attorney General Thornburgh will provide an executive branch perspective.

Mr. Chairman, members of the committee, in my view, need to understand the extent to which restrictions on congressional access may or may not be necessary to the fair and effective administration of justice.

The history of relations between the two branches, as we all know, is replete with examples of disagreements over separation of powers issues. Greater congressional oversight, not surprisingly, may be accompanied by greater executive branch concerns about possible encroachments on the delicate balance between executive and legislative prerogatives. I believe this is inherent in our constitutional scheme.

History also teaches us, however, that public officials of good will in the two branches possess a tremendous capacity to find appropriate solutions to problems, solutions that recognize the legitimate interests and concerns of each branch.

I am hopeful these hearings will assist members of this committee in identifying constructive ways to resolve—without confrontation—conflicts over access to information and documents.

Thank you, Mr. Chairman.

Mr. Brooks. Thank you, Mr. Fish.

I would like to announce to those of you interested in the Democratic caucus activities—and everybody is a little bit—that Mr. Hoyer received 109 votes and Mr. Bonior received 160 and will be elected, therefore, as the new whip.

I would add that I had a chat with Mr. Bonior yesterday. Mr. Bonior said he thought he had about 160 votes, maybe 161, but there might be a couple, might pick up a couple, lose a couple. This morning, he told me the same thing. Apparently, he was right.

Mr. Edwards, the distinguished ranking member of the committee from California.

Mr. EDWARDS. I will not take the time of the committee except briefly.

The subcommittee I chair with jurisdiction over the FBI feels very, very strongly about the issues being brought up today. In 1989, we read in the newspaper about an opinion that the FBI could kidnap people overseas without the consent or knowledge of the local government. Of course, we wanted to know what authority the FBI had for this rather extraordinary claim.

We had a hearing. The FBI came over and explained they had an opinion from the Legal Counsel's Office. We asked them for the legal counsel's opinion, naturally. It is unclassified material, certainly paid for by the taxpayers of the United States and should be taxpayers' business. They refused to give it to us.

Then we had to cancel a second hearing with experts, outside witnesses who were going to testify on the constitutionality of being able to send FBI agents all over the world and kidnap people without the knowledge of these foreign governments.

We had protests from the foreign affairs departments of friendly nations, what in the world do you people in the United States think you are doing?

But again the Attorney General refused to send us this document, which is unclassified. We have been receiving all opinions for years. We have never had any difficulty in receiving these legal opinions.

I feel, my subcommittee majority feels very strongly about this. I am pleased our chairman is looking into the matter.

Thank you, Mr. Chairman.

Mr. HYDE. Mr. Chairman.

Mr. BROOKS. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

I appreciate the comments made by the distinguished gentleman from California. I think this is a very interesting inquiry. I am looking forward to hearing the testimony from the interested parties.

I would simply comment that the Office of Legal Counsel of the Justice Department is viewed as the lawyer for the Attorney General. I never heard, in and out of law school, where the lawyer's work product—the written notes, opinions of a lawyer—are susceptible of discovery if the client objects.

There is such a thing as a lawyer/client privilege, and even in the Government, of all places, that might obtain.

I don't think it is classified. I have never known an attorney's notes to be classified, but I would be very uncomfortable if a lawyer's work product were susceptible of discovery.

I think something would be lost in the field of jurisprudence, and I think that may be one of the reasons. I just wanted to add that to the very illuminating remarks of the distinguished gentleman from California.

Thank you.

Mr. BROOKS. This morning, the first three witnesses will appear as a panel. In addition to its primary role as the oversight committee for the Congress, the Government Operations Committee is the legislative committee for the General Accounting Office. That committee has become increasingly concerned by the Justice Department's lack of cooperation with GAO. It is particularly troubled by the suit the Justice Department has filed attacking the GAO bid protest function, as defined in the Competition in Contracting Act of 1984.

We welcome our friends, my friends for many, many years, Chairman John Conyers, Ranking Minority Member Frank Horton, and Robert E. Wise, chairman of the Government Information, Justice, and Agriculture Subcommittee.

Gentlemen, I appreciate your taking the time to be with us this morning. Your individual statements will be made a part of the hearing record.

Mr. Chairman, you might proceed as you see fit.

**STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN**

Mr. CONYERS. Mr. Chairman, this is an awesome looking Committee on Judiciary. Now I know what causes all of the problems of witnesses.

Mr. BROOKS. You are on the committee.

Mr. CONYERS. I know. I am part of the problem.

I understand now why it causes fear and trepidation in the hearts of those called before the Judiciary Committee.

I want to tell you that it is a valued experience that I serve on both this committee and have the honor of chairing the Government Operations Committee as you did before me.

I come here about a subject that you are very familiar with because you are the author of the Competition in Contracting Act. The gentleman sitting to my left was the Cochairman of the Commission that brought this committee forward. Frank Horton was the Cochair of the Competition Commission which he and Lawton Chiles took forward in 1969.

It was last month that the Department of Justice filed a lawsuit challenging the constitutional authority of Congress to grant GAO, under the Competition in Contracting Act, authority to award protest costs and bid proposal preparation costs to companies that feel they have been wronged in the procurement process and filed meritorious protests.

This lawsuit filed by the Attorney General is, in my view, an unprecedented assault by the executive branch upon Congress' constitutional authority to pass legislation.

In 200 years of Federal law, this appears to be the first time the Department of Justice has ever initiated unilaterally a lawsuit challenging the constitutionality of an act of Congress.

Now, while the President has been unsuccessful in getting a line item veto, if this is to become a style accepted by our Government, unilateral lawsuits by the Attorney General would be the next best thing.

This lawsuit has been under consideration for almost a year. The Justice Department only last month informed the Committee on Government Operations, which has jurisdiction over competition in contracting, of its intentions.

As soon as I found out about it, I wrote a letter asking that the Attorney General delay the filing of any such suit until the committee viewed the concerns of the Justice Department regarding the award of costs by GAO.

We could meet, we would hold hearings, we would see if there were anyway to resolve this.

But I emphasized that there was an air of secrecy about the lawsuit.

Then it was followed by an immediate filing for a change of regulations in the Federal Register. My letter was ignored.

A regulation was then issued to declare the statute unconstitutional, and the lawsuit was filed. There is no precedent for this conduct. The Department's actions, though, remind us of what happened in 1985 when the GAO litigation procedure was attacked again. There they went after the ability of GAO to stay the provisions of the Contracting and Competition Act, to delay the award of a contract while a protest was pending.

That was found to be illegal after extensive Government Operations Committee hearings, and the court finally ended up throwing it out. Then Attorney General Meese agreed to comply with the Competition in Contracting Act after an incredible amount of controversy.

The courts, I think, will continue to reject the claims of the Justice Department in these kinds of instances, but the Justice Department appears not to have learned from its mistakes. The proposed regulations, which apparently were issued at the behest of the Department of Justice, have the effect of declaring the law unconstitutional, advising the Federal agencies to ignore the law, and substituting in its place what shall be the provisions under the Competition in Contracting Act until the law has been changed.

In other words, the Department of Justice is advising the agencies to violate the law.

They are acting, then, as not only the executive branch but as the legislative branch and the judicial branch, as well.

As we know, the Competition in Contracting Act resulted from concern by the Congress about enormous amounts of waste, fraud, and abuse going unchecked in the Federal procurement system. Even before the stench of Operation Ill Wind drifted across the Potomac, extensive studies and investigations by Congress spanning more than a decade clearly showed that major reforms to Government's procurement practices were needed in order to bring these problems under control.

The Congress concluded that any such reform effort would have to start with a firm commitment to increase the use of competition in the Federal marketplace. So we included, with your bill, Chairman Brooks, the GAO bid protest authority in Competition in Contracting to assure that the mandate for competition would be followed and vendors wrongly excluded from Federal contracts would receive fair relief.

And so there was nothing new about the bid protest provisions in CICA. They were designed to significantly strengthen procedures already in existence at GAO prior to the enactment of the Competition Act.

Now, GAO has been examining executive branch contest awards for about 60 years. The bill goes back—the original legislation and authority go back to about 1923.

The GAO's cost and fee award authority is intended to enhance the prospect that protests will be brought for GAO's consideration. Without the ability of GAO to award these costs, potential protesters, even those with good complaints, could be dissuaded from filing protests by the high costs of pursuing the protests.

Only the winners of the protests would be awarded legal costs.

So, I believe that we are on good ground in prosecuting this suit. I am hopeful that the House counsel will move into this matter.

We have had some discussions. We think that this is a very important bill since we have a \$200 billion procurement system in this country. We remember the disclosures you made, Frank Horton made, other members of the committee made, Mr. Wise as well, when we exposed the sweetheart deals with \$500 hammers, \$1,000 toilet seats.

I believe we must vigorously defend the Competition in Contracting Act. The emphasis should be on competition. We save billions of taxpayers' dollars. I think the GAO provisions that are being challenged are constitutionally sound. I will defer to the General Counsel to the Clerk of the House who is working on these issues.

I conclude by merely pointing out that this activity by the Justice Department, besides being highly uncooperative, is really assault litigation. Rather than taking care of some of the enormous problems that are being raised here—white-collar crime, the failure to put in computer strategies and management systems in the Department of Justice that is costing us billions of dollars—what is being revealed is that we have a tacky system over at the Department of Justice.

I want to commend you for adding this measure of authorization oversight in Judiciary rather than just taking the 5-minute rule and going down the line with the Attorney General.

Holding these kinds of hearings to raise details so that the Department of Justice can prepare, and that we can deal seriously with these issues is a very important step forward in the authorization amendment for Judiciary over the DOJ which I myself introduced in this committee a number of years back.

It is frightening to think what other statutes that are unpopular with this administration or any other that could be next on the Justice Department hit list. The origin of this lawsuit and these proposed regulations that appeared in the Federal Register remain a mystery. There was no outcry by the Federal agencies about a system we have been using for several years.

There was no lawsuit to which the Department of Justice could attach itself as an amicus. They went out and created a lawsuit unilaterally with none of the agencies that are parties to these proceedings complaining.

I am outraged by it. I hope that the rest of my committee will stand by this very important law that you and Frank Horton were the authors of, the same way that you did a number of years back, and that we move from this position to continue the kind of competitive practices that are necessary when we have a \$200 billion procurement system.

Thank you very much.

I ask unanimous consent my full statement be entered into the record.

Mr. BROOKS. Without objection, so ordered.

[The prepared statement of Mr. Conyers follows:]

STATEMENT OF JOHN CONYERS, JR.
BEFORE THE HOUSE JUDICIARY COMMITTEE ON
THE JUSTICE DEPARTMENT'S CHALLENGE TO GAO BID PROTEST AUTHORITY
JULY 11, 1991

THANK YOU MR. CHAIRMAN. I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE THE COMMITTEE TODAY. I SHARE YOUR CONCERN REGARDING THE MANY PROBLEMS THAT CONTINUE TO PLAGUE THE JUSTICE DEPARTMENT, DESPITE THE INTENSIVE OVERSIGHT OF THIS COMMITTEE. THE JUSTICE DEPARTMENT IS ENTRUSTED WITH THE IMPORTANT RESPONSIBILITIES OF PROTECTING THE LAWFUL INTERESTS OF THE UNITED STATES, OF UPHOLDING THE DULY ENACTED LAWS OF THE LAND, AND OF PROTECTING THE RIGHTS OF ALL AMERICANS. BUT RECENTLY, INSTEAD OF BEING A CHAMPION OF EQUAL JUSTICE UNDER LAW, THE JUSTICE DEPARTMENT ALL TOO OFTEN ITSELF IS A SOURCE OF LAWLESSNESS IN THE WAY IT BRAZENLY IGNORES THE INTENT OF CONGRESS OR JUST DISREGARDS THE LAW ENTIRELY IN PURSUIT OF SOME ADMINISTRATION POLICY.

AS CHAIRMAN OF THE GOVERNMENT OPERATIONS COMMITTEE, I AM PARTICULARLY CONCERNED REGARDING THE RECENT RECORD OF THE JUSTICE DEPARTMENT IN COMPLYING WITH LAWS AND PRECEDENTS REQUIRING COOPERATION WITH THE LEGISLATIVE BRANCH. THE CONGRESS AND GAO HAVE HAD SEVERE PROBLEMS IN GAINING ACCESS TO RELEVANT JUSTICE DEPARTMENT RECORDS. JUSTICE FREQUENTLY FAILS TO COOPERATE WITH GAO INVESTIGATIONS, AT TIMES EVEN QUESTIONING THE VERY RIGHT OF GAO TO CONDUCT AN INVESTIGATION REQUESTED BY CONGRESS.

TODAY I WOULD LIKE TO BRING TO THE COMMITTEE'S ATTENTION A PARTICULAR EXAMPLE OF ABUSE BY THE JUSTICE DEPARTMENT, THAT

THREATENS SERIOUS DAMAGE TO THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE CONGRESS AND THE EXECUTIVE BRANCH.

LATE LAST MONTH THE JUSTICE DEPARTMENT FILED A LAWSUIT, CHALLENGING THE CONSTITUTIONALITY OF THE AUTHORITY CONGRESS GRANTED GAO IN THE COMPETITION IN CONTRACTING ACT TO AWARD PROTEST COSTS AND BID AND PROPOSAL PREPARATION COSTS TO COMPANIES THAT FEEL THEY HAVE BEEN WRONGED IN THE PROCUREMENT PROCESS AND FILE MERITORIOUS PROTESTS.

THIS LAWSUIT IS AN UNPRECEDENTED ASSAULT BY THE EXECUTIVE BRANCH ON CONGRESS' CONSTITUTIONAL AUTHORITY TO PASS LEGISLATION. IN TWO HUNDRED YEARS OF UNITED STATES LAW, THIS APPEARS TO BE THE FIRST TIME THE DEPARTMENT OF JUSTICE HAS EVER INITIATED A LAWSUIT CHALLENGING THE CONSTITUTIONALITY OF AN ACT OF CONGRESS. WHILE THE PRESIDENT HAS BEEN UNSUCCESSFUL IN GETTING A LINE ITEM VETO, THIS LAWSUIT IS THE NEXT BEST THING.

ALTHOUGH THIS LAWSUIT HAS BEEN UNDER CONSIDERATION FOR ALMOST A YEAR, THE JUSTICE DEPARTMENT ONLY LATE LAST MONTH INFORMED THE COMMITTEE ON GOVERNMENT OPERATIONS, WHICH HAS JURISDICTION OVER THE COMPETITION IN CONTRACTING ACT, OF ITS INTENTIONS. IN A LAST MINUTE EFFORT TO RESOLVE THIS CONTROVERSY, I WROTE TO ATTORNEY GENERAL THORNBURGH, ASKING HIM TO DELAY FILING OF ANY SUCH SUIT UNTIL THE GOVERNMENT OPERATIONS COMMITTEE HAD AN OPPORTUNITY TO REVIEW THE CONCERNS OF THE JUSTICE

DEPARTMENT REGARDING THE AWARD OF COSTS BY THE GAO. I SUGGESTED HEARINGS, AT WHICH THE ISSUES COULD GET A FULL AND PUBLIC AIRING. I PROPOSED THAT THE PROBLEMS COULD BE SOLVED THROUGH LEGISLATION OR OTHERWISE, WITHOUT LITIGATION.

MY LETTER WAS IGNORED, A REGULATION WAS ISSUED TO DECLARE THE STATUTE UNCONSTITUTIONAL, AND A LAWSUIT WAS FILED.

THE DEPARTMENT'S ACTIONS IN THIS CASE ARE REMINISCENT OF SIMILAR ACTIONS TAKEN BY THE REAGAN JUSTICE DEPARTMENT IN 1985 TO EVADE THE GAO "STAY" PROVISIONS OF CICA, WHICH DELAYED THE AWARD OF A CONTRACT WHILE A PROTEST WAS PENDING. MR. CHAIRMAN, YOU CHARACTERIZED THE DEPARTMENT'S ACTIONS IN 1985 AS "INAPPROPRIATE AND ILLEGAL." THE GOVERNMENT OPERATIONS COMMITTEE HELD EXTENSIVE HEARINGS AT WHICH THE IMPROPER ACTIONS OF THE JUSTICE DEPARTMENT WERE UNCOVERED AND HUGE HOLES WERE BLOWN IN THEIR LEGAL ARGUMENTS. WHEN THE JUDICIARY COMMITTEE ALSO LOST ITS PATIENCE WITH JUSTICE DEPARTMENT ARROGANCE, IT REPORTED AN AUTHORIZATION BILL, DELETING FUNDS FOR THE OFFICE OF THE ATTORNEY GENERAL UNTIL THEN-ATTORNEY GENERAL MEESE AGREED TO COMPLY WITH THE COMPETITION IN CONTRACTING ACT. THAT CONTROVERSY, AFTER MUCH CONFRONTATION BETWEEN THE CONGRESS AND THE JUSTICE DEPARTMENT, WAS ULTIMATELY RESOLVED WHEN THE COURTS REJECTED THE CLAIMS OF THE JUSTICE DEPARTMENT AND FOUND THE GAO "STAY" PROVISIONS TO BE CONSTITUTIONAL.

THE JUSTICE DEPARTMENT, HOWEVER, APPEARS NOT TO HAVE LEARNED FROM ITS MISTAKES. THE PROPOSED REGULATIONS -- WHICH APPARENTLY WERE ISSUED AT THE BEHEST OF THE JUSTICE DEPARTMENT -- HAVE THE EFFECT OF DECLARING THE LAW UNCONSTITUTIONAL AND ADVISING FEDERAL AGENCIES TO IGNORE THE LAW. SO, ONCE AGAIN, THROUGH PROPOSED REGULATIONS, EXECUTIVE AGENCIES ARE BEING ADVISED TO VIOLATE THE LAW.

MR. CHAIRMAN, AS YOU WELL KNOW, THE COMPETITION IN CONTRACTING ACT RESULTED FROM CONCERN BY CONGRESS ABOUT THE ENORMOUS AMOUNT OF WASTE, FRAUD, AND ABUSE GOING UNCHECKED IN THE FEDERAL PROCUREMENT SYSTEM. EVEN BEFORE THE STENCH FROM ILL WIND DRIFTED ACROSS THE POTOMAC, EXTENSIVE STUDIES AND INVESTIGATIONS BY CONGRESS SPANNING MORE THAN A DECADE CLEARLY SHOWED THAT MAJOR REFORMS TO THE GOVERNMENT'S PROCUREMENT PRACTICES WERE NEEDED IN ORDER TO BRING THESE PROBLEMS UNDER CONTROL. THE CONGRESS CONCLUDED THAT ANY SUCH REFORM EFFORT WOULD HAVE TO START WITH A FIRM COMMITMENT TO INCREASE THE USE OF COMPETITION IN THE FEDERAL MARKETPLACE.

CONGRESS INCLUDED THE GAO BID PROTEST AUTHORITY IN CICA TO ENSURE THAT THE MANDATE FOR COMPETITION WOULD BE FOLLOWED AND THAT VENDORS WRONGLY EXCLUDED FROM FEDERAL CONTRACTS WOULD RECEIVE FAIR RELIEF. EVEN THE BEST-DRAFTED LAW IS USELESS WITHOUT SOME MEANS OF ENFORCEMENT. THERE WAS NOTHING NEW ABOUT

THE BID PROTEST PROVISIONS IN CICA. THEY WERE DESIGNED TO SIGNIFICANTLY STRENGTHEN PROCEDURES ALREADY IN EXISTENCE AT GAO PRIOR TO THE ENACTMENT OF THE COMPETITION ACT. GAO HAD BEEN EXAMINING EXECUTIVE BRANCH CONTRACT AWARD PROTESTS FOR ABOUT 60 YEARS UNDER ITS AUTHORITY TO DETERMINE THE LEGALITY OF PUBLIC EXPENDITURES AND HAD BEEN MAKING AWARDS OF COSTS.

GAO'S COST AND FEE AWARD AUTHORITY IS INTENDED TO ENHANCE THE PROSPECTS THAT PROTESTS WILL BE BROUGHT FOR GAO'S CONSIDERATION. WITHOUT THE ABILITY OF GAO TO AWARD PROTEST COSTS, POTENTIAL PROTESTORS, EVEN THOSE WITH VERY MERITORIOUS COMPLAINTS, COULD BE DISSUADED FROM FILING PROTESTS BY THE HIGH COSTS OF PURSUING PROTESTS. IN ADDITION, THE ABILITY TO AWARD BID AND PROPOSAL PREPARATION COSTS GIVES GAO A WAY TO PROVIDE MEANINGFUL RELIEF WHEN REMEDIAL PROCUREMENT ACTION, SUCH AS SUSPENDING AWARD OF THE CONTRACT, IS NOT POSSIBLE. .

I BELIEVE THAT THE AUTHORITY OF GAO TO AWARD COSTS TO COMPANIES FILING MERITORIOUS PROTESTS IS INTEGRAL TO THE SCHEME OF THE COMPETITION IN CONTRACTING ACT AND ESSENTIAL TO THE FULL, FAIR, AND OPEN COMPETITION THAT CICA WAS DESIGNED TO ENSURE. THESE PROVISIONS ARE ESPECIALLY IMPORTANT TO SMALL AND DISADVANTAGED BUSINESSES, WHICH ARE UNLIKELY TO HAVE THE "DEEP POCKETS" NECESSARY TO FINANCE A BID PROTEST. IN MY VIEW, ACCORDINGLY, THE EXECUTIVE BRANCH CHALLENGE TO THOSE PROVISIONS

CONSTITUTES A FUNDAMENTAL ASSAULT ON THE COMPETITION IN
CONTRACTING ACT.

MR. CHAIRMAN, THE COMPETITION IN CONTRACTING ACT, WHICH YOU PLAYED A KEY ROLE IN ENACTING, HAS WORKED. COMPETITION IS NOW THE STANDARD IN FEDERAL PROCUREMENT. SOLE SOURCE AWARDS ARE NOW STRICTLY LIMITED. MORE FIRMS HAVE AN OPPORTUNITY TO COMPETE FOR FEDERAL CONTRACTS. ALTHOUGH THERE ARE STILL ABUSES - SUCH AS THOSE AT THE JUSTICE DEPARTMENT CURRENTLY UNDER INVESTIGATION BY THIS COMMITTEE - A LEVEL PLAYING FIELD HAS BEEN CREATED IN FEDERAL PROCUREMENT.

MR. CHAIRMAN, WE CANNOT GO BACK TO THE DAYS OF SWEETHEART DEALS, \$500 HAMMERS AND \$1000 TOILET SEATS. THE COMPETITION IN CONTRACTING ACT MUST BE DEFENDED. I BELIEVE THAT THROUGH ITS EMPHASIS ON COMPETITION, THE COMPETITION ACT HAS SAVED THE TAXPAYERS BILLIONS OF DOLLARS. IN SO DOING, HOWEVER, IT HAS MADE POWERFUL ENEMIES IN THE EXECUTIVE BRANCH, WHO WOULD PREFER TO GO BACK TO THE "GOOD OLD DAYS." THE CONGRESS SHOULD RESIST THEIR LATEST ATTACK.

I BELIEVE THAT THE GAO PROTEST PROVISIONS ARE CONSTITUTIONALLY SOUND, AND WILL BE UPHELD BY THE COURTS. ON THIS MATTER, HOWEVER, I WILL DEFER TO THE GENERAL COUNSEL TO THE CLERK OF THE HOUSE, WHO I UNDERSTAND WILL ADDRESS THE LEGAL ISSUES IN HIS TESTIMONY TODAY.

MR. CHAIRMAN. I THINK THAT THE JUDICIARY COMMITTEE ALSO SHOULD LOOK CAREFULLY AT HOW THE JUSTICE DEPARTMENT IS SPENDING THE TAXPAYERS' FUNDS ON THIS "ASSAULT LITIGATION." RATHER THAN FULFILLING ITS MISSION OF DEFENDING THE LEGAL INTERESTS OF FEDERAL AGENCIES, THE JUSTICE DEPARTMENT HAS LAUNCHED A CONSTITUTIONAL ATTACK ON A LAW THAT WAS PASSED BY OVERWHELMING MAJORITIES IN BOTH BODIES OF CONGRESS, WAS SIGNED BY THE PRESIDENT, AND HAS BEEN IMPLEMENTED EFFECTIVELY FOR 7 YEARS. IT IS FRIGHTENING TO THINK THAT OTHER STATUTES THAT ARE UNPOPULAR WITH THIS ADMINISTRATION COULD BE NEXT ON THE JUSTICE DEPARTMENT HIT LIST.

THE ORIGIN OF THIS LAWSUIT AND THESE PROPOSED REGULATIONS REMAINS A MYSTERY. CERTAINLY THERE HAS BEEN NO OUTCRY BY FEDERAL AGENCIES, WHICH HAVE BEEN COMPLYING WITH THE LAW FOR 7 YEARS. NO AGENCY COMPLAINTS HAVE BEEN BROUGHT TO THE ATTENTION OF THE GOVERNMENT OPERATIONS COMMITTEE. IT IS TELLING THAT THE JUSTICE DEPARTMENT COULD NOT EVEN FIND A LAWSUIT TO DEFEND, BUT RATHER HAD TO MANUFACTURE THIS UNPRECEDENTED SUIT FOR DECLARATORY JUDGMENT.

AGENCY OFFICIALS HAVE ADMITTED THAT THERE WAS SUBSTANTIAL OPPOSITION TO THE JUSTICE DEPARTMENT'S COURSE OF ACTION FROM INDIVIDUAL AGENCIES AND WITHIN THE FEDERAL PROCUREMENT BUREAUCRACY. NONETHELESS, THIS ADMINISTRATION'S AMBITION AND

ARRÓGANCE APPARENTLY WON OUT, AND WE NOW HAVE LITIGATION,
CONFUSION, AND A CONSTITUTIONAL CONFRONTATION.

THE GOVERNMENT OPERATIONS COMMITTEE INTENDS TO HOLD HEARINGS
ON THE ACTIONS OF THE JUSTICE DEPARTMENT IN THE NEAR FUTURE. WE
INTEND TO WORK WITH THE JUDICIARY COMMITTEE TO GET TO THE BOTTOM
OF WHY THE JUSTICE DEPARTMENT HAS PROCEEDED IN THIS UNPRECEDENTED
MANNER TO ATTACK A LAW THAT HAS WORKED HIGHLY SUCCESSFULLY FOR
SEVEN YEARS.

THANK YOU, MR. CHAIRMAN.

Mr. BROOKS. Mr. Horton, a man who, I know, has spent the last 25 years trying to save the people of this country, the taxpayers, billions of dollars. He has worked assiduously to prevent fraud and collusion within the Government while serving on the Government Operations Committee.

Mr. Horton, the gentleman from New York.

**STATEMENT OF HON. FRANK HORTON, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW YORK**

Mr. HORTON. Thank you, Mr. Chairman. It is an honor and privilege for me to appear before this prestigious committee and to congratulate you for the first time on the chairmanship of this committee. This is the first time I have appeared before it during your chairmanship.

As you know, I served with you 13 years as your ranking member when you were the chairman of the Government Operations Committee. It is an honor for me to testify on this very serious subject of Competition in Contracting.

As I read the papers today, I see there are a few matters of current interest that might come before your committee and also before the Government Operations Committee. Certainly this is one of them. This issue is one by the Justice Department action that threatens a competitive procurement system, an essential ingredient of which is an unbiased, qualified and independent bid protest mechanism.

I might say parenthetically from the beginning of that bill, the bid protest procedure was a part and parcel of that bill. That is an integral part of that competition in contracting account.

The Competition in Contracting Act embodies both components of an important, indeed fundamental, Federal procurement process. These components are competition, which produces the best product at the lowest prices, and a protest mechanism to guard against faulty or biased or unfair procurement.

The Procurement Commission referred to was one of the important things we looked at as we went through that Commission's work. How do you have a very effective, quick protest procedure so people can move on with their contracting and so Government can go ahead and get the products that it is looking for?

The Competition in Contracting Act passed the Congress in 1984 as part of that year's Defense Authorization Act. It was signed into law by President Reagan and subsequently declared unconstitutional by the Attorney General in a directive he sent to Federal departments telling them not to comply with the act.

I remember all the furor that occurred as a result. For the first time, an Attorney General said that an act was unconstitutional. I thought that responsibility was up to the Supreme Court. As a matter of fact, we made that point during the course of some hearings that we held following that.

Then, that action by the Attorney General was challenged at the district and appellate levels where decisions were rendered in favor of the General Accounting Office. Then Attorney General Meese withdrew the directive and the Competition in Contracting Act has operated effectively since 1985.

I take a moment to praise the work of Steven Ross, the General Counsel to the House of Representatives. He handled that case very well. He did an excellent, outstanding job.

Subsequent to that, the directive was withdrawn. The action was no longer in effect as far as the declaration—as far as the declaration by Attorney General Meese that it was unconstitutional.

That bill has saved the Federal Government, the American taxpayer, billions of dollars annually.

I would like to make just a few points to follow on to what my chairman, John Conyers, has already said.

All of us feel great pride in our country's accomplishments in the Persian Gulf. The defense industry feels a special pride, too.

Their products worked and worked well. Those of us who consider ourselves architects of CICA feel a little special pride, too. Many of the products used in the gulf were procured under CICA, with competition the driving force that ensured high quality at the best price. I can guarantee you that the \$50 billion-plus price tag of that war would have been substantially greater without CICA.

I might say parenthetically that the act followed the initial hearings we held in the Government Operations Committee looking at the problem of spare parts. Some of you will remember the Air Force had a little wrench they charged several thousand dollars for. There were all kinds of spare parts charged to the Government at tremendous amounts.

Our hearings were held as a result of that spare parts controversy. Then we developed the Competition in Contracting Act which, as I say, was signed into law by the President in 1984.

Then along came the Justice Department and its recent declaratory judgment action that seeks to kill the bid protest mechanism, and hence, the act's effectiveness. And this brings me to my second point. The General Accounting Office is being criticized today for what some consider operational practices that favor one party over another. This action by the Justice Department just taken is not part of that debate, and I want to make that very clear. This issue is not one of partisan politics.

Instead, as Members of Congress we ought to be concerned as to how our Government buys the \$200 billion in goods and services it consumes each year. We need an independent, unbiased bid protest mechanism with the resources to manage a wide range of contract disputes from a number of different agencies.

The Government Operations Committee held extensive hearings on this subject when it created the Competition in Contracting Act. The General Accounting Office made perfect sense to us. It has worked well. It continues to work well, and it works well precisely because of the independence GAO has, its multiagency abilities and its resources.

However, the Justice Department seems to have a problem with the process on constitutional grounds. For that Department, it is a separation of powers issue. So how does the Department approach the issue? Does it approach the respective committees of Congress with its concerns, explain their reservations about the act? The Government Operations Committee has heard something from them but not the problem they have with CICA. Government Oper-

ations is the committee in the House that it would approach, and I am aware of no such effort.

Does it suggest legislative changes to the act and propose a solution that would guarantee the integrity of our procurement system, a system, again, that is forcing cost and quality competition in the Federal procurement process and saving the taxpayer billions of dollars?

No, it takes neither of these reasonable approaches. Instead, it seeks a declaratory judgment against a small company which successfully protested a faulty procurement and was awarded attorneys' fees. There is something inherently wrong with that approach.

First, it runs counter to a rational sense of justice. Second, it threatens a procurement system that I think is working and working well.

Mr. Chairman, the courts have upheld the Competition in Contracting Act before, but times change, courts change, and issues are framed differently. If the Justice Department loses its action, then our act and its essential bid protest mechanism are protected. But if it wins, then Justice has proved its point on its separation of powers issue.

But we will lose, and by "we" I mean the Federal Government and its ability to procure goods and services in a fair, cost and quality-effective manner, and, of course, the American taxpayer will lose also. This is a matter of good government, not of partisan politics, and that is the point I would like to leave with this committee.

Mr. Chairman, I worked with you in constructing this procurement system. I know the time and effort you invested in it, that I invested in it, that the Government Operations Committee invested in it. I hope and expect that the view from this table for certain Justice Department officials might be as intimidating as it should be as you and the members of this committee work through this authorization process.

Mr. BROOKS. We now recognize the distinguished chairman of the subcommittee, Mr. Robert Wise of West Virginia.

STATEMENT OF HON. ROBERT E. WISE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. WISE. I want to thank you also because I think this is a very encouraging way in which the oversight of one committee is assisting the oversight function of another committee.

It is also an honor, of course, to be seated at the same table with my chairman and ranking minority member, Mr. Conyers and Mr. Horton.

Our subcommittee has jurisdiction over the Department of Justice. We have examined several programs at the Department, often with the very able assistance of the General Accounting Office.

I will summarize both my lengthy statement submitted for the record, and I will summarize my less lengthy spoken, verbal statement. But what is beginning to emerge is a pattern of management inefficiency undermining the ability of the Department to carry

out its law enforcement mission. That is both in the civil and criminal areas.

I am also concerned because of instances in which the Department of Justice has failed to comply with important Government-wide policies. The chief law enforcement agency for our Nation cannot itself maintain less rigorous standards of compliance with the laws of the United States than it asks for its citizens and other agencies.

I would like to touch on several matters that are covered at length in my prepared statement.

In the first area of halfway houses and contracting out, the Department of Justice contracts with the private sector to provide a broad range of activities.

In one of the areas we investigated we looked at the administration of contracts for community correction centers—better known as halfway houses—by the Federal Bureau of Prisons. That investigation identified a variety of problems in the program, the most serious of which was the failure to conduct background investigations of contract principals and their staff.

In the case of a major New York halfway house, the operator—the contractor—had a record of manslaughter along with a lot of other misdoings and which was never picked up.

There are also inadequacies in assuring compliance with the Bureau of Prison standards and contracts which are written so it is virtually impossible to penalize a contractor failing to provide services for which taxpayers have paid.

Auditors have found problems in several of the Department's program areas where Justice is relying. Year after year auditors repeatedly find problems in this procurement process.

I would like to turn to the asset seizure area now. Under its asset forfeiture and seizure authority, the Department has seized and retained for law enforcement purposes several small aircraft. We heard complaints the Attorney General was using the FBI planes to the detriment of the law enforcement missions.

I requested the GAO to look at their use. They found three sets of planes were used for executive transportation 53 percent of the time to transport the Attorney General and Director of the FBI to give speeches, attend meetings and visit field locations.

GAO made recommendations including that Justice conduct a cost analysis presently required by the Office of Management and Budget. As of today, we have no indication that such an analysis meeting OMB standards has been performed. The Attorney General did take care of his problem, however. He signed an order containing a blanket authorization for his own use of planes because of security considerations.

There have been other problems keeping track of the Justice air force according to the Marshals Service. A plane with sensitive communications equipment on board was stolen from Miami, FL. It is now in the hands of a narcotics cartel in South America.

Last spring the subcommittee asked what seemed to be a simple question. How much debt is pending at the Department of Justice for collection? Justice is, of course, the debt collector—the ultimate debt collector—for the Federal Government.

I was surprised to find out how difficult the answer was to get at, and we asked the GAO for assistance. We learned \$6.6 billion in unpaid civil debt and \$968 million in unpaid criminal fines was pending collection. Furthermore, Justice was not able to account for \$5.5 billion in recovered debt.

Accordingly, the committee filed a recommendation for several improvements. The Department's failure to efficiently manage debt collection undermines the use of monetary penalties and contributes to further erosion of the solvency of the federally guaranteed loan programs.

There are other areas. One area that concerns me greatly is—and we have received a number of complaints on this—is certain prosecution practices along with statutory changes placing authority increasingly in the hands of prosecutors. It is my feeling that the Department and Congress should monitor this closely.

Our specific recommendations include withdrawal of a memorandum issued by the Attorney General providing essentially that Department of Justice attorneys need not comply with selected ethical rules adopted by State bars and the Federal courts. They do not have to play by the same rules everyone else has to play by.

We also raised concerns about the cloak of secrecy on actions taken as a result of findings by Federal judges of misconduct on the part of Department of Justice attorneys.

Recently, incidentally in a hearing not involving the Department of Justice but involving our information function under the Government Information, Justice, and Agriculture heading, our subcommittee received testimony underscoring the importance of scrutinizing the activities of Federal prosecutors. An analysis of data from several agencies revealed that two-thirds of the referrals for Federal prosecution from Federal enforcement agencies are being turned down.

This raises questions regarding the effective implementation of our regulatory and criminal laws and suggests there is not adequate coordination of investigation and prosecution.

This Judiciary Committee probably knows more than any others as well as the Government Operations Committee of the inefficiencies in the Asset Seizure and Forfeiture Program. An important source of information for identifying problems in this program for the GAO and the Department has been audits produced by the Office of Internal Inspections in the Director's Office. These reports have identified problems such as the failure to keep track of valuable assets, diamonds, works of art and occasional sweetheart contracts with contractors.

We learned these reports would be reduced significantly, and the subcommittee recommended Justice continue an inspection program equal to that in previous years. Justice's response to the subcommittee was a disagreement regarding transmission of a report to Congress. Justice never got at the heart of what we were requesting.

There is another area that the Judiciary Committee I know has great interest in and has been involved in. That is the Office of Justice Programs which contains five grant-making bureaus and which distributed nearly \$500 million in block and discretionary grants this year. Our oversight hearings revealed infighting and

power grabbing at the Department of Justice have received as much attention as the distribution of grants. The Attorney General has now issued an order regarding control of all final grant-making which probably is inconsistent with the law.

There are problems in monitoring grants and funds that have been improperly transferred. For that reason, I might add, I have introduced H.R. 1657 to halt the practice of the Justice Department granting to itself money. That is, within its own agencies instead of putting that money out on the street where it is supposed to belong. If they need to come to you to get authorization for the Appropriations Committee to get the funding, they ought to do it in a heads-up way. Congress should not appropriate the money for local law enforcement only to have it cycled back through the Justice Department systems to itself.

On computer security, I already testified on that. Our message was simple. Sensitive information contained in Department computers is not adequately protected and is putting at risk the Department's core critical law enforcement mission.

I know this committee is concerned about the adequacy of departmental systems used for the management of information, particularly case management. We also noticed these problems involving environmental litigation and referrals from the Offices of Inspectors General. Without these information systems, the Department of Justice managers will have great difficulty identifying breakdowns in their litigation effort.

Mr. Chairman, there are other areas we could talk about.

There is one I would like to touch on, the area you referred to in your opening statement: Obstacles being put in front of congressional subcommittees trying to conduct oversight. The officials at the Department of Justice seem to lack a fundamental understanding of our system of checks and balances including elected Representatives' constitutional responsibility to conduct inquiries concerning the administration of existing laws.

We seem to be routinely confronted with obstacles to our performance. Over the past 2 years officials at the Justice Department have made many mistaken assertions claiming information need not be provided to Congress. I listed some of these mistaken privilege claims in my statement.

Finally, I point to the Attorney General's present policy that Members of Congress and committee staff cannot talk to Government employees to obtain information regarding their activities notwithstanding the provisions of Federal law that the right of employees to provide information to a committee or Member of Congress may not be interfered with or denied.

The Attorney General insists that our staff and indeed Members either talk to supervisors or have the supervisors or the Office of Legislative Affairs present. It is hard to think somebody is going to blow a whistle—an employee two or three steps down in the ranks is going to blow a whistle—with the OLA official or their supervisor standing nearby.

The oversight function and the authorizing function you perform is crucial. Oversight is crucial since the Congress has enacted new laws and delegated new authority to the Department and its prosecutors. I note since 1981 the Department's budget has grown from

\$2 billion to \$9 billion. The number of DEA agents has grown from 1,800 to over 3,000, FBI agents from 7,700 to over 10,000. In 1980, the Congress appropriated \$16.5 million for prison construction. In 1990, it authorized \$1.5 billion for such construction.

I appreciate greatly the opportunity to appear before you today.

Mr. BROOKS. Thank you very much.

[The prepared statements of Mr. Wise follows:]

PREPARED STATEMENT OF HON. ROBERT E. WISE, JR., A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF WEST VIRGINIA

Mr. Chairman, Rule X.4(c)(2) of the House of Representatives provides that the Committee on Government Operations report its oversight findings to the standing committees of the House. The Subcommittee on Government Information, Justice, and Agriculture has been delegated responsibility for overseeing the Department of Justice (DOJ). As Chairman of that Subcommittee, it is a pleasure to testify today to report on our activities.

During my tenure as Chairman, the Subcommittee has examined several programs at the Department. We have often been ably assisted by the General Accounting Office, and I want to extend my appreciation to the Comptroller General for GAO's assistance.

From this work, what is beginning to emerge is a pattern of management inefficiency which I believe undermines the ability of the Department to carry out its law enforcement mission—whether it is the enforcement of the civil or criminal laws. There are also instances in which the Department of Justice has failed to comply with important government wide policies—policies which are often established by statute.

The American public is ill served by a law enforcement agency which cannot efficiently carry out its responsibilities. As *Time* magazine recently reported, the criminal underworld is "professional, intelligent, efficient, and imaginative." It takes an efficiently managed organization to combat an efficiently managed organization. The American public is also ill served by a law enforcement agency which does not itself maintain standards of rigorous compliance with the laws of the United States.

I. PROBLEMS IDENTIFIED THROUGH OVERSIGHT

Problems in Contracting—The Department of Justice contracts with the private sector to provide a surprisingly broad range of activities, from court security, to data input, to management of assets seized in the "war on drugs." In recent years, Departmental auditors have found contract problems in several of the Department's program areas.¹

Last week, our Committee filed a report regarding the administration of contracts

¹ Procurement Activities in the Drug Enforcement Administration, Rept. 90-7; The Bureau of Prisons' Community Treatment Center Contract Award and Administration Process, Rept. No. 86-21, June 1986; Audit Report on the Procurement Activities in the United States Marshall Service, June 1988; Audit Report, Northern District of Illinois, 88-34-C; Audit Report, Eastern District of Washington, 88-32-W, January 5, 1989; Special Audit of the United States National Central Bureau, April 1989, No. 89-1; The Bureau of Prisons Procurement of Community Treatment Center Services, April 1989; Employee Relocation Services of the Federal Bureau of Investigation and the Immigration and Naturalization Service, March 1990; Procurement Activities in the Federal Bureau of Investigation, Report No. 91-10, March 1991.

for community corrections centers (halfway houses) by the Federal Bureau of Prisons.² BOP contracts with almost 300 facilities throughout the country to provide correctional services for individuals returning to the community from prisons, as well as direct court commitments. Our investigation identified a variety of problems in the program, the most serious of which is the failure to conduct background investigations of contract principals and their staff. In other words, Justice delegates important correctional and public safety responsibilities to contractors but does no more than conduct a criminal record name check through the NCIC/NLETS system—a process which the Attorney General himself has pointed out has severe limitations.

Other problems identified included inadequacies in assuring compliance with BOP standards and contracts which are written so that it is virtually impossible to penalize a contractor who fails to provide the services for which the taxpayers have paid. Unfortunately, many of these problems are not new.³

Our numerous findings and recommendations with regard to contract halfway houses are relevant not only to the administration of this program, but also to assessing other efforts to provide correctional services through private contracts.

As to contracting practices generally, in light of Justice's heavy reliance on contractors, it is particularly disturbing that auditors repeatedly find problems in the procurement process. Accordingly, last year I asked the Attorney General what was being done to eliminate the pattern of inefficiency in contract administration, and was assured that the Department would "concentrate on the procurement process" as part of its annual review under the Financial Integrity Act.⁴ Until Justice demonstrates that it has resolved its contracting problems, all contract initiatives should be viewed with skepticism, particularly when important program areas are involved.

A Department which cannot efficiently select and manage its contractors cannot effectively mobilize those contractors for its law enforcement mission, and is highly susceptible to contract fraud.

Air Justice--Using its asset forfeiture and seizure authority, Justice has seized and retained for "law enforcement" purposes several small aircraft. When we heard complaints that the Attorney General was using these FBI planes to the detriment of their use for law enforcement missions, I asked the General Accounting Office to look at their use. GAO found that three such planes were used for executive transportation

² "Bureau of Prisons Halfway Houses: Contracting Out Responsibility," H. Rept. 102-139.

³ In 1980, the General Accounting Office issued a report that halfway houses were failing to meet many of their program goals, and criticizing BOP for contracting inadequacies. U.S. General Accounting Office, "Community-Based Correctional Programs Can Do More To Help Offenders," GGD-80-25, February 15, 1980.

⁴ Letter to the Honorable Bob L. Wise, Chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives from Bruce C. Navarro, Acting Assistant Attorney General, June 6, 1990.

53% of the time, the majority of which was to transport the Attorney General and the FBI Director to give speeches, attend meetings, or visit field locations.⁵

GAO recommended that Justice conduct the cost analyses which are required by the Office of Management and Budget to determine whether transportation could be provided more cheaply by the private sector, and meet the Department's stated security needs. If so, the FBI aircraft, along with their highly trained FBI agent pilots, could be turned loose to conduct criminal investigations. Alternatively, I suggested that the planes be made available to the Immigration and Naturalization Service and the Drug Enforcement Administration, both of which have said that they need smaller aircraft to meet mission needs.⁶ (One of the reasons given for the use of these planes was the need for "secure communications" for the Attorney General. One plane was used to transport the Attorney General during a time that it did not have such secure communications.)

To date, we have no indication that an analysis meeting OMB's standards has been performed. However, the Attorney General has signed an order containing a blanket authorization for his own use of the planes for personal travel because of security considerations. The order also authorizes himself to approve the personal use of DOJ aircraft by departmental employees, if such use is necessary for their protection. It further appears that as the head of DOJ, the Attorney General has authorized himself to permit private individuals to accompany him on the planes when he determines this to be in the government's best interest.⁷

Justice also seems to have problems keeping track of its planes. The Marshals Service told the Inspector General's Office that one of its planes was stolen from Miami, Florida:

...the King Air was stolen and commandeered by narcotics fugitives from Columbia and current intelligence indicates the aircraft, including sensitive communications equipment aboard the plane, is now in the hands of a narcotics cartel in South America.⁸

A Department which does not efficiently and effectively manage its air force will have a hard time getting off the ground in the war against crime.

⁵ Government Civilian Aircraft: Use of Government Aircraft by the Attorney General and FBI Director, GAO/GGD-90-84 (June 15, 1991).

⁶ Letter to the Honorable Dick Thornburgh, Attorney General of the United States, Department of Justice, Washington, D.C. from Bob Wise, Chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives, July 6, 1990.

⁷ U.S. Department of Justice, DOJ Order 2460.1, October 1, 1990.

⁸ U.S. Department of Justice, Office of the Inspector General, Audit Report, United States Marshals Service Aircraft Hangar, January 1991 at 21.

Debt collection--so little money. Last spring, I asked what seemed like a simple question: How much debt is pending at the Department of Justice for collection?

The answer was much more difficult to find than I ever imagined. Reports submitted by Justice contain information on amounts collected, but not on the amounts pending collection. The Office of Management and Budget has been slow in submitting reports to Congress which are required under the Debt Collection Act of 1982. Furthermore, studies conducted by both the General Accounting Office and the Department's own auditors repeatedly found problems with accuracy of reporting. Accordingly, I asked GAO for assistance in getting the best answer possible.

We learned that \$6.6 billion in unpaid civil debt and \$968 million in unpaid criminal fines was pending collection. Furthermore, Justice could not account for \$5.5 billion in referred debt. Accordingly, the Committee filed a report containing several recommendations for improvement.⁹ Subsequently, the Attorney General's spokesman stated that the Department has taken "steps to emphasize its commitment to debt collection as a priority management item."¹⁰

The Department's failure to efficiently manage the collection of penalties undermines the usefulness of the assessment of monetary penalties as a law enforcement tool, and the failure to effectively manage debt collection efforts contributes to further erosion of the solvency of the Federally guaranteed loan programs.

The exercise of prosecutorial authority--Decisions regarding whether to bring criminal charges; if so, what charges; and whether to prosecute or dismiss charges shape the character, quality and efficiency of the whole criminal justice system. As a former Deputy Attorney General observed, prosecutors have "...more direct power over the lives, property and reputation of those in [his] jurisdiction than anyone else in this nation..."¹¹ Yet, while the public is directly affected by the manner in which this discretion is exercised, the Courts and Congress afford enormous deference to prosecutors--a group whose number at the Federal level has grown from 1,839 in 1981 to approximately 4,028 today.

Last year, the Committee issued a report pointing out that with recent developments in prosecution practices, along with statutory changes placing increasing authority in the hands of prosecutors, both the Department and Congress should monitor the exercise of this authority more closely.¹² Our specific recommendations

⁹ "Department of Justice Debt Collection: So Many Intentions, So Little Money," H.Rept. 101-825.

¹⁰ Letter to the Honorable Bob Wims, Chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, January 15, 1991.

¹¹ 13 *Hastings Constitutional Law Quarterly* 537, at 540 (1986).

¹² "Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required," H. Rept. 101-986.

included withdrawal of a memorandum issued by the Attorney General which provides, essentially, that Department of Justice attorneys need not comply with selected ethical rules adopted by state bars and the Federal courts. If, as claimed by Justice, compliance with such rules hinders effective law enforcement efforts, we urged that the Department gather data regarding actual instances in which such problems have occurred, and seek corrective action from Congress. We also raised concerns about the cloak of secrecy surrounding disciplinary action taken as a result of findings by Federal judges of misconduct on the part of Justice Department attorneys.

Recently, we received testimony which underscores the importance of scrutinizing the activities of Federal prosecutors. A non-profit organization known as TRAC¹³ conducted an analysis of data obtained from a variety of agencies which led them to conclude that about two-thirds of the referrals for Federal prosecution by the FBI, the DEA, and other Federal enforcement agencies are turned down. They also found wide divergence among Federal districts in their criminal and civil enforcement efforts. Data like this raise important questions about the impact of prosecutorial discretion on Federal regulatory and criminal law enforcement programs. The high declination rates suggest that investigative and prosecution efforts are not being efficiently managed and coordinated, with the result that substantial Federal investigative effort may be wasted.

Identifying and correcting problems in the asset seizure and forfeiture program--Perhaps more than any Committee of Congress, the Judiciary Committee is aware of the inefficiencies which have plagued the asset forfeiture and seizure program. Half a billion dollars annually is funneled through this program, currently considered a "high risk" area by OMB. For years, an important source of information for identifying problems in this program has been the audits of the U.S. Marshals' Offices which were produced by the Office of Internal Inspections. These audits identified problems such as the failure to keep track of valuable assets (diamonds and art) and occasional "sweetheart contracts" with contractors.

We learned that with the creation of the Inspector General's Office, these inspection reports were to be reduced significantly. Accordingly, we recommended that Justice continue an inspection program at a level equal to that in previous years.¹⁴ The Department's response to the Committee's report did not address such specific recommendations. Rather, DOJ's response focused on the Department's disagreement with information contained in the records of the House Parliamentarian regarding the receipt of a report to Congress.¹⁵

¹³ Susan B. Long and David Barnham, *Transactional Records Access Clearing House, Statement before the Subcommittee on Government Information, Justice and Agriculture, Committee on Government Operations, U.S. House of Representatives, "The Value of Government Transactional Data", Hearings held on June 19, 1991.*

¹⁴ "U.S. Marshals Service: Don't Arrest Overnight", H. Report. 101-420.

¹⁵ Letter to the Honorable Bob Wise, Chairman, Subcommittee on Government Information, Justice and Agriculture, House of Representatives from Harry H. Pickinger, Assistant Attorney General for Administration, U.S. Department of Justice, May 14, 1990.

There is another matter related to the program I would like to mention in passing--the question of adequate staffing. In response to audits critical of the program, the Marshals Service has repeatedly stated that their problems are due to inadequacies in staffing.¹⁵ This raises the question of whether changes should be made in the administration of the asset seizure fund to facilitate the addition of Federal staff.

The Department must resolve the problems in this high risk area. Failure to efficiently manage the program puts at risk millions of dollars in resources for the fight against crime.

Department's Grant Unit--Is it Delivering the Goods? The Office of Justice Programs contains five grant making bureaus. This includes the Bureau of Justice Assistance (BJA) which administers the Byrne Grant Program and handed out nearly \$500 million in block and discretionary grants this year. Our oversight hearings have revealed that infighting and powergrabbing at BJA receive as much attention as does the distribution of grants.¹⁶ In addition, in a move inconsistent with Congressional intent when Congress established five independent bureaus--each headed by a Presidentially appointed chief--in February of this year the Attorney General issued an order essentially giving control of all final grant making authority to the Assistant Attorney General for Justice programs.

BJA, like the Bureau of Prisons, is plagued by monitoring problems. Justice earlier assured us that their monitoring efforts conformed with Congressional requirements, but a recently issued report from the Office of the Inspector General makes clear that is not the case.¹⁷ Formula grants, Office of Victims of Crime, and the Bureau of Justice were all faulted by the IG for monitoring problems. In addition, the IG found that the transfer of Byrne Grant Discretionary Funds to the Bureau of Justice Statistics was an unauthorized transfer in violation of Federal law.

The Department's failure to efficiently manage this program leaves state and local jurisdictions shortchanged in the fight against crime. Again, mismanagement seems to be the common theme.

There are two related legislative initiatives I would like to bring to your attention. Recently, I introduced H.R. 1657 to halt the practice of the Justice Department granting to itself money which Congress intended be spent for state, county and local law enforcement. I urge inclusion of its provisions in the reauthorization of the Office of

¹⁵ Department of Justice, Office of the Inspector General, United States Marshals Service, National Asset Seizure and Forfeiture Program, April 1990, Report No. I-90-05, Appendix I: The Seized Asset Deposit Fund, September 1990, Report No. 90-17; Management of Seized and Forfeited Assets in the Department of Justice, September 1990, Report No. 90-14.

¹⁶ "Grant Programs Administered by the Department of Justice," Hearings before the Government Information, Justice, and Agriculture Subcommittee, Committee on Government Operations, April 18, 24; and May 24, 1990; "Office of Justice Programs Criminal Justice Assistance Programs: Problems and Solutions," Hearings before the Government Information, Justice, and Agriculture Subcommittee, Committee on Government Operations, February 20, 1991.

¹⁷ U.S. Department of Justice, Office of the Inspector General, "Office of Justice Programs," January 1991, Report No. I-91-01.

Justice Programs. I am also personally very concerned about the future of the Byrne Block Grant Program. At the end of this fiscal year, the match requirement for state participation is due to double, a change which will cause many states to reduce their participation in the program. For this reason, Congressman Mollohan and I introduced H.R. 2473 to keep this increase from occurring.

Insecure computers--On June 27, I testified before the Economic and Commercial Law Subcommittee to describe the failure of the Department of Justice to comply with the Computer Security Act of 1987. I will not repeat that testimony today, but have attached a copy for your review. Its message is simple--sensitive information contained in Departmental computers is not adequately protected.

The failure of Departmental management to insure the protection of sensitive information (such as grand jury information and the names of witnesses and informants) puts at risk the Department's core criminal law enforcement mission.

BOP hazardous waste--still not cleaned up--Since 1987, the Bureau of Prisons has identified compliance with fire protection codes and regulations for the management and disposal of hazardous waste as a "material weakness" under the Financial Integrity Act. In some places, prison factory by-products such as solvents, thinners and paint were discarded in dumps on Bureau lands. Where such lands are near local water supplies, not only are prisoners and prison employees at risk, but local populations face potential dangers as well.¹⁹

Accordingly, I asked GAO to find out what the Bureau of Prisons had done to correct hazardous waste problems.²⁰ Although the Bureau had set aside about \$16 million for cleanup, this cleanup work was not to begin until the Bureau completed assessments at seven facilities. Bureau officials acknowledged that delays in awarding assessment contracts were likely to cause it to miss its scheduled cleanup completion date of September 30, 1992. BOP's response was to state that it would start certain projects in 1991, and we have not verified whether BOP followed its schedule. (The Inspector General has also issued a report identifying other problems in hazardous waste management which require correction.²¹)

The failure to efficiently manage this program endangers human health and increases the risk to the Government of liability in lawsuits which result from environmental damage.

¹⁹ Letter to the Honorable Michael Quinlan, Director, Bureau of Prisons, Washington, D.C., from Bob Wias, Chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, October 31, 1990.

²⁰ Hazardous Waste: Efforts to Address Problems at Federal Prisons, GAO/RCED-90-212 (August 30, 1990).

²¹ U.S. Department of Justice, Office of the Inspector General, "Management of Hazardous Materials and Waste in the Bureau of Prisons," September 1990.

Widespread minority underrepresentation at Justice--Like all Federal agencies, Justice is required by the Equal Employment Opportunity Act of 1972 to develop and implement affirmative action programs to eliminate the historic underrepresentation of minorities and women in the work force. I requested a GAO study which found that Justice continues to have widespread minority underrepresentation in five of the six key jobs identified as the focus for its equal employment opportunity efforts. GAO also criticized Justice for collecting, but not analyzing, data which is necessary to determine long term trends. With regard to recruiting efforts, GAO criticized the Department for failing to collect key data.²²

The nation's premier law enforcement agency must be managed to insure that it, too, complies with the law.

Information management?--I know that this Committee is concerned about the adequacy of Departmental systems used for the management of information--particularly case management. We too have noticed problems. In the area of environmental litigation, it took six months to obtain from Justice information identifying "all lawsuits currently pending against departments and agencies of the United States for violations of environmental laws." There were sixteen cases in all. According to the Attorney Generals' spokesperson, it took six months to get this information because the "computerized docket system does not categorize case entries in the manner required to respond quickly to your inquiry."²³ It is hard to imagine a docket system so poorly designed that information on cases in which the United States is a defendant is so difficult to obtain.

More recently, I asked GAO to determine what has happened to criminal referrals from Offices of the Inspector Generals (OIG) to the Justice Department. In the process, they found problems with the information management systems. The Executive Office of the U.S. Attorneys' primary management information system, the Prosecutor's Management Information System (PROMIS), does not track criminal referrals by agency OIG's. On the other hand, the Criminal Division's management information system, referred to as the Fraud and Corruption Tracking system (FACT), does not contain complete information regarding the number of OIG referrals.²⁴

Without good information systems, DOJ's managers will have difficulties identifying breakdowns in their litigation efforts.

Material weaknesses go uncorrected for years--The Federal Managers Financial

²² ERO at Justice: Progress Made but Underrepresentation Remains Widespread, GAO/OIG-91-4, October 2, 1990.

²³ Letter to the Honorable Bob Wias, Chairman, Government Information, Justice and Agriculture Subcommittee, U.S. House of Representatives from Carol T. Crawford, Assistant Attorney General U.S. Department of Justice, December 8, 1989.

²⁴ Letter to Mr. Harry H. Plickinger, Assistant Attorney General for Administration, Department of Justice, Washington, D.C. from Bob Wias, Chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives, May 7, 1991.

Integrity Act of 1982 was enacted so that Federal agencies would identify and correct internal control weaknesses. The Comptroller General has said that the problems which erupted at the Department of Housing and Urban Development were the result of weak internal controls and second-rate accounting systems.²⁵ In the FIA reports submitted by Justice since 1982, year after year many of the same material weaknesses are identified, yet uncorrected. I am very concerned about Justice's apparent inability to correct problems which are identified as part of this process.²⁶ (In addition, the Department's Inspector General recently completed an inspection report identifying improvements which need to be made in this internal review process.)²⁷

The failure of Departmental management to correct material weaknesses puts at risk billions of dollars of taxpayer's resources appropriated for the war against crime.

Other items--I would like to conclude this summary of the work of the Subcommittee by mentioning a few other items:

- * The Subcommittee conducted a hearing regarding the Federal Witness Security Program. We learned that prosecutors have encountered difficulties when bringing foreign national witnesses and their family members into the program. Current immigration procedures do not permit a prosecutor to offer a prospective witness in need of protection permanent resident alien status, the ultimate assurance that they will not be deported to face certain death. Accordingly, the Committee has recommended a change in the Immigration and Naturalization Act to address these problems.²⁸

- * The Committee has focused its oversight of the Drug Enforcement Administration on DEA's implementation of Operation Snowcap--a program designed to stop the flow of cocaine at its source.²⁹ The Committee visited cocaine producing regions of Bolivia, Colombia and Peru, conducted several hearings, and issued reports on the status of U.S. interdiction efforts in South America.

While we have been impressed with the enthusiasm and dedication of the U.S. personnel operating in the isolated reaches of the Andes, we have been concerned that U.S. and host country interdiction personnel have the resources necessary to accomplish this most difficult and all too frequently dangerous task; that the resources provided are appropriate for the task at hand; and that such resources are not misused. One example raises questions about the appropriateness of equipment is the following: during one of

²⁵ U.S. General Accounting Office, Comptroller General's 1989 Annual Report, "Facing Facts", at 11.

²⁶ Department of Justice, Report by the Attorney General on Internal Control, 1987, 1988, 1989, 1990.

²⁷ U.S. Department of Justice, Office of the Inspector General, "Department of Justice's Implementation of the Federal Managers' Financial Integrity Act and OMB Circular A-123," March 1991, Report Number I-91-09.

²⁸ Immigration Limbo or the Flight of Foreign National Witnesses Used in Major Narcotics Prosecutions, H. Rept. 101-476.

²⁹ "Stopping the Flood of Cocaine With Operation Snowcap: Is it Working?", H. Rept. 101-673; "United States Anti-Narcotics Activities in the Andean Region," H. Rept. 101-991.

our field visits to Bolivia, the Committee was repeatedly told of the need for additional cargo aircraft that could take-off and land on the short and frequently primitive landing strips in the remote areas of the Chapare and Beni regions. The DEA has been seeking additional Casa aircraft for years, but the Department has been lending a deaf ear.

* In a matter pending in Federal District Court, the Department of Justice made several misrepresentations regarding a report of the Committee on Government Operations. Accordingly, Representative Synar and I raised concerns with the Attorney General that the Department's lawyers do not always comply with the "great tradition of excellence, professionalism and commitment to the equal administration of the laws of the land."³⁰

II. OBSTACLES TO EFFECTIVE OVERSIGHT

These are some of the areas in which we have identified problems, and in many cases, have made constructive suggestions for change. There is much more to be done. Unfortunately, our work is often slowed, and sometimes seriously impeded, by obstacles created by the Department. Sometimes it seems that officials at the Department of Justice lack a fundamental understanding of our system of checks and balances--a system premised on accountability of the actions of the Executive Branch to the Congress and to the American public.

Congress' investigative responsibility was described by Justice Wilson, a member of the first Supreme Court and a principal architect of the Constitution, as follows:

The house of representatives...form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.³¹

The obligation to conduct investigations derives from the legislative authority of Congress under the Constitution and encompasses "inquiries concerning the administration of existing laws as well as proposed or possible needed statutes...It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."³² To carry out that responsibility, we need extensive information: "Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold

³⁰ *See Our Chambered Mountain, Inc. et. al. v. Manuel Lujan, Jr., Secretary of the Interior*, Civil No. 81-2134 BDP (D.D.C.1989), Memorandum of Points and Authorities in Support of the Defendant's Motion to Strike Certain Exhibits Attached to Plaintiff's Motion.

³¹ James Wilson, "The Works of James Wilson" (Chicago, 1896) Vol. II at 29.

³² *Watkins v. United States*, 354 U.S. 178, 197 (1957).

responsibilities effectively.³³ James Wilson, who led the fight for the Constitution in the Pennsylvania Ratification Convention, said it best: "The executive is better to be trusted when it has no screen...not a single privilege is annexed to his character..."³⁴

While the duty of inquiry is among the responsibilities we assume when elected to represent the people, we are routinely confronted with obstacles to performing that duty. Over the past two years, among mistaken assertions made by the Attorney General and his assistants have been the following:

- * ordinary audit reports cannot be provided to Congress;
- * routine agency documents are covered by grand jury secrecy, notwithstanding the fact that Rule 6(e) of the Rules of Criminal Procedure only covers matters occurring directly before a grand jury;
- * requested documents or information cannot be provided because a variety of litigation privileges (appropriately asserted against private parties) preclude such access, notwithstanding the fact that these privileges are irrelevant to Congressional inquiries;
- * the restrictions of the Privacy Act or exemptions under the Freedom of Information Act preclude the submission of materials to the Congress, notwithstanding the provisions of those Acts specifically exempting Congress; and,
- * "executive privilege" covers a routine management report.

And, this does not exhaust the list of mistaken claims which we have heard.

Needless delays have become a way of doing business with the Congress. For example, commitments to provide information are made, then broken. The American public is ill-served by such tactics which divert the time and attention of Congress from its crucial role of probing into the department "to expose corruption, inefficiency or waste."

Finally, there is the Attorney General's "policy" which provides that Members of Congress and the Committee staff cannot talk to government employees to obtain information regarding their activities, notwithstanding the provisions of Federal law that the right of employees to provide information to a committee or Member of Congress "may not be interfered with or denied."³⁵ The "policy" also insists that when the Attorney General "authorizes" discussions with Federal employees, supervisors or representatives of the Office of the Legislative Affairs must be present to "insure

³³ *Murphy v. Department of the Army*, 413 F. 2d 1151, 1158 (D.C.Cir. 1979).

³⁴ "Contempt of Congress," hearings before the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee, Serial No. 89, 97th Cong. at 187.

³⁵ 5 U.S.C. Sec. 7211.

accuracy" and that information "goes out with one voice." This is because of the Attorney General's concern that Congress will have a "chilling effect" on Federal employees.

Can you imagine a prosecutor accepting a bank president's claim that the only witness to a robbery that the government can interview is the supervisor who was in his office, rather than the bank teller who was an eye witness to what happened? Suppose, (hypothetically of course) a Federal employee was told by his supervisor to do something inconsistent with the law or maybe to "revise" figures in a way inconsistent with the facts. Can you imagine him or her saying that in front of the offending supervisor? As a former Watergate Counsel pointed out, if such "ground rules" had been imposed on the Watergate Committee: "...it would probably have taken us about three years longer to do what we did."²⁶

The Subcommittee's halfway house inquiry illustrates why we cannot simply rely on what bureaucrats tell us to determine serious deficiencies in the implementation of Federal laws. This spring, the Executive Director of a contract facility in New York pled guilty to one count of a 20 count indictment. The indictment recited counts of bribery which were based on giving drugs to inmates and extorting sex from them. When the Subcommittee asked the Bureau of Prisons (BOP) what was necessary to address the problems which gave rise to this situation, we were told they had hired additional staff to conduct monitoring at contract facilities. But, as a result of our persistent efforts to review agency documents and talk to field staff, we disclosed that the Bureau's solution was totally inadequate.

For example, our review of documents [which BOP initially claimed were covered by grand jury secrecy] and discussions with "line" staff revealed several problems:

- A false resume was submitted by the Executive Director of the halfway house who had a previous conviction of manslaughter under very disturbing circumstances. BOP's review of the contractor's qualifications was inadequate to identify these facts.
- A document from the "pre-occupancy" inspection--the purpose of which is to insure that a contractor can comply with Bureau of Prisons' standards--was prepared by the contractor, not the government monitor. Furthermore, the monitor did not confirm the ability of the contractor to comply with BOP standards.
- Monitoring documents were incomplete with respect to the very program areas in which abuses occurred, and the monitor failed to maintain records supporting the conclusions that he did reach.

In other words, because we were ultimately able to go to the sources, our

²⁶ "Department of Interior Failure to Cooperate With Congress," hearing before the Subcommittee on Environment, Energy, and Natural Resources, House Committee on Government Operations, February 24, 1982, at 37 & 38.

investigation revealed that not only is additional staff needed, but the Bureau of Prisons must fundamentally reform its practices in selecting and monitoring contractors who provide halfway house services.

The Department of Justice is creating obstacles to oversight at the very time that time it is most important for Congress to carry out its responsibility to oversee the Department. Congress has enacted new laws and delegated even more power and responsibilities to the Department and its prosecutors. We have authorized new agents to arrest, new prosecutors to convict and new prisons to hold those who commit crime. Since 1981, the Department's budget has grown from \$2.35 billion to \$9.28 billion. The number of DEA agents has grown from 1,896 to 3,561 and of FBI agents from 7,751 to 10,198. In 1980, we appropriated \$16.5 million for prison construction and in 1990, we authorized \$1.5 billion dollars for such construction.

Rapid growth like this brings with it new opportunities for waste, fraud and abuse. New prosecutors, just by virtue of their inexperience, may more susceptible to mistakes in judgement amounting to an abuse of power—particularly now that the Department is under increasing pressure to "do something" about crime. Underpaid DEA agents, routinely confronted with danger and temptation, may be increasingly susceptible to corruption. Under these circumstances, I would think that the Department would welcome, rather than resist, efforts to determine what is really happening at the Department.

PREPARED STATEMENT OF HON. ROBERT E. WISE, JR., A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF WEST VIRGINIA, BEFORE THE SUBCOMMITTEE ON ECONOMIC AND
COMMERCIAL LAW, COMMITTEE ON THE JUDICIARY, JUNE 27, 1991

Mr. Chairman, I appreciate having the opportunity to comment briefly today on the work my Subcommittee has done regarding computer security. Of particular concern are the statements made by the Attorney General in response to questions from this Committee that problems identified by the General Accounting Office could "potentially, permit the breach of sensitive data resident in the computers or automated storage media in some of the Department's various component organizations" and further, that DOJ has "no evidence that any case or investigation has been compromised by a loss of information."

Justice may indeed not have evidence that one or another of its investigations has been compromised. But, it seems to me that lacking evidence to that effect does not mean that such investigations haven't been compromised. In fact, given the nature of computer security in general, and specific problems identified to date, it is not surprising that Justice would conclude that "no cases or investigations" have been compromised. Mr. Harry Flickinger, who testified before the Government Information Subcommittee in March said it best: "we don't know what we don't know." We don't know what we don't know, indeed Mr. Chairman.

If a security breach is exploited by organized crime or the drug cartels and results in the disclosure of the identity of informants working with the government, will they issue a press release announcing it? Not likely. More likely they will seek to capitalize on such information, perhaps by feeding false information to the informant to wreak havoc on an investigation, or to set someone up. Or they may just quietly arrange an unfortunate accident.

At the Subcommittee's request, GAO has conducted three reviews of computer security at Justice:

- the EAGLE system, currently being installed throughout U.S. Attorneys' Offices;
- the main Justice Department data center and the computer systems used by Justice Department litigation organizations;
- and, after the sale in Kentucky of surplus computer equipment containing sensitive files, a review of the Department's actions to determine whether or not similar problems exist elsewhere. I know that you will hear testimony from the General Accounting Office, but there are some issues I would like to highlight.

First, the aftermath of the Kentucky incident. We know that equipment was sold through the surplus process and that data on those systems was not properly removed. The information contained on the storage media included grand jury information and information relating to the identity of confidential informants and the Witness Protection program. (There was also other information which, according to the Computer Security Act, is to be protected from unauthorized access). After several uneasy days for the Federal government, the systems were recovered.

I cannot tell you where the information went, who saw it, and what use was made of it. This is due in part to pleas from Departmental officials that we not delve into specific facts gathered in conjunction with its ongoing criminal investigation. Because our primary concern at the time was what the Department had done to insure that there

have not been, and will not be, "son-of-Kentucky" incidents, we chose not to pursue such details. However, I continue to expect Justice to prosecute any violations of the criminal laws which may have occurred, and you may want to question the Department regarding the status of its inquiry.

To date, I am not satisfied that Justice has done enough to protect itself from another "son-of-Kentucky" incident. According to testimony received by my Subcommittee, Justice's review of the sale of surplus equipment was very limited. It was only last Friday that Justice was following up on GAO's recommendation and made a request to all of the Department's Bureaus to identify all computer equipment with storage capability which has been surplused since January 1, 1990. Components like the Marshals Service and the Bureau of Prisons also process sensitive information on their computers. And, in the case of the FBI, for example, a recent Inspector General's report found that the FBI could not account for more than 2,000 pieces of ADP equipment. Where is that equipment, and what was on it?

GAO also testified that it had concerns regarding the reviews of Offices of the U.S. Attorneys which were conducted by the Executive Office. The scope was too narrow to adequately identify all equipment which may have been surplused by U.S. Attorneys, and they had reservations about the accuracy and completeness of data reviewed by the Executive Office.

Furthermore, a "limited official use" report submitted by GAO to us and the Department describes facts regarding ongoing problems in the management of

computers. If uncorrected, they clearly pose security problems. Based on the facts presented regarding one practice in particular, if I were an official of the Department I would not be willing to put my neck out and assure any Committee of Congress that "no cases or investigations" have been compromised.

At this point, I do not know if the problems identified have been satisfactorily resolved. For example, both my Subcommittee's Ranking Minority Member and I felt that Justice's testimony with regard to action taken to resolve questions related to equipment in at least two U.S. Attorneys' offices, was mushy. In addition the Departmental response to the GAO report, which is required by Section 236 of the Legislative Reorganization Act, is past due. So, we too, do "not know what we do not know."

In reflecting on what we learned, it seems to me that the more informative answer to your question to the Attorney General is not that Justice has "no evidence," but rather to explain what evidence it does have that none of its cases or investigations has been compromised. I do not believe Justice can provide such evidence. For one, I do not think that they have looked hard enough. What would they have?—a certified, return receipt from Pablo Escobar indicating that at no time he received information from Justice's systems regarding an informant?

Turning now to the review of the main data center and the litigating organizations, GAO identified several problems, including weaknesses in physical security. In January 1991, Justice let a contract to correct certain vulnerabilities at the

data center. In the context of the Attorney General's response to this Committee, I want to bring to your attention the following statement in the GAO report:

there is no formal system for specifically tracking computer security violations, and the security staff were unable to provide documentation and specific details on the few incidents they said had occurred.

Absent such capability, how does the Attorney General know that there have not been breaches which compromised its activities? Again, we "do not know what we do not know" and, as the National Research Council has been trying to tell us, until government has the capability to identify and report breaches, we are at risk at the hands of a clever computer thief or a keyboard terrorist.

Finally, there is Project EAGLE. In 1989, GAO issued a report which found that Justice had not developed the required security plans and risk analyses for the project. At the time Justice had agreed to do the required risk analyses and security plans prior to the installation and operation of the system. In March, Representative Peterson and I raised questions about the status of EAGLE, and GAO staff conducted a preliminary follow-up inquiry to determine the current status of security safeguards. We learned that while progress had been made, we nevertheless felt that it was important to write to the Attorney General to urge re-focused attention on this matter. With respect to risk analyses, in some locations they were not being completed before the EAGLE systems were installed. As we told the Attorney General, it is important that all risk analyses be completed before installation. Furthermore, once risk analyses are completed, the identified risks must be corrected. For example, we understand that although a contractor has conducted a vulnerability assessment of the EAGLE network, not all of

the identified vulnerabilities have been addressed.

I believe that until the security compliance reviews and computer security training which are currently underway are adequately completed, the Department simply cannot provide assurances that breaches do not occur. Maybe I can illustrate the problem by sharing with you a statement which appears in a memorandum regarding the results of one of the security briefings which took place a few months ago in a key metropolitan area:

Personnel believe that the DOS "erase/delete" commands removed sensitive data that was stored on hard disks. If the equipment were to be removed from the office under these circumstances, sensitive information could be compromised.

It bears noting that the Kentucky incident occurred in part because of a lack of understanding of what works and does not work in terms of erasing data. And now, almost a year after the Kentucky incident, I still have concerns about Justice's ability to adequately protect its sensitive information.

Mr. BROOKS. Mr. Conyers—Mr. Chairman—do you believe the acquisition regulation of GAO regarding attorney fees and bid preparation costs is consistent with congressional intent in enacting the Competition in Contracting Act?

Mr. CONYERS. No, I don't. I think this lawsuit is a precedent, as I have indicated. What we have now is the Department of Justice declaring, in its view, a provision of the law, signed by the President, passed by both bodies, to be unconstitutional. Then, introduce a lawsuit to have it declared unconstitutional, while at the same time introducing the changes that would be operative in the Federal Register.

In other words, they have become the judiciary in deciding questions of constitutionality, and they have become the legislature in deciding what the remedy shall be in terms of how the rules of this payment process will occur. So they have become all three branches of Congress as opposed to a more orderly process of us trying to meet, hold hearings, and process.

But the key point in this, Mr. Chairman, Members, is that there were no complaints coming from the agencies of the Government that were in the bid process procedure. They are not a party to the suit nor had they brought forward even one complaint.

So they have created a wall of secrecy in which they dropped this on us. I think it harks back to the days when Attorney General Meese thought that he had a duty to instruct the President that anything he thought was unconstitutional, he was not supposed to obey. And we would let the chips fall where they may from there.

We are harking back to that kind of procedure which is, frankly, shocking.

Mr. BROOKS. Mr. Wise, you have to leave?

Mr. WISE. If that would be possible, Mr. Chairman.

Mr. BROOKS. Let me just ask you a few questions.

The Attorney General is proposing that his Department be given perpetual authorization without the benefit of oversight hearings. How do you view this proposal?

Mr. WISE. Well, Mr. Chairman, if Congress wants to create an executive emperor for life, at least measured by the life of an administration, you can do that. On a serious note, I think that would be disastrous. We have enough trouble conducting adequate oversight now over the Department of Justice. I don't know how it is on your committee. I suspect it is the same as on our subcommittee. I have excellent staff, but I don't have enough hounds for this hunt. Keeping track of what we have and what is there is tough enough, particularly in light of the "new privileges" and obstacles being tossed to conduct adequate oversight.

To give the Department of Justice the opportunity to say we never have to come back before Jack Brooks and the Judiciary Committee again, we will never get them to talk to us.

I would urge you not to follow that approach. I am not that worried about it.

Mr. BROOKS. Based on your testimony, do you believe the enforcement of ethical standards within the Department is lacking?

Mr. WISE. Yes. It is an area of great concern as reflected in our report and particularly of concern to me. We get complaints. Of course, you have members of the bar that are reluctant to come

forward. You have this kind of back door stuff because they have to deal with the Justice Department every day. We get a number of complaints.

The one that the committee has been especially critical of is the Attorney General's action seeking to exempt departmental attorneys from not having to comply with rules of State bars. As I understand, the Department of Justice feels the attorneys don't have to abide by the regulations and ethical standards adopted by West Virginia, Texas, California, or wherever they practice. You have a U.S. attorney who can move into an area, not comply with those ethical standards. Yet the lawyers in that region are expected, of course, to comply with those.

It is a radical departure from past practice.

Mr. BROOKS. You recall in the *INSLAW* case in 1987, the bankruptcy judge concluded that the Department—the Justice Department—took, converted and stole proprietary software through trickery, fraud and deceit."

That judge thought they were acting without too much ethics.

Mr. WISE. There have been other Federal judges that have written similar notations in their opinions. Yet, to the Justice Department, they feel they don't abide by the same ethical standards the rest of us do.

Mr. BROOKS. Mr. Conyers, it is my understanding the Department pressured the Federal acquisition regulatory counsel to issue his regulations. Do you have any evidence of that in your investigation or evaluation?

Mr. CONYERS. We are trying to find out where all of this came from. We know that OMB is the budget direction, and has that focus which comes directly from the President of the United States, from the White House. So we are going to look very closely into how all of this came about.

There are a lot of people trying to take their fingerprints off the instrument right now, but we are going to have a hearing in Government Operations to try to find out where all this interest came from.

By the way, there have been statements quietly made by the organizations and agencies, that have indicated they didn't want any part of this, that they were happy the way things were working. That is what makes this kind of suit a constitutional threat to the entire process.

The Department of Justice is to protect and enforce the law. When the Department of Justice begins to unilaterally challenge constitutionality, we are in big trouble because that could be the beginning of a way we get a line item veto. Anything that any executive officer doesn't like, he merely hauls it into court and goes about it that way. In the interim suspending the operation of the law until the outcome of the court proceeding. There is no precedent for that.

We thought that a former Attorney General had been straightened out, but now we are back at this assault again.

Mr. BROOKS. As late as July 8 of this year—1991—in Federal Computer Week, they quoted a NASA procurement official, Thomas Layton, as opposing the Justice Department on this matter. He stated "In our system of law, a law is presumed to be

valid and agencies do not have the power to decide for themselves what the laws should be."

I have one more question.

Mr. Chairman, the last time the Competition in Contracting Act was attacked by the Justice Department in 1984-85, the Government Operations Committee voted to withhold the funds of the Office of Attorney General. Do you recall what that vote was? How that came about? You were there and participated actively.

Mr. CONYERS. I was. It was a unanimous vote. We are hoping that we do not have to cut off the funds, but it seemed that that was a very instructive lesson in 1985 or was it 1986 that that happened?

Mr. BROOKS. Yes.

Mr. CONYERS. So what we are trying to do is find out if we are going to all be reasonable and prudent men and women in the Federal Government, or if we are going to have to do what you did with the full support of the committee and that is cut off the authorizing legislation for the Office of the Attorney General. I believe, while you were at it, you cut it off for the Office of Management and Budget at the same time.

Those are cautionary warnings I would hope the Department would take under advisement because—

Mr. BROOKS. We will get a copy of all of this in the hands of the Appropriations Committee. We will be talking with them, of course.

Mr. CONYERS. I know you will negotiate with the usual openness that characterizes your relations with the executive branch most of the time.

We were not unmindful of what the committee was forced to do. This time, it is an even stronger situation. They have Frank Horton and me over in Government Operations, and now we have you as chairman of the Judiciary Committee. It sounds like a worse situation potentially than it was in 1986.

Mr. BROOKS. We will do the best we can.

I wanted to ask you a question, Mr. Horton. If the Justice Department's challenge to GAO's bid protest authority is successful, is there another place in the Federal Government where this function could be transferred?

Mr. HORTON. There is, Mr. Chairman. First of all, I want to agree with what the chairman has said. Having lived through this before, if the act was unconstitutional, I think the Attorney General had a burden and a responsibility to inform the President, have the President veto the bill.

Mr. BROOKS. If they thought it was?

Mr. HORTON. Right. Which they did not do. They signed the bill. The President signed the bill.

Then, the Attorney General issued a directive that it was unconstitutional, so don't agree with it. We were very concerned about that, Republicans and Democrats alike. We were very concerned about that at the time.

I am concerned about it here now. First of all, the Attorney General has not been in touch with me to tell me—and it is a Republican administration and I am the Republican leader on that com-

mittee—they have not been in touch with me to tell me anything about the bill. I am the author of the bill.

Mr. BROOKS. They have not talked to you?

Mr. HORTON. They have not.

Mr. BROOKS. Just filed the lawsuit?

Mr. HORTON. That is all. And, as I recall, the bid protest procedure has always been a—the question is where you put it. We decided in the Government Operations Committee it was better to be put in the General Accounting Office because they were an independent agency. They could act quickly. And then because they worked with all the agencies and the other reasons we felt that that was the proper place to put it.

It could be put in the GSA Board of Contract Appeals, but the administration—so many people in the administration are not too happy with them. They are having financial and workload problems. I am not sure that they would be able to act expeditiously.

The problem is to act expeditiously when you are dealing with one of these bid protests. You have the Government, you have a contractor and you have an aggrieved contractor. Somebody has to resolve it and resolve it quickly. We felt the best place to put it was in the independent agency, the General Accounting Office. They have the ability, the manpower, the money, and so forth.

It could be put, as I say, in the GSA Board of Contract Appeals, but, again, we are going to end up where we were before. That is delayed action and contracts not being carried out, everybody sitting around doing nothing until it is resolved. Which I think is very bad in the procurement process.

Mr. BROOKS. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

Mr. Chairman, the Committee on Government Operations performs an absolutely indispensable role not only for the Congress but for the American people. I want to thank the chairman and ranking minority member for the several issues that have been brought to our attention, serious issues today, because they will be very helpful to us in our continued oversight responsibilities.

We also know the work—and the justifiable pride that you took—in fashioning the Competition in Contracting Act, but there must be something I am missing in understanding the depth of concern of the Committee on Government Operations over this particular issue of the Comptroller General.

It seems to me this is a separation of powers issue that is of a variety that is constantly—throughout our history—determined by the third branch of the Government, the judiciary, and, on that, I will ask you a series of questions. Maybe I am missing something.

It seems to me that here the Department of Justice is seeking a declaratory judgment focusing on a narrow and severable provision of the Competition in Contracting Act. At issue is whether the Comptroller General, an instrumentality of the legislative branch, can award a successful bid protester preparation costs and attorneys' fees.

Is that the issue?

Mr. HORTON. I want to say it this way. That is a penny ante way to go about it. What they ought to do is come and talk with the Government Operations Committee and tell us we have a serious

problem about this. In my judgment, it is not a separation of powers issue. It is something that the General Accounting Office can do. It has done it. Has done it well. Nobody has been critical of them. If they want to resolve a question with regard to separation of powers, I think they ought to take it up with the Government Operations Committee and suggest legislation.

For them to do it this way, I think, is reprehensible. I hope that we—that the counsel will go in and beat them as they did before. It was resolved by the courts at that time.

As I said in my prepared statement, I don't know what the courts will decide now. They might go the other way. Very well could happen. But I think it would be to the disadvantage of the taxpayers and the process if they do go against it. Then we will have to have another way of resolving these protests.

I am trying to emphasize to you the need for us to resolve those protests and do it in a quick, efficient, effective manner.

Mr. FISH. Do we have a dispute here that there is not some justification under *Bowsher v. Synar*—which was not decided until 1986—for the view that the statute does give an executive branch function to the Comptroller General?

Mr. CONYERS. If I may answer that for my colleague, Mr. Fish. Let me point out that a dispute is one thing, but a declaration of unconstitutionality coming unilaterally from the Department of Justice and ordering the agencies to violate the existing law is the problem. I am in perfect agreement with you that there could be a legitimate dispute about the separation of powers doctrine. I think it is a very minor one. I think our counsel will be able to point that out because the GAO has been doing this for so long without any complaint from any of the agencies that are involved in FARR.

Here is the problem. Assuming there is a legitimate difference of view about this matter, for them to declare it unconstitutional, at the time they file the suit, and then order the agencies to disregard this provision, we have just ceded to the Department of Justice the judiciary and the legislative functions of government. That is what we are trying to slow down.

What they did is that they ordered the agencies in FARR, NASA, GSA and another to discontinue obeying this provision of the Federal statutes, and do it this way. They put out a proposed regulation and said that this is what we are going to do from now on because of our finding of unconstitutionality.

Therein lies the difference between a reasonable test of the separation of powers doctrine and a unilateral usurpation of the legislative function.

Mr. FISH. Mr. Chairman, I thank you very much for that. I think you have answered my second question. Maybe I was given some erroneous information.

My question had to do with the continuing implementation of the act pending a determination on the declaratory judgment. I understood under the regulations, the agencies are free to continue to pay GAO awards and attorneys' fees and bid preparation costs. You are saying they were mandated not to.

Mr. CONYERS. They were told that this provision is unconstitutional, and if they decided to continue obeying the law as presently written, they would be doing it at their own risk of recoupment. In

other words, they are saying if the Department of Justice wins this suit, then this money is going to go back. This puts them in a highly uncomfortable position and leads to the kinds of comments we know are floating around in the executive branch.

Mr. FISH. I guess it is discretionary with the agencies as to whether they pay it. You are saying they pay at their peril.

This idea of it being new concerns me.

It seems to me the executive branch raised the issue prior to 1985; that President Reagan when he signed the bill raised the issue; and three Attorneys General since then have raised the issue. Now the *Synar* case made it even more prominent.

So I guess I am taking a longer view that this is the kind of thing that is sort of grist for the mill here in our constitutional procedures. We have to blame Brother Madison for writing it that way.

Mr. CONYERS. Not too completely. You know, it is one thing to have constitutional disagreements between the branches, we have them all the time, but it is altogether different for our President to sign into law a measure passed by both bodies, and then say that this law that I am signing is unconstitutional. I mean, that is what the veto is all about. There we have the opportunity to override it.

But if we begin a practice for which there is no precedent in the Constitution or the statute that the President signs a bill into law, then declares through his Department of Justice it is unconstitutional, then that puts everything in the Department of Justice's hands in terms of determining what is, in fact, constitutional or not.

Mr. FISH. I appreciate that very much.

Thank you.

Mr. BROOKS. Mr. Edwards.

Mr. EDWARDS. No questions, Mr. Chairman.

Mr. BROOKS. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

This is a very interesting inquiry. It seems to me the procedure of choice for the Justice Department would have been to go into court and ask for an injunction, if they could get one, restraining the enforcement of the act pending a constitutional determination. To do it unilaterally—and I know nothing other than what you have told me this morning—does seem to be arbitrary and I certainly do not think that that is the way they should have done this.

Mr. CONYERS. But there is something they could have done before, Mr. Hyde. If they would notify either me or the ranking minority member about this, we meet with departments and agencies about these kinds of questions all the time. We had no inkling—I read about this. We never got a call. As soon as I heard about it, we sent a letter to the Attorney General asking him to delay the filing because we might need to change or modify the payments and costs award in the Competition in Contracting Act. It may be perfectly valid for all I know. I have not yet seen the suit.

So there was one thing they could have done before they went in on the injunctive route, which I agree with you they could easily have done.

Mr. HYDE. I am informed that Justice objected back in 1984 in a letter to Chairman Brooks, then chairman of the Government Op-

erations Committee, dated April 20, 1984. I am sure there were objections noted in the President's signing statement. I think what is fascinating here—what students of civics ought to take note of is that this bill, very important bill, very useful bill, controversial bill, was folded into the Deficit Reduction Act, and so the President had to sign it. Had it come as a freestanding bill, he might well have vetoed it.

But this habit we have around here of passing omnibus legislation and putting everything in there from aardvark to zebra and shoving it at the President and saying, aha, you sign it, that is not his fault. That is our fault.

And I just think that that ought to be mentioned.

Again, agreeing with you. Most useful legislation. The costs and fees, there is a legitimate controversy. We are jealous of our turf. That is being demonstrated here today. Rightly so.

But the executive is jealous of its turf also and wants to hand down to succeeding administrations an unimpaired executive function. So it is a legitimate controversy.

The only way to adjudicate it is not unilaterally, but with a court. They are uniquely set up to determine these things. I would not be mad at them for filing the suit.

I want to say lastly—not prolonging this, and not shutting you off at all—the Executive, as well as ourselves, take an oath to defend the Constitution, not laws which are subordinate to the Constitution. They should be law-abiding. There should be a presumption of constitutionality pending an adjudication or injunction.

I do agree with you as far as the way this was done. I would be a little more sympathetic—it seems to me who is going to call up whom and say who is going to work this out.

They have never called anybody from what you have said. Maybe that is why this controversy has gotten out of hand.

Mr. CONYERS. Look, we are in agreement. The only thing I want to add is that I didn't realize that I should have combed the files from 7 years ago to find a 1984 objection. Remember—

Mr. HYDE. You mean Mr. Brooks didn't bring that to your attention?

Mr. HORTON. We knew about that.

Mr. CONYERS. Frank knew about that.

Mr. BROOKS. We knew about it. You knew about it.

Mr. HYDE. You read your mail.

Mr. BROOKS. Everybody knew about it. When it was over with and we resolved it in the report, Congressmen Horton, Walker, Clinger, McCandless, Craig, Nielson, Saxon, Swindall, Monson, DiGuardi, Arme, Lightfoot, and John Miller all signed a separate view saying that they agreed with the essential message of the report. In ordering Federal agencies not to implement certain provisions of the Competition in Contracting Act, the President, the Attorney General, and the Director of the Office of Management and Budget have taken action not permitted under the Constitution.

Quoting the *Marbury* case of 1803, these Members said they agreed with the report in believing that every part of the Competi-

tion Act, which is an extremely important reform of Federal procurement law, appeared to be constitutional.

The Justice Department's contention that the Comptroller General is a part of the legislative branch and therefore unable to bind executive agencies in their actions was not convincing. They concurred wholeheartedly in the first recommendation made by the report, that the executive should immediately withdraw its order that the agencies not comply with specified provisions of the Competition Act and instruct all executive officials to comply fully with the law.

That is what the Republicans thought then. That is what the Democrats thought then, and that is what they think now.

Mr. HYDE. Recapturing what little time I may have left—

Mr. BROOKS. You have got more time. Go ahead.

Mr. HYDE. Thank you, sir.

I can only say that having brought that to my attention, if any of those gentlemen are nominated for the Supreme Court, I would bring up at their confirmation hearing, their erroneous opinion of what is constitutional.

Mr. BROOKS. Not a one of them admitted to smoking pot.

Mr. HYDE. That is Texas pot.

Mr. BROOKS. They probably ship a lot of it in. Well, thank you very much, gentlemen.

Our next witness is Milton J. Socolar, Special Assistant to the Comptroller General of the GAO. Mr. Socolar recently testified on ADP management problems at Justice before the Economic and Commercial Law Subcommittee.

He is accompanied by Richard L. Fogel, Assistant Comptroller General for General Government Programs, and Richard C. Stiener, Director of the Office of Special Investigations.

Mr. Socolar, we thank you for appearing before the committee again. Your prepared statement will be made a part of the record. You are recognized now to speak as you see fit.

STATEMENT OF MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY RICHARD L. FOGEL, ASSISTANT COMPTROLLER GENERAL FOR GENERAL GOVERNMENT PROGRAMS, AND RICHARD STIENER, DIRECTOR, OFFICE OF SPECIAL INVESTIGATIONS

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

My detailed statement outlines various difficulties we have had in obtaining access to the Department of Justice data relevant to certain kinds of examinations we make on behalf of the Congress.

We have had few access difficulties with regard to other kinds of work we do at the Department. In a management review of the Immigration and Naturalization Service we found that INS was in need of strong leadership to balance its dual roles of enforcement and service.

We recommended that the Attorney General take action to bring the management of INS under control. Since our report was issued, both Justice and INS have moved systematically to improve the INS management framework.

Last summer we testified on the rapid growth of delinquent debt and the Department's deficient collection efforts. We observed that Justice lacked the system to track, manage and collect in a timely fashion civil debt referrals from other Federal agencies over \$5 billion.

The Department has initiated actions toward correcting this situation. Between 1980 and 1989 the Federal inmate population increased from 19,000 to over 53,000 or 80 percent. Inmate populations are projected to further increase to over 125,000 by 1999.

Projected costs could reach \$29 billion by fiscal year 1995 and substantially more if additional expansion is approved to accommodate Bureau of Prisons inmate projections for 1999.

We found that with reasonably modified standards, the Department's requests for \$315 million in expansion funds requested for fiscal year 1992 and any additional prison expansion funding in fiscal years 1993 and 1994 could be substantially reduced.

At the end of 1990 with regard to asset seizure and forfeiture, Justice has a seized asset inventory of \$1.4 billion being managed by the Marshal's Office. We found that substantial savings were possible through better oversight and consolidation of the seized asset management programs at Justice and the Bureau of Customs.

The Department has taken some action on our recommendations to implement improved external controls. Program consolidation is under consideration.

On June 17, I testified before the Subcommittee on Economic and Commercial Law of this committee that the Department is not adequately managing its automated data processing resources or providing adequate computer security.

Senior Department officials acknowledged that they have not effectively fulfilled their ADP management responsibilities, a matter of particular concern in light of the Department's plans to spend over \$2.7 billion for information technology and related services between fiscal years 1991 and 1995.

I review these examples because they illustrate the need for and the benefit of effective congressional oversight of Department programs. Our ability to provide assistance to the Congress in these reviews depended on obtaining reasonable timely access to relevant documents and officials within the Department.

The fact is, however, that we have not enjoyed consistently good access to information over the full range of our work. As we look less at administrative and support functions and more at investigation and prosecutorial activities of the Department, we have encountered increasing resistance to our requests for information.

The problems are most prevalent at the Federal Bureau of Investigation and in connection with our work related to financial institution fraud. In February 1988, after documents released under the Freedom of Information Act raised questions about FBI terrorist investigations involving American citizens exercising their first amendment rights of free speech and peaceful assembly, we were asked by the chairman of the Subcommittee on Civil and Constitutional Rights to review the FBI's investigations of terrorist activities.

In September 1990, we issued our report, but because of data access problems, we were unable to draw conclusions on whether

the first amendment rights of Americans were violated. The FBI refused to provide us access to information regarding open investigations and insisted that information it considered sensitive be removed or redacted from the closed investigative files they did make available.

As we have turned our focus toward a critical justice law enforcement priority of the 1990's, white-collar crime, we have encountered similar access problems. As additional resources are appropriated in response to the enormity of the S&L debacle and growing worry over bank failures, congress has voiced concerns as to whether the resources are adequate, how well they are being used, and the results being achieved.

Congress has provided the Comptroller General broad authority to access the records of Federal agencies in support of the oversight of Federal programs and activities. Our problems at the Department generally fall into four broad categories—resistance to work done through our Office of Special Investigations, delays in obtaining routine management information, deletion of data from closed investigation files, and denial of any information related to ongoing investigations.

Our Office of Special Investigations was established in 1986 to investigate fraud, waste and abuse in Government programs. OSI investigates allegations of fraud and abuse received from Congress, other sources or arising from GAO's own work.

OSI assesses the merit of the allegations, which may be criminal in nature, reports relevant facts to Congress, and refers possible criminal law violations to the appropriate executive branch investigative or prosecutorial offices for further action.

Almost from its inception, OSI has encountered resistance at the FBI. It is the official Department of Justice position not to provide assistance to OSI. Reasons cited by the Deputy Attorney General include the executive branch's exclusive constitutional obligation to conduct criminal investigations and concerns that OSI's requests for information were unrelated to any review of FBI programs and procedures but were related instead to independent criminal investigations.

While the prosecution of criminal cases is, of course, referred to the executive branch, both Congress and the GAO clearly have authority to investigate matters that may involve potential criminality.

Our authority to investigate all matters related to the receipt, disbursement, and use of public money extends by its plain terms to investigations of fraud, waste and abuse in Federal programs. With regard to delays in providing information, our review of the adequacy of the Department's response to financial institution fraud is a case in point.

We requested basic management information from the FBI in December 1990, the kind of information the FBI had routinely supplied GAO in the past. In this instance, the FBI ultimately did provide the data but only after 6 months of negotiations.

In some instances, Justice and FBI insist upon information from requested files being deleted or redacted. The process is time-consuming and leaves us with less than a full awareness of the facts involved.

This is currently occurring at the executive office of the U.S. attorneys, where we have requested access to reports evaluating the performance of specific U.S. attorney offices. Under most circumstances, the objectives of our work can be met through a review of closed case files.

However, in some instances, information regarding open cases is essential to a credible evaluation of the effectiveness of Department efforts to identify and prosecute cases. All requests we make for data related to operations are categorically denied.

The Department appears to be concerned that providing GAO with open case information might prejudice important prosecutions and result in loss of control over sensitive information. We understand the Department's concern. We are confident that it can be accommodated through appropriate safeguards.

GAO routinely handles the most sensitive information and has an unblemished record in protecting it from inadvertent or otherwise inappropriate disclosure. Working with congressional committees, we have identified several areas affecting investigative functions that warrant oversight priority.

For example, are the Department's efforts to counter white-collar crime adequate? How do Federal law enforcement agencies set their investigative priorities and measure their effectiveness? How effective is the Drug Enforcement Administration war on drugs?

We also think that a look at the overall management of the FBI would be worthwhile. In addition, because perspective appears to be lacking as to the interrelationships among various components of the criminal justice system, it is difficult to foresee the overall impact of budgetary changes in parts of the system.

Pursuant to the Drug Abuse Act of 1988, we developed a model to address this problem and have successfully applied it to estimating the national workload impact of enacting title X of S.1241, the Violent Crime Control Act of 1991. The future value of the model will depend on our ability to update the underlying data and assumptions and the Department's continued resistance to our access will most certainly affect adversely our ability to do the needed work in all of these areas.

In closing, I would want to make clear that we understand the Justice Department's investigation and prosecution of criminal activity as being without question a critical executive branch responsibility.

By its nature, this responsibility carries with it a set of imperatives that limits the Department's discretion in disseminating certain types of information to protect both the rights of those who stand accused and the integrity of the investigative process.

In our view, however, these imperatives do not exempt the Department from congressional oversight nor do they prevent the Department from providing a wider range of information about its activities to the Congress and to the GAO than is now the case.

The current situation is counterproductive, with both GAO and the Department wasting valuable resources in dealing with these access issues. In short, it is important that the Justice Department reach a greater accommodation with GAO in connection with providing information and documentation in specific cases.

As we recognize the importance of its role, we would in turn invite the Justice Department to recognize that congressional oversight of executive branch activities is fundamental to the constitutional powers vested in the legislature.

A self-evident but nonetheless critical prerequisite of effective congressional oversight is that Congress be fully informed. A partially informed Congress cannot balance interests fairly, resolve issues effectively, or deliberate soundly.

That concludes my remarks, and my colleagues and I would be pleased to answer any questions that you or the other members may have.

[The prepared statement of Mr. Socolar follows:]

PREPARED STATEMENT OF MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE
COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE

Mr. Chairman and members of the Committee, thank you for the invitation to testify on the authorization of the Department of Justice's budget for fiscal year 1992. Pursuant to requests of this and other congressional committees, the General Accounting Office has often assisted Congress during the past several decades in conducting oversight of the Department, its divisions, and its component agencies.

RESULTS OF GAO OVERSIGHT

Immigration and Naturalization Service

In our management review of the Immigration and Naturalization Service (INS), we found that INS was in need of strong leadership to balance its dual roles of enforcement and service.¹ Over the past decade, weak management systems and inconsistent leadership have allowed serious problems at INS to go unresolved.

The problems we found had undermined INS' effectiveness. We recommended that the Attorney General take immediate action to ensure INS put in place sound management systems. Although much remains to be done, I am pleased to report that since our report was issued, both Justice and INS have moved systematically to improve the INS management framework.

Debt Collection

Last summer, we testified on the rapid growth of delinquent debt and on the Department's deficient collection efforts.² We observed that Justice lacked a system to track, manage, and collect in a timely fashion civil debt referrals from other federal agencies -- over \$5 billion.

Subsequently, the Department appointed an Associate Deputy Attorney General for Debt Collection to centralize the Department's debt collection efforts. The Department has also committed to issuing a long term strategy to manage civil debt collection more systematically. Both actions are critical first steps to management of this program.

Bureau of Prisons

It is possible to achieve significant potential cost savings in the Bureau of Prisons' (BOP) multibillion dollar expansion

¹Immigration Management: Strong Leadership and Management Reforms Needed to Address Serious Problems (GAO/GGD-91-28, Jan. 23, 1991).

²U.S. Department of Justice: Overview of Civil and Criminal Debt Collection Efforts (GAO/T-GGD-90-62, July 31, 1990).

program.³ Between 1980 and 1989, the federal inmate population increased from 19,025 to 53,347, or 180 percent. Inmate populations are projected to further increase to 125,478 by 1999.

Projected costs could reach \$2.9 billion by fiscal year 1995 and substantially more if additional expansion is approved to accommodate BOP inmate projections for 1999. These amounts represent only a down payment on the ultimate cost of expansion; BOP estimates that operating facilities over their useful life costs 15 to 20 times the construction costs.

We found that if BOP modified the standards used in computing the need for additional facilities, it could substantially reduce--if not eliminate--its request for \$315 million in expansion funds requested for fiscal year 1992 and any additional prison expansion funding in fiscal years 1993 and 1994. The modified standards we proposed are already being embraced by state and local governments.

Asset Seizure and Forfeiture

At the end of 1990, Justice had a seized asset inventory of \$1.4 billion dollars which was being managed by the Marshals Service. We found that substantial savings were possible through better oversight and consolidation of the seized asset management programs of Justice and the Bureau of Customs.⁴ The Department has taken some action on our recommendations to implement improved internal controls over asset management and disposal, but program consolidation is still under consideration.

Information Resources

On June 27, I testified before the Subcommittee on Economic and Commercial Law, of this Committee that the Department is not adequately managing its automated data processing (ADP) resources or providing adequate computer security.⁵ Senior Department officials acknowledge that they have not effectively fulfilled their ADP management responsibilities--a matter of particular concern in light of the Department's plans to spend over \$2.7 billion for information technology and related services between fiscal years 1991 and 1995. After more than a decade, the Department still does not have a well integrated case management

³Federal Prisons: Revised Design Standards Could Save Expansion Funds (GAO/GGD-91-54, Mar. 14, 1991).

⁴Asset Forfeiture: Opportunities For Savings Through Program Consolidation (GAO/T-GGD-91-22, Apr. 25, 1991).

⁵Serious Questions Remain About Justice's Management of ADP and Computer Security (GAO/T-IMTEC-91-17, June 27, 1991).

system and is at least 3 years from its goal of having one.

Although part of overall ADP management, the requirement for computer security deserves special attention. Serious security vulnerabilities exist with life-or-death implications for those whose safety depend on anonymity. The Department has not taken all of the actions necessary to ensure that its highly sensitive computer systems are adequately protected.

Last summer, computer equipment exsessed by the U.S. Attorney's office in Lexington Kentucky, was later found to contain highly sensitive data, including grand jury material and information regarding confidential informants. In February, a different U.S. Attorneys office cautioned federal and local officials that, again, sensitive data that could potentially identify agents and witnesses may have been compromised. Our review showed similar patterns of neglect and inattention nationwide.

The foregoing examples illustrate the need for and benefit of effective congressional oversight of Department programs. Our ability to provide assistance to Congress in these reviews depended on obtaining reasonably timely access to relevant documents and officials within the Department.

The fact is, however, that we have not enjoyed consistently good access to the information necessary over the full range of our work. As we look less at administrative and support functions and more at investigation and prosecutorial activities of the Department, we have encountered increasing resistance to our requests for information. The problems are generally most prevalent at the Federal Bureau of Investigation (FBI) and in connection with our work related to financial institution fraud.

Reflecting widespread public concern about the extent of fraud in failed banks and thrifts, Congress has expanded both the authority and the resources of the Department toward prosecuting this fraud. Understandably, Congress has intense interest in tracking what the Justice Department is achieving and has enlisted our assistance. Our work has been impeded by a continuing dispute with the Department regarding our right of access to numerous documents and data.

In addition, the FBI routinely resists cooperating with our Office of Special Investigations (OSI). As you, Mr. Chairman, are well aware, OSI was established precisely to assist Congress in investigating allegations of fraud, waste, and abuse in federal government programs.

FBI Investigations of Terrorist Activities

In carrying out its responsibilities for investigating possible terrorist activities, the FBI must balance its investigative needs against the need to respect individuals' First Amendment rights, such as freedom of speech and the right to peacefully assemble. In February 1988 after documents released under the Freedom of Information Act raised questions about FBI investigations of American citizens exercising their First Amendment rights, we were asked by the Chairman of the Subcommittee on Civil and Constitutional Rights to review the FBI's international terrorism program. In September 1990, we issued our report, but because of data access problems we were unable to draw conclusions on whether the First Amendment rights of Americans had been violated.⁶

The FBI refused to provide us access to information regarding open investigations and insisted that information it considered sensitive be removed or "redacted" from the closed investigative case files they made available.

JUSTICE RESISTANCE TO GAO'S INVESTIGATIVE
AND FINANCIAL INSTITUTION FRAUD WORK

As we have turned our focus toward a critical Justice law enforcement and prosecutorial priority of the 1990s--white collar crime--we have encountered similar access problems:

The investigation and prosecution of white collar crime is a top national priority of Congress and the Department of Justice. This priority reflects a \$500 billion cost to taxpayers of savings and loan failures, a significant number of which it is believed were due to fraud. There are similar concerns with regard to a number of bank failures.

In response, the federal government has significantly intensified its efforts to investigate and prosecute bank and thrift fraud. Four hundred additional prosecutors, FBI agents, and other personnel have been deployed. Justice's fiscal year 1991 appropriation provided over \$112 million for bank and thrift fraud investigations and prosecutions--more than double the previous year's appropriation. This will translate into more agents and prosecutors. In addition, a "Special Counsel for Financial Institutions" has been established within the Department. The Special Counsel is responsible for coordinating all matters concerning the investigation and prosecution of financial institution fraud and ensuring proper allocation of resources to the most significant cases.

⁶International Terrorism: FBI Investigates Domestic Activities to Identify Terrorists (GAO/GGD-90-112 Sept. 7, 1990).

As the additional resources have been appropriated, Congress has voiced concerns regarding whether the resources are adequate, how well they are being used, and the results being achieved. In seeking to respond to these questions we have encountered access problems.

GAO Access and Investigative Authority

Congress has provided the Comptroller General with access to the records of federal agencies to support our oversight of federal programs and activities. GAO's basic access statute, 31 U.S.C. Section 716(a), requires that agencies give the Comptroller General requested information about the duties, powers, activities, organization, and financial transactions of the agency. This section applies to the Department, including the FBI, and does not exempt information related to investigative or prosecutorial functions. Additionally, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 gives GAO a broad right of access to the records of certain agencies including the Department of Justice.

In carrying out its investigative work, GAO operates as an agent of Congress. The Supreme Court has repeatedly recognized the broad scope of congressional investigative powers, stating that they are "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution".⁷ The Court has stated that Congress' investigative power extends to any matter subject to existing law or possible future laws and that the power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."⁸

Our problems at the Department generally fall into four broad categories

- (1) resistance to work done through our Office of Special Investigations (OSI),
- (2) delays in obtaining routine management information,
- (3) deletion of data from files, and
- (4) denial of any information related to ongoing investigations.

⁷Barrenblatt v. United States, 368 U.S. 189 (1959).

⁸Watkins v. United States, 354 U.S. 178 (1957).

GAO's Authority to Investigate Questioned

OSI was established in 1986 to investigate fraud, waste, and abuse in government programs. Investigative functions previously spread throughout GAO were centralized in OSI. OSI investigates allegations of fraud and abuse received from Congress, other sources, or arising from GAO's own work. OSI assesses the merit of the allegations, which may be criminal in nature; reports relevant facts to Congress; and refers possible criminal law violations to the appropriate executive branch investigative or prosecutorial offices for further action.

Almost from its inception, OSI has encountered resistance at the FBI. The lack of cooperation from the FBI has had significant adverse effects on our ability to investigate congressional concerns. For example, in our review of the USS Iowa explosion for the Senate Committee on Armed Services, agents of the Naval Investigative Service (NIS) told us that they had verbally communicated additional information to FBI analysts who had also investigated the incident. The FBI refused to allow us to interview the analysts, thus we were unable to determine if the NIS information conflicted with documentary evidence. It is worthy to note that the FBI denied us access even though the FBI analysts had already testified before the Senate Armed Services Committee about the investigation.

It is the official Department of Justice position not to provide assistance to OSI. Reasons cited by the Deputy Attorney General include

- the executive branch's "exclusive constitutional obligation . . . to conduct criminal investigations" and
- concerns that OSI's requests for information were unrelated to any review of FBI programs and procedures, but were related instead to "independent criminal investigations."

While the prosecution of criminal cases is, of course, reserved to the executive branch, both Congress and GAO clearly have authority to investigate matters that may involve potential criminality. For example, 31 U.S.C. 712 expressly authorizes the Comptroller General to "investigate all matters related to the receipt, disbursement, and use of public money." This authority extends by its plain terms to investigations of fraud, waste, and abuse in federal programs. We conduct investigations in support of Congress' legislative and oversight functions. Notwithstanding the broad statutory language, however, Justice argues that our authority under section 712 is "limited to financial audits." Indeed, as noted previously, we refer possible criminal violations to appropriate executive branch officials.

GAO's ability to meet its responsibilities to Congress in this work depends upon the willingness of the executive branch to acknowledge our statutory investigative and access rights and to cooperate affirmatively with us. In the final analysis, I believe that an approach of cooperation instead of resistance would better serve the interests of the executive branch and the public as well.

Delays in Obtaining Management Information

The second category of access problems involves delays in receiving routine management information--in some cases, information that we have been provided in the past. For example, to support our review of the adequacy of the Department's response to financial institution fraud, we requested from the FBI basic management information on

- workload by type of investigation,
- accomplishments that describe convictions, restitutions, etc., and
- investigation progress.

Our request was made in December 1998. The FBI had routinely supplied GAO with this data in the past. In this instance, the FBI ultimately provided the data but only after 6 months of negotiations. The FBI has not yet provided a promised briefing on its management information systems--a briefing designed in part to help us more explicitly frame our requests for data. The data in question is stored electronically; the FBI will not provide us data in electronic format.

Deletion of Data From Files

In some instances, Justice and FBI insist that information be deleted or redacted from requested files. The redaction process is time consuming and can delay the issuance of our reports. It also prevents us from knowing if all of the relevant or requested information has been provided.

This situation currently exists at the Executive Office of the U.S. Attorneys, where we have requested access to reports evaluating the performance of specific U.S. Attorney offices. Even though we have received these reports in the past, they are now being denied unless we agree to accept redacted versions of the reports and agree in writing to various other restrictions on our access to and disclosure of the information. Obviously, this is not acceptable. As a result, after several months we still do not have the requested reports.

Denial of Access to Open Cases

Under most circumstances, the objectives of our work can be met through a review of closed case files. However, in reviewing Department actions to pursue financial institution fraud, recent changes in the law coupled with the length of time it takes to prosecute a case, make data in closed cases obsolete. Thus, information regarding open cases is necessary for us to credibly evaluate the effectiveness of Department efforts to identify and prosecute these cases.

All requests we make for data related to open cases are categorically denied. The Department appears to be concerned that providing GAO with open case information might prejudice important prosecutions. We understand the Department's concern. We are confident that it can be accommodated through appropriate safeguards. GAO staff routinely handle some of the most sensitive government information and have an unblemished record in protecting it from inadvertent or otherwise inappropriate disclosure.

FUTURE OVERSIGHT WORK

Working with congressional committees, we have identified several areas that warrant oversight priority. The Department's continued resistance to our access will adversely affect our ability to do the needed work.

First, is the adequacy of the Department's efforts to counter white collar crime. Second, is how federal law enforcement agencies set their investigative priorities and measure their effectiveness. Third, is how well Justice has responded to the recommendations resulting from our 1986 general management review. Fourth, is a review of the effectiveness of the Drug Enforcement Administration in the war on drugs. And fifth, is a look at the overall management of the FBI.

In addition, another area that we believe warrants the Committee's attention is the interrelationships between the components of the criminal justice system. We believe this perspective is lacking at times in the administration's funding proposals. Recently, in response to a requirement in the Anti-Drug Abuse Act of 1988, we developed a model designed to provide Congress and federal agencies with estimates of the potential affect that budgetary changes for part of the federal criminal justice system would have on the system as a whole.⁹

At the request of Senator Bob Graham, we recently used the model

⁹Federal Criminal Justice System: A Model to Estimate System Workload (GAO/GGD-91-75, Apr. 11, 1991).

to estimate the national workload impact on the federal criminal justice system of enacting the budgetary increases provided by title X of S.1241, The Violent Crime Control Act of 1991. We found that a probable impact would be to increase substantially an already growing backlog of criminal justice defendants in the federal courts. The future value of the model will depend upon our ability to update the assumptions it contains, including those on the effectiveness of investigative and prosecutorial resources.

In closing, Mr. Chairman, I want to make clear that we understand the Justice Department's investigation and prosecution of criminal activity as being without question, a critical executive branch responsibility. By its nature, this responsibility carries with it a set of imperatives that limits the Department's discretion in disseminating certain types of information, to protect both the rights of the accused and the integrity of the investigative process.

In our view, however, these imperatives do not exempt the Department from congressional oversight. Nor do they prevent the Department from providing a much wider range of information about its activities to Congress and to GAO than is now the case. The current situation is counterproductive, with both GAO and the Department wasting valuable resources in dealing with these access issues.

In short, Mr. Chairman, it is important that the Justice Department reach a greater accommodation with GAO in connection with providing information and documentation in specific cases.

As we recognize the importance of its role, we would in turn invite the Justice Department to recognize that congressional oversight of executive branch activity is fundamental to the Constitutional powers vested in the legislature. A self-evident, but nonetheless critical prerequisite of effective congressional oversight is that Congress be fully informed. A partially informed Congress cannot balance interests fairly, resolve issues effectively, or deliberate soundly.

That concludes my prepared statement. My colleagues and I would be pleased to answer any questions.

Mr. EDWARDS [presiding]. We thank you, Mr. Socolar, for excellent testimony, and we thank you for a long, long period, indeed many years of cooperation with the House Judiciary Committee. Your work has been very valuable to all of us, especially to the subcommittee I chair, which has jurisdiction over the FBI.

I recall more than 20 years ago, the FBI had thousands upon thousands of internal security files, domestic intelligence they called them, on Americans all over the country who weren't even suspected of criminal activity, and that was the first audit ever done of the FBI's files by the General Accounting Office.

The GAO ran into the same problem that the Director and the Attorney General at that time insisted that there always be an FBI agent standing between your audit and the file. Somehow or another you worked out an arrangement where the report was issued. Almost immediately, all of those cases disappeared, and instead of many thousands of domestic intelligence files, today there are just a handful, all of which are legitimate terrorism cases, so you certainly did a good job under a severe handicap.

You worked out an agreement with the FBI in 1976, is that correct, and how is that working out?

Mr. SOCOLAR. That is correct. We still function under that agreement. We are, as I said in my statement, running into increasing problems under that agreement with regard to the kinds of work that we are getting into now.

As long as we are dealing with the straightforward administrative matters that don't touch on how the Department is pursuing its prosecutive activities, we seem to be having reasonably decent access.

Mr. EDWARDS. Mr. Fish, do you have any questions of Mr. Socolar?

Mr. FISH. Thank you. Yes, I do.

Welcome back, Mr. Socolar. Over the years, the GAO has prepared a number of reports on operations of the Department, some of which you described in your submission. How does the extent of recent GAO scrutiny of the Department compare with the extent of the scrutiny that you recall, say, 5, 10 or even 15 years ago?

Mr. SOCOLAR. We have always had difficulties in dealing with the FBI, particularly. As I said, and as you referred to, in connection with examination of administrative operations in the constituent agencies of the Department, we have not had too many problems.

It really, again, is in connection with their activities that relate to the criminal investigation type work that they do, that we do have the problem.

Mr. FISH. Well, let's talk about the FBI for 1 minute. Do you think it is fair to say that oversight and scrutiny of the Department of Justice functions generally is different from oversight, say, of Departments like HHS and HUD?

I cite the FBI as an example, which involves confidentiality concerns, which involves matters in litigation, which involves criminal matters, which might involve the Department's investigations that have not resulted in prosecutions.

It has always struck me that there is a delicacy, a comity, and judiciousness that is required in the oversight of the Department of

Justice. That is not so evident with respect to other Federal Departments.

Mr. SOCOLAR. No, I fully recognize that, and we at GAO recognize that these aspects of confidentiality and sensitivity are a factor to be contended with, but I would want to make clear that in dealing with those issues, we at the General Accounting Office are quite ready to make what are reasonable accommodations to those sensitivities.

For example, in reviewing even open case investigative files, we are not necessarily seeking to find out who confidential informants are and probing into areas that require the maintenance of that kind of confidentiality.

We are perfectly willing, for example, to have the name of a confidential informant blocked out. What we are interested in when we look at those files is to find out how the Department's processes are affected, how the responsibilities of the Department are being implemented. If we can't look at some of the basic data that gives us the kind of information needed to reach judgments on that, then we really can't do the kinds of reviews we are being asked to do.

Mr. FISH. You say in your testimony: "As we look less at administrative and support functions and more at investigation and prosecutorial activities of the Department, we have encountered increasing resistance to our requests for information."

Do you attribute that to the fact that the problems associated with investigating the Department's investigative and prosecutorial activities are a result of the need to protect privacy interests and avoid prejudicing prosecutions?

Mr. SOCOLAR. That is the reason that the Department gives us for not providing information. However, I again want to emphasize that our requests for access to data would not impinge on those confidences.

We are willing to work with the Department to develop arrangements and accommodations that will perfectly protect that kind of information. I should say, too, that we in the General Accounting Office, since our inception, have been dealing with the most sensitive kinds of information, from very highly classified defense information to other kinds of sensitive information, and have not, to my knowledge, been derelict in any premature disclosure of that kind of information.

Mr. FISH. Thank you. You did in your testimony, on page 8, express confidence that this concern can be accommodated through appropriate safeguards. Let's talk about that.

What kind of safeguards do you have in mind, and is there a problem here that providing such information, even with safeguards, could be interpreted by a court as a waiver of rights by the Department of Justice—with the result that defendants may be able to obtain information in pending cases that otherwise would not be available to them?

Mr. SOCOLAR. In terms of the information that we are seeking, I don't really see that that would be a problem, particularly in the context of the oversight function that we are performing. I don't think there is any question about the right of the Congress to oversee how the Department is implementing its authorities.

And in order to understand how the Department is implementing its authorities, it is necessary to look at this information, even if not on a wholesale basis, on a sample basis, that should not cause any great concern.

Mr. FISH. Taking a larger view, an historical perspective of your time in public service, can you compare the problems that GAO is encountering today in terms of access to Justice Department information with the problems GAO encountered in former times?

Mr. SOCOLAR. We have had a history of access problems, not only in the Department of Justice but in other agencies as well. For a long time, for example, we took the position that our access authority provided access to the Internal Revenue Service.

Mr. FISH. But specifically with the Department of Justice, which is the subject of this oversight hearing, has there been any change under various Attorneys General over the last 10 years?

Mr. SOCOLAR. Well, the need to enter into the agreement that has been referred to in 1976, stemmed from difficulties that we were having at that time.

Mr. FISH. Nineteen seventy-six?

Mr. SOCOLAR. That is correct.

Mr. FOGEL. Mr. Fish, I was involved in leading the work we did for Mr. Edwards' subcommittee back in the midseventies, looking at the domestic intelligence operations of the FBI, and indeed, in working with the Justice Department and the FBI to negotiate the agreement, my view is that we are having more difficulties now than we were once we negotiated this agreement.

There are more categorical denials of access to information today than there was from the midseventies on, so I think it is tougher for us to complete our work in a timely manner today than it was back then.

Mr. FISH. Well, now, Mr. Socolar, the previous panel stressed the enormous increase in the burden on the Department of Justice—the number of people incarcerated, the number of personnel, the range of activities, because the whole drug phenomenon has increased the size and the responsibilities of the Department—so wouldn't that be a contributing factor to the fact that you have a much larger range of scrutiny and, therefore, you are going to run into more obstacles?

Mr. SOCOLAR. I appreciate that, and again, where large volumes of data need to be compiled, we are not unreasonable. We understand that it takes time to put information together. The problem we are having, though, is most often with regard to initial denials of information and the need to spend time skirmishing to reach some kind of understanding, that the information will be provided. When that accommodation is reached, it doesn't necessarily take too long after that for the information to be furnished.

Mr. FISH. You remember in my opening statement, I said that so much preferable to confrontation would be for people of goodwill to accommodate their various interests. Thank you very much.

Mr. BROOKS [presiding]. Thank you, Mr. Fish.

Mr. Socolar, you have touched on this. You may want to amplify, and I wonder if you would elaborate: How do you respond to the Department's concerns that providing GAO access to open case

files could lead to unauthorized disclosure of highly sensitive law enforcement?

Mr. SOCOLAR. Well, we understand the concern, as I have said. It is a legitimate concern, but I think it is misdirected when it is applied to denying GAO access to records. As I mentioned earlier, we have been in business a long time. We have had access to a lot of sensitive Government information, and I think it is fair to state that our record with regard to premature disclosure of that kind of information has been virtually impeccable.

Mr. BROOKS. How about their record?

Mr. SOCOLAR. I think their record is perhaps not as good as ours. As I testified earlier with regard to their computer security, the Department has experienced some inadvertent dissemination of sensitive information through computers surplused without adequately looking into what information they contained.

Mr. BROOKS. Have there been instances where the FBI's refusal to cooperate has impeded GAO's investigation of waste, fraud, and abuse within the agency?

Mr. SOCOLAR. Yes, there has been, particularly with regard to a job that we viewed as being one of internal review of the Department itself. Allegations that we were asked to look at involved agents at the Houston motor pool in Texas, using motor pool assets to fix up their own cars, from tune-ups to using tires from the motor pool. Rather than allowing us to examine and investigate into that, the FBI precluded us, asserting that they were conducting their own internal investigation.

We were never allowed access to the basic data, and I don't know to this day what the ultimate result of their investigation was with regard to the FBI agents involved.

Mr. BROOKS. And the FBI employee who pointed this out as a fault was punished?

Mr. SOCOLAR. I understand that the investigation actually was directed against the individual making the allegations.

Mr. BROOKS. And it was 1987 when this occurred?

Mr. SOCOLAR. That is right.

Mr. BROOKS. One other comment, Mr. Socolar. Do you agree with the Attorney General's statement, "We believe that the Department provides timely and responsive information to the GAO with little wasted time and effort?"

Mr. SOCOLAR. Well, we have letters that we have received from the Department, and if you would read those letters, I think you would come to the fair conclusion that they are cooperative, but the facts of the matter are otherwise.

I find it somewhat incredible that the Department would take the position that they are fully cooperating with the GAO. We have continuing and increasing problems in obtaining timely information from the Department with regard to the kinds of work that the Congress is asking us to do these days.

Mr. BROOKS. Well, just keep putting your tooth under the pillow, the tooth fairy will come some night, maybe.

Now, in response to the committee's questions some time ago, the Attorney General has asserted that the GAO has no authority to review activities that are not statutorily created. I wonder what you think about that.

Mr. SOCOLAR. Well, we flatly disagree with the Department on that. We have authority under title XXXI of the United States Code—it is actually section 717—that provides us authority to review programs and activities of the Government agencies, and we simply don't view that as requiring some specific statutory program that we are going in to look at.

Mr. BROOKS. Now, Mr. Stienen, is it true that the FBI and the Department have challenged the constitutional authority of your office to conduct investigations?

Mr. STIENER. Thank you, Mr. Chairman. The answer to your question is definitely yes.

Let me expand just a little bit, if I may. The Bureau and other elements of the Department have challenged that constitutional authority almost from our inception in 1986. The Bureau has been the most adamant in its refusal to cooperate.

The September 1987 letter from Deputy Attorney General Burns to the Comptroller General first stated the position of OSI's unconstitutionality. In a subsequent letter to the Director of the FBI, the Comptroller General answered that position.

However, Director Sessions' September 1988 reply reiterated the FBI's position of nonassistance to OSI. On the basis of its position, the FBI in 1990 instructed its personnel worldwide not to assist us. That position has at times crossed over to other Justice agencies, and has caused significant delays in a number of OSI investigations, both completed and ongoing at this time.

Mr. Chairman, for the record, what I would like to do is enter four detailed examples of that lack of cooperation. One of them you will be especially interested in, because it is the INS example, wherein the delay was 14 months, and it was only after your personal involvement with the Attorney General that we were able to continue the investigation.

Mr. BROOKS. Well, submit those four, and without objection, fill out your answer, give us those details.

[The information follows:]

Yes, Mr. Chairman, the FBI and other elements of the Department of Justice have challenged OSI's constitutional authority almost from our inception in 1986. However, the FBI has been the most adamant in its refusal to cooperate with us. A September 1987 letter from Deputy Attorney General Arnold Burns to the Comptroller General first stated the position of OSI's unconstitutionality. In his letter to the Director of the FBI, the Comptroller General answered that position as we do now. "There can be no doubt as to the constitutional authority of GAO, as part of the legislative branch, to assist Congress by investigating matters within its legislative and oversight jurisdiction, including possible criminal activity." The Comptroller General is authorized by statute (31 U.S.C. section 712(1)) to investigate all matters related to the use of public money. However, Director Sessions' September 1988 reply reiterated the FBI's position of nonassistance to OSI.

On the basis of its position, the FBI in 1990 instructed its personnel worldwide not to assist us. That position has at times crossed over to other Justice agencies and has caused significant delays in a number of OSI investigations, both completed and ongoing.

For example, Mr. Chairman, you may recall that, at your request, OSI initiated an investigation of alleged misconduct and possible unlawful activity by a Regional Commissioner of the

Immigration and Naturalization Service (INS). This investigation was initiated in July 1988; however, after contacting INS, OSI was forced to delay its investigation because of an access problem that developed between OSI, the Department, and INS. We were informed that the Office of Professional Responsibility had initiated an investigation and that we would be denied access until that investigation was completed. It wasn't until you personally interceded, in May 1989, with the Attorney General that these access problems were resolved. In late September, 1989, OSI was provided access and was able to begin its investigation (14 months later). Since that time, INS has cooperated in this investigation, providing access to both INS personnel and documents. OSI has no other investigation with INS currently and it is therefore not known whether this cooperation will continue when we initiate a new assignment.

Recently we contacted the FBI for access to information concerning three of our investigations:

One of these investigations concerns your request that we collect information from appropriate law enforcement officials about industrial espionage. The FBI was contacted (February 1, 1991) and initially agreed to furnish requested information; however, it subsequently informed OSI that it would provide the information only to the Committee. It wasn't until the Committee refused to accept the information

that the FBI provided some of it to OSI. As a result, we made another request for the remaining information. The FBI has suggested that the information requested is either not available or should be obtained from other entities. The FBI suggested that it would provide a briefing to both OSI and the Committee. At the request of the Committee, OSI sent a letter (July 5, 1991) requesting clarification of what would be available to OSI and what was to be withheld from the briefing. While the FBI has indicated that it will cooperate in this case, the record reflects a pattern of prolonged discussions and delays in dealing with OSI/CAO.

A second OSI investigation involves a request from the Chairman, House Committee on Post Office and Civil Service. He requested OSI to investigate allegations of mismanagement and illegal activity by high-level officials appointed to the Christopher Columbus Quincentenary Jubilee Commission. At the request of the Committee, we contacted the FBI to determine whether it was conducting an investigation into the matter. We made several contacts at various levels of the FBI and received no response to our inquiries. The FBI did eventually advise us that it had an ongoing investigation and suggested that there be an exchange of information. Subsequently, however, the FBI informed OSI that it could not exchange information because of the FBI policy regarding OSI.

The third active investigation involves a request by Senator Pryor concerning allegations that certain officials of the Export-Import Bank received gratuities and abused travel regulations. The FBI contacted us, indicating that it had been requested to determine if we were investigating the matter. Saying that it was also conducting an investigation concerning the Export-Import Bank and had sole jurisdiction, the FBI refused to cooperate in our investigation. Instead it "wanted OSI to . . . brief the FBI on the OSI case." But the FBI would not say who its requester was or what allegations it was investigating. We later read in the Washington Post that the president of the bank had publicly requested the FBI's additional inquiry, yet the FBI was unwilling to provide what was already public information. The FBI missed an opportunity to exchange information and likely avoid duplication and possible interference with its own investigation.

In conclusion, the FBI's position of nonassistance is counterproductive, and it impedes our congressional oversight responsibility. With this position, the FBI has lost numerous opportunities to benefit from the exchange of information and keep itself informed of investigations that may parallel its own. With this position, OSI cannot fully respond to the legitimate needs of the Congress.

Mr. BROOKS. I have a question or two I will submit to you, Mr. Socolar. Mr. Conyers, do you have any questions?

Mr. CONYERS. Just briefly, Mr. Chairman. I think I get your drift. First of all, these are very important hearings, and they are raising the work and the relationship of GAO to the Congress in a very important way.

I want to talk with you, not on the record, about the police brutality investigation that is under way by the FBI, and we will be talking about that more.

I want to observe that the U.S. attorney's offices across the country leak all the time. I mean, for them to be worrying about your abilities to keep confidential matters within your own shop almost begs the question.

Now, you have identified 13 years here, going from Immigration and Naturalization Service to denial of access and deletion of data and so forth. These are all important issues, and I can assure you that a number of members of this committee are going to be following them quite carefully.

What about the white-collar crime prosecutorial problem? Is that separate from the financial fraud activity that you include in your work, or did you wrap those all together?

Mr. SOCOLAR. No, that is all part of the same problem.

Mr. CONYERS. Well, I was struck by the fact that we have got big problems not only in RTC but in DOJ as well, in terms of how this white-collar crime situation is developing. Now, you say this priority on prosecution of white-collar crime reflects a \$500 billion cost to the taxpayer.

Is that annual or is that a collective figure?

Mr. SOCOLAR. That is the overall total cost of the S&L bailout situation.

Mr. CONYERS. Right. Then, to which we add the ordinary white-collar crime that was going on before the S&L fallout occurred, what is that, in the range of about \$40, \$50 billion now?

Mr. SOCOLAR. I don't have that number.

Mr. CONYERS. Anybody here know? Well, it was \$40 billion a number of years back, and I can't imagine that it has gotten smaller. What we are concerned about is how, as the chairman indicated, we began to give you more support for getting this information.

This would be an entirely different organization in the Department of Justice if these 13 areas could meet muster, as GAO has described their problems. I think that we have now an increased will and commitment to do that. We want to work with you on this, and I want to encourage you to continue pushing as vigorously as you can to reduce the time between you retrieving the information and access that you need and to cut out some of this endless negotiations.

When you think about all the people that are just in Washington negotiating time, it is a catastrophe. I think that we in the Congress have to devise ways to give you even increased backup so that we can get to the job of making these changes that you are pointing out to us.

I want to commend you for it.

Mr. SOCOLAR. I think that is one reason we appreciate these hearings, and regard these hearings as important. It is important

for this committee and the Congress to be aware of the kinds of problems that we have been describing here today in connection with the kind of work that the Congress is interested in having us do.

Mr. CONYERS. Suppose that we cloned the chairman of this committee and put him over in GAO? I mean, I think it is fair to say there would be war going on. We wouldn't be here, diplomatically, in very careful language, pointing out how you have been stiffed time after time on just routine material.

I have begun to get a little taste of that when corporations come to the Government Operations Committee and say, we would love to give you the information your staff asked for, but it is proprietary, and therefore, it is secret to our company, and our competitors may find out.

Here we have files that are loaded not only with proprietary information of everybody else's, but classified information from the Government's point of view, ranging all the way up to top secret, and we have never had any problem with that.

We are very careful about who gets permission on our staffs to handle that sensitive information, how it is stored, how it is handled, how quickly we can get it back out of our files, and I know that you have been doing the same thing.

I urge you to continue with the same care and sensitivity with which you have handled these matters, because I think time is on your side, and whether the tooth fairy will come or not, I think it is time that we start really giving you further backup.

I think that is the purpose of these hearings. Thank you, Mr. Chairman.

Mr. BROOKS. Thank you.

Thank you, gentlemen. Enjoyed seeing you.

The next two witnesses will appear as a panel. As members of the committee know, Steven R. Ross is General Counsel to the Clerk of the House; and Charlie Tiefer is his talented Deputy General Counsel.

These two gentlemen have been asked to appear before this committee to respond to the constitutional challenges to congressional authority that have been raised by the Attorney General and this administration. They are the House's constitutional experts, and we are fortunate to have them on our side, the House's side.

Gentlemen, we thank you for being with us. Your prepared statements will be made a part of the record. We would be delighted to hear a summation by both of you, and then we will have a few questions.

STATEMENT OF STEVEN R. ROSS, GENERAL COUNSEL TO THE CLERK, U.S. HOUSE OF REPRESENTATIVES, ACCOMPANIED BY CHARLES TIEFER, DEPUTY GENERAL COUNSEL

Mr. Ross. I am Steven Ross, General Counsel to the Clerk of the House. In that capacity, I represent the House in litigation, including matters of separation of powers.

Our office also advises committees who are conducting oversight investigations with regard to claims of privilege that would have

been interposed in an attempt to thwart such committees' investigations.

I am accompanied today by Charles Tiefer, our Deputy General Counsel, who, as those of you who have worked with him have noted, brings in a level of intellectual intensity to these issues which is unparalleled and a wealth of information and knowledge.

Mr. Chairman, we have come to discuss the Department's unprecedented policies of blocking and even attacking Congress in its two most important constitutionally based functions: That is, the enactment of laws and the conduct of oversight investigations.

With respect to their attacks on the Congress' ability to enact laws and see that they are faithfully executed, we will talk in a few moments, and I will defer to Mr. Tiefer for that, about the Competition in Contracting Act attack, which has been discussed earlier this morning.

With respect to their attempts to block oversight, let me detail a few matters. First, the Attorney General has implemented a secret opinions policy, what he calls the executive branch's policy on the confidentiality of Department of Justice legal advice.

Confidentiality, in this context, means confidentiality from congressional oversight. The policy is being used not for some kind of tentative Justice Department suggestions or helpful advisory ideas for the Attorney General or for agencies, but for covering up from oversight the formal important pronouncements by the Department of the U.S. Government's legal positions on matters of highest importance, such as national security decision directives.

Memoranda such as these are not an oversight-free area of sacrosanct confidentiality. On the contrary, as we will show, these legal positions, from 1789 to the present, have necessarily been subjected to congressional oversight as part of the Government's accountability to the public.

We could cite literally dozens of examples from recent administrations that are contrary to this new unsupportable secret opinions policy. Attorney General Thornburgh's secret opinions policy is one of a number of secrecy policies that the Department has unveiled, but this one is unique.

If I might take just a moment, during Mr. Socolar's appearance, Mr. Fish asked him about whether providing the GAO with access to certain documents would constitute a waiver of a privilege that the Government might assert in pending or prospective litigation.

Mr. Socolar answered that with respect to the type of documents that he as an investigator was seeking, he did not see why that would particularly be a problem.

There is another answer to your question, and that is, the U.S. Court of Appeals for the District of Columbia Circuit has specifically ruled that providing information to Congress does not constitute a waiver of a privilege that the Government might assert in litigation, and that is in the case of *Murphy v. the Department of the Army*.

So, when the Department has suggested that their rationale for not providing information for the use of a congressional committee is that they fear that such a provision would constitute a waiver, that is legally not a sound position.

As I have said, the Department's secret opinion policy is unique of their various secrecy positions because it does allow them to shield authoritative legal memorandums formally establishing the position of the Department of Justice on matters of highest legal importance.

That policy has become quite simply an effort to refuse to show Congress these documents. Pursuant to this new policy, the Attorney General has decided he will not even show these opinions when their existence has been reported and described in the press and when this committee has held hearings about their significance.

In fact, in a recent extreme twist, the Attorney General has refused even to list for this committee the names and dates of such opinions to confirm their existence. Attorney General Thornburgh summed up his secret opinion policy in answers that he gave to the written questions propounded by this committee.

In question 14 you asked, "over the last 5 years has the Department's Office of Legal Counsel issued any opinions related to the issuance and implementation of national security decision directives?"

"If so, please provide a list of these opinions, including the title, subject, and date of issuance." The Attorney General's answer was that, "there are no published or publicly available Office of Legal Counsel legal opinions or analysis on this issue," and this is the point to highlight, "under the executive branch policy on the confidentiality of Department of Justice legal advice, we cannot disclose whether the Office of Legal Counsel has provided legal advice concerning the issues."

These national security decision directives which were referred to are directives of policy and law on national security issued on behalf of the President on subjects of the highest importance. It may be useful to give a couple of concrete examples of the Attorney General's refusal even to provide a list of the Justice Department's opinions on NSDD's.

As further discussed in our written statement, and as the chairman will recall, NSDD 145, the NSDD on computer secrecy, gave national security agencies the authority to control public access to unclassified information located in civilian agencies and even in the private sector, notwithstanding major first amendment implications. That NSDD was denied congressional oversight.

Another example that is particularly timely this week is the NSDD referring to implementation of the Comprehensive Anti-Apartheid Act of 1986.

That was NSDD No. 273, which has now been declassified and obtained in recent times. A full copy of that NSDD has been provided to accompany our statement. I have a short excerpt of the relevant portion of that NSDD on the easel next to us. After Congress' enactment in October 1986, over the President's veto of the Comprehensive Anti-Apartheid Act of 1986, this South Africa NSDD was issued by then President Reagan in May 1987.

This South Africa NSDD includes two crucial legal statements about how that act of Congress would be applied, which may prove to be of particular interest in oversight of legal matters. The NSDD says, "The United States will implement a strategy of active in-

volvement in South Africa and the region, consisting of the following elements: Good faith but nonvindictive implementation of the provision of the Comprehensive Anti-Apartheid Act of 1987."

Now, one may want to ask how the NSDD has been interpreted when it says that the act should receive, "nonvindictive implementation." I always thought the executive branch was duty bound to implement the statutes as enacted and that feelings of vindictiveness were not part of their judgment.

Now, those are questions that are properly a matter for congressional oversight, how a law is being implemented, but if the Congress is denied access to the administration's external policy directives to how they will implement a statute and how they are going about that implementation, it is impossible for Congress to do the appropriate followup oversight on how its laws are being administered.

To focus on the question even more closely, you will recall that during the enactment of this statute on the eve of the President's unsuccessful veto, the House received the bill back from the Senate with an ambiguous provision which some Senators thought would preempt State and local antiapartheid sanctions.

The House was so opposed to such a mistaken and pernicious interpretation of the bill that the House took an extraordinary step. The special rule for considering that bill, H. Res. 548, took the highly unusual step of stating in the text of the rule itself that, "It is not the intent of the House of Representatives that the bill limit, preempt or affect in any fashion the pertinent State and local actions."

Yet, the President's then classified and therefore not available to the Congress' South Africa NSDD nullified the express view of the House of Representatives and covertly committed the executive branch to active enforcement of a preemption policy aimed at wiping out State and local antiapartheid sanctions.

The South Africa NSDD said in its now declassified text that, "The executive branch should actively pursue enforcement of the Federal preemption provisions of the Comprehensive Anti-Apartheid Act." Now, it is not for me to question, and I am not here today to question whether the administration's implementation of that act was legally justified or not.

All I am saying is that it is appropriate for the Congress to have access to the information to allow it to make that determination because it is an appropriate determination for this committee and others in Congress to make as to whether the laws enacted by the Congress are being appropriately administered, but that absent information on how those laws are being administered, it is impossible for you to fill that function.

Let me defer to my Deputy, Charles Tiefer, for discussion of another controversial Justice Department opinion.

[The prepared statement of Mr. Ross follows.]

STATEMENT BY GENERAL COUNSEL TO THE CLERK
OF THE HOUSE OF REPRESENTATIVES
REGARDING THE ATTORNEY GENERAL'S WITHHOLDING
OF DOCUMENTS FROM THE JUDICIARY COMMITTEE
AND UNPRECEDENTED ATTACKS ON ACTS OF CONGRESS

Mr. Chairman, we have come to discuss the Department of Justice's unprecedented policies of blocking and even attacking the Congress in its constitutionally-based legislative functioning. The Attorney General has moved to frustrate and to attack the Congress as it performs its two chief constitutional responsibilities: enacting the laws, and conducting oversight of the Executive Branch to see that it faithfully executes the laws.

Six years ago, we testified before you when Attorney General Edwin Meese first claimed the power to declare statutes unconstitutional, and attempted to implement his unilateral seizure of that great power by an assault on the Competition in Contracting Act ("CICA"). We surely all assumed that when this Committee and the courts scourged Attorney General Meese for that grab for unconstitutional power, and when the courts repeatedly and, in fact, unanimously affirmed our defense of CICA on behalf of the bipartisan leadership of the House of Representatives, that would be the last we would hear of that particular issue.

Yet we are back again -- again with the Attorney General, this time Attorney General Thornburgh, again taking for himself the power to declare statutes unconstitutional, again attacking the very same Competition in Contracting Act, and again asserting unprecedented powers. In the past two weeks, Attorney General Thornburgh has claimed a power, never seen before in two hundred

years of United States law, for the Justice Department to file a suit in the name of the United States to have a law of the United States struck down. This is no case, of the kind that has occurred occasionally over the past two centuries of a private party raising constitutional issues or of the Executive Branch "conceding" unconstitutionality in a privately initiated lawsuit. The Attorney General seeks to usurp the power to decide which laws to change, and to get them changed, not by coming to Congress, but by employing the resources of the United States government to initiate attacks on the duly enacted laws.

To block oversight, the Attorney General has implemented a "secret opinions" policy -- what he calls "the Executive Branch policy on the confidentiality of Department of Justice legal advice." "Confidentiality" in this context means confidentiality from Congressional oversight; the policy is being used, not for some kind of tentative Justice Department suggestions or helpful advisory ideas for agencies, but for the covering-up from oversight of the formal and potent pronouncements by the Department of the United States government's legal positions on matters of the highest importance, such as National Security Decision Directives.

Memoranda such as these are not an oversight-free area of sacrosanct confidentiality. On the contrary, as we will show, these legal positions from 1789 to the present have necessarily been subjected to Congressional oversight as part of the government's accountability to the public. We will cite literally dozens of examples from the Carter Justice Department and

especially the Reagan Justice Department that are contrary to this unsupportable "secret opinions" policy.

Moreover, together with blocking oversight by its "secret opinions" policy, the Justice Department has added recalcitrance during oversight of allegations of waste, fraud, and criminality in the Justice Department itself, as evidenced by its continuing refusal to provide documents for this Committee's INSLAW investigation.

We will discuss these two matters -- the blocking of oversight by the making of secret law, and the assault on CICA -- separately. (For some of the detailed aspects, I may have the deputy counsel, Charles Tiefer, add some pertinent information, during the course of our appearance.)

I. BLOCKING CONGRESSIONAL OVERSIGHT

THE "SECRET OPINIONS" POLICY

With regard to the resistance to oversight, both parts of our analysis -- the "secret opinions" policy and the recalcitrance regarding INSLAW -- focus on the Office of Legal Counsel. This is the office that implements for the Attorney General this "secret opinions" policy,¹ and it has been given by Attorney General Thornburgh the responsibility of addressing -- and apparently stalling by frivolous assertions of privilege -- this Committee's INSLAW inquiry.

¹ Congress has given the Attorney General the statutory authority to give such opinions, whether raised by the civilian or military departments, and he has delegated that authority to the Office of Legal Counsel. See 28 U.S.C. § 512 (opinions to civilian departments) and § 513 (opinions to military departments).

Attorney General Thornburgh's secret opinions policy, one of a number of secrecy policies for the Justice Department but a unique one in terms of the importance of the matters now being cloaked, concerns the authoritative legal memorandum opinions formally establishing the position of the Department of Justice on matters of the highest legal importance. That policy has become, quite simply, to refuse to show Congress these documents. Pursuant to this new policy, the Attorney General has decided he will not even show these opinions when their existence has been reported and described in the press, and when this Committee has held hearings about their significance. In fact, in the recent extreme twist, the Attorney General has refused even to list for this Committee the names and dates of such opinions.

Attorney General Thornburgh summed up the "secret opinion" policy in the answers he personally gave to written questions sent for the Committee by Chairman Brooks in anticipation of this hearing, which we were asked to address. Perhaps one of the most significant written question-and-answers concerns opinions of the Office of Legal Counsel, under Assistant Attorney General Luttig and his predecessors, about the issuance and implementation of National Security Decision Directives, or NSDDs.²

As we will discuss below, in the past, major Office of Legal Counsel opinions have regularly been scrutinized by Congress on national security and other subjects. NSDDs represent

² These are now called National Security Directives, or NSDs, during the Bush Administration.

enunciations on behalf of the President of the law and policy of the government on matters of the highest importance, and the associated opinions of the Justice Department have corresponding significance. Some might consider oversight of the Justice Department's positions on such matters one of the most important functions of the House Judiciary Committee.

However, the new "secret opinions" policy puts an effective end to that function of this Committee. Attorney General Thornburgh says he will not even "disclose whether the Office of Legal Counsel has provided legal advice concerning the[se] issues," much less provide the actual OLC opinion. The written question submitted by Chairman Brooks, and the Attorney General's personal answer, are as follows (with emphasis added):

CHAIRMAN BROOKS' QUESTION 14: Over the last five years, has the Department's Office of Legal Counsel issued any opinions related to the issuance and implementation of National Security Decision Directives (NSDD's)? If so, please provide a list of these opinions, including the title, subject, and date of issuance.

ANSWER OF ATTORNEY GENERAL THORNBURGH: There are no published or publicly available Office of Legal Counsel legal opinions or analyses on this issue, and under the Executive Branch policy on the confidentiality of Department of Justice legal advice, we cannot disclose whether the Office of Legal Counsel has provided legal advice concerning the issue.

The Justice Department further explicated its "secret opinions" policy in its answer to another question put in writing by Chairman Brooks in anticipation of this hearing. There have been serious accusations that the Administration's stated position of being "tough on crime" conflicted with the positions it actually took on the issue of sanctions against corporate organizations for

white collar crime. It was widely reported that the differing positions taken by the Justice Department before the Sentencing Commission figured prominently in Deputy Attorney General Donald B. Ayer's resignation. It would obviously be difficult to untangle just what the position of the Justice Department has been, without seeing the pertinent opinions. Yet, the Justice Department says "we cannot disclose whether any component of the Department has provided legal advice concerning this issue." The question and answer were as follows:

CHAIRMAN BROOKS' QUESTION 35: Has the Department prepared a statutory analysis of the [Sentencing] Commission's authority to issue binding organizational sanctions? Please provide any opinions or analyses regarding this authority.

ANSWER OF DEPARTMENT OF JUSTICE: There are no published or publicly available Department legal opinions or analyses on this issue and under the Executive Branch policy on the confidentiality of Department of Justice legal advice we cannot disclose whether any component of the Department has provided legal advice concerning this issue.

This amounts to telling the House Judiciary Committee it has no right to determine the position of the Justice Department on whether it really is tough on crime or just talks that way at convenient times.

In one particularly crucial instance, this Committee has developed extensive experience with the ramifications of the Department's "secret opinions" policy. It developed this experience in seeking to obtain the Justice Department's famous - - but still secret and withheld -- opinion on the legality of seizing persons in foreign countries, including when necessary foreign government leaders, to bring them to the United States for

trial. According to published reports, the Justice Department's Office of Legal Counsel issued a legal opinion in 1989 entitled "Authority of the FBI to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities."

According to the published reports, the opinion overruled the previous legal position of the Justice Department established in 1980, and established the new legal position that as a matter of American law, the FBI could apprehend fugitives in foreign countries without the consent of those foreign countries, even though that might violate customary or other international law. The question has often arisen, regarding proposals to make extraterritorial seizures of individuals -- from accused criminals of low rank up to General Manuel Antonio Noriega of Panama, and perhaps higher.

The legal position of the Executive Branch on this matter has great importance for some obvious reasons. That question of overseas seizure is clearly significant enough on its own. However, even more important, a likely rationale used by the Justice Department in that secret opinion to justify extraterritorial seizures without having even asked Congress for statutory authority may well be that the Executive Branch claims itself to be authorized by its inherent extra-statutory prerogatives to commit some kinds -- perhaps many kinds -- indeed, perhaps all kinds -- of violations of international law even without statutory authorization by the Congress.

In other words, that secret opinion may be, in its implications, a breathtaking claim of Executive prerogative -- that without partnership by Congress, the Executive Branch has the authority to freely, at will, whenever it chooses, roam the world acting in violation of the rules and norms between nations. This is certainly an issue of tremendous controversy in the international law community.

It may well have enormous implications for Congressional statutory enactments in many areas such as the extradition laws, posse comitatus, diplomatic immunity, structuring of statutory interactions with foreign courts and foreign departments or ministries of Justice, as well as implications for defense, trade, other aspects of international commerce, immigration, foreign aid, statutory criminal provisions with extraterritorial application, and a host of other areas. At least, the Congress has a powerful interest in knowing the basis on which the Justice Department overruled its prior position and decided that it has no need even to ask Congress for authority to violate international law in this regard.³

The Subcommittee on Civil and Constitutional Rights, under Chairman Don Edwards, held a hearing on this opinion, FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and

³ See, e.g., Glennon, Raising the Paquete Habana: Is Violation of Customary International Law By the Executive Unconstitutional?, 80 Nw. U. L. Rev. 321 (1985); Glennon, Can the President Do No Wrong?, 80 Am. J. Int'l Law, 923 (1986); Paust, The President Is Bound by International Law, 81 Am. J. Int'l Law 377 (1987).

Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989),⁴ with testimony by Assistant Attorney General Luttig's predecessor, then-Assistant Attorney General for the Office of Legal Counsel (now Deputy Attorney General) William Barr. He admitted the OLC opinion's holding and importance:

MR. BARR: The Department of Justice issues legal advice on matters of domestic legal authority. The issue very simply is whether or not there is legal authority in the United States, under our own domestic laws, to engage in extraterritorial arrests without the consent of the host government.

We issued an opinion, as a matter of law, saying, yes. . . .

The Department of Justice says, yes, we do have the authority under our own laws.

Hearings at 60-61. A previous OLC opinion in 1980 had given the opposite position. Assistant Attorney General Barr explained:

MR. BARR: Our office was asked by the FBI to reexamine the 1980 opinion, and we did that, and I think there was broad consensus within the administration that the 1980 opinion was fundamentally flawed and should be reexamined.

Id. at 62.

Chairman Brooks wrote to the Attorney General on January 31, 1990, that "I do not believe that it is either legally supportable or in the nation's best interest for the Justice Department to pick and choose which opinions of the OLC are made available to the Congress." The Subcommittee on Civil and Constitutional Rights intensified its efforts this past year, with support by the Committee Chairman, to obtain this singularly vital opinion, but

⁴ The original public report of this opinion in the Los Angeles Times was published on October 13, 1989. It stated that the opinion was issued on June 21, 1989. The hearing was held on November 8, 1989.

without success. This Committee is in the position of having only the previous (1980) OLC opinion as a prior statement of the legal position of the Department of Justice, but not the opinion which supersedes it. Under Attorney General Thornburgh and Assistant Attorney General Luttig, the Office of Legal Counsel still continues to insist that no matter how important it is to conduct oversight over one of its formal opinions, it can, and will, keep the opinion a secret from Congress.

WITHHOLDING OF NSDD OPINIONS

It may be useful to give some concrete examples of the significance of one of the latest manifestations of the "secret opinions" policy, namely, the refusal even to provide a list of the Justice Department opinions on NSDDs.⁵ Chairman Brooks will recall when he chaired hearings on NSDD-145, the NSDD on computer secrecy; that NSDD gave national security agencies the authority to control public access to unclassified information located in civilian agencies and even the private sector, notwithstanding the major First Amendment implications. When hearings about NSDD-145 were initially blocked by an executive privilege claim on behalf of the National Security Adviser, Admiral John Poindexter, the Committee on Government Operations voted unanimously to subpoena him and his subordinate, Kenneth de Graffenreid.

Those Congressional subpoenas issued on February 27, 1987. An initial claim of executive privilege was withdrawn on March 17,

⁵ For background on NSDDs and Congressional oversight, see Relyea, The Coming of Secret Law, 5 Govt. Information Q. 97, 109-110 (1988).

1987, by a letter from the new National Security Adviser, Frank C.

Carlucci, who wrote:

We trust the Committee recognizes the chilling impact which the formal presentation of views by a former member of the President's staff in a context such as this can have on the candid unvarnished advice which the President's closest aides are willing to give. . . .

Nonetheless, if the Committee deems it essential that RADM Poindexter and Kenneth de Graffenreid appear before the Committee to respond to your questions regarding NSDD 145, NTISSP 2, and computer security policy, we will not object to such an appearance.

Computer Security Act of 1987: Hearings Before a Subcomm. of the House Comm. on Government Operations, 100th Cong., 1st Sess. 389 (1987).

By the way, that particular hearing shed light on yet another of General Thornburgh's personal answers in anticipation of this hearing on withholding secret opinions, which went as follows:

QUESTION FIVE BY CHAIRMAN BROOKS: Recently, the CIA has refused to cooperate with investigations and studies conducted by GAO at the request of the Judiciary Committee. . . . Has the Department issued any legal opinions . . . concerning this issue?

ANSWER BY ATTORNEY GENERAL THORNBURGH: There are no published or publicly available Department legal opinions or analyses on these issues and, under the Executive Branch policy on the confidentiality of Department of Justice legal advice, we cannot disclose whether any component of the Department has provided legal advice to the CIA or any other client concerning the issue. . . . As its legislative history makes clear, the Intelligence Oversight Act establishes a comprehensive scheme for congressional oversight of intelligence activities that constitutes the exclusive means of congressional oversight.

Attorney General Thornburgh's answer is particularly remarkable in two respects. First of all, it invokes secrecy to withhold opinions from Congress which themselves were opinions on

withholding evidence from Congress as secret. In other words, the secrecy has now piled up so thickly, in so many layers, that the Justice Department first may determine that secrecy from Congress is legal, set that forth in a secret opinion, then refuse to disclose even the existence of that secret opinion, citing further grounds of secrecy. Thus, not only cannot the Committee conduct its investigation, it cannot even investigate why it is not being allowed to conduct its investigation. Not only are the doors and windows locked, but they have been bricked over.

Second, the Attorney General stated in his answer that his apparent rationale in these secret opinions on secrecy was that the Intelligence Committees are the only ones with jurisdiction to look at these matters. Yet if such a secret opinion were to see the light, this Committee might well have the tools to disprove that secret opinion as erroneous. For example, at that very hearing before Chairman Brooks on NSDD-145 just discussed, the Computer Security Hearing, a key witness was Representative Anthony Beilenson, then chairman of the pertinent subcommittee of the House Intelligence Committee, and subsequently chairman of the full House Intelligence Committee. Chairman Beilenson, far from contending that the Intelligence Committee was, as the Attorney General would have it, the exclusive means of congressional oversight of such matters, testified freely that the Intelligence Committee welcomed oversight by other committees.⁶

⁶ To quote one discussion between the Ranking Minority Member, Mr. Horton, and Representative Beilenson on behalf of the Intelligence Committee:

Nevertheless, Attorney General Thornburgh refuses even to list his department's opinions regarding implementation of NSDDs, placing a major obstacle in the way of Congressional follow-up about the legal positions taken since that hearing.

Another example is particularly timely this week, since the Administration is apparently on the verge of implementing an interpretation of the Comprehensive Anti-Apartheid Act of 1986 which would allow the termination of sanctions against South Africa. There was a National Security Decision Directive Number 273, "United States Policy Toward South Africa," issued late in the Reagan Administration -- it may or may not still be in effect -- which has been declassified and obtained only in the last month. A copy accompanies our statement. This will be the first Congressional proceeding to discuss the declassified NSDD on South Africa. After Congress's enactment in October 1986 -- over President Reagan's veto -- of the Comprehensive Anti-Apartheid Act

MR. HORTON: I think it's very important to highlight the issue that we are concerned with. . . . This subcommittee is concerned with [NSDD-145] because it does have to do with national policy on telecommunications and automated information system security. . . . [T]his whole NSDD-145 . . . is the bible, as it were, today.

MR. BEILENSON: . . . I understand the policies and the problems that are posed by that particular directive, and I and others on behalf of our chairman, Mr. Stokes, congratulate the gentlemen's committee for undertaking this study. . . . [I]t's an inquiry which needs to be undertaken, and we are happy that the gentleman is undertaking it, and we would like to be of help.

Computer Security Act of 1987, supra, at 396-98. To understand the nature of multiple committee jurisdictions, see C. Tiefer, Congressional Practice and Procedure 82-87 (1989).

of 1986, the South Africa NSDD was issued by President Reagan in May 1987.

The South Africa NSDD includes two crucial legal statements about how that Act of Congress would be applied, which may prove to be of particular interest in oversight of legal matters. That NSDD says "The U.S. will implement a strategy of active involvement in South Africa and the region consisting of the following elements [g]ood faith but non-vindictive implementation of the provisions of the Comprehensive Anti-Apartheid Act of 1986" Now, one wants to ask, how has the NSDD been interpreted when it says the act should receive "non-vindictive implementation?" Is that a code for something, or does it just mean that the Administration was afraid its officials were so fiercely anti-apartheid that they would be vindictive against South Africa in implementing the 1986 Act? Why not let this Committee pursue the matter?

To focus even more closely, it will be recalled that during enactment process for the Comprehensive Anti-Apartheid Act of 1986, on the eve of the President's unsuccessful veto, the House received the bill back from the Senate with an ambiguous provision which some Senators had thought would pre-empt state and local anti-apartheid sanctions. The House was so opposed to such a mistaken and pernicious interpretation that the House took an extraordinary step; the Special Rule for considering that bill, H. Res. 548, took the highly unusual step of stating in the text of the Rule itself that "it is not the intent of the House of Representatives that the

bill limit, pre-empt or affect, in any fashion" the pertinent state and local actions. (See 1986 Cong. Q. Almanac 371.)

Yet, on this matter of the legal interpretation of an Act of Congress immediately thereafter enacted over President Reagan's unsuccessful veto, the President's then-classified South Africa NSDD nullified the expressed view of the House of Representatives, and covertly committed the executive branch to active enforcement of a pre-emption policy aimed at wiping out state and local anti-apartheid sanctions. The South Africa NSDD said, in its now-declassified text, that "the executive branch should actively pursue enforcement of the federal pre-emption provisions of the Comprehensive Anti-Apartheid Act of 1986." In other words, the secret legal interpretation in the South Africa NSDD of a law meant to strengthen anti-apartheid sanctions, was to weaken such sanctions. This constitutes one of the most amazing interpretations of law in recent years, by which a Presidential NSDD created secret law directly antipathetic to the expressed will of the Congress even when Congress has overridden a veto. If there are OLC opinions that implemented this NSDD, or similar NSDDs making such interpretations of Acts of Congress, should not the Congress see them?

A final example of the importance of NSDD's was a report, "Missed Signals in the Middle East," Washington Post Magazine, March 17, 1991. This article asserts that "National Security Directive 26, signed by [President] Bush in October 1989," id. at 21, set United States policy toward Iraq; particularly, in the

context of interpreting our trade laws regarding exports of chemical, biological, and nuclear war-potential material, the article attributes to the alleged NSD the alleged view that "U.S. Companies would be encouraged to participate in the post [Iran-Iraq] war reconstruction of Iraq . . . as long as this did not conflict with U.S. concern about nuclear proliferation." *Id.* Attorney General Thornburgh's position is that any OLC opinions implementing NSDs will not be shown to or even listed for this Committee. Only the Washington Post Magazine, it seems, deserves to deal with such subjects, not the Congress.

INSLAW WITHHOLDING

Regarding another category of Justice Department blocking of oversight, the seemingly never-ending stonewalling by the Justice Department of the INSLAW investigation, this Committee previously held in-depth hearings, which developed the background at length. The Attorney General's Refusal to Provide Congressional Access to 'Privileged' INSLAW Documents: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (Dec. 5, 1990).

In brief, INSLAW, which supplied case management software to the Justice Department, was driven into bankruptcy by withholding of payments from the Justice Department. Elliott L. Richardson, former Attorney General and counsel to INSLAW's owners, testified at this Committee's last hearing, "We believe, Mr. Chairman, that these attempts to acquire control of [the INSLAW software] were linked by a conspiracy among friends of Attorney General Edwin

Meese to take advantage of their relationship with him for the purpose of obtaining a lucrative contract. . . ." INSLAW Hearing at 6. The bankruptcy judge, Judge Bason, who tried the INSLAW case, testified "as the evidence showed and as I held, the Justice Department stole Inslaw's valuable property and tried to drive Inslaw out of business." Id. at 56.

As early as August, 1989, Chairman Brooks wrote Attorney General Thornburgh about this Committee's investigation, and Attorney General Thornburgh wrote back on August 21, 1989 -- almost two years ago -- that "I can pledge this Department's full cooperation with this Committee in this matter." Id. at 170. Nevertheless for two solid years the Attorney General has dragged his feet on providing this Committee with access to key documents.

Last December 4, 1990, on the eve of this Committee's Inslaw Hearings, Assistant Attorney General Lee Rawls wrote to Representative Hamilton Fish, the Ranking Minority Member, another letter insisting on, and justifying, a refusal to provide documents. The Committee will recall that the Rawls letter denied the Committee's oversight power, linking the document withholding to the Justice Department's contention that "Congressional investigations are justifiable only as a means of facilitating the task of passing legislation. . . . [and] Congress cannot legislate concerning the Department's discharge of the Executive's constitutional responsibility for enforcing the laws through litigation." Inslaw Hearings at 164. In other words, Congress has a power to legislate, but not a power to oversee. Two centuries

of Congressional practice and a century of Supreme Court pronouncements were set at naught by this proclamation.

This was so far out of line that Representative Hamilton Fish, the recipient of that letter, interrupted our testimony at that hearing -- quite appropriately, of course, to say:

MR. FISH: Mr. Ross, I intend to go into some detail with you when the opportunity arises as to the thrust of this argument, but I want to concede at this point that the sentence that you picked out from this 2 1/2 page letter from the Department of Justice is, in my judgment, also not a technically correct statement of the power of the Congress in this regard

INSLAW Hearings at 78. We noted at that time, and continue to observe, that the Rawls letter denial of Congress's right to conduct oversight on behalf of the public was no accidental or idle comment. Rather, it represented the foundation of an entire grand structure of Justice Department doctrine on secrecy and withholding in the face of Congressional oversight. Id. at 79.

Following that hearing, numerous public comments and press articles and editorials condemned the Department's stonewalling,⁷ and the Attorney General gave responsibility to Assistant Attorney General J. Michael Luttig of the Office of Legal Counsel to address the matter. Three more months passed, before Assistant Attorney

⁷ A typical discussion was the Washington Post editorial that month, "Another INSLAW Inquiry":

It's hard to understand why the attorney general is refusing to cooperate. . . . [T]he charges are extremely serious. The Judiciary Committee has not only the right but the responsibility to look into these allegations, and the department's stonewalling only undermines its own credibility, not just with the committee that oversees the department's operations but with the public as well.

A copy accompanies this statement.

General Luttig provided any proposal at all, and then he provided a proposal which we analyzed at the Committee's request. Our analysis was furnished to the Justice Department, which made no attempt to disagree. As we noted, the Luttig proposal "includes an array of conditions, requirements, prerequisites and incidental procedures and delays. . . . Considering that the Committee held its hearing on December 5, it took the Department almost three months to come up even with this proposal that would just now start a further process. There is simply no merit, at this late date, in this array of further obstacles and ancillary delays." Memorandum of March 22, 1991, at 1-2. (A copy accompanies this statement.)

The Luttig proposal thus created further delays. Eventually, through the patient accommodation by the Committee Chairman, an acceptable arrangement was mutually agreed to that was intended to end the matter by guaranteeing, in writing, access by Committee investigators to all the documents, without delay. Yet, despite the agreement, now, eight months after the last hearing, the Committee's investigators still continue to be refused even access, let alone copies, to hundreds of INSLAW documents.

The withholding is on the same baseless argument -- attorney-client privilege during pending proceedings -- that was raised and rejected at the December 5 hearing, and that has been raised without merit to justify the "secret opinions" policy. What the INSLAW matter makes clear is that in an instance when the top officials of the Justice Department itself are the subject of trial

findings by Judge Bason and allegations by Elliott Richardson of waste, fraud, and conspiracy, the Department will raise attorney-client privilege during pending proceedings as one of a sequence of delaying and diversionary tactics.

As we testified at length at the December 5 hearing the withholding of documents was unjustified in light of the numerous precedents, including Teapot Dome, Watergate, EPA/Anne Gorsuch, and Iran-contra. Inslaw Hearings at 77-104. We summed up:

that time and again, Attorneys General have put the excuse of pending proceedings as a basis for avoiding legitimate Congressional oversight; that the Supreme Court has confirmed the validity of such oversight; that Congress has confirmed the validity of such oversight; that Congress has time and again insisted, successfully, on obtaining the internal records of the Department despite such claims by Attorneys General; that when Congress has done so, it has been vindicated by the discovery of waste, fraud, abuse, and criminality; and that often Attorneys General have been convicted, or required to resign, after the crumbling of such claims for withholding records.

INSLAW Hearings at 94.

HISTORY CONTRADICTS THE "SECRET OPINIONS" POLICY

The Committee may hear from the Justice Department that this secret opinions policy is merely an extension of the familiar attorney-client privilege. Just as a client of a private lawyer can keep his advice secret, we may be told, so the Justice Department can choose whether it wants any Congressional oversight of its opinions.

That line of justification is utterly without merit. This secret opinions program is flatly at odds with this country's strongest traditions about democratic accountability and the rule of public law. Since the beginning of the Republic, the Attorney

General's opinions have been subjected to oversight under Congress's direction. The new policy is a radical break with that history.

The vital history of the oversight of the Justice Department's opinions, until the start of this recent and unprecedented policy, traces back to when the First Congress created the office of Attorney General in 1789. Congress prescribed that there be appointed "a meet person, learned in the law, to act as attorney general for the United States . . . to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." The First Judiciary Act, Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92. That law, with minor modifications, is still on the books over two centuries later. This Congressionally assigned function of rendering authoritative opinions on matters of public law soon took on the highest importance. "The preparation of official opinions was unquestionably the most laborious of the Attorney General's duties," according to the history of the Attorney General and the Justice Department prepared by former Attorney General Homer Cummings and Carl McFarland, Federal Justice: Chapters in the History of Justice and the Federal Executive 89 (1937).⁸

⁸ As a recent commentator writes, "From the date of its creation, the office [of Attorney General] was seen by Congress as a valuable source for legal opinions on the propriety and constitutionality of proposed legislation." Palmer, The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General, 11 Pepperdine L. Rev. 331, 349 (1984).

Given the vital importance of avoiding a body of secret opinions, in 1840 the House of Representatives formally called upon the Attorney General, by House Resolution, to publish his opinions. Specifically, to quote from the history of the Justice Department by Attorney General Cummings, "the first compilation of the opinions was made in 1840 in response to a resolution of the House of Representatives." Cummings & McFarland, *supra*, at 91 & n.62 (citing Resolution of March 23, 1840, in H.R. Jour., 26th Cong., 1 Sess. 665 (1840)).

"Attorney General Gilpin pushed the project vigorously and on March 1, 1841, sent the President all the opinions of the Attorneys General he could obtain. The collection . . . at once appeared as a printed document of the House of Representatives. . . . The bulk of the opinions of the chief law officer of a great commonwealth became accessible to the public." Cummings & McFarland, *supra*, at 91. During 1841, "The Opinions of the Attorneys-General of the United States from the Beginning of the Government to 1841," which was transmitted by the President to Congress [was] printed as a House Document." J.S. Easby-Smith, The Department of Justice: Its History and Functions 12 (1904). Attorney General Gilpin explained, in a letter transmitted to the House of Representatives by President Van Buren:

In compliance with the resolution of the House of Representatives. . . . I have now the honor to transmit copies of all such opinions of the Attorneys General of the United States as I have been able to obtain. Previous to the year 1817, no records of such opinions were preserved. It has therefore been necessary to procure them, as far as practicable, from the different departments to which they were sent. . . .

H. Ex. Doc. No. 123, 26th Cong., 2d Sess. 1 (1841) (reproducing letter of Attorney General of March 1, 1841). In short, the notion of secret opinions was anathema; hence, when the House called for the opinions, the Attorney General complied.

In requiring the opinions from the beginning of the government be published, the House of Representatives did not intend just a one-time publication. Ten years later, the House again directed that the later opinions be published, and the Attorney General again complied. As Cummings and McFarland continue, "In 1850, the House called for the opinions since 1841, and to collect them the President employed his friend, Benjamin F. Hall. . . . The opinions appeared in two volumes." Cummings & McFarland, *supra*, at 92 & n.63 (citing Resolution of July 24, 1850, H.R. Jour., 31st Cong., 1st Sess. 1176 (1850); Cong. Globe, 31st Cong., 1st Sess. 1475-76 (1850); House Ex. Docs., VII, Pts. 1 and 2, No. 55, 31 Cong., 2 Sess.). In other words, again the House of Representatives published the Attorney General's opinions as a House Document. Attorney General Thornburgh will look in vain for evidence that these successive Attorneys-General, who knew attorney-client privilege as well as anyone, thought it pertinent when the House of Representatives called for such opinions.

Quite the opposite: the Attorneys-General themselves set forth both the high public status of such opinions, and conceded the proper role of Congressional oversight. In 1854, Attorney General Caleb Cushing summarized the history of such opinions in his unequalled and classic opinion on the "Office and Duties of

Attorney General," published, of course, in the next volume (volume six) of the Opinions of the Attorney General (at page 326, in 1854). Attorney General Cushing noted the First Congress's statute enacting the duty of the Attorney General to give opinions, and he explained

the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive . . . as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts

Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.

Id. at 334.

This exposition would describe perfectly the Attorney General's "secret opinions" of today -- while showing in the words of an Attorney General himself why they cannot be shielded from oversight. Administration officials are relieved from "the responsibility which would otherwise attach to their acts" in connection with implementing the South Africa NSDD or the Computer Security NSDD, or planning extraterritorial seizures of foreign persons, or making proposals for greater or lesser sanctions for corporate crime, or resisting Congressional oversight by the GAO, or any of the other matters we will discuss, because those

officials rely on these opinions as "final and conclusive, as a practical matter." Attorney General Cushing set forth the historic understanding of why such opinions were being provided to the House to be published as House Documents. Deeming such opinions secret would be a grave and unjustifiable break with history.

Even though Attorney General Cushing was, of course, a spokesman for the Executive Branch's view -- it has been noted that he had a "zeal for executive power"⁹ -- he acknowledged nonetheless, in this same discussion, the duty not to withhold information from Congressional investigation. Attorney General Cushing stated that "by express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with other secretaries, and with the Postmaster and Attorney General." *Id.* at 333 (emphasis added). He further explains in this opinion:

[Attorney General William Wirt], in common with other persons holding the office, has recognized, by his action in sundry cases, the right of either House of Congress to call on him for information in any matters within the scope of his office, and his duty to communicate the same.

Id.

For executive departments in general, this authoritative opinion explains as follows:

⁹ R. Berger, Executive Privilege: A Constitutional Myth 200 & n.206 (quoting Edward S. Corwin, The President: Office and Powers 250 (3d ed. 1948)).

[The] relation of the departments to Congress, is one of the great elements of responsibility and legality in their action. They are created by law; most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it see fit, interpose by legislation concerning them, when required by the interests of the Government.

Id. at 344 (emphasis added). Plainly, this opinion is a compact admission by the Attorney General of our fundamental system of government: that Congress enacts the law, that officers such as the Attorney General interpret the law, that Congress must oversee such interpretation, and therefore the notion of secret law in secret opinions on matters of the highest importance is entirely out of the question.

Rather than keep up, after 1850, a perpetual stream of House requests, the Congress enacted into law the publication requirement. As Congress included in the 1870 charter of the Department of Justice ("An Act to establish the Department of Justice," ch. 150, sec. 18, 16 Stat. 162, 164 (1870)), now codified at 28 U.S.C. § 521:

§ 521. Publication and Distribution of Opinions.

The Attorney General, from time to time--

(1) shall cause to be edited, and printed in the Government Printing Office, such of his opinions as he considers valuable for preservation in volumes.

The Office of Legal Counsel receives its authority for opinions as a delegation of the Attorney General's power, and so the same duties of submitting to oversight apply to that Assistant Attorney General.¹⁰ Pursuant to these statutes, forty-three volumes of Opinions of the Attorneys General have been published, and six volumes of the Opinions of the Office of Legal Counsel.¹¹ The Reagan Administration slowed the publication of these volumes, but we will discuss next, it did not stop the dozens of Congressional oversight hearings on these opinions.

¹⁰ Another, and particularly pernicious, executive privilege claim occurred during oversight by the Committee on Government Operations regarding the Department of Education's decision to defer a petition of an accrediting agency. The Education Department had rendered a decision expressing asserted concern that by encouraging diversity in higher education, the accrediting agency would give too much help to minorities, this being deemed the same as "quotas." When the Committee on Government Operations sought the underlying documents regarding this Education Department decision, an executive privilege claim was put forth by the Department's General Counsel, who explained as follows:

The Department of Justice's Office of Legal Counsel has reviewed these documents and advised the Department that they are protected by the doctrine of Executive Privilege. See United States v. Nixon, 418 U.S. at 705.

Letter of May 13, 1991, from Edward Stringer, Education Department General Counsel, to Subcommittee Chairman Ted Weiss, at 3. Only after we testified to the frivolous nature of this executive privilege claim, and the Subcommittee voted to subpoena the documents, did the executive privilege claim collapse and the Subcommittee receive the documents.

¹¹ Anyone who thinks these opinions are secret can go and look at the rows of these volumes on the open shelves of the Law Library Reading Room, Room 242 of the James Madison Building of the Library of Congress.

DOZENS OF CONGRESSIONAL HEARINGS
CONTRADICT THE "SECRET OPINIONS" POLICY

The "secret opinions" policy becomes particularly indefensible when contrasted with the actual Congressional oversight practice throughout recent administrations. With assistance from the counsel for the Subcommittee on Civil and Constitutional Rights, James X. Dempsey, we conducted a survey of the better-known Congressional hearings from 1978 to 1989 on OLC opinions. Since there is, of course, no computerized index of Congressional hearings, we could only follow up some of the better-known hearings, and undoubtedly found only a fraction of the hearings of this kind.

Yet we found no fewer than twenty-three Congressional oversight hearings on OLC opinions -- literally dozens of recent counter-examples to the notion of a "secret opinions" policy. (Our list accompanies this statement. We have brought copies of excerpts from these hearings, but considering that these amount to hundreds of pages of Congressionally-published OLC opinions, this Committee may not want to put into its record for one hearing all of this large bulk of refutations of the claim of a "secrets opinions" policy.)

Some of these hearings concerned subjects of very considerable importance and controversy. To take just a few of these twenty-three examples, the Senate Committee on Governmental Affairs held a hearing on Oversight of the Operation of Inspector General Offices. This concerned a controversial opinion of Assistant Attorney General Luttig's predecessor, Assistant Attorney General

Douglas M. Kmiec, on the "Authority of the Inspector General to Conduct Regulatory Investigations." In that opinion, the Justice Department found that Inspectors General, such as the State Department I.G., could only investigate in-house crimes, and could not investigate what were called "program" violations. These were the crimes, which many Inspectors General and Congressional Committees were eager to see investigated, of fraud and abuse of departments instigated from outside the departments, such as passport and visa counterfeiting rings outside the State Department.

Numerous Inspectors General testified that this OLC distinction sharply interfered with their ability to pursue waste, fraud, and abuse, but that they had no choice but to obey the opinion. This is an issue that has stirred up the entire Inspector General community, yet, under the "secret opinions" policy, Attorney General Thornburgh would maintain that he could keep that opinion as secret law. Instead, the opinion was printed in full, and two senior Justice Department officials, then-Assistant Attorney General Barr and Assistant Attorney General Stuart Gerson, were interrogated about the opinion.

Two others of the twenty-three hearings concerned an issue so controversial that one OLC opinion was the subject of one Congressional hearing, the opinion proved so controversial OLC abandoned its position and superseded it with a second opinion, and the second opinion was then the subject of a second hearing. In 1986, Assistant Attorney General Charles J. Cooper gave an opinion

that section 504 of the civil rights act, which proscribes discrimination against the handicapped, did not protect persons with AIDs from discrimination. That Cooper opinion generated a great controversy, particularly with criticisms that the OLC Assistant Attorney General had distorted the published medical literature as well as the law. Oversight of the Office of Civil Rights at the Department of Health and Human Services: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 2d Sess. 191 (1986).

Accordingly, in 1988, Assistant Attorney General Douglas M. Kmiec produced a new opinion with the opposite conclusion, that section 504 did protect AIDs-infected individuals who could perform their jobs and were not a direct threat to others. The Senate Labor Committee held a hearing on Americans with Disabilities Act of 1989, concerning that second opinion. That vitally important public debate over the first controversial opinion, from which the Office of Legal Counsel had to retreat, would be blocked by Attorney General Thornburgh's "secret opinions" policy. Moreover, this episode, like so many others, shows that OLC opinions are not infallible, and so often implement political rather than legal judgments, that it would be extremely inappropriate to shield them from oversight.

Attorney General Thornburgh's refusal, in Chairman Brooks' questions to prepare for this hearing, to provide opinions regarding blocking GAO oversight suggests that the secret opinions policy could apply to opinions themselves counseling secrecy, a

multi-layered-secrecy approach. To take an example from the period before this new policy, this Committee considered, at its Justice Department authorization hearing two years ago, an OLC opinion which became known as the "Kmiec Memo." That opinion said: "Inspectors General could refuse to give Congress information about waste, fraud, and abuse, except that 'Congress' interest in evaluating the functioning of a criminal statute presumably can be satisfied by numerical or statistical analysis of closed cases." Department of Justice Authorization for Appropriations for Fiscal Year 1990: Hearing Before the House Comm. on the Judiciary, 101st Cong., 1st Sess., 66 (1989).

We recall that hearing quite well. This Committee asked us for an analysis of the Kmiec Memo, and published both the Kmiec Memo and our analysis. As we showed, *id.* at 77, the Kmiec Memo misused the legislative history of the Inspector General Act, gave entirely inadequate weight to the importance of Congressional oversight, and would have supplanted Congressional oversight of such live matters as Watergate, EPA/Anne Gorsuch, and Iran-Contra with "numerical or statistical analysis of closed cases." As a result of Congress' prompt refutation of the Kmiec Memo, many Inspectors General have been forthcoming in Congressional investigations since then, and the Kmiec Memo has been viewed as discredited. Yet, by the "secret opinions" policy, this Committee would not see a copy, or even be told the title and date, of a Kmiec Memo. Instead, its unrefuted errors would remain an

underground block to Congressional oversight throughout the government.

Another famous opinion on withholding of information from Congress was published in the hearings of the Iran-Contra Committees. Called "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act," this 1986 Opinion by Assistant Attorney General Charles J. Cooper justified the withholding of notification to Congress of the Iran "arms-for-hostages" initiative from the early Findings of January, 1986, until the scandal broke in late November, 1986.

This Cooper Memorandum said, "[w]e now conclude that the vague phrase 'in a timely fashion' should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress. . . . [although it] necessarily leaves room for some dispute about the strength of the President's legal position in withholding information about the Iranian project from Congress over a period of several months." Iran-Contra Investigation: Joint Hearings at 1547 & n.2. In other words, OLC put a legal stamp of approval on the year-long cover-up of the arms-for-hostages deal, which, in its more extreme phases, led to the conviction for obstruction and false statements to Congress of National Security Adviser John M. Poindexter. The oversight of that Cooper Memorandum has furnished material for years of subsequent legislative debate over codifying stricter requirements for Presidential notification of Congress. Yet, the Attorney

General's position is apparently that such memoranda need only be shown to Congress if the Justice Department feels so inclined, and can be kept secret if that is considered more advantageous.

Accompanying this memorandum is a list of the OLC opinions and the hearings in which they were published. As far as the detailed doctrinal basis on which such opinions are available for oversight, and are not withheld from oversight on grounds of attorney-client privilege, we accompany our statement with a detailed memoranda we prepared on that question.¹² As that opinion develops in detail, since Congress is part of the government, a Congressional committee decides for itself whether to accept any government lawyer's claim of attorney-client privilege, which might be applicable in litigation by persons outside the government. See, e.g., Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985) (attorney-client privilege does not apply during internal inquiries).

The courts have firmly rejected use of attorney-client privilege in comparable circumstances: "A strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law' used by it . . . but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980); see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (noting the "strong congressional aversion to

¹² The memorandum was prepared during an unsuccessful attempt by an agency general counsel to withhold an opinion memorandum from an oversight subcommittee.

'secret [agency] law'). Without belaboring the point, "[t]he scope of the [Congressional] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.14 (1959).

In McGrain v. Daugherty, 273 U.S. 135, 151 (1927), the Supreme Court focused specifically on Congress's authority to study "charges of misfeasance and nonfeasance in the Department of Justice." The Supreme Court noted with approval that "the subject to be investigated" by the Congressional committee "was the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties. . . ." Id. at 177. That is the subject asked about by Chairman Brooks in his questions to Attorney General Thornburgh. It is a proper question, and the Attorney General must provide the pertinent documents to the Committee.

II. INITIATING THE ASSAULT ON CICA, AN ACT OF CONGRESS

Our second subject is the extraordinary step, never taken before in two hundred years of United States law, of the Justice Department initiating an assault on an Act of Congress. It is useful to recount the legal background of the Attorney General's assault on CICA. After all, the Justice Department explained the suit as follows:

Justice Department spokesman Joseph C. Krovisky said the suit continues seven years of efforts to solve an infringement on

executive branch powers. He said the branch has a duty to address constitutional violations, so the department was compelled to file suit.¹³

If we are to find out what "compelled" the Justice Department to take for itself a power without precedent in American history, we must look at its "seven years of efforts" to usurp that power.

Congress enacted the Competition in Contracting Act ("CICA") in 1984 after almost two decades of consideration, starting with the Commission on Federal Procurement, on which distinguished members of the Congress, including Representative Frank Horton, served. As the United States Court of Appeals for the Third Circuit said in upholding CICA, "Although competitive bidding is supposed to be the way most government purchases are made, Congress has found procuring officials extremely -- and increasingly -- reluctant to use competitive bidding as the method of choosing sellers." Ameron v. United States Army Corps of Engineers, 809 F.2d 979, 983 (3d Cir. 1986).

The Court of Appeals then explained how the bid protest process properly, legally, and constitutionally works to oversee agency compliance with the laws to increase competition in procurement:

[T]he bid protest resolution process created by CICA is also intended to inform Congress of the operation of existing procurement laws, and to use the pressure of publicity to enforce compliance with those laws. CICA's bid protest procedures enable disappointed bidders to compel the executive to explain some of its procurement decisions to the

¹³ "Justice Department Takes on the GAO: Suit Against Contractors Appears Aimed at Agency's Review Powers," Washington Post, July 4, 1991 (emphasis added). A copy accompanies this statement.

Comptroller General. Although that official, in turn, is not authorized to alter the executive decisions in any way, he is empowered to recommend action to the procuring agency. If his recommendation is not accepted the Comptroller General must inform Congress about the entire episode in "a report describing each instance in which a Federal agency did not fully implement the Comptroller General's recommendations." 31 U.S.C. § 3554(e) (2).

Ameron, 809 F.2d at 984.

CICA included a number of provisions intended to make the recommendatory GAO process viable. Most prominent among these were its stay provision, to prevent the contract from being executed until the GAO decided the protest, and the provision for awarding protesters their costs. These provisions encourage protesters to use the GAO provision, but they do not change the recommendatory nature of the proceeding, just as they do not give GAO policy-making power. As the Third Circuit said:

Finally, CICA also authorizes the Comptroller General to order the procuring agency to reimburse bid protesters for the costs they incurred in preparing their bids and/or their bid protests. See 31 U.S.C. § 3554(c).

These provisions do not compel procuring agencies to obey the recommendation of the Comptroller General. Instead, the effect of these provisions is to compel procurement officials to make purchase decisions in light of what the Comptroller General recommends the government do in that case. The Comptroller General's interpretation of the procurement laws has come to be highly respected. [Cites omitted] His recommendations are therefore a persuasive mechanism through which Congress and disappointed bidders can speak to the executive about the way the laws are being executed.

Ameron, 809 F.2d at 985-86.

When Congress passed CICA in 1984, President Reagan did not veto it. President Reagan signed it. Instead, the Attorney General asserted the power to declare laws unconstitutional (after President Reagan signed CICA into law -- with a signing statement

saying executive agencies should "comply with this bill in a manner consistent with the Constitution"),¹⁴ and issued an opinion that the stay provision and the costs provision were unconstitutional.

The Office of Management and Budget, using its supervisory power over federal agencies, issued a bulletin (the "OMB Unconstitutionality Bulletin") declaring those provisions of CICA unconstitutional, and ordering the procuring agencies to implement that declaration through regulations, which they did in the Federal Acquisition Regulations.

Now, there is simply no doubt that Attorney General Meese's effort in 1985, until ended by the change in regulations of that year, concerned all of CICA -- both the stay provision and the cost provision. Both were discussed in the OLC opinion declaring CICA unconstitutional. Both were declared unconstitutional in the OMB Unconstitutionality Bulletin. Both were declared unconstitutional in the Federal Acquisition Regulations. (Copies of these accompany this statement.)

The rest is history. This Committee, in its annual Justice Department authorization hearings of 1985, and the Committee on Government Operations, in its hearings, exposed the attack on CICA by OMB and Attorney General Meese as a grab for the power to radically alter the delicate system for raising constitutional

¹⁴ The President's signing statement is reprinted in Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 675 (1985).

issues about Acts of Congress. The testimony at those hearings made utterly plain that executive officials have no power to declare laws unconstitutional, or to adopt regulations making laws unconstitutional. Constitutionality of GAO's Bid Protest Function, supra; Department of Justice Authorization for Fiscal Years 1986 and 1987: Hearings Before the House Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. (1985-86).

High Justice Department officials -- Attorney General Meese, and Deputy Attorney General Jensen -- appeared at those hearings, but were unable to make a persuasive case that they should have the power to declare laws unconstitutional or to have these tactics at their disposal. Quite the contrary, both committees issued reports excoriating the Justice Department's usurpation of power. Department of Justice Authorizations Act Fiscal Year 1986: H.R. Rep. No. 113, 99th Cong., 1st Sess. (1985); The President's Suspension of the Competition in Contracting Act is Unconstitutional: H.R. Rep. No. 138, 99th Cong. 1st Sess. (1985) ("Suspension/Unconstitutionality Report").

At that point, Attorney General Meese gave in. He issued a press release that the Department would no longer fight CICA, except to continue the prior test cases (principally Ameron and Lear Siegler) brought by private parties. Freed from his yoke, the procuring agencies adopted a regulation as part of the Federal Acquisitions Regulations which obeyed the CICA stay provision and agreed to pay costs to protesters who qualified in GAO proceedings. By ceasing to follow the OMB Unconstitutionality Bulletin, and

adopting that regulation, the procuring agencies abandoned the claim of power to declare statutes unconstitutional. Subsequently, two courts of appeals unanimously upheld CICA, in opinions discussed later in the statement.

Since the Justice Department makes so much of the Supreme Court ruling in Bowsher v. Synar, 478 U.S. 714 (1986), that the Comptroller General was, for separation of powers purposes, not an official who could receive power to set binding national policy, it should be noted that both courts of appeals -- the Third Circuit upholding CICA in Ameron, and the Ninth Circuit upholding CICA in Lear Siegler -- did so after Bowsher v. Synar and applied that decision to CICA. As both courts of appeals patiently explained, the bid protest system pursuant to CICA was a recommendatory system, which the Comptroller General could legitimately conduct fully consistent with Bowsher v. Synar. The presence of the stay and cost provisions did not change the fundamental recommendatory nature of the system, but simply gave the system the time, and the payment of fees, so that protesters would come to the Comptroller General for him to provide recommendations.

The CICA system worked in this fashion for several years. Then, suddenly, without apparent cause, the Justice Department decided to undo the system. We emphasize this point: the Justice Department has offered no explanation for why now it has undone the regulation that in 1985 ended the controversy, and a fortiori, it has offered no explanation for the radical step of, for the first time in two hundred years of history, initiating an assault asking

for a law of the United States to be struck down. Two weeks ago, the procuring agencies took the prior regulation, put in place when the Justice Department lifted the yoke imposed through the OMB Unconstitutionality Bulletin, and published a proposed Unconstitutional Regulation that would strike down the CICA system. 56 Fed. Reg. 28652 (June 21, 1991). The proposed Unconstitutional Regulation would provide that the award of protest costs is purely a "recommendation" and an agency can report that the award "will not be followed by the agency." *Id.* at 28653 (new section 48 C.F.R. §33.104(g)).

What is particularly bizarre about this proposal is that it did not even mention the OMB Unconstitutional Bulletin, or the reasons the regulation now being replaced was originally adopted in 1985 -- namely, the dropping at that time, in the face of intense criticism by Congress and the courts of the claim of power to declare statutes unconstitutional by the OMB Unconstitutional Bulletin. It is as though the enormous controversy in 1985, and how it was resolved, escaped their notice. How an Unconstitutional Regulation could be proposed without explanation of this grave and historic step is difficult to fathom, although the Executive Branch's unwillingness to satisfactorily address that background is understandable.

To underline the lack of explanation, Attorney General Thornburgh sent notification letters to the leadership of the Senate and the House that "the Department of Justice continues to believe that CICA's 'costs and fees' provision is

unconstitutional." (A copy of the letter accompanies our statement.) The letter gave a strangely distorted version of events. The letter admitted that in 1984, the "Attorney General [] notified Congress that the Department considered CICA's 'costs and fees' and 'stay' provisions to be unconstitutional," Letter, at 4. In other words, the Justice Department admits that the controversy it started and lost in 1985 covered all of CICA -- both provisions -- including the one it now attacks.

Otherwise, however, the letter ignored much of what happened in 1985. The letter did not mention the OMB Unconstitutionality Bulletin, which purported to strike down both the costs provision and the stay provision. The letter similarly did not mention the first agency regulations implementing that Bulletin, which also purported to strike down both the costs provision and the stay provision. Clearly, the Attorney General cannot explain why he has undone the regulation that ended the Meese claim of power in 1985.

With those omissions, the letter proceeded to ignore almost the whole rest of the controversy in 1985, including the Congressional hearings, the Congressional reports, and the public firestorm. Instead, the letter explains that when "the Executive Branch decided to comply with CICA, including its 'costs and fees' provision," it did so "on a temporary basis pending the outcome of the Ameron litigation." Letter, at 5. There then follows an account of the outcome in the Ameron case which ignores that the courts of appeals utterly rejected the Justice Department's position and the Justice Department pulled back from a Supreme

Court test. Having ignored how the 1985 controversies over the OMB Unconstitutionality Bulletin and the regulations involved the costs provision as well as the stay provision, having ignored why the 1985 regulations ended the controversy for the costs provision as well as the stay provision, and having ignored the ignominious outcome of its litigation, the Justice Department tells the tale that Bowsher v. Synar renders CICA unconstitutional. Again, it does not even mention that the two Court of Appeals opinions upholding CICA both applied Bowsher v. Synar.

All of this would have been unfortunate enough. What followed, however, was more shocking. At least in 1985, Attorney General Meese followed, in one respect, the time-honored and delicate system of litigation regarding constitutionality. He did not break the two hundred year barrier that the United States has never initiated lawsuits to strike down Acts of Congress. See, e.g., International Society for Krishna v. City of Los Angeles, 611 F. Supp. 315, 319 (C.D. Cal. 1984) ("The Court has not discovered, nor have the parties cited, a single case brought by a state, city or federal government seeking, before the law is enforced, a declaratory judgment that a law is constitutional. . . .").

Instead, in 1985, the Justice Department awaited private litigants who brought cases. Attorney General Thornburgh, however, claimed a new power that had never been used before, not even in 1985. The week of June 24, 1991, Assistant Attorney General for the Civil Division Stuart Gerson came to the offices of several

Congressional committees to announce what was going to happen that week: the United States would request, by initiating a case, that one of its laws, CICA, be struck down.

He was asked whether the Justice Department would present, as a legislative proposal, the suggestions it had for changing the statute. It would not. He was asked whether the Justice Department had ever before filed such a lawsuit -- a suit by the United States asking that an Act of Congress be struck down. His answer was to the effect that: if you are going to look at this in a confrontational way, I cannot stop you from looking at it that way. However, he explained, that was the wrong way to look at it. This was really an effort on the Justice Department's part, he explained, to take a measured and controlled step, by having the Justice Department frame the suit in a measured, controlled way.

And then, the lawsuit was filed. For the first time in history, the United States initiated an effort to have one of its laws be struck down. If that lawsuit proceeds, even with CICA upheld, the Justice Department can be expected to claim this as an established power for it to exercise at will in the future. There are no guidelines, no rules, and no procedures which, from the Attorney General's viewpoint, would limit use of this new power. Since it has claimed an inherent power without any statutory authorization, it follows that from the Attorney General's viewpoint he has no guidelines, rules, or procedures to limit it.

The implications of this claim of power must be faced. For two hundred years, we have lived under the constitutional system

described in Marbury v. Madison. Attorneys General have not received the power to declare Acts of Congress unconstitutional and have never once exercised the power to initiate lawsuits to implement such declarations. Court cases questioning Acts of Congress have been limited to those special and delicately developed situations in which the interactions of private persons, or the defense of private lawsuits, brings constitutional issues into question. The United States does not initiate them. The system we have lived by for two centuries is a system by which, when the Administration does not like a provision in a newly passed bill, it either vetoes the bill, or lives with the provision. If the Administration does not like an Act of Congress on the books, it proposes to Congress a change in the laws. These are enormous powers in themselves -- we saw in the previous Administration that a President can persuade Congress to make major changes in the laws, and we have seen in this Administration the potency of the veto power.

Now, however, the Justice Department will add a new power to this arsenal, a power alien both to the intent of the Framers and to the system of constitutional litigation known for two centuries. If an Attorney General does not like a provision in a bill, he need not advise a veto. He can advise the President to sign the bill, and then declare the provision unconstitutional. If an Attorney General does not like a provision on the books, he need not propose a legislative change. He can riffle through the United States

Code, pick out whatever provisions he dislikes, and declare them unconstitutional.

Whether the bill is recently signed or old law, the Attorney General claims the power to have agencies adopt Unconstitutional Regulations declaring laws unconstitutional. He claims the power to initiate cases with whatever shape he likes, picking the court, the parties, the facts, the timing, and everything else. Moreover, as the CICA litigation shows, even if he loses at first, he can stop awhile, even admit by his actions the wrongfulness of his claim of power, and then have a new regulation declaring the law unconstitutional be issued, trying at another court at another time. Ask anyone who wants to change laws whether this sounds like an easier system than coming to Congress with proposals for legislative change and working to make them pass. For an Attorney General commanding all the resources of the Justice Department, it probably looks like a very potent and unchecked power to acquire.

Shifting to a system by which the Attorney General decides the constitutionality of laws and then employs these new levers of power to implement that decision utterly contradicts the fundamental premises of our system of checks and balances. The Executive, needless to say, has a direct interest in disputes involving it, and can hardly be viewed as judiciary-like in its neutrality.

The Amaron case upholding CICA set forth a careful study of the history of the Faithful Execution Clause rejecting such claims

of power:¹⁵

During the reign of absolute British monarchs, the notion that the Executive, at the time the King, could decide for himself, without a decision of the courts, which laws should be obeyed was put to the test. . . .

Shortly thereafter, James II was forced into exile in the Glorious Revolution of 1689, and the English Bill of Rights was enacted. The first article of that historic charter of freedom declared 'That the pretended power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal.' Scholars have concluded that the 'faithful execution' clause of our Constitution is a mirror of the English Bill of Rights' abolition of the suspending power,' that is, the abolition of what the English Bill of Rights had called 'the pretended (Royal) power of Suspending.'"

Ameron, Inc. v. U.S. Army Corps. of Engineers, 610 F. Supp. 750, 755 (D.N.J. 1985) (quotation omitted).¹⁶ The Supreme Court's rejection of such Executive claims of power traced directly back to the revulsion, after the English Bill of Rights, against the royal "dispensing" or "suspending" power which had been abused by the Stuart monarchs to nullify Parliamentary laws.¹⁷

¹⁵ For further discussions of this history, Suspension/Unconstitutionality Report at 10; CICA Hearings at 264; Reinstein, An Early View of Executive Powers and Privileges: Trial of Smith and OGDAN, 2 Hastings Con. L. Quart. 309, 321 (1975); Stewart, The Trial of the Seven Bishops, Cal. St. Bar. J., Feb. 1980, at 70 (account of 1688 case).

¹⁶ The district court case was subsequently affirmed on appeal, 787 F.2d 875, 889-90, modified, 809 F.2d 979 (3d Cir. 1986), and the Supreme Court first granted, and then dismissed certiorari, cert. dismissed, 109 S. Ct. 297 (1988).

¹⁷As the District Court noted:

Any possible doubt about the matter was resolved in the historic case of Kendall v.

"[T]he abuse of regal authority in England was much on the framers' minds."¹⁸ Accordingly, the Constitutional Convention expressly rejected any Presidential power to suspend Acts of Congress, binding the President instead to obedience with the faithful execution clause.¹⁹

When the U.S. Court of Appeals for the Ninth Circuit reviewed the Executive claim in one of the CICA cases, it flatly rejected claims to powers such as the Attorney General is seeking. "Here,

United States, 37 U.S. (12 Pet.) 524 (1838)
 The Supreme Court said that "[t]o contend, that the obligation imposed on the [P]resident to see that the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."

Ameron, 610 F. Supp. at 756 (quotation omitted) (quoting Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838)).

The Supreme Court further explained regarding the specious Executive claim of power from the "faithful execution" clause:

that the effect of such power would be the 'vesting in the [P]resident [of] a dispensing power, which has no countenance for its support, in any part of the constitution; [such an argument is] asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the [P]resident with a power entirely to control the legislation of [C]ongress, and paralyze the administration of justice.'

Ameron, 610 F. Supp. at 756 (quotation omitted), quoting Kendall v. United States, 37 U.S. at 613 (emphasis supplied).

¹⁸ Suspension/Unconstitutionality Report at 14 (citations omitted).

¹⁹ Ameron, 610 F. Supp. at 756; Suspension/Unconstitutionality Report at 10-14 (including Alexander Hamilton's discussion); H.R. Rep. No. 113, *supra*, at 14.

the government reasserts the position taken by the Justice Department before Congress: that the President's suspension of the CICA stay provisions is justified, because the President's duty to uphold the Constitution and faithfully execute the laws empowers the President to interpret the Constitution and disregard laws he deems unconstitutional." Lear Siegler, Inc. v. Lehman, 942 F.2d 1102, 1121 (9th Cir. 1988).²⁰ The Court of Appeals concluded: "Because we regard this position as utterly at odds with the texture and plain language of the Constitution, and with nearly two centuries of judicial precedent, we must reject the government's contention. . . ." Id. The Court of Appeals found "Not surprisingly, the government offers scant and extremely questionable support for this dubious assertion of power." Id.

The Court of Appeals explained that the Framers had refused to give the President a line item veto, and then observed that "the executive branch's action in this case assumes a power far more extensive than would be conferred by a 'line item veto,'" since "unilateral suspension of the CICA stay provisions in this case afforded no opportunity for a congressional override." 842 F.2d at 1124. "Certainly the framers were strongly opposed to the idea of an absolute veto power for the President," and thus, "Such an incursion into Congress's essential legislative role cannot be tolerated." Id.

²⁰ The decision was subsequently vacated en banc in part on a separate issue regarding attorneys' fees.

"The duty of the President to see that the laws be executed is a duty that does not go beyond the laws," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (quoting Holmes, J.). The Justice Department's strained views of the Faithful Execution Clause were decisively rejected by the Court of Appeals, Lear Siegler, 842 F.2d at 1124-25:

The government's contention was addressed and rejected by the Supreme Court 150 years ago, in Kendall v. United States, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838). There, the Court affirmed the issuance of a writ of mandamus ordering the Postmaster General, then a cabinet official, to settle certain claims with mail contractors as required of him by an act of Congress. The Attorney General's lawyer defended the Postmaster General's nonfeasance by relying on the President's full and exclusive duty to execute the laws, 37 U.S. (12 Pet.) at 545-47, 612, but the Court disagreed.

"To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution and entirely inadmissible." 37 U.S. (12 Pet.) at 613. See also United States v. Smith, 27 F.Cas. 1192, 1230 (Cir. Ct. D.N.Y. 1806) ("The president of the United States cannot control the statute, nor dispense with its execution"); Da Costa v. Nixon, 55 F.R.D. 145, 146 (E.D.N.Y. 1972) (Once bill was passed by Congress and signed by the President, "[n]o executive statement denying efficacy to the legislation could have either validity or effect"); Catano v. Local Board, 298 F. Supp. 1183, 1188 (E.D. Pa. 1969) ("The President is not at liberty to repeal Congressional enactments.").

CONCLUSION

Mr. Chairman, the combined effect of these two assaults on Congress's legislative functioning -- blocking Congressional oversight, and assailing CICA -- reflect an unprecedented assertion of power by the Attorney General. It shows little or no regard for the constitutionally established processes for enacting public laws. We have discussed the roots of the Supreme Court's rulings and the Constitution's provisions in these regards, in Parliament's defeat of the assertions of monarchical powers during the Stuart reign. Attorney General Thornburgh's claims of powers resemble those assertions. Let us hope his efforts meet no more success than did Attorney General Meese's.

Mr. TIEFER. Thank you, Mr. Chairman.

In one particularly crucial instance, this committee has developed extensive experience with the ramifications of the Justice Department's secret opinions policy, and that was in seeking to obtain the Department's famous but still secret and withheld opinion on the legality of going outside the extradition process of the law to forcefully seize persons in foreign countries, persons from accused criminals of low rank up to heads of state, like General Manuel Antonio Noriega of Panama or perhaps higher, and to bring them to the United States for trial.

According to published reports, the Justice Department's Office of Legal Counsel issued a legal opinion in 1989 entitled, "Authority of the FBI To Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities."

The Subcommittee on Civil and Constitutional Rights under Chairman Don Edwards, as was mentioned in his opening statement today, held hearings on this opinion. At those hearings it received testimony from Assistant Attorney General William Barr as follows: "The Department of Justice issues legal advice on matters of domestic law authority, legal authority. The issue very simply is whether or not there is legal authority in the United States under our own domestic laws to engage in extraterritorial arrests without the consent of the host government.

"We issued an opinion as a matter of law saying, yes. The Department of Justice says, yes, we do have the authority under our own laws." A previous opinion of the Office of Legal Counsel in 1980 had given the opposite position, and Assistant Attorney General Barr explained in his testimony, "Our office was asked by the FBI to reexamine the 1980 opinion, and we did that, and I think there was broad consensus within the administration that the 1980 opinion was fundamentally flawed and should be reexamined."

Now, the legal position of the executive branch on this matter has great importance for obvious reasons. The question of overseas seizure of persons is clearly significant enough on its own, but even more important, a likely rationale used by the Justice Department in that secret opinion to justify extraterritorial seizures without having even asked Congress for statutory authority to engage in them may well be that the executive branch claims itself to be authorized by its inherent extrastatutory prerogatives to commit many kinds, and indeed perhaps all kinds of violations of international law even without statutory authorization by the Congress.

Apparently, the executive branch claims the authority to freely at will roam the world, acting in violation of the rules and norms between nations. This is certainly an issue of tremendous controversy in the international law community, and so Chairman Brooks, with respect to this opinion, wrote to the Attorney General, "I do not believe it is either legally supportable or in the Nation's best interest for the Justice Department to pick and choose which opinions of the OLC are made available to the Congress."

But Attorney General Thornburgh and the Assistant Attorney General for the Office of Legal Counsel, J. Michael Luttig, continued to insist that no matter how important it is to conduct oversight over one of its formal, legal pronouncements, it can and will keep the opinion a secret from Congress.

Mr. Ross. Let me turn for a moment to another instance in which the Department has attempted to thwart a congressional inquiry, and that is one that this committee is familiar, perhaps all too familiar with, the *INSLAW* matter.

It is sufficient to note that now 8 months after your last hearing on that matter, the committee's investigators still continue to be refused to even access, let alone copies to hundreds of *INSLAW*-related documents on the same baseless arguments that were raised and rejected at your December 5 hearing.

The committee may hear from the Department of Justice that this secret opinions policy is traditional, that Attorney Generals have the same role as private lawyers who keep advice confidential.

That line of justification is utterly without merit. This utterly secret opinions program is flatly at odds with this country's strongest traditions about democratic accountability and the rule of public law. Given the vital importance of avoiding a body of secret opinions, in 1840 the House of Representatives formally called upon the Attorney General by House Resolution to publish his opinions.

During 1841 a House document was printed entitled, "The Opinions of Attorney Generals of the United States, From the Beginning of the Government to 1841." I have with me the House document with the 1840 letter, transmittal letter by Attorney General Gilpin explaining, "in compliance with the resolution of the House of Representatives, I have now the honor to transmit copies of all such opinions of the Attorney Generals of the United States as I have been able to obtain."

When Congress in 1870 created the Department of Justice, it added the same instruction to the Department's charter, where it remains to this very day. Pursuant to these instructions, 42 volumes of opinions of Attorney Generals have been published, as have 6 volumes of the newer opinions of the Office of Legal Counsel.

In 1854 Attorney General Caleb Cushing summarized the law on this point as follows: referring to one of his predecessors, William Wirt, he said that "in common with other persons holding the office, he had recognized by his action in sundry cases the right of either House of Congress to call on him for information in any matters within the scope of his office and his duty to communicate the same."

In fact, there have been dozens of congressional hearings that have explored the types of opinions that the Department now seeks to keep secret. Charles Tiefer will run through examples of those hearings.

Mr. TIEFER. I will be brief. We conducted a survey of the better-known congressional hearings from 1978 to 1989 on Office of Legal Counsel opinions. Although we undoubtedly found only a fraction of the hearings of this kind because they are not indexed in a way that would list by that criterion, we found no fewer than 23 congressional oversight hearings on OLC opinions, literally dozens of recent examples contrary to the notion of secret opinions policy.

One of the exhibits that I have provided accompanying our statement is the list of these 23 congressional hearings on OLC opinions.

Some of these hearings concerned subjects of very considerable importance and controversy, and, to take just one or two and not to go through all 23 examples, this committee considered at its Justice Department authorization hearing 2 years ago an Office of Legal Counsel opinion which became known as the Kmiec memo after the Assistant Attorney General who wrote it, Douglas M. Kmiec.

That opinion said inspectors general could refuse to give to Congress information about waste, fraud and abuse except for "numerical or statistical analyses of closed cases."

At the time this committee asked us for an analysis of the Kmiec memo and published in that hearing volume both the Kmiec memo and our analysis. As we showed, the Kmiec memo misused the legislative history of the Inspector General Act. It gave entirely inadequate weight to the importance of the congressional oversight, and it would have supplanted congressional oversight over such live and famous matters as Watergate, EPA in the Ann Gorsuch period and Iran-Contra, none of which, needless to say, were occasions when Congress limited itself to numerical or statistical analyses of closed cases.

As a result of Congress' prompt refutation of the Kmiec memo, many inspectors general have been forthcoming in congressional investigations since then, and the Kmiec memo has been viewed as discredited. Yet by the secret opinions policy this committee would not see a copy or even be told the title or date of a memo like the Kmiec memo. Instead, the unrefuted errors of such a memo would remain an underground block to congressional oversight throughout the Government.

The second subject we are here to address is the extraordinary step, never taken before in 200 years of U.S. law, of the Justice Department initiating an assault on an act of Congress. It is useful to recount the legal background of this, particularly since the Justice Department spokesman explained the matter as follows: According to the Washington Post, which reported "Justice Department spokesman Joseph C. Krovisky said the suit continues several years of efforts to solve an infringement on executive branch powers. He said the branch has a duty to address constitutional violations so the Department was compelled to file suit."

If we are to find out what compelled the Justice Department to take for itself a power without precedent in American history, we must briefly look at its 7 years of efforts to usurp that power. Congress enacted the Competition in Contracting Act in 1984 after almost two decades of consideration, starting with the Commission on Federal Procurement that Mr. Horton spoke about earlier as one of its leading members. Until CICA, only one-third of Federal procurement was competitive, and what CICA did, besides strengthening the procurement laws themselves—

Mr. BROOKS. Would the gentleman suspend a moment? We are very likely to have a vote before long and have to adjourn.

I am wondering if we might not be well served by including all of this excellent analysis in the record and let us ask you a couple of questions before we get banged on.

Mr. ROSS. Whatever the committee's pleasure is.

Mr. BROOKS. Recently the Attorney General has asserted that under current law the CIA is only accountable to the House and Senate Intelligence Committees. Is that true?

Mr. ROSS. The Attorney General's assertion demonstrates that he does not understand how congressional committee jurisdiction works. The Intelligence Committees under several chairmen have supported the position of the standing committees, that the standing committees retain the authority to investigate matters under their jurisdiction, even though those are intelligence matters as well.

For example, and our written statement goes into this in a little more detail, during the Government Operation's Committee hearings on the Computer Security Act, Chairman Beilenson of the Intelligence Committee testified himself in full support of the committee's investigation of NSDD 145, notwithstanding that it was a matter relating to intelligence.

Mr. BROOKS. What options does the committee have to compel the production of requested Office of Legal Counsel opinions?

Mr. ROSS. Well, it would appear from the record that has been developed so far that simply asking is not going to be sufficient, and so the Congress can use its constitutionally based power to compel information from the executive branch by the issuance of a subpoena, and then, of course, there are the methods that you, sir, have sometimes utilized to get their attention via means of the authorization or appropriations process.

Mr. BROOKS. How do we know that the issuance of a subpoena to Mr. Luttig or to the Attorney General would be successful?

Mr. ROSS. Well, while there is no guarantee that any particular subpoena would be successful, notwithstanding its legal sufficiency, this is a time in Mr. Luttig's life when he is likely to be highly attuned to the desire of the Congress to learn information. As you know, his nomination as a Federal court of appeals judge is pending before the Senate, and history reveals that at times such as this, when somebody has a nomination pending, they are less likely to, in essence, thumb their nose at Congress.

Mr. BROOKS. I notice, Mr. Luttig has been recently nominated by the President, as you know, for a Federal judgeship, and it may be a legitimate concern of Congress to know what the views of a nominated official are toward interpretation of the Constitution, particular with regard to release of information to Congress.

Now, the Justice attorney handling the CICA litigation has claimed that declaratory judgments are commonplace and an appropriate way to approach this. What are the pitfalls in this approach and how should the committee respond to this suit?

Mr. TIEFER. If I may, there may be commonplace declaratory judgments in contexts like suits to quiet title to land, but there has never been a declaratory judgment or any other type of lawsuit initiated by the Justice Department for the United States to attack its own laws. Never.

As for the pitfalls, if the power to do this is established, the Attorney General will be free to riffle through the provisions in any new bill that is enacted and any of the 50 volumes of the United States Code that are previously enacted, pick and choose whatever provisions of law he dislikes that day and wishes to declare uncon-

stitutional and then implement those declarations, by regulations making the laws unconstitutional, and by lawsuits.

Now, a significant new power claimed by the Attorney General must not go unchallenged by the Congress, particularly when a previous Attorney General—Attorney General Meese—tried to overturn CICA by a similar claim. When Attorney General Meese tried, he was largely stopped by the hearings and reports of this committee and by this committee's reporting legislation regarding the Department's use of proprietary funds.

Similar steps may be necessary here, such as to clarify that the Congress does not, in its appropriations, spend to fund the Justice Department to initiate suits challenging acts of Congress.

Mr. BROOKS. The Department has claimed on several occasions it has a duty to protect certain confidential executive branch information from congressional access. What are the ramifications of this policy?

Mr. ROSS. The ramifications are broad indeed. The executive branch is attempting to unilaterally declare beyond the reach of congressional oversight certain governmental functions and how they are conducted.

One of the greatest preservers of liberty in this Nation is the fact that executive branch activity is subject to congressional oversight. If you remove that potential of oversight by keeping executive branch governmental policy secret, then you have taken from the people one of their best protections.

Mr. BROOKS. Mr. Fish, any comment?

Mr. FISH. Yes, please. Just following up on that, Mr. Tiefer, I note that a declaratory judgment is simply a determination of a concrete legal issue, and I am at a loss to understand why—in a situation where the Department of Justice concludes that an act of Congress is unconstitutional—it is inappropriate for the Department to bring a lawsuit that will facilitate a determination by the separate branch of government, the judiciary, as to whether the statute is consistent with the Constitution. Isn't this an appropriate issue for the Federal courts to decide?

Mr. TIEFER. Mr. Fish, there are two aspects that have generated controversy in the way they have gone about this. One which was discussed earlier by Mr. Conyers and Mr. Horton is that they have—part of the way they have set up this case is by adopting a regulation, by publishing a regulation which already takes the statute as unconstitutional, that is the previous regulation which has been in effect since Attorney General Meese backed down in 1985, which was when the previous regulation was issued, says awards of costs and fees will be paid.

The newly published regulation, which was at the exact same moment that the lawsuit was filed, says we are not going to obey the statute any more. We treat these as recommendatory, and even if we pay it on the recommendation, we could recoup it here. That is one thing, the regulation.

Mr. FISH. Excuse me, but maybe you heard our discussion because we characterize the regulations differently. I gather we ended up saying it was really a warning to the agencies that they were at risk, without prohibiting them in any sense from paying. It was brought to their attention that while it was discretionary on

their part to make the awards, it says here: "Pending a judicial determination, agencies may continue to pay protest costs out of funds available," but they "may be subject to recoupment," which I think is a fair expression of the risk involved to the agencies, rather than a directive.

Mr. TIEFER. That regulation is the exact language. The fact that they have in their regulation they now call this "a recommended award," a "recommended" award of protest costs is a declaration that the statute, which is very clear that recommendations are on the substance and the awards themselves are awards, they have now redefined what these are, and they have now redefined them as recommended awards.

Now, they can't do that in the face of the statute unless they have decided, as they have, that the statute is unconstitutional.

Mr. FISH. But isn't it true that that would be exactly what happens if the Justice Department prevails?

Mr. TIEFER. That is correct. They have in their regulation assumed that they have already prevailed.

Mr. FISH. I am sorry I interrupted your answer, but I wanted to clarify this issue as to just what the regulation said. Please go back to the role of Federal courts here. You might add to your answer how this approach affects Members of Congress because frequently we are involved in lawsuits, as you know.

We go on briefs to the Supreme Court willy-nilly—and why shouldn't the Justice Department bring an action if it wants to challenge a particular, very narrow provision that is severable in a piece of legislation?

Mr. ROSS. If I might, you bring up a couple of my favorite topics, and with the committee's indulgence, let me address them. With respect to Members going on lawsuits willy-nilly, as you put it, it has long been an effort of mine to discourage Members from appearing as amici on a willy-nilly basis, and I have, only through the authority of moral suasion have attempted, and in some cases, successfully urged Members not to participate in litigation in that fashion because I think it does not serve this institution's interests.

I think that this institution, when it is required to go to court to fulfill an institutional responsibility is better received if we are not running into court all the time simply to say this is what we meant by the law, give us another shot at stating what legislative intent is, and so we have attempted to discourage that type of willy-nilly filing of amicus briefs.

Mr. FISH. Mr. Ross, first of all, you know of cases where Members of Congress have been plaintiffs in cases—and also when I used that phrase I was talking not in a pejorative sense that it was unimportant but that we feel free, when we think a matter is of significance in the Supreme Court, to do what we can to bring to the attention of the court important statements. I think that is entirely justified. I just wonder if we can do it why it is bad form for the Department of Justice to do it. But let's go on here. This phrase "secret opinions policy": Is that a euphemism for privileged, legal advice from a government lawyer to a client?

Mr. ROSS. I don't believe so because I don't believe that it refers to—that it is proper to characterize those documents as privileged legal advice, for example—

Mr. FISH. The Attorney General feels that OLC opinions may address the pros and cons of particular arguments and point out the strengths and weaknesses of different positions. They are not designed as statements of Department policy. I have never seen any hesitancy in the Department about rendering a legal opinion—and there is hardly a time that we have a full committee meeting that we don't have a letter detailing the Department's position on a matter, so they are hardly shy about it. Why aren't congressional interests adequately served by communications from the Department of Justice stating their legal position in response to matters before us or in response to inquiries?

Mr. Ross. I guess I would answer that in the following fashion: First of all, it is my understanding that many of these OLC opinions that have been sought are not opinions that simply go from the head of OLC to the Attorney General for the Attorney General's private consideration, but rather, are pronouncements of legal positions that are circulated throughout the executive branch and to which executive branch entities, various agencies and personnel are expected to adhere.

Second, I do not discount the possibility that the Attorney General might have an attorney-client relationship with an individual lawyer. Certainly Attorney General Meese had such an attorney-client relationship with Nat Lewin, who he privately hired to render private legal advice to him, but that is not the role of the Office of Legal Counsel. They do not render private, confidential, legal advice. They render public, in the sense that it belongs to the Government, legal advice.

They are part of the Government's team of lawyers, and it is your job as a Member of Congress to be conducting oversight of what such public officials such as the lawyers at OLC are doing in their publicly paid-for jobs performed in Government buildings to assist the Government in implementing the laws that you enact.

Mr. FISH. Well, I must say I haven't heard that argument before. I thought these documents were exempt from the Freedom of Information Act, but you are saying really they are not. They are not lawyer-client documents, and they are not privileged in any sense.

Mr. Ross. I am saying I reject the notion that the standards of the Freedom of Information Act should be applied to Congress. The Freedom of Information Act, which, after all, was enacted by the Congress to ensure that the public had access to certain information, did create a series of exemptions, but it also specifically said that those exemptions were not to be used and could not be used to prevent information from being given to Congress. Your right to get information as a committee of Congress does not stand on the same footing as a reporter or a member of the public who tries to avail themselves of the Freedom of Information Act.

You have a constitutionally based right to fulfill your function to learn what the executive branch is doing, and so that even if they might be justified in denying the Washington Post access to one of these opinions, that does not mean they are justified in denying you access to the document.

Mr. FISH. We have the Attorney General's position on one side, and then we have your opinion on the other side that these are

public documents even though they are just internal pros and cons for the advice of the people in the Government.

Well, I guess we are not going to resolve that unless we go to court.

Mr. ROSS. It is not my position that they are public documents.

Mr. FISH. I thought that is the word you used.

Mr. ROSS. Well, let me make sure I am clarifying what I said. If you mean public—if the word “public” is to be taken that there is public access to them, that the Washington Post or a member of the general public has access to them, that is not what I meant to say. I use the term in that instance of public in that they refer to public business as opposed to Attorney General Meese’s private affairs, and I was using public to draw that distinction.

Mr. FISH. Well, this is your view. It seems to me we need to distinguish between two things here: A document showing how a legal position is arrived at—that is the pro and con type legal memorandum—and information on how our laws are administered.

Certainly once any legal opinion is circulated and a decision is made, then the actions taken by any part of the administration or many parts pursuant to this decision, of course, are subject to scrutiny. That gets you into how our laws are administered, which is the subject of oversight, but I fail to see how a mix of opinions that went into the mill that came out with the final position is all that helpful to us.

Well, that is all I have, Mr. Chairman.

Mr. CONYERS. Mr. Chairman, can I just say these are probably two of the most skilled counsels that we have had the privilege of having in the House of Representatives.

Mr. EDWARDS. Mr. Chairman, I always am interested in what the counsels to the Clerk have to say, but one thing in particular interests me very much. You point out, Mr. Tiefer and Mr. Ross, that these opinions, especially the one on the snatch authority of the FBI, came out at the time there was a discussion from the White House and from the public generally that perhaps the best way to handle the Panama situation was to kidnap General Noriega, and curiously enough, just as that discussion became hot and heated, this opinion came out. We had existed for more than 200 years without giving authority to the Federal police to wander around the world snatching people without the knowledge of the host government.

At the same time, within a week or so, another opinion, which we also can’t get ahold of, said that the time-honored law, over 150 years, of posse comitatus would not apply to the military overseas. The military, for good reasons, are not allowed, except in extraordinary circumstances, to be the cop on the beat in the United States. That is the law in the United States. However, right out of the blue came this legal opinion which is still secret that overseas the military of the United States could be used as policemen, and that had a strange connotation because what did they do in Panama? For nearly a year they were used as police, and the basis for the legality of this was the opinion that we still cannot get. Do you have a response to these observations?

Mr. TIEFER. If I may just complete the circle, the posse comitatus law that you are referring to which Congress originally enacted in

the late 1800's as an appropriation limitation, as a limitation on what appropriated funds could be spent for on the Army appropriation. It eventually became permanent law.

What you are describing is a situation whereby these interpretations of law frustrate previously enacted laws, and then they say to you you are not going to be shown the opinion that is frustrating your previously enacted law.

Mr. EDWARDS. Well, thank you very much.

Mr. BROOKS. I would like to thank all the witnesses for their analyses and insights into the problems they have been experiencing with the Department of Justice. The Attorney General will be here next Thursday, July 18, to present the Department's proposed fiscal year 1992 budget, to respond to any questions regarding the management and operations of the Justice Department. The information provided by the witnesses today will be very useful in questioning and discussing matters with the Attorney General.

Furthermore, I believe the committee must, in the very near future, carefully consider the actions needed to be taken to require production of documents requested from the Department and to respond to the Department's recent assault on the Competition in Contracting Act.

I urge all the members to attend next week's hearing. Without objection, the record of today's hearing will remain open for the purpose of receiving further material. The committee is adjourned.

[Whereupon, at 2 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]

DEPARTMENT OF JUSTICE AUTHORIZATION FOR APPROPRIATIONS, FISCAL YEAR 1992

THURSDAY, JULY 18, 1991

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Jack Brooks (chairman of the committee) presiding.

Present: Representatives Jack Brooks, Don Edwards, John Conyers, Jr., Romano L. Mazzoli, William J. Hughes, Mike Synar, Patricia Schroeder, Dan Glickman, Barney Frank, Charles E. Schumer, Edward F. Feighan, Harley O. Staggers, Jr., John Bryant, George E. Sangmeister, Craig A. Washington, Peter Hoagland, Michael J. Kopetski, John Reed, Hamilton Fish, Jr., Carlos J. Moorhead, Henry J. Hyde, F. James Sensenbrenner, Jr., Bill McCollum, George W. Gekas, Howard Coble, D. French Slaughter, Jr., Tom Campbell, and Jim Ramstad.

Also present: Jonathan R. Yarowsky, general counsel; Robert H. Brink, deputy general counsel; James E. Lewin, Jr., chief investigator; Daniel M. Freeman, counsel; Lynne Jones, clerk; Ellen L. Jones, clerk; and Alan F. Coffey, Jr., minority chief counsel.

Mr. BROOKS. The committee will come to order.

The gentleman from California, Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

I question the absence of a quorum.

Mr. BROOKS. The clerk will call the roll.

The CLERK. Mr. Edwards.

Mr. EDWARDS. Here.

The CLERK. Mr. Conyers.

[No response.]

The CLERK. Mr. Mazzoli.

Mr. MAZZOLI. Here.

The CLERK. Mr. Hughes.

[No response.]

The CLERK. Mr. Synar.

[No response.]

The CLERK. Mrs. Schroeder.

Mrs. SCHROEDER. Here.

The CLERK. Mr. Glickman.

[No response.]

The CLERK. Mr. Frank.

Mr. FRANK. Here.

The CLERK. Mr. Schumer.
 Mr. SCHUMER. Here.
 The CLERK. Mr. Feighan.
 Mr. FEIGHAN. Here.
 The CLERK. Mr. Berman.
 [No response.]
 The CLERK. Mr. Boucher.
 [No response.]
 The CLERK. Mr. Stagers.
 Mr. STAGGERS. Here.
 The CLERK. Mr. Bryant.
 Mr. BRYANT. Here.
 The CLERK. Mr. Levine.
 [No response.]
 The CLERK. Mr. Sangmeister.
 Mr. SANGMEISTER. Here.
 The CLERK. Mr. Washington.
 [No response.]
 The CLERK. Mr. Hoagland.
 [No response.]
 The CLERK. Mr. Kopetski.
 Mr. KOPETSKI. Here.
 The CLERK. Mr. Reed.
 Mr. REED. Here.
 The CLERK. Mr. Fish.
 Mr. FISH. Here.
 The CLERK. Mr. Moorhead.
 Mr. MOORHEAD. Here.
 The CLERK. Mr. Hyde.
 Mr. HYDE. Here.
 The CLERK. Mr. Sensenbrenner.
 Mr. SENSENBRENNER. Here.
 The CLERK. Mr. McCollum.
 [No response.]
 The CLERK. Mr. Gekas.
 [No response.]
 The CLERK. Mr. Coble.
 Mr. COBLE. Here.
 The CLERK. Mr. Slaughter.
 [No response.]
 The CLERK. Mr. Smith.
 [No response.]
 The CLERK. Mr. James.
 [No response.]
 The CLERK. Mr. Campbell.
 [No response.]
 The CLERK. Mr. Schiff.
 [No response.]
 The CLERK. Mr. Ramstad.
 [No response.]
 The CLERK. Mr. Brooks.
 Mr. BROOKS. Here.
 The CLERK. Mr. Hughes.
 Mr. HUGHES. Present.

The CLERK. Mr. Synar.

Mr. SYNAR. Here.

Mr. BROOKS. Thank you.

The CLERK. Mr. Chairman, 19 members are present.

Mr. BROOKS. Thank you very much.

The meeting will come to order.

This morning the Committee on Judiciary was scheduled to hear from the Attorney General of the United States as the sole witness concerning the Department of Justice's request and justification for \$10.6 billion authorization for fiscal year 1992.

It is no exaggeration to say that this annual meeting of the committee may be the most important business session we will have in this session of Congress because it carries out one of the core responsibilities of the legislative branch under our Constitution; that is, to monitor how the executive branch has carried out the laws that Congress has passed; how the executive has spent the funds that only Congress can appropriate; and whether the executive is acting within the scope of the authority granted to it under the Constitution or delegated to it by the legislative branch.

This is a simple essence of the principle of separation of powers and the system of check and balances that gives meaning and substance to that principle.

In the light of the extreme importance of this proceeding, it is particularly unfortunate and deeply disturbing that the Attorney General notified us last night, late last night, that he would refuse to appear before us this morning.

He refuses to attend for a myriad of reasons—even though his appearance was duly scheduled for 1 full month.

I am shocked and saddened by the appearance of the empty chair before us and all the other chairs that he asked to be reserved for his people. The unanswered request and the delayed response are becoming the symbols of an increasingly remote and self-centered Justice Department that seems bent on expanding the accepted boundaries of executive branch power and prerogatives.

This disturbing view of government has served as the Justice Department's rationale for doing these things. For denying access to the committee of documents under a vaguely worded notion of executive branch privilege; for unilaterally declaring that acts of Congress are unconstitutional without any adjudication by any court; and by arrogating unto itself the discretion to ignore congressional inquiries short of compulsory process.

It appears that the only function that Congress plays in the Justice Department is to appropriate funds for the operation, and if that indeed is how the Justice Department views our constitutional form of government, then it may well be time to get their attention by using that process decisively.

Given this backdrop, it was something out of the theater of the absurd to hear yesterday the stream of demands and requests and excuses issuing forth from the Department of Justice.

At twelve noon, the committee was summarily informed that unlike previous years when the Attorney General appeared as the sole invited witness, this Attorney General was demanding to bring a Roman legion of 21 with him to sit by him, to tell him what to do, to speak for him if he needed help, or else, if not that, I guess

they would just be a cheering section; I don't know. But he included four who had to sit with him, by his warm side.

When the committee offered instead simply to seat all the witnesses right behind him within three feet of him and allow them one by one whenever he wanted them to to come up and talk with him, advise him, testify, counsel him, whatever, spokesmen for the Department deemed the arrangement was offensive to the honor and discretion of the Department.

Next the Department demanded to be able to make a video presentation even though such presentation, of course, cannot be recorded by this reporter here who makes the record, cannot be seen very well by all the people who are here, not seen very well by the press, not seen very well by the Members of Congress who sit on either end of this large podium, and cannot be seen very well by people like me who have to wear glasses.

But I finally agreed. Let them have their show, let them put on the dog-and-pony show for a few minutes.

I agreed to that and then the real reason seemed to be revealed; namely, that the committee press release announcing the hearing had been unduly aggressive and contentious and not in keeping with the tenor of an oversight hearing.

In other words, the Attorney General seems to be objecting to a robust interchange of views that is an essential part of the give-and-take at the hearts of the political process.

Do you know what he said about this committee's work on the crime bill last year?

He said it was a procrime bill.

Well, I didn't get my feelings hurt. I didn't forget it, but I didn't get my feelings hurt.

Of the civil rights bill we have passed similar to civil rights bills we have passed since 1964, he said that it is a quota bill.

I didn't get my feelings hurt. I didn't go in the corner and pout. I didn't need to bring 21 people with me to tell him that is a bunch of hogwash.

I can do that any day, and have and will.

I regret that straight talk is somehow found to be beyond the bounds of the Department's concept of civility, but I will continue to be nothing less than forthright, publicly and privately, in discharging this committee's oversight function.

I am not going to soft-pedal the demands of the Department after 2 years of personal reassurances from this Attorney General that they will finally hand over almost 490 documents in the *INSLAW* investigation.

We have been trying to wrap that investigation up and he assured me we would do that.

I am not going to back off from the legitimate demand made to the Department that the committee be permitted to have access to an Office of Legal Counsel opinion that formed the basis of the President's executive directive that the FBI had authority to kidnap or detain persons overseas without the permission or knowledge of the host government.

I am also resolutely determined to question the Attorney General about the Department's radical notion—most recently embraced by his predecessor, former Attorney General Meese—that the exec-

utive branch can choose to ignore duly enacted laws passed by Congress and signed by the President if, in the wisdom, the independent, individual, clairvoyant wisdom of the Attorney General that such laws are deemed by him to be unconstitutional.

In short, these oversight authorization hearings are not staged entities in which coequal branches of the Government pat each other on the back and we avoid all the issues of dispute, tell everybody that the budget is balanced and there is no deficit.

Friction and conflict have always been forces that have helped to shape the democratic system in which we live.

Anglo Saxon common law is completely predicated on the notion of joining the issues and yet the understanding in a democracy is that conflicts will be resolved, that checks and balances will lead to cooperation, to resolution.

Last Friday I talked with the Attorney General by phone from Texas about three or four items I wanted to discuss with him today at the hearing.

He sounded a hopeful and constructive note at that time.

I had thought that when the Attorney General was appointed by former President Reagan that he would be the kind of individual who would remove the stigma of former Attorney General Meese, who left under a large, dark cloud.

I think Mr. Thornburgh's stewardship has, in fact, restored some of the luster of the dedication of the professionals who make that agency one of the finest in our Government.

But that empty chair and that absence, the image of imperious Roman legions accompanying him to the Capitol, clank, clank, clank, are not compatible with that mission.

We will just have to see what happens in the coming days.

I am deeply disappointed in this situation.

I would yield to my distinguished friend from New York, Mr. Fish.

Mr. FISH. Mr. Chairman, thank you.

We agree on many points, namely that this hearing today with the Attorney General of the United States, the chief law enforcement officer of the United States, would have been enormously helpful to the committee.

I would like to ask what is an oversight hearing? To me the answer is an informational gathering process, and I for one fail to see how restricting the way the Attorney General makes his presentation helps the informational gathering process.

I recall former Attorney General Civiletti appearing before this committee flanked by policymakers of his Department.

I don't see how participation can do anything but enhance the process of adding to our knowledge.

Mr. Chairman, you are correct that the anticipatory press release you sent out was perceived as extremely ill advised and abrasive and served only to confirm the suspicions of the Attorney General—based on prior hearings before this committee—of what to expect.

I will read excerpts from this press release.

The Attorney General "will be called upon to justify controversial Department of Justice practices ranging from its 'secret opinions' policy to alleged FBI misuse of seized aircraft."

Then, "Testimony taken by the committee last week documented a Department of Justice that seems intent on provoking a constitutional confrontation. . . [I]t has pursued major law enforcement initiatives on the authority of 'secret opinions;' and it has attempted to circumvent the legislative process."

Mr. Chairman, I am sure that if the Attorney General felt that there would be a true oversight hearing that he would be willing to appear.

At present, it is clear to the Attorney General—as it is clear to many members of this committee—that this hearing would be nothing but confrontational.

Therefore, for now, I have recommended to the Attorney General—and did so last night—that under the present circumstances he decline to appear at this hearing today.

Mr. Brooks. Without objection, I would like to include in the record a copy of the news release so there is no misunderstanding about it.

[The information follows:]

MAJORITY MEMBERS

Jack Brooks, Texas, Chairman
 Dan Rostenkowski, Illinois
 John Conyers, Jr., Michigan
 Romano L. Mazzoli, Kentucky
 William J. Hughes, New Jersey
 Mike Synar, Oklahoma
 Patricia Schroeder, Colorado
 Dan Claitman, Kansas
 Barney Frank, Massachusetts
 Charles E. Schumer, New York
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 Harter O. Staggers, Jr., West Virginia
 John Brent, Texas
 Max Lerner, California
 George E. Brown, Illinois
 Craig A. Vatter, Texas
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 Bill McCollum, Florida
 George W. Galas, Pennsylvania
 Howard Coble, North Carolina
 D. French Slaughter, Jr., Virginia
 Lamar B. Smith, Texas
 Craig T. James, Florida
 Tom Canadeo, California
 Steven Schiff, New Mexico
 Jim Ryunosuke, Minnesota

One Hundred Second Congress
 Congress of the United States
 U.S. House of Representatives
 Committee on the Judiciary
 Washington, D.C. 20515

FOR IMMEDIATE RELEASE
 July 17, 1991

NEWS RELEASE

JUDICIARY COMMITTEE TO QUESTION ATTORNEY GENERAL ON DEPARTMENT OF JUSTICE STONEMALLING, MISMANAGEMENT

Attorney General Dick Thornburgh will be called upon to justify controversial Department of Justice practices ranging from its "secret opinions" policy to alleged FBI misuse of seized aircraft when he testifies before the House Judiciary Committee this Thursday, July 18. The hearing will be held at 10:00 a.m. in Room 2141, Rayburn House Office Building. This is the second hearing by the Committee on legislation to authorize funds for Department operations for fiscal year 1992.

"Testimony taken by the Committee last week documented a Department of Justice that seems intent on provoking a constitutional confrontation," said Congressman Jack Brooks (D-Texas), Chairman of the Committee. "The Department has repeatedly failed to cooperate with legitimate Congressional oversight audits and investigations; it has pursued major law enforcement initiatives on the authority of 'secret opinions'; and it has attempted to circumvent the legislative process by filing suit to have a validly enacted Federal statute, signed by the President, declared unconstitutional. Simply put, these policies represent a serious threat to the checks and balances system of government underlying this country's constitutional democracy."

Brooks stated, "There is no question that these issues are complex; by definition, the system of checks and balances is overlapping in nature and defies simplistic generalizations. Yet, it is this intricate architecture of government that is the chief strength of our Republic. I am hopeful that as a result of this hearing, these problems can be quickly resolved; and Congress and the Justice Department can continue with their normal responsibilities."

Last week, the Committee took testimony from the bipartisan leadership of the House Government Operations Committee, the House's principal oversight panel; from representatives of the General Accounting Office; and from Steven Ross, General Counsel to the Clerk of the House of Representatives. The witnesses sharply criticized current Department of Justice policies and procedures. They said that, under the Attorney General's "secret opinions policy", the Department refuses to provide Congress with, or even acknowledge the existence of, critical memos written by the Department's Office of Legal Counsel even if such opinions are the basis of Executive Branch policy. With respect to the FBI, testimony documented that certain aircraft seized from criminals had been used primarily to fly the Attorney General and the FBI Director around the country to give speeches, attend meetings, or visit field locations.

"Accountability is a basic tenet of our system of government," said Brooks. "This hearing will give the Attorney General a public opportunity to defend his management of the Department of Justice and his theories of constitutional government. I look forward to his testimony."

Mr. BROOKS. The gentleman from California, Mr. Edwards.

Mr. EDWARDS. Mr. Chairman, I am deeply disappointed that the Attorney General didn't show up today. We had a lot of things to talk to him about. He is the chief law enforcement officer of the United States, perhaps one of the most powerful law enforcement officers in the world today. We wanted to ask him about his crime package that we are revising and will enact in this committee within a very few weeks.

I would have liked to ask him why he included in the crime package a secret court, a star chamber court where a defendant would not be allowed to question witnesses or to see the evidence against him. The Senate got rid of that, but I think I would like to have asked the Attorney General why he put that into the package.

I wanted to ask him also about his advice to the President when the President said the other day that he is going to insist on a nominee to the Supreme Court who is a strict constructionist of the Constitution, which I think that all of us on this committee like to think of ourselves as, and yet he wants to change the Constitution. He wants a line-item veto that gives enormously more power to the President and takes away from the legislature a lot of power.

I would like to ask him about freedom of speech, the fact that he came here last year and asked us to weaken for the first time in history the first amendment protection of speech.

I would like to have asked him about his legal opinion on the separation of church and State, because his administration wants to use vouchers for schoolchildren paid for by the taxpayers, these vouchers to be used in religious schools.

I think we ought to ask him about the crime rate in this country, what he is going to do about it as chief law enforcement officer. I was shocked to find out we have more prisoners proportionately than any nation in the world, \$16 billion a year we spend just on jails and prisons.

We had lots to talk to the Attorney General about. The country is in trouble. Violent crime went up 10 percent last year and yet the crime package that he sent us would do nothing about crime whatsoever. Nothing.

So I am very disappointed. I subscribe to your excellent statement, Mr. Chairman.

Mr. BROOKS. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

I have always wanted to serve on a subcommittee of the Government Operations Committee and I see that I now have that opportunity.

I remember Ben Civiletti sitting in this very hallowed chamber at that chair there surrounded by policy advisers. I thought at first it was the Mormon Tabernacle Choir rather than a Roman Legion.

In any event, it seems to me if we want information, rather than our own star chamber proceeding, we would let the man who is going to testify—who heads an enormously large governmental department with seven divisions, at least—to have next to him those policy advisers so they wouldn't have to raise their hands and get permission from the chairman to speak and then climb over sever-

al other of their colleagues and get up and whisper in the ear of the Attorney General.

Now, nobody knows all of the answers about a vast agency such as the Department of Justice. And if we want information rather than confrontation, we ought to let him testify as he wishes, not as we tell him to.

I think this was the ultimate discourtesy. It shredded any notions of comity between the legislative and the executive branch. And I don't blame the Attorney General for not coming. The political nature of this hearing is eminently clear. We don't want information. We want to beat up on the man.

Thirty-four grand jurors here talking about separation of church and State—and secret opinions as though the lawyers on this committee never heard of attorney-client privilege. No more. The Attorney General, who is the attorney for the President, is no longer entitled to give candid, objective legal advice without this committee looking over his shoulder.

And so there is a lot of talk, but I think if we are serious about getting information rather than confrontation, we invite the Attorney General to come and talk to us, bring with him his advisers that he can get information from without the physical leap-frogging that apparently the choreographer for this hearing, the chairman, wanted the Attorney General to go through.

I think this was designed to demean the Attorney General, to show that he had to get advice, information from this enormous agency that he is supposed to know every nook and cranny about. I think it is discourteous and I am embarrassed that we have done this.

I am sure we will not deter the political crusade that probably has something to do with the Senate race in Pennsylvania down the road, although I hesitate to even hint that there is anything political in what we are doing here.

Mrs. SCHROEDER. Would the gentleman yield?

Mr. HYDE. I will be delighted to yield to my good friend and colleague.

Mrs. SCHROEDER. You don't like the furniture arrangement, right?

Mr. HYDE. Love it. Chippendale, I think. Geometric pattern. I haven't checked the spelling on all the names, but it looks good to me.

Mrs. SCHROEDER. How would you arrange them? The chairman, I thought, tried to be very fair. He has everyone's name out there as the Attorney General requested.

Mr. HYDE. He requested that he be permitted to have certain of his staff sit next to him at the table as every other head of every other department in Washington has when they testify before a committee of Congress.

Mrs. SCHROEDER. We are going to need a much bigger table.

Mr. GEKAS. Would the gentleman yield?

The gentleman from Illinois mentioned the attorney-client privilege, and that goes to another aspect of this fiasco.

In the memorandum that the chairman circulated to the members of the Judiciary Committee, he complains about the fact that the Attorney General somewhere along the line—or the Office of

Legal Counsel—refused to turn over certain documents because of the attorney-client privilege. Yet in this chamber a few days ago—when the Legal Services issue came up—that side, including the chairman, voted against my amendment which would relax the attorney-client privilege to an extent that would allow Legal Services attorneys locally to allow us to gather information from them. They, however, stood hard and fast—including the chairman—for the attorney-client privilege when it suited that side.

Mr. HYDE. Mr. Gekas, don't confuse this hearing with considerations of fairness and balance and consistency.

Mr. FRANK. Will the gentleman yield?

Mr. HYDE. In a moment.

Don't confuse these hearings with logic and consistency and evenhandedness.

I notice in the press release that the chairman issued that the Attorney General is criticized for attempting "to circumvent the legislative process by filing suit to have a validly enacted Federal statute, signed by the President, declared unconstitutional." I don't know how else you find something unconstitutional. I guess you ask the chairman if it is constitutional. But I don't blame the Attorney General for not wanting just to accept the chairman's fiat that it is constitutional.

If they don't think it is constitutional, they go to court and ask the court to declare whether or not it is constitutional. I don't think that is a threat to the legislative process. I don't think everything we pass is written in Carrera marble that can't be interpreted by the courts. I want them to have something to do. But this has been a fiasco.

Mr. FRANK. Would the gentleman yield?

Mr. BROOKS. Would the gentleman yield?

Mr. HYDE. Yield to Mr. Frank, because he has been most persistent, but I would rather yield to you.

Mr. FRANK. Let the gentleman yield to the gentleman from Texas.

Mr. BROOKS. With the gentleman's very keen and perceptive knowledge of the law, I know you would not want to let pass the fact situation about the Attorney General's lawsuit against a bill that he did not like, the language that he didn't like. He says it is unconstitutional.

I don't mind him filing the lawsuit. He has a right to file the lawsuit. You can't make him stop that. But what he should not have done was to tell all the agencies of the Government they should not follow the law that they had followed for 6 years and to violate that law, not to follow it. That is what I contend is absolutely wrong.

If he wanted to leave the law in place until the proper branch of the Government made an adjudication, which would be the judicial, and they declared it unconstitutional, fine, but until then he is still obligated to follow it as law, even as you and I are, even though we may have private reservations. That is what my problem is.

Mr. HYDE. I appreciate the instruction from the chairman.

I understand that the Attorney General, like all of us, has taken an oath to uphold the Constitution and if he thinks something is

unconstitutional, the way to find out about it is ask the court to make a determination.

I yield to my friend from Massachusetts.

Mr. FRANK. I must say I thought the gentleman from Texas had a point which the gentleman from Illinois was trying to evade. I notice he didn't want to yield to me until that argument wasn't going well.

Mr. HYDE. I am always pleased to yield to you, but not in the middle of a point I am trying to make.

Mr. FRANK. The gentleman from Texas made the point that you have to separate two issues. The gentleman from Illinois did not want, I understand, to continue to discuss that. It is one thing to recognize the Attorney General's right to institute a suit; it is another to recognize his right to act as if he had already won the suit before he even filed it.

Once the law has been passed and signed by the President of the United States, or otherwise it wouldn't have been law, the Attorney General, we believe, is under an obligation to abide by it while he is suing, so his right to bring suit to adjudicate the issue is not at issue. It is his right to unilaterally refuse to enforce an action before a Federal court has agreed with him on that, and that was the question.

The other issue was the gentleman from Pennsylvania's reference to Legal Services. It is early in the day, but as of now that is my candidate for the worst analogy I will hear during the day. I don't think it will be overcome.

What we debated in Legal Services was an amendment that would have said that for poor people only there is less of an attorney-client privilege than for anybody else.

We rejected an amendment which didn't deal with the attorney-client privilege for everybody. It said that only for Legal Services' attorneys there would be a lesser attorney-client privilege than for everybody else in the country. That is hardly analogous to the question the chairman has raised about the attorney-client privilege. It was not an effort to deal with it at all.

The amendment said, if you are poor and go for legal services, you will have a lesser attorney-client privilege than anybody else.

Mr. HYDE. If I may, I just want to say the issue that has caused such a sweat on the other side of the aisle is about a proposed rule. It isn't even a final rule yet; it is a proposed rule and the Justice Department doesn't like the related statutory provision. It doesn't think it is constitutional, and is attempting to determine by a court adjudication if indeed the provision is constitutional.

I don't see any problem with that. I would rather that they do that than that they ignore the provision on the grounds that it is indeed unconstitutional.

Under the practice, while this suit is pending, discretion exists for agencies to go ahead and make the payments that are the subject matter of the provision, but we are getting lost in a morass of minutia. We have a lack of comity, an act of congressional discourtesy that I think is beneath this body, and I am sorry to be a part of it.

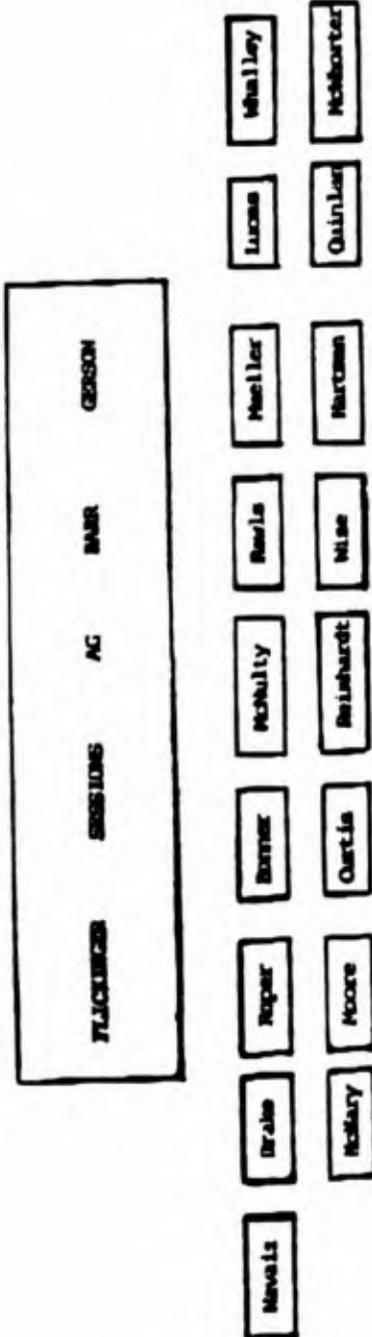
And I yield back the balance of my time.

Mr. BROOKS. Mr. Hughes.

Mr. HUGHES. Well, Mr. Chairman—

Mr. Brooks. I ask unanimous consent at this time to put the seating chart in for the Attorney General.
 [The seating chart follows:]

JUSTICE DEPARTMENT'S PROPOSED SEATING CHART



Mr. HUGHES. Mr. Chairman, I hate to continue some of the dialog because it sounds more like Romper Room U.S.A. than the House Judiciary Committee.

I regret that the Attorney General isn't here today. The oversight function of the Judiciary Committee is an extremely important one, and I regret we have come to this because we can't function unless we work together, hopefully in a bipartisan fashion, on issues that we may disagree about from time to time.

I came to the Congress 17 years ago with a great deal of respect for the Department of Justice, and I must say over the years I have seen an erosion of professionalism that has been the hallmark of that Department for many years. Looking back some 10 years as chairman of the Subcommittee on Crime, I could probably name 30 crime bills that we worked on where the Department of Justice was not even a participant because they didn't submit statements, because they played games, and that is most unfortunate.

So I have seen an arrogance of power, and I don't want to talk about seating arrangements because I think it is nonsense to argue about that. But we should argue about substance.

I think the chairman's position on substance is right. We cannot permit the Department of Justice to drag its feet for 2 years in producing documents we are entitled to in the *INSLAW* matter. When we attempted to get documents out of the Meese Department of Justice involving the E.F. Hutton investigation, we had to essentially take him to court at one point to get the documents.

We waited for a long time and when we finally got the documents, we got a truckload. They made no effort to sort out the documents, and it took staff, GAO and people on a temporary detail, weeks to sort out that information.

The Department of Justice determined about 5 years ago under Attorney General Meese that they could decide what laws are constitutional and which are unconstitutional. That is absolute nonsense. For any Member of Congress, who is on the Judiciary Committee who has practiced law and is trained in the law, to suggest that the executive branch of government can interpret which laws they want to enforce and which they don't want to enforce, missed something in their basic education while at law school.

The Attorney General has a right to challenge in the courts any law. He doesn't have a right, however, to ignore the law. He is the chief law enforcement officer of the country.

So I am disappointed with that and many other issues. Adoptive forfeiture is another of these issues that comes to mind. It was a minor part of the crime bill, but there was a principle involved in that, Mr. Chairman, one of complying with the laws of this country. Adoptive forfeiture is a procedure whereby we, a few years ago, to accommodate local law enforcement agencies, ran forfeiture proceedings which were State in nature and where the Feds had no involvement, through the Federal process in an already overcrowded Federal judiciary just to avoid State law.

If the States don't like their laws, they can change their laws, but to use the Federal process to basically corrupt and distort State law is wrong. For the chief law enforcement officer of the country to encourage this process is untenable. Even though the mayors were on our side, we lost it because the law enforcement agencies

around the country insisted that that is what they wanted to do. In the process, local law enforcement in such States as California could get a few more dollars by running State forfeitures through Federal courts, frustrating State law, and in so doing, denied education and treatment organizations within California moneys in which they were entitled. I have seen that over the years, and I regret that.

My question is, where do we go from here? Frankly, if the question is cutting off funds for the Department of Justice, I am ready to do that to get their attention, but I don't think the argument should be over seating arrangements or who is at the counsel table. I, too, remember many instances when former Attorneys General brought in who they wanted, and frankly it was a little crowded at the witness table.

I agree with the substance of it, Mr. Chairman. I support you, and if the way we have to bring this thing to resolution is to cut off funds, I am prepared to work to do that to get their attention.

You have my support, Mr. Chairman. I am prepared to do that to get the Department's attention.

I regret that we haven't developed the kind of relationship that makes this place work. We can't get the business of government done with all the complex issues we face with this kind of nonsense.

I yield back the balance of my time.

Mr. BROOKS. Congressman Sensenbrenner.

Mr. SENSENBRENNER. I think it is unfortunate that some have decided to play politics today with the appearance of the Attorney General at what has become an annual authorization hearing.

Every witness has been told that they could present as they wanted to, could submit the type of printed material and video material that they wanted to submit to try to prove their point, Mr. Chairman, and sometimes that has been very useful.

For example, last year some architects submitted video material relative to the architectural copyright law that this committee processed and which I believe was passed and signed into law.

The problem is that there has been a stream of confrontational press releases and press statements leading up to this hearing.

One Member was quoted in the Philadelphia Inquirer saying that he was going to use this hearing to nail the Attorney General.

That Member doesn't even come from Pennsylvania.

That kind of smacked of politics to me. The press release that was issued by the chairman yesterday, dated July 17, was headed "Judiciary Committee to Question Attorney General on Department of Justice Stonewalling, Mismanagement"—and it was the kind of press release that reached a conclusion before the questions were asked and the answers were given.

So I don't blame Mr. Thornburgh—given this background—for declining to appear today, particularly since he was the first Attorney General that apparently was not allowed to proceed as he wished to present his Department's case.

I am absolutely shocked that there are thoughts of cutting off the money for the Department of Justice because of this dispute.

The Department of Justice handles many important things relating to the safety and integrity of this country.

The FBI, the Immigration Service, are two that come to mind immediately.

Also, if we cut off the money for the prisons, for the U.S. attorneys' offices, I don't know what is going to happen.

I think that that would be a completely irresponsible response.

Mr. Chairman, I don't think we should be playing political games today.

We have an awful lot more important work on our plate, most important being the crime bill.

The President on March 6 challenged the Congress to pass a crime bill within 100 days.

It took the chairman of the committee over 100 days to refer the crime bill to the relevant subcommittees of jurisdiction—and we still don't have a date for markup of a crime bill while the other body has already passed its version of the crime bill and sent it over to us.

Apparently the message that the people want a crime bill passed is being heard better on the other side of the Capitol, and that is unfortunate.

I think we ought to set our priorities straight, quit playing politics, start talking about issues, and let the chips fall where they may in this committee and on the floor of the House.

In this way, I think the committee will be able to restore the confidence of the American public in it as well as the confidence of the American public in the activities of the Justice Department.

Thank you.

Mr. BROOKS. Mr. Synar.

Mr. SYNAR. One of the most critical functions of Congress is to do oversight. The ability for us to determine how the public's money is spent on the activities in many ways only strengthens the public confidence in the integrity of government.

That oversight responsibility remains crucial.

In the past 10 years, there has been tremendous growth at the Justice Department with new duties.

Under the leadership of Chairman Brooks, we have responded quickly to the needs of this Department of Justice.

During that same period of time, however, this Department, under Ronald Reagan and George Bush, have increasingly chosen to ignore and challenge the authority of Congress at all levels.

I am the chairman of an oversight subcommittee on Government Operations and I have had numerous problems with the Justice Department which have interfered with our subcommittee's oversight responsibilities.

Let me give you an example since some of my Republican colleagues think that this is a witch hunt.

We had an example of an investigation of the DOE Rocky Flats facility in Colorado.

Despite Federal investigations and designation of the facility as a Superfund site, our Justice Department entered into negotiations to relieve the company managing the facility of liability for the problems.

The effect of that action would have been to make the Federal Government and hence the American taxpayer totally responsible for the cost of the cleanup.

Such a unilateral decision by our Justice Department did not seem to be either in the public interest or the correct legal interpretation of the applicable statutes and existing contracts.

It is inconceivable that we should not have investigated that by Congress.

The public has a right to know that the Government was accepting responsibility for the cost of the cleanup for problems created while the facility was operated by a private contractor. It is foolish to think that my constituents should even be satisfied with the explanation, well, the Attorney General made a unilateral legal decision that the facility manager shouldn't be liable and I don't have the legal reasoning, but he says he must pay out huge costs.

I, like everyone else, anticipated the Attorney General would be here to answer questions.

It is beyond my comprehension that he refused to appear.

I have been told that he wasn't pleased that this hearing might be confrontational.

I don't know if that is true.

If it is, however, I suggest he reconsider career choices. He is a Government official who must be accountable to the American public.

To suggest that he could only be subjected to easy questions and to easy oversight hearings and never be challenged is to suggest that Congress completely abandon its oversight responsibilities.

Those hard questions and potential confrontations would have never arisen had it not been for the Attorney General's and this Department's failure to account for its actions in the use of taxpayer funds, period.

If he had been here this morning, I had some questions and perhaps some of his associates that are in the audience can pass these on to him.

They were, first, is there a written procedure which has been circulated in the Department of Justice which details the Department's policy for responding to congressional requests?

Second, are all congressional requests for information treated in the same manner?

Does it matter if it is from an individual Member as opposed to a request from a committee and pursuant to the investigation?

Third, are you aware of instances in which GAO has failed to conduct an exit interview for any of its investigations of the Department of Justice?

Fourth, there have been numerous instances of unwarranted delay in providing materials and information for committee investigations.

Can you explain to me, for example, in the Rocky Flats investigation, why the Department of Justice decided after 5 months of refusal, claims of privilege and confidentiality, finally provide the original documents requested?

Fifth, was this refusal a deliberate attempt to set up a confrontation to see how far we could go on our request?

These are only a few of the questions I had for the Attorney General this morning.

I had many other concerns, particularly on the Department's apparent decision to decide that certain statutes are unconstitutional

in the absence of any court case and to issue regulations on that basis.

I hoped to have some information today to at least evaluate the performance of the Justice Department.

Just as other heads of agencies defend their agency's actions, I would have expected the Attorney General of the United States to be able to do the same.

I don't know why he considers himself so different. I hope he reconsiders his refusal and accepts his responsibility to the American people to account for his Department.

Mr. BROOKS. Mr. McCollum, the gentleman from Florida.

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

Yesterday I participated in a meeting that the Republican House Members have routinely had with the Attorney General. I say routinely because we generally always do that prior to his appearances here for oversight matters, whether this Attorney General or any other during Republican administrations.

There was no hint during that meeting the Attorney General in any way was afraid of any question that would be presented here. It was his intent at that point in time to come here and answer the most confrontational and controversial questions. He was actually looking forward to that. He was looking forward to the opportunity, particularly, to address the crime bill questions and—I am sure—issues Mr. Edwards raised a few minutes ago would have been something he would have relished going back and forth with give and take on.

We talked about some of our concerns of what we expected to be raised with him here today. I particularly wanted to have him highlight for us what his views were with regard to where the Immigration Service funding was going and some of the particulars like the Investigations Section. We went over a number of things.

One of the things that came up during the meeting was the fact there would be some questioning in one area or another that he would not personally be able to answer because he had recused himself from dealing with those matters. I think it is publicly known he has recused himself because of personal investments or whatever, as most public office holders do or have to do from time to time.

His point was he wanted to be sure to have his people with him, two or three key people at the table to be able to answer those kinds of questions and provide the specific responses in the crime area, areas he expected most of the substantive oversight questions to be about. That is a nominal common courtesy we provide around this place. That is what this committee's chairman has decided not to do this time.

I am saddened by that.

In the second instance, I know he wanted to present six slides and 2 minutes worth of video. That is not very long. Six slides, 2 minutes worth of video to illustrate points he wanted to make to us with regard to crime legislation, the fact the President's crime bill has not moved in this Congress or in this committee or been marked up. It was something of paramount concern to him. He wanted to drive home the points he had with respect to the importance of that piece of legislation. That was his main concern.

He said to us, and I am sure he meant this very sincerely, I know tomorrow is going to be political in large measure. I even admit or acknowledge he is running as a candidate. We all know that, that he probably is.

He saw this press release as highly political and inflammatory. We agreed it probably was. His concern was—I want to come up before the Judiciary Committee tomorrow and make the case for the President's crime bill, two or three other things, and respond to the substantive questions asked of me, and to heck with the rest of it; we will let them fire away, and I will be glad to answer them.

He was no more cowardly about this than anything I have ever seen. He was very forthright, very convincing to me and never hinted he wasn't about to come up here.

Mr. BROOKS. Would the gentleman yield?

Mr. McCOLLUM. I would be glad to yield to the chairman.

Mr. BROOKS. I want to correct one misconception.

Last night, my staff and I had the very distinguished and able ranking minority member, Mr. Fish, convey to the Justice Department our complete willingness to let them have their video show.

Mr. McCOLLUM. I am glad to know that.

Mr. BROOKS. They knew that.

Mr. McCOLLUM. Earlier in the evening they did not know that when the decision was made not to come up here. I know that. I talked to them about it.

Mr. BROOKS. At 6:30 they did know it. I live by the hour.

Mr. McCOLLUM. I respect the chairman. I am glad he informed me. That is a piece of information I was not aware of. I suspect at that point he was very perturbed overall with the process.

I will be glad to yield to the gentleman from New York.

Mr. FISH. Since my name was mentioned, that is correct. I did convey to the Attorney General the modifications in the rules for the process that the chairman offered. By that time, the Attorney General had seen this highly inflammatory and anticipatory press release, and realized what he thought earlier about this being a totally confrontational political hearing was confirmed by the language in this press release. I think that is what tipped the scales in his decision.

Mr. McCOLLUM. And the fact he could not have his people at the table to answer responsibly the questions.

Mr. FISH. He could have them only one at a time, yes.

Mr. McCOLLUM. I think over all, Mr. Fish, Mr. Chairman, this is a bottom-line process. We had clear signals from him yesterday in a meeting that was very normal and routine that he had no problem coming up here and answering the normal questions, even the confrontational questions.

I think what he perceived, as Mr. Fish has described, as the day went on with the disputes over initially the slide and film which was ultimately agreed upon—I am glad it was—over who could sit at the table—were just figments, things that were placed in the way of his being able to make a good, clear presentation.

In the end, I assume based upon what Mr. Fish has just said, he concluded this was going to be nothing but a political confrontation today rather than a substantive one that the Attorney General and other Cabinet members are routinely expected to see.

I am disappointed he has chosen not to be here. I understand why he is not here. Once in a while the executive branch has to lay down what it believes to be the line and not cross over and yield to the legislative branch on something like this. So I respect that.

I think Mr. Fish did the right thing by advising him last night he should not come up here. It was a decision made not just in isolation by the Attorney General obviously but in consultation with the minority on this side. We happen to agree on this side he should not have come today with the political climate being what it is.

It is too bad. It is one thing to have tough questions. It is another thing to have a political circus. It is another thing to take the routinely controversial matters the Attorney General will have—because that is the nature of his business—and turn that into something else as a show that it appears that it is because he is likely to be a candidate for the U.S. Senate in the next few weeks.

I am saddened it has become politics in this committee. It appears that is what it is. I hope I am wrong, but it appears that is what it is.

Mr. BROOKS. Mrs. Schroeder, the gentlewoman from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I must say I am very saddened by this. I understand the minority using the best defense and they are accusing us of being political. That takes a lot of chutzpah, I think, in this case.

We have had them admit it is not the furniture arrangements. It is not the video. Now they don't like the press release.

I have to tell you, I sit on Armed Services. Secretary Cheney comes up there. You should see some of Aspin's press releases. They still come. Dellums and I are allowed to ask questions. They are man enough to come and sit at the table. We have kind of the same arrangement. It is incredible that we can conduct business that way.

Mr. Chairman, I support you totally. I think you are absolutely right. We are being asked to put out a lot of money for a Justice Department and until today I thought the Justice Department's clients were the people of the United States whom we represent. Now we are hearing today the Justice Department's client is the President of the United States so he has executive privilege. I thought that was Boyden Gray.

Obviously we do not call Boyden Gray up here because he is the President's attorney. There is executive privilege. Now we are hearing the whole Justice Department say that we do not have the right to question because they do not represent the people of the United States, they represent the President.

Now, that is a whole rewriting. I know we have lost the Supreme Court. It sounds like today we have just lost the Justice Department. That troubles me very much.

I had some terribly serious questions that I wanted to ask the Attorney General because, as you heard from the gentleman from Oklahoma, Mr. Synar, obviously my people live downwind of Rocky Flats. They were not particularly pleased with the way the Justice Department handled the Rocky Flats nuclear plant.

They also have not been pleased with the way the taxpayers get to pay all the bills in the S&L bailout issue; but the Justice Depart-

ment has allowed all the judgments to be sealed and, of course, many of the defendants are some very high-profile Republican givers. There may be a reason for sealing all those judgments. There may be a reason that none of them had to pay any more than their insurance even though they are told it will be worth hundreds of billions of dollars.

I don't see it. None of us can see it because they have sealed the judgments. I find that really interesting that the Justice Department would do that.

I had a lot of other questions, too. You know, the Attorney General asked for \$2 million from this committee for bonuses. Bonuses. Bonuses. He was going to give those people, those stealth people sitting out there, they are going to get \$2 million for bonuses for not showing up.

We have to think real seriously about that as we look at this. In other words, they are asking us as Representatives of the people to give them a tremendous amount of money at a time when funds are not really very flush around here. They are asking us to give them a blank check to spend however they want. They are really saying we have absolutely no right to ask any questions.

I say all this, and I say it very sadly. I tell people that when I was at Harvard Law School, if anyone came to the law school and said you could work for the U.S. Justice Department, their toes tingled. They knew they would not make a lot of money but they thought they would be on the front line of antitrust, civil rights, doing things very exciting. I think if you go on that campus today and make that announcement, they run for the exit.

I think today is part of the reason we see that. If we do not restore the concept of public service, pride, and start conducting government in the sunshine—you know, the Justice Department should not be a fungus. It ought to be able to operate in sunshine and come forward here and answer questions.

So I really find this horrifying. I think it may have something to do with politics; but the politics are on the other side. All I want to say is, "George Bush, come home."

I certainly hope, Mr. Chairman, you consider very seriously subpoenaing the Attorney General. I would be very supportive of it.

I think it is a sad day when we get to the point we have to subpoena the Attorney General of the United States to appear in front of the Judiciary Committee. It appears that is what we are going to have to do.

Mr. BROOKS. Mr. Campbell, the gentleman from California.

Mr. CAMPBELL. A fungus?

It may also be a comment on the difference in students at Harvard these days. It seems to me this is an unnecessary confrontation. That is too bad.

Let me just say, if I may, that there is a need for respect and courtesy and, in this instance, it has not been met. I am not here to judge, but I will make this comment and it is with all good conscience. I don't think we need to operate in as confrontational a manner as we have.

I would not use the sorts of phrases I have heard this morning. I think that an accommodation could have been arranged.

I think the placement of names and positions on empty chairs is a device for the cameras. I think a press release that refers to stonewalling is also a confrontational device.

I also think the Attorney General has a lot to tell us. It would have been better if we could have worked out an arrangement.

Let's avoid confrontation, if we can. If we cannot, so be it. I think we could have avoided it.

One point on substance—the issue of the Justice Department's attorney-client privilege. It is an important point.

Yes, they are the servants of all the people. Yes, Boyden Gray is the Counsel to the President; that is a separate office.

But when we deal with the issue of attorney-client, advice given, let's say, from a branch of the Department of Justice to another branch, the importance of attorney-client is such that it is appropriate to assert that privilege up until the time that a court has definitively ruled it does not apply.

I sat through the hearing on INSLAW, and the question posed there was whether this committee was entitled to documents the Department of Justice asserted the attorney-client privilege over.

I remember Elliot Richardson was here representing the other side on this point of view. The question was whether the attorney-client privilege could be asserted with regard to a request by Congress.

We had counsel for the House present. I asked counsel, do you have any court ruling on that issue? It is a very interesting issue. Do you have a court opinion on that issue?

There was not a single court opinion on that issue. The argument being advanced was attorney-client privilege only applied to court.

You think about that for a moment, that is illogical. The purpose of attorney-client privilege is to encourage the free flow of communication between counsel and client.

If that communication is exposed to the public in a congressional hearing, it as much defeats the free flow of information as if it were disclosed in a court of law.

In advance of that hearing, I think it was correct for the Attorney General to take the position that he did that privilege is different. It is not attached to materiality, it is not attached to relevance.

It is attached on the basis of privilege. Until that is advocated the proper thing for the counsel is to refuse to provide the data.

One last point. My colleague might be interested in putting a question to me.

I would be delighted to yield in a second.

One other point I would make—returning to the point of undue confrontation. I was also here during the hearing on the Eagle system. Assistant Attorney General Flickinger was present.

He wanted to have a U.S. attorney who worked with the system testify. Eventually I asked the chairman, and the chairman was able to allow him to do so, but not before a little bit of jumping over hurdles.

And the question there was did the Department of Justice go for the highest bidder or not? And if so, for venal purposes? Well, it

turned out in the hearing it was not the highest bidder. It was in the middle.

The argument that you could get cheaper software on cheaper terminals, as I recall, on the streets in Washington turned out not to be all that relevant because any of the bidders offered a combined package. You couldn't get part without it all.

At the end of the day, my observation was the suggestion that it was a massive instance of venality was really overstated.

Mr. BROOKS. Will the gentleman yield?

Mr. CAMPBELL. I will be pleased to yield to my chairman.

Mr. BROOKS. To my distinguished friend, I wanted to comment. You understand the two rows of chairs were certified by the Attorney General and the Justice Department. They sent us a chart on how they wanted to seat everybody. Two rows, the front two rows reserved for all their people. We readily agreed they could have those two. They could have three or four more if they wanted.

Mr. CAMPBELL. If my chairman would yield back?

The point I was making was the identification with names as to who was supposed to be—

Mr. BROOKS. That is the way they came to me.

Mr. CAMPBELL. It was an attempt to identify this for the media.

Mr. BROOKS. They had the names on them. They had them set up.

Mr. CAMPBELL. It is traditional—

Mr. BROOKS. That row, that end, this one here.

Mr. CAMPBELL. If the chairman will yield back the time to me?

The point I was making is that it is appropriate for an Attorney General or Cabinet officer to have assistants here. The identification of empty seats with name tags, unless I am mistaken, was done by the chairman. That, however, is not the bulk of my point.

The bulk of my point was on the *INSLAW* matter. It is appropriate to preserve the attorney-client, and on the Eagle hearing, which I thought was unduly confrontational.

I yield to the gentleman from Texas.

Mr. WASHINGTON. I thank my friend for yielding.

I agree with what you said about the professionalism and the lack of confrontation; my questions have nothing to do with that.

One is a point of clarification and the other is a question of your interpretation of the law.

On the clarification, I understood you to say—and perhaps it was just my misunderstanding—if so, that will dispense with it.

I understood you to say on the question of the attorney-client privilege, that one division of the Justice Department may give advice to another. That would fall within the gambit of attorney-client privilege?

First, I want to know, is my understanding of your assertion correct?

Mr. CAMPBELL. It is correct.

Mr. WASHINGTON. That is one lawyer may give advice to another lawyer in the same law department and be covered by attorney-client privilege?

Mr. CAMPBELL. Let me take the instance of the *INSLAW* case. This is what I had in mind.

The allegation is several members of the Contracting Office within the Department of Justice might have acted in an illegal or improper fashion.

If they sought advice, and apparently they did, from attorneys in the Department of Justice, whether Office of Legal Counsel, Office of Professional Responsibility, pursuant to this investigation, yes, I do believe the appropriate application of attorney-client—

Mr. WASHINGTON. In other words, you are speaking of in the nature of an investigation or an alleged potential criminal allegation?

Mr. CAMPBELL. That is what we were speaking of, yes.

Mr. WASHINGTON. The other question—that was a clarification. The question relates to my general understanding of the law that on the question of an attorney-client privilege, it is only the client who can claim privilege, that is your understanding?

Mr. CAMPBELL. It is my understanding the client can raise privilege.

Mr. WASHINGTON. Only the client can raise the privilege?

Mr. CAMPBELL. Can raise or waive.

I thought you were referring to raising it.

You are quite right.

Mr. WASHINGTON. If Mr. Thornburgh claims an attorney-client relationship, based upon a relationship with the President, it would be only the President who could raise it or waive it and not the lawyer?

Mr. CAMPBELL. That is correct, if that were the context.

Mr. WASHINGTON. To my knowledge he has not done so, that is, the President?

Mr. CAMPBELL. But I don't believe your context is the context we are discussing. I believe we are talking here about the assertion—at least I am—in the *INSLAW* matter of attorney-client privilege within the Department of Justice.

You are quite right. In the role of Attorney General as counsel to the President, then the President is the client.

Although as your colleague and distinguished Member from Colorado identifies, there is an additional player there, Boyden Gray, who also may play a role.

The context I was raising was an inquiry of potentially criminal liability within the Justice Department, and there it is appropriate for the client—which were these individuals within the Justice Department itself—to assert the privilege.

Mr. WASHINGTON. Insofar as the failure to testify, and claim the privilege on that basis, it would be the client who would have to make that claim and not the lawyer; is that correct?

Mr. CAMPBELL. It is always so, although the client oftentimes raises it through her or his lawyer. In this instance, the Department is under inquiry.

Reclaiming my time and concluding, I appreciate the colloquy.

I always enjoy colloquies with my colleague from Texas.

I do believe we can proceed less confrontationally.

I have been in Congress 3 years, not 30. Other committees do not operate in as confrontational a manner; I was hopeful we would not as well.

I yield back.

Mr. BROOKS. Mr. Glickman, the gentleman from Kansas.

Mr. GLICKMAN. I want to follow up on the *INSLAW* case.

I am not sure I totally agree with the analysis of attorney-client privilege; and just from a personal perspective, I continue to be baffled by the unwillingness of the Department to cooperate with the committee and release all Justice Department documents pertaining to this case.

I understand the concerns about attorney-client privilege, but I think this is a perfect example of the old saying that a lawyer who represents himself has a fool for a client.

When the Department of Justice is both attorney and client, then there is no question that Congress should be allowed to oversee the activities.

I would ask the question today of the Department. When will you release the *INSLAW* document to the Judiciary Committee?

I don't think this is as complicated a legal issue as some folks would make it.

Mr. CAMPBELL. Will the gentleman yield to me at some point.

Mr. GLICKMAN. I will; just let me finish my statement.

I do agree this takes on a tremendously confrontational tone. I must tell you, however, that I think most of that emanates from the Department for two reasons.

Number one, as Mr. Hughes said, over the last 10 years, I have seen a different category of people rise to the top in the Department of Justice.

People are not there because of their legal qualifications, their mind or intellectual abilities, but a lot more because of their politics. Not that politics should not play a role in why people are promoted to Assistant Attorneys General at the Attorney General level.

There is no question that in the last 10 years particularly—the Department of Justice has been stocked full of folks who are there for their political experience than for their intellectual and legal capabilities.

In this context I must say I see an enormous conflict of interest. The Attorney General of the United States who from all reports did a good job as Governor of the State of Pennsylvania has announced his candidacy for the U.S. Senate. I believe that is essentially a fact.

We are not talking about an executive branch official who just has a difference of opinion with Chairman Brooks. We are talking about a man who has announced that he is resigning as Attorney General sometime toward the end of the summer, maybe when he learns when the election is going to be held for the U.S. Senate seat in Pennsylvania; but who is going to resign to run for the seat of a U.S. Senator.

That is his goal, to leave the executive branch and move into the legislative branch of Government. He has been as far as I am aware unequivocal about it. He has not equivocated about that at all.

I further understand various persons are raising money in Pennsylvania for that race. I also believe the Attorney General's name was mentioned by Vice President Quayle in a recent fundraising event in Pennsylvania.

What I am saying is, he has made a decision to run for the Senate. That is his prerogative. I believe he is the frontrunner for that position.

I am not demeaning his qualifications for that involvement. But once that decision is made, then I think he has an obligation to resign.

Otherwise, he creates a political problem. We have enough problems in terms of trying to defuse the political controversy between Congress and the President in this country anyway.

But this is the chief law enforcement officer of the United States—that is what he is—he is not Chief Counsel to the President. He is the chief law enforcement officer of the United States.

He represents 240 million people in fighting crime, in keeping government on the straight and narrow. When you have that person who made the judgment to run for another office and when the campaign is being actively pursued, then it just sets us up for this kind of problem, with this kind of battle.

And so I think it is unfortunate. I think that if the Attorney General wanted to keep his Department on a level of a very high degree of professionalism, he would resign and let the President appoint somebody who reflects the President's perspective, but at the same time, somebody who is separate and apart from the nitty-gritty politics of a U.S. Senate race.

What I am really saying is I think the Attorney General has brought this on himself. I think it is unfortunate.

I think that the best thing for America, and for the people, would be for him to step down and let somebody else take the job.

Mr. CAMPBELL. Will the gentleman yield?

Mr. GLICKMAN. I will be glad to yield to you.

Mr. CAMPBELL. I thank my friend from Kansas. I think the statement I would like to ask you to explain might have been a little too broad and perhaps I am wrong, too.

I took you to say that whenever there was one part of the Department of Justice giving legal advice to the other, that that should not be able to be withheld from a committee of Congress and—I might have heard it wrong.

Again, suppose if that were the statement, it would cause me a bit of concern for this reason.

Consider the following hypothetical, which may or may not fit *INSLAW* but is a hypothetical I am allowed to give because your statement was across all cases.

Suppose you have an inquiry as to a contract let by the contracting department within Justice, the contracting agency. It is in litigation because the defeated bidder on the contract did not like it.

There is a challenge, and the Department of Justice employee who let the contract asks advice from the Office of Professional Responsibility, Office of Legal Counsel.

It is my belief that that kind of conversation would be chilled if not prevented from happening if the substance of that conversation could be exposed to Congress.

Mr. GLICKMAN. First of all, you were an outstanding professor. I have heard great things about you.

I was not the greatest law student in the world. I don't know if I can pass the test you just gave me.

Let me say, I do not think the Justice Department is like a law firm. It is a body which represents the people of this land.

What we are trying to do is make sure the people's interests are best represented. We would like to get some of this data in here to review the information.

I guess what I am saying is the attitude of the Justice Department is basically philosophical; to keep us from getting the information.

It seems to me that is using the attorney-client privilege as a sword rather than having a cooperative attitude and trying to share the information with us; that is all.

Mr. CAMPBELL. Thank you.

Mr. BROOKS. Mr. Ramstad.

Mr. RAMSTAD. Thank you, Mr. Chairman.

I have the utmost respect for the members of this committee. As a new Member, I certainly respect the gentleman's admission this exercise is all about the Pennsylvania Senate race.

This exercise makes pro wrestling look real. I don't know whom we are trying to kid.

Certainly not ourselves. I hope not the American people.

This was intended, it is obvious, to be the ambush at the "Congressional Corral." I think this Justice bashing is truly unfortunate.

To me—and I am sure to many other members of the committee—it is surrealistic when the crime epidemic in this country is rampant. We have so many other problems to deal with.

Rather than marking up the crime bill or dealing with those problems, this committee spends valuable time playing politics. I think the American people deserve more.

Mr. Chairman, I did meet yesterday with the Attorney General, and I guarantee you and the other distinguished members of this committee that he was committed to coming here.

More than that, he was looking forward to this session.

But, Mr. Chairman, this press release riddled with unfounded conclusory accusations, obviously, tipped the balance.

I am somewhat disappointed that our very distinguished chairman, for whom I have immense respect—in fact, unlimited respect, Mr. Chairman—would allow the situation to occur.

Mr. BROOKS. With some exceptions.

Mr. RAMSTAD. Thank you, Mr. Chairman.

Mr. FRANK. Mr. Chairman.

Mr. BROOKS. Mr. Frank, the gentleman from Massachusetts.

Mr. FRANK. Mr. Chairman I am disoriented. I come to the Congress of the United States where people are elected, where we spend our time debating each other; and what am I told? That the Attorney General of the United States will not come because people are going to be confrontational.

I think that the American people watched with great glee and interest and almost a sense of envy the question period in the House of Commons.

Can you see Margaret Thatcher saying to Neil Kinnock, "Now you are being confrontational." This is bizarre. I looked at the Constitution.

Where does it say one may not confront the Attorney General of the United States when one disagrees with him?

He has done absolutely something I did not think possible. Richard Thornburgh has generated a nostalgia for Ed Meese. That is not anything I would have thought possible.

When you disagreed with Attorney General Meese he came up here and told you this. What else have we been told?

Not only were we going to be confrontational, but in the U.S. House of Representatives there was going to be politics.

Can you imagine? Politics? It is like finding gambling in Claude Rains' joint.

Of course there are going to be politics.

Yes, there was going to be politics. Politics is debate over issues. Some of us disagree very much on the issues.

I worked on an immigration bill last year the chairman helped us put together. It had a section in it dealing with excluding people from the country if they have the HIV virus.

The Secretary of Health and Human Services said we should not do that any more. The Attorney General overruled it.

I wanted to talk about that. Would it have been confrontational? Probably.

Would politics have been involved? Of course.

Where are we? In church? In nursery school? What are we talking about here?

Of course there would be confrontation and politics. That is called democratic debate.

For the chief law enforcement officer of the United States, the Attorney General, to say I was going to come, but I read that press release and that chairman, he hurt my feelings.

Welcome to the real world. Welcome to democracy.

Yes, this is a process in which people are rough and tough. My friend from Illinois left.

I am sorry. I was going to pay him the compliment of saying he is one of the best confronters here. To then say we should not confront the Attorney General is nonsense.

He doesn't like the seating arrangements? Let him come up here and say so. That is clearly an excuse.

I do think the gentleman from Kansas pointed to a very real problem. The Attorney General is in this position. I don't remember Cabinet officers not coming. Most Cabinet officers, if they saw a press release that was unfair to them, they would be eager to come up here and set the record straight and debate. No Cabinet officer has ever retreated from saying what he or she wants.

What we have is an Attorney General who has, as the gentleman from Kansas pointed out, has put himself in an incompatible position. He has declared a candidacy and continues to be indefinitely the Attorney General of the United States. That is where the problem is.

He has today, by not showing up before the oversight committee that has jurisdiction over his Department, proven conclusively that it is incompatible for him to remain Attorney General while he continues to work on a Senate candidacy.

Anybody who thinks a sensible adult who is now the Attorney General of the United States, who is planning to run for the

Senate, is not spending at least part of his working day thinking about how activity will impact on his Senate candidacy, must believe we don't do confrontation in the U.S. House of Representatives.

The last point I would like to make would be to my friend from California. I agree with him in the situation he described in his colloquy with the gentleman from Texas there was an attorney-client privilege. The problem was there should not in that case, in my judgment, and I think in the judgment of my friend from Texas, have been an attorney-client relationship.

If you are an employee of the U.S. Justice Department and you are accused of something wrong, don't go to another member of the Department of Justice to get advice. That is an inappropriate use of the Justice Department, the public law firm for this country. If you are worried about what you did, you ought not to create that relationship between you and one of your colleagues involving your actions.

I would yield to my friend.

Mr. CAMPBELL. I think that is not correct because of the Office of Professional Responsibility within Justice. When I was there, I recall, the Department encouraged anybody with a question, if you have the slightest issue about whether something is ethical, come, talk with us.

Mr. FRANK. Before the fact or after the fact?

Mr. CAMPBELL. Both.

Mr. FRANK. Before the fact, I urge that very strongly. After the fact, if it is a question of confronting an accusation, dealing with an accusation, then you should not be in that position.

Mr. CAMPBELL. I appreciate your candor. You have admitted the point. You previously said you should not seek counsel within the same Department. Now at least as to before that—

Mr. FRANK. Let me say to the gentleman, I am the candor champion of the U.S. House of Representatives. I think I established that.

My point is, yes, I misspoke. I acknowledge that. In the instance we are talking about, it is one thing to go before the fact and get advice about how you should act. It is entirely different to go after the fact and say, am I in trouble here, can you help me?

I would also say, Mr. Chairman, just to summarize, I have told one of our colleagues he couldn't use an easel. I told people let's get right down to it whether he should or shouldn't have been able to have aides or not, that is not the point here.

The Attorney General of the United States having declared himself a candidate, is he afraid he would get mussed up. He is afraid it would be hard to do. It underlies the incompatibility of the two roles. He is entitled to be Attorney General. He is entitled to run for the Senate. He cannot ride both of those horses. He has just split his pants very badly.

Mr. BROOKS. Mr. Schumer, the gentleman from New York.

Mr. SCHUMER. Thank you, Mr. Chairman.

I agree with what has been said before. My colleague from Florida said that Attorney General Thornburgh has come up here time and time again and been willing to answer the tough questions. That is true. I have seen him.

What is different this time than all the other times? It is not the chairs. It is not the number of people he would sit with. It is that he is running for the Senate. That is the big difference this time from the last time. What has happened which would inevitably happen to any of us—I am not disparaging his integrity in any way—is that his political hat is becoming far more important than his chief law enforcement hat.

He is only going to be Attorney General for a couple more months, maybe, depending upon what happens in the Pennsylvania primary. But his Senate race is his political life or death. Quite naturally when faced with the choice of answering tough questions which he has had no problem of answering before and then faced with the choice of answering them now when every little paper from Altoona to Wilkes-Barre is going to be writing everything down, he says, "Wait a minute. There is a great danger to what I am doing."

What we have seen is just as the gentleman has said. You cannot wear both hats. You cannot be a candidate for office and be the chief law enforcement officer of the country. Plain and simple.

In fact, in Mr. Thornburgh's position right now, the political hat is always going to predominate. That is why it is not very good to be in this position.

The empty chair is there not just—I will be happy to yield in a minute to my colleague from New York—not because he couldn't have some people sit next to him, but simply because he has another responsibility, another thing on his mind, that is predominant. That seems obvious to me.

As the chairman laid out, there were lots of excuses. First it was the seating. Then the video. Then the press release. This is the Attorney General who called Democrats last year procrime because we prefer a different bill than Republicans. Now he is saying he will not play hard ball. He shouldn't play hard ball. Come on. That is just absurd.

The Attorney General has been on the case of this committee to bring a crime bill forward. He wants it there quickly. We are trying to move as quickly as we can. But today's hearing would have helped move that bill forward.

I had a number of questions about provisions in the President's proposal I wanted to ask the Attorney General. We can't.

I suppose now he could say, well, that should delay things another 50 days or wait until he comes here so we can ask him these questions. I don't want to do that. None of us do. We want to have a crime bill.

If this 100 days is so important, and if moving a crime bill is so important, I am sure it is far more important to the Attorney General than who sits at the table and what kind of chairs there are and what Chairman Brooks says in his press release.

I think we have seen once again that when it suits their purposes, they want a crime bill. But when it doesn't suit their purposes, things that might get in the way, slow it down, are easily dealt with.

So I am disappointed. I am disappointed on a substantive basis. I had some real questions to try to get answers on the crime bill.

Some of them might have been confrontational. Many of them would not have been.

But I also feel that those of us who are extremely queasy in having the chief law enforcement officer of this country who has to make lots of impartial decisions—and he did—also be a candidate for office have had our queasiness unfortunately vindicated by the empty seats there.

I would be happy to yield to the gentleman from New York.

I would be happy to yield to the gentleman from Florida.

Mr. BROOKS. Will the gentleman yield to me?

Mr. SCHUMER. I yield to the Chair.

Mr. BROOKS. I would like to say I personally have some difference with that view of yours and of Mr. Glickman's. I believe that if I were running for the U.S. Senate—which I am not—my opportunities would be enhanced by a straightforward, honest, candid answer on whether or not we can release the INSLAW papers, whether we have destroyed some of them. I would give by providing an honest answer on whether or not there is sufficient legal support for the President to issue an order authorizing the FBI to kidnap and detain citizens or people in foreign countries without the countries knowing about it. I would answer those questions. I think his stature would be enhanced by forthrightly standing up and, whatever his opinion is, stating it.

I talked with the Attorney General, as I told you, on Friday. I thought we had a pretty good understanding on resolving two or three of these issues without much problem. He could have done that. He could have agreed with some of you, disagreed with some of you. Whatever he wanted to do.

I think by honestly, candidly looking problems in the eye, saying what you think, telling the truth is the best way to get elected to anything.

Mr. SCHUMER. I will yield to the gentleman from Florida.

Mr. MCCOLLUM. I thank the gentleman for yielding.

One thing about the crime bill that is important, in terms of the Attorney General, he has requested—and I am personally aware of this—on numerous occasions over a period of time this year, to come up here, to have a hearing, to have the Judiciary Committee have a hearing on the crime bill and let him testify. I don't think that is an issue. I think it is the reverse.

He should have been given an opportunity on the crime bill before. It is not the gentleman's fault. The crime bill was not referred to him altogether. I think the chairman of the full committee has played a little game with this.

Second, I would like to come back to the politics of this a little bit. Yes, there is politics here. There is no question there is. As Mr. Frank said, it is inevitably going to be the case. The shape of all of this is that the tone and tenor of this committee has changed toward the Attorney General since he has become apparently a candidate, or likely to be one. I think that is as much a shame as anything else.

We can say, well, you cannot keep politics altogether out of it. Of course you cannot. The fact remains this committee has shown on many occasions—by many of the Members on the other side—a great deal of respect for Attorney General Thornburgh. A lot of

people thought he was doing a fine job in most areas, although they disagreed with one or two points he was making, his views or his philosophy. I heard those comments time and time again in subcommittee and full committee, contrasting him with other figures, and so on.

All of a sudden, when we get to the point of his being a candidate, it appears to me this committee became very hostile to him and all these things were orchestrated. That is the appearance that is being given. It is a chicken and egg proposition about whose politics it is, who is right.

I think that the idea that Mr. Campbell said earlier, that as a committee it behooves us to be less confrontational, to take off the hat a little bit. Take the edge off. Get him up here. Let him have his day. Let the politics at a normal level proceed.

I yield back.

Mr. SCHUMER. Of course, when the Attorney General says he is going to run for political office, things are going to change. That is the whole point we are making. People are naturally going to react differently. That is how it is in this country.

The bottom line is, by trying to do both at once, he deserves each.

Mr. MOORHEAD. Will the gentleman yield?

Mr. SCHUMER. I will be happy to yield.

Mr. MOORHEAD. One of the problems, of course, is that a court decision has delayed the ability of the Attorney General to get into the political race he probably will get into.

I think that once that decision is made, which will probably be in the next 30 days, that he can decide whether he is running or not going to be running. I know it creates some problem in the meanwhile, but he draws a lot of flak from this committee and from elsewhere when he becomes a candidate, naturally.

But it has been my experience that everyone on this committee has thought that he had been doing a good job up until he became a potential candidate. Very little opposition has been expressed.

There are things that I would like to ask the Attorney General about, areas that I am involved in, I am concerned about, such as the border patrol, some of the immigration services, some of the court services and so forth.

But I do not think that you can have a meaningful hearing that involves the basic things that we are, each one of us, interested in on our committees and combine that with a political vendetta that involves issues that have been present in every single administration—Democrat, Republican—about what records are distributed to committees of the Congress and what are kept—for very real and positive reasons—in the Attorney General's Office dealing with cases that they are handling where the results of the cases can be adversely affected by distribution.

I have not made an argument on any particular desire for any particular piece of evidence; but I think you have to separate them. I would really like to be able to have our normal hearing that we have when the Attorney General comes down here. I know that he would very much like to participate in that; but 30 days before he probably will no longer be Attorney General, when he is a candidate, I think it is not a very good idea for us to be in a partisan

victory contest over things that have been traditionally the battleground between the Congress and the executive branch.

Mr. SCHUMER. Reclaiming my time, and I very much appreciate the gentleman from California's statement, and I know he approaches these issues in the best of legislative ways, but all I would say is the questions the chairman and others wanted to ask him on *INSLAW* and everything else, he came last year when those questions were out there. He was asked about them, as I remember.

I think it just again bolsters the point when you are running for political office, things that you would have normally done and looked forward to and been able to have the kind of confrontation that often occurs from that end of the table to this one, you just do not do any more. You cannot do both jobs at once. It is that simple.

Mr. HUGHES. Will the gentleman yield to me?

Mr. SCHUMER. I will be happy to yield to the gentleman from New Jersey.

Mr. HUGHES. I agree with the chairman. I don't think the Attorney General could possibly have believed by not appearing today it works in his favor.

I think by not appearing today, he probably has the worst of all worlds.

This is probably going to be the biggest setback for him in his race for the Senator's position in Pennsylvania because pressure is going to now double on him to resign.

So that had to be factored in the decision.

I think he got bad advice.

I say to my colleague from California, who is the ranking Republican on my new subcommittee and who has worked well with me in a bipartisan fashion, that what triggered this happened a long time ago.

It is not *INSLAW*, in particular.

It is not the attorney-client privilege issue.

It is not any one thing. I have seen this deterioration for a long time.

My colleague from Florida was the ranking Republican for a number of years on the Crime Subcommittee.

I don't know how many times we had to confront the Department of Justice because they did not get statements to us in a timely fashion.

It was a continuous problem. I realize part of it was OMB.

We have had U.S. attorneys up here who were not allowed to testify because of failure to provide timely information in a timely fashion. There has not been a degree of comity that is necessary for a long time.

Over the years I was privileged to serve on that subcommittee. We moved ahead with legislation without their cooperation in many instances, because they really were uncooperative.

We have a liaison that is supposed to work with Members of Congress.

I tell you, they failed.

What we need to do, Mr. Chairman, is perhaps have some breakfast meetings once again with members of the Department of Justice to try to build a relationship again.

We have lost it.

There is no comity whatsoever today, unfortunately.

I have seen it coming for a long time. So frankly, as I asked before, where do we go from here?

Mr. MOORHEAD. If the gentleman will yield, I certainly agree with you.

Mr. SCHUMER. I know the people on the second row have been waiting a while. I thought the chairman was going to cut my time. It seems to me it is going on forever.

I yield to the gentleman from California for a brief rejoinder.

Mr. MOORHEAD. I did want to join with the chairman of my subcommittee in saying I think the meetings we can have with the Attorney General are very important.

We can do a lot to take care of any differences that might be there.

I think that is a great suggestion.

As we move along, I will do everything to see that they take place.

Mr. BROOKS. Mr. Stagers, the gentleman from West Virginia.

Mr. STAGGERS. Thank you, Mr. Chairman.

When I first found out the Attorney General was not going to be here I wasn't disappointed really. I didn't expect to get a whole lot of information from him anyway.

Also, I knew he was a candidate. I knew it was likely he may not show up because of that candidacy.

That is not the point.

I was angered as I listened to some of my colleagues when they tried to justify his absence by questioning our motives.

First I thought they must be talking about this press release, seating arrangements, or the chairman.

Obviously I wanted to defend the chairman. Then I realized the chairman is a big boy.

He can defend himself.

Mr. BROOKS. I never turn down support.

Mr. STAGGERS. And you have it.

I keep hearing these things about this conspiracy, this orchestrated effort.

I wasn't part of an orchestrated effort. I didn't even know he wasn't going to be here.

I had questions to ask him.

I resent other colleagues saying I don't have the right as a Member of Congress to ask those questions.

My questions didn't have anything to do with some of the issues that they may disagree with.

In fact, one of the matters I wanted to ask about was the Brady bill which the majority of the people on this side of the aisle were for and the majority over there were against.

Those were the questions I wanted to ask.

I resent those comments by Members of this body, and this panel that there is some sort of orchestrated event where we were trying to beat up on the Attorney General.

They know that is not true.

Mr. McCOLLUM. Will the gentleman yield to me?

What I said was it appeared to be an orchestrated thing.

Mr. STAGGERS. Well, it is not.

Mr. McCOLLUM. I respect the gentleman very much.

I am sure he is telling it exactly the way it is. He is not a party to that type of thing. Maybe it wasn't orchestrated.

Mr. STAGGERS. All I heard so far is this press release; I was not part of this press release.

I don't think there is any other Member on this side of the aisle that was part of the press release.

As I understand it, we are supposed to have a 5-minute rule.

If this came from the chairman, you are talking about 10 minutes of confrontation.

I think the other Members talked about what the confrontation may have been about, answering hard questions.

I had hard questions I wanted to ask. I think that is the point that has to be brought up here.

This was not orchestrated. This is not a Democrat trying to beat up on the Attorney General.

I cannot understand him not being here.

He, as an Attorney General, has an obligation to be here and answer some of these questions, to talk about the crime bill, 100 days, whatever.

How are we supposed to do a crime bill if we have an Attorney General that will not come up and talk with us?

Mr. McCOLLUM. First of all, I am glad to know it wasn't orchestrated.

It is good to have that out on the record.

Again, the appearance was there to him and many of us. That may not be true. I understand.

The point was right or wrong, this press release and other things gave that appearance. We are clearing the air today.

The second thing, if you would still yield—

Mr. STAGGERS. I would like to reclaim my time.

I cannot understand where one member of this panel could give the appearance of an orchestrated—

Mr. McCOLLUM. Will the gentleman yield?

It is not just the press release. Earlier in the day, until 6:30 yesterday, and for some time the Attorney General wanted the opportunity to present the six slides and a video presentation.

Mr. STAGGERS. If I can reclaim my time?

I have been on panels where other members—have requested video presentations, but that is something that is up to the chairman. Nobody on the other side objected when it was not seen.

I don't know how we do this. Do we have every witness before this panel give us a list of things they want?

If they are not satisfied, then they don't have to come? I don't think that would be any different from other committees.

There are some things that have to be left to the chairman.

The gentleman from Texas did say that he would allow that.

I would yield to the gentleman, but I was one of the victims who has been 2 hours waiting to make a statement.

I know there are several other members of the panel that want to make their statements.

Mr. BROOKS. The gentlemen from Texas, Mr. Bryant.

Mr. BRYANT. Mr. Chairman, I want to advise the Republicans that if they are the ones who advised the Attorney General not to

be here, it is a low point for them. It is a mistake. You should be deeply ashamed if you did advise him he should not be here.

In doing so, you substituted a clear political judgment of a candidate for the U.S. Senate for an honest judgment about the proper duties of the Attorney General of the United States and his obligation to this institution and this country.

If anything has been orchestrated—and the comments of Mr. McCollum are particularly offensive, it has been the chorus of complementary statements made by the Members on the Republican side.

All of you over there know very well—most all of whom are gone but one—that the Attorney General has an obligation to be here to speak before this committee as he has every other year.

You also know that having his assistants sit behind him and calling them up to speak whenever he wants, one at a time, is absolutely no different than having them sit parallel to him.

It makes no difference whatsoever. I heard Mr. Fish interject a minute ago, “well, what you mean is you only want to talk one at a time.”

Well, I have news for the Republicans. People can only talk one at a time. That is the case in every committee.

It is preposterous what you have done here today. You ought to be deeply ashamed of it.

I am contemptuous of your comments that have been in my view, contrived, trying to defend what the Senate candidate on your side has done and defend your own behavior here today as well.

I will not yield until I am finished.

I know it has been said several times today but I want to make it clear to all who are observing, I have regularly as a Member of Congress seen members of the Cabinet come before every committee in this House. It is not even newsworthy most of the time when the Secretary of Commerce, of State, Treasury, the Secretary of Health and Human Services, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff during war time, the Secretary of Defense, the Chairman of the Federal Reserve Board, all of them come before committees all the time. It is not even big news.

The fact that in order to protect one Republican candidate for the U.S. Senate, you were willing to subvert all the processes of this House, and exaggerate and twist recent history, and go to great lengths to try to justify what has been done here to defend his candidacy, is an outrage and you ought to be deeply ashamed of it, Mr. McCollum, Mr. Fish, and Mr. Hyde and all the rest.

I have a high opinion of your abilities to represent your points of view in political debate. I think there are times when even you all rise to a virtuous level. We all try hard to work together within the context of our political differences.

What you have done today has been a terrible mistake. It is an outrage. You ought to be deeply ashamed of it.

I will yield to you, Mr. McCollum.

Mr. McCOLLUM. I thank the gentleman for yielding.

What I say is the outrage is the way the Attorney General was treated with this press release, the whole set up that appears to be there.

I think although some of you are correct you weren't participants in it, the whole atmosphere was poisoned from the beginning.

Mr. BRYANT. Reclaiming my time.

I would like to say we have heard Mr. McCollum make the same comments two or three other times as he did today. Let's read this press release.

I would have been happy to sign the press release. It is fine. It is a common type of press release.

What it says is that "Attorney General Dick Thornburgh will be called upon to justify controversial Department of Justice practices ranging from its 'secret opinions' policy to alleged FBI misuse of seized aircraft when he testifies before the House Judiciary Committee this Thursday, July 19."

Is that not true?

That is absolutely true; he was going to be called upon to testify.

"The hearing will be held at 10 a.m.," and so forth.

"This is the second hearing."

Then "Testimony taken by the Committee last week documented a Department of Justice that seems intent on provoking a constitutional confrontation, said Chairman Brooks, chairman of the committee.

"The Department has repeatedly failed to cooperate with legitimate Congressional oversight, audits," and so on.

All those things are the chairman's opinion. This is not any kind of partisan orchestrated effort.

It is a commonly issued news release. Mr. Fish knew it. Mr. McCollum knew it. Mr. Hyde knew it.

When you caucused in the back room before coming from here today, you agreed upon what you were going to say to try to defend your Republican Senate candidate.

If you want to defend him, then defend your own honor, and suggest to him he resign as the Attorney General, go back to Pennsylvania, and start campaigning for the office which apparently is more important than being Attorney General of the United States.

I yield back my time.

Mr. BROOKS. Mr. Washington.

Do you have a copy of that news release?

Mr. McCOLLUM. I do, Mr. Chairman.

Mr. BROOKS. Good, I wanted to be sure you had one.

The gentleman from Texas is recognized.

Mr. WASHINGTON. Thank you, Mr. Chairman.

I think most of the things that need to be said have been said.

I would only add on the question of conspiracy which troubles me, I hope my colleague from Florida didn't actually mean that in a literal sense.

If he did, we need to get to the bottom of it. If there is no conspiracy on one side of the scales, then there must be paranoia of a conspiracy on the other side of the scales.

One other thing and then I will be finished. "The guilty flee when no man pursueth.

"The guilty flee when no man pursueth."

Mr. BROOKS. Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Mr. BROOKS. From Oregon.

Mr. KOPETSKI. And proud of it, Mr. Chairman.

We are the Congress. There is a natural confrontation and tension that exists between the executive and the legislative branches of the government.

I am very disappointed the Attorney General, a lawyer, is not here today. As Members of Congress, we have to face tough times, but the people of this country pay us a lot of money to do so. Not just for good times, but for the tough times as well. The Attorney General is in a similar situation.

I am sure he gets to do a lot of things that are very pleasurable, ribbon cutting ceremonies, whatever.

He also has tough times. One of those tough times, on occasion, is to come up here before the Congress to justify his actions and the actions of his agency. The Congress appropriates the money for his agency. His agency has the responsibility to spend it correctly.

But how they spent it; that is, whether it is according to the law of the land and within the intent of the Congress, it is our job to monitor continuously. To make certain that they do so according to the policies enunciated by the committee reports and the Congress is the Congress' proper oversight duty.

This is our hearing room.

This is not the executive branch's hearing room. If we want to be obnoxious, we get to be obnoxious.

If we want to be kind, we can do so. And if we want to be confrontational, that is our right as Members of Congress. In fact, I believe it is part of our duty.

Now, I have observed Mr. Brooks, the chairman of our committee.

He is tough. He is fair. He injects humor in the process, and I believe he controls a hearing very well.

So there is the safeguard of the chairman, Mr. Brooks, who runs this committee. But there is an even bigger and bigger safeguard than the chairman for those Member who are overly rude to any witness. That safeguard is the folks back home because we will hear from them if we were overly confrontational or rude or, no doubt if we were too nice to a witness.

Before I was a Member, I sometimes watched Congress and wondered why weren't they tougher to and harder on some witnesses? Why didn't they follow up with their questions? Why didn't they go after a witness? How could they let them get away with that?

Our job is to be tough in our hearing room.

Mr. Chairman, there is a lot of secrecy about in this town. There has been over the past decade. Mr. Bill Moyers recently wrote a book about the secret Government. I want to read a paragraph from it: "Secrecy is the freedom zealots dream of, no watchman to check the door, no accountant to check the books, no judge to check the law. The secret government has no constitution. The rules it follows are the rules it makes up." We need to stop their secret government.

The Attorney General is making up his own rules.

The Constitution says, through our implied powers of oversight that we get to ask him questions. We get to ask him these questions all by himself, and no one else if we want.

That is the tough part of his job sometimes.

We get to ask that.

What does he have to hide about his budget, his agency actions? We don't know.

By his actions today, we should expect the worst, because he is not here doing his job.

They talk about holding the appropriation back. We should not pay him for today's work because he is not doing his job today, not until he comes here and defends his budget, defends his agency's action.

Thank you.

Mr. BROOKS. Mr. Reed.

Mr. REED. Thank you, Mr. Chairman.

I want to thank you for doing your job today in conducting this hearing.

I am deeply disappointed that the Attorney General didn't come forward today to address this committee.

If he doesn't have the confidence to do that, that is a terrible commentary on his position as Attorney General.

I came here today because I had some particular issues I wanted to raise.

They weren't as global or sweeping as some of the issues that my colleagues have talked about—policies toward HIV-infected individuals, policies toward retention of information by the Department of Justice, but they are very important to me because one of my jobs is to help my constituents. I have contacted the Department of Justice, the Attorney General, on two occasions asking for a response and assistance for problems that are of particular concern to my State; help for a Federal investigation of a financial disaster that took place in January and more recently, help to investigate the unparalleled rise in gasoline prices in my community.

These are small things, but they are of critical importance to my community.

I have not yet received a response from the Department of Justice. I think that if the Attorney General can't respond to Congress on small things and refuses to come here today and discuss the larger things, then a real question about his performance and his tenure is raised.

I regret deeply that I did not have the opportunity to do my job on behalf of my constituents today.

I would hope that the Attorney General would reverse this policy of avoidance and come forward and talk to the issues.

Again, I thank you, Mr. Chairman.

I know as a fighter you are disappointed that we have just been shadow boxing today.

So am I.

Mr. BROOKS. Without further comment, we will conclude by expressing our deep concern that great damage has been done to the relationship between the Judiciary Committee and the Justice Department by the Attorney General's refusal simply to come up here and engage in an open dialog with us.

As Members from both sides of the aisle have demonstrated in their statements, there are a number of important issues on the

table involving the committee and the Department—crime, civil rights, antitrust, immigration, just to mention a few.

We need to talk about these, but we can't talk to an empty chair and no witnesses.

I hope the Attorney General will think about today's events and decide to resume the dialog so that the Department of Justice and this committee can fulfill the responsibilities with which we are entrusted under our constitutional democracy.

Thank you.

Without objection, the committee is adjourned.

[Whereupon, at 12:05 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

CHAIRMAN JACK BROOKS' LETTER OF AUGUST 5, 1991, TO THE GENERAL ACCOUNTING OFFICE WITH ADDITIONAL QUESTIONS, AND GAO'S SUBMISSIONS, DATED August 23, 1991

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ONE HUNDRED SECOND CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6218

August 5, 1991

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Mr. Milton J. Socolar
Special Assistant to the Comptroller General
General Accounting Office
Washington, D.C. 20548

Dear Milt:

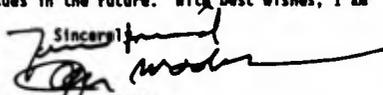
Thank you for testifying at the July 11, 1991, Committee on the Judiciary oversight and legislative hearing focusing on the Administration's proposed Department of Justice Appropriations Authorization. As you know, over the past few years, the Justice Department has become increasingly aggressive in its pursuit of controversial theories of executive power and privilege. In addition, the Judiciary Committee and other committees of Congress, as well as the General Accounting Office, have encountered access problems at the Department. The testimony you provided concerning these matters was powerful and very enlightening. Your efforts in assisting the Congress in addressing these most serious issues is sincerely appreciated.

Following the July 11 proceeding, two additional questions came to mind:

- (1) Has the Office of Special Investigations (OSI) received cooperation from Executive Branch law enforcement agencies other than the Department of Justice? If so, which agencies have cooperated with OSI, and has this cooperation proved beneficial?
- (2) Do you believe that a broad review of the FBI's management and operations is needed?

To ensure that your answers are included in the July 11 hearing record, please respond to these questions during the week of August 19.

Again, thank you for a job well done, and I look forward to working with you on other Judiciary Committee issues in the future. With best wishes, I am

Sincerely,

JACK BROOKS
Chairman



United States
General Accounting Office
Washington, D.C. 20548

General Government Division

August 23, 1991

The Honorable Jack Brooks
Chairman, Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

The following responds to questions raised in your August 5, 1991, letter regarding our work at the Department of Justice.

Question 1: Has the Office of Special Investigations (OSI) received cooperation from Executive Branch law enforcement agencies other than the Department of Justice? If so, which agencies have cooperated with OSI, and has this cooperation proved beneficial?

Response: Yes, OSI has experienced numerous instances of outstanding support and cooperation from executive branch law enforcement agencies. These include Treasury Department and independent federal agencies, the Department of Defense (DOD), and the Inspector General (IG) community. These organizations have cooperated in providing access to their information and their investigative personnel. In addition, some of these entities have worked jointly with OSI, enhancing the efficiency and effectiveness of both our and their investigations.

These cooperative organizations include the U.S. Secret Service and the Postal Inspection Service. Within DOD, the Air Force Office of Special Investigations, the Army Criminal Investigation Command, the Naval Investigative Service, and the Defense Criminal Investigative Service have cooperated with OSI. The list of cooperative Inspector General is also expansive: The Departments of Defense, Health and Human Services, the Interior, Labor, Transportation, and Veterans Affairs, as well as those of the Agency for International Development, the Environmental Protection Agency, and the Small Business Administration.

This cooperation has resulted in both the sharing of information and less duplication of effort—with no detriment to the organizations or the investigations. In some cases, when appropriate, the law enforcement agency was able to proceed with obtaining indictments and convictions. At the same time, OSI provided the congressional requesters with information necessary for their oversight role concerning fraud, waste, and abuse.

As an example of such cooperation, OSI is currently conducting a joint investigation with an executive branch law enforcement agency. This joint investigation involves potential fraud in the financing of real property. Early indications are that

the investigation will involve some of the same cast of characters as in the savings and loan debacle--loan officers, underwriters, resitors, appraisers, and investors. The sharing of information in the joint investigation is assisting the agencies, the Congress, and ultimately, the taxpayer.

Question 2: Do you believe that a broad review of the FBI's management and operations is needed?

Response: There is no question that a general management review of the FBI would be beneficial. We have conducted similar reviews in about 20 other federal agencies over the past 10 years. These reviews have revealed numerous management problems. The most prevalent center around weak systems at the top for direction and control. These include weak strategic planning and budgeting mechanisms, inadequate program accountability strategies, weak financial and information management systems, and inattention to the management of human resources.

Dramatic changes in the law enforcement environment, brought on by drug usage, increased violence and white collar crime, have led Congress to not only increase FBI's budget but also to question the Bureau's role and relationship to other law enforcement organizations. These circumstances argue for a broad management review of FBI programs to evaluate their efficiency, effectiveness, and whether they are appropriately addressing national priorities. A management review would allow us to determine how FBI resources are being allocated and the return on our investment. It would also help answer the question of whether we are spending scarce federal dollars on the highest priority law enforcement needs.

In addition, as we have found in other management reviews, problems affecting specific FBI activities may be systemic. These include problems with coordination between FBI and other law enforcement organizations, with FBI information systems, and with the agency's efforts to investigate white collar crime. A management review could address the root causes of these areas of concern, in terms of FBI's overall management and leadership.

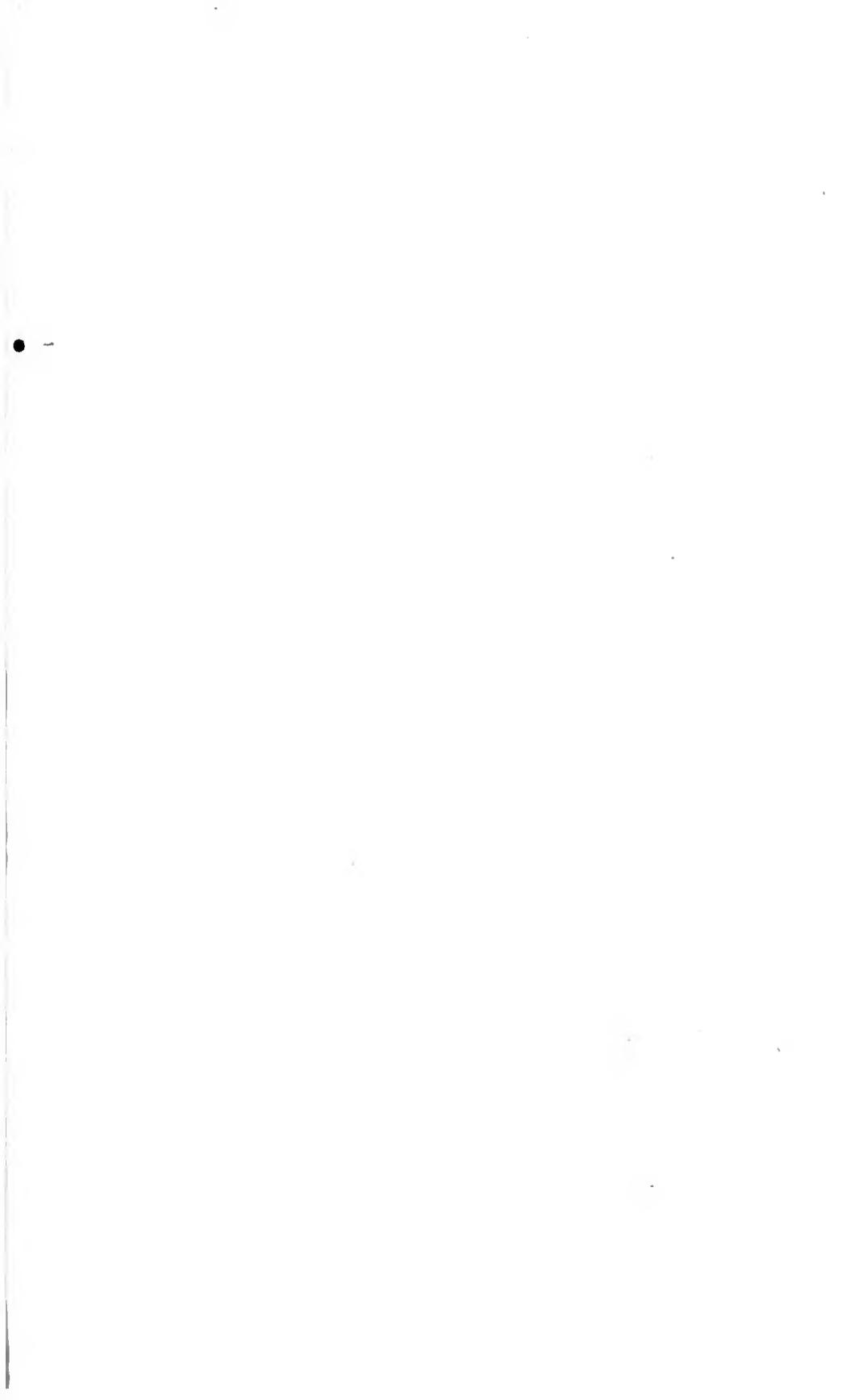
I trust this responds to your concerns. If you have any further questions, please contact me on (202) 275-6059, Lowell Dodge on (202) 275-8389, or Dick Stiener (202) 272-5500.

Sincerely yours,



Richard L. Fogel
Assistant Comptroller General





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