

proceeding state that a party is obligated to introduce an exhibit simply because it indicated an intention to do so weeks before the actual hearing. Accordingly, on July 6, 2012, the Representative undertook multiple actions which included: asking for additional time to effectuate the scheduling order; complying with the scheduling order so as not to waive his rights to do so; and, requesting that the Committee issue subpoenas to compel the appearance of, among others, FBI Agent Butler. The Committee denied the Representative's request for more time and it failed to issue a subpoena to Agent Butler or to the other primary witness in this matter, the confidential informant referred to as CS-1. The Representative asked that the Committee compel the appearances of Agent Butler and CS-1 for multiple reasons, including to enable the Committee to hear their allegations first-hand, in order to assess their credibility, in order to have them authenticate the proposed exhibits and to enable the Representative to cross-examine them about their alleged claims.

The Scheduling Order also enabled the parties to "*raise objections in writing*" to any or all of the evidence disclosed by the opposing party. In addition, the order expressly states that, "The parties are strongly encouraged to stipulate to admissibility of evidence and to the applicable facts and law".

C. THE REPRESENTATIVE TIMELY AND CLEARLY OBJECTED TO THE ADMISSION OF BUTLER'S AFFIDAVIT AND DID NOT STIPULATE TO ITS USE

On July 13th, the Representative clearly objected, in writing, to the introduction of the Butler affidavit by the House Managers, because it lacks foundation. Simultaneously, the Representative never indicated in writing or otherwise that he would stipulate to the use of that affidavit. In fact, he repeatedly said as much to the House Managers in each and every conversation they had together before and after July 13th. Accordingly, any hint that the

Representative agreed to, or waived, the admission of Butler's affidavit is false. The only scenario where the Representative was open to the use of the Butler affidavit was if the FBI agent appeared before the Committee to authenticate it, which is why the Representative asked that a subpoena be issued for his appearance.

D. THE LAW DOES NOT SUPPORT THE INTRODUCTION OF THE AFFIDAVIT

The Sixth Amendment right to confront one's accusers is almost as old as the United States itself. Rooted in that right is the concept that if you are going to accuse someone of committing a crime, then you have to have the gumption to appear in public and face the accused. So far, the United States Government has been unwilling to produce CS-1 and Agent Butler. Without them, there is nothing left to these proceedings but naked accusations against the Representative.

The law has long held that out of court statements are inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness. *Crawford v. Washington*, 541 U.S. 26 (2004). The Butler affidavit, therefore, is inadmissible for two reasons. First and foremost, the House Managers have not established that Butler is unavailable to testify. In all likelihood, agent Butler is right up the street in the Federal Building and would be available to testify if asked. In this same regard, unlike the Representative and upon information and belief, the House Managers have not even asked Agent Butler to testify. Since they have not asked him to testify, they cannot claim that he is unavailable.

Second, even if Agent Butler is unavailable, the Representative has not had an opportunity to cross-examine him, which is the second prong of the *Crawford* test. Accordingly, the standard indicia that would establish that an affidavit can be relied upon when the affiant is unavailable are not present. In this instance, the allegations in the affidavit are just that,

allegations. The affidavit is especially unreliable, because as he previously admitted, Agent Butler initially told one thing to Federal Magistrate Nolan about CS-1's criminal background and then completely changed his story to indicate that CS-1 has a long and sordid criminal history. In particular, Agent Butler represented to the Magistrate that CS-1 had almost no criminal history when it turns out that his history extends back many, many years. It stands to reason that if the Agent's affidavit is materially inaccurate in one respect it is materially inaccurate in other ways too. For example, Agent Butler did not initially disclose to the Magistrate that CS-1 had been on the FBI payroll for many years; his job, apparently, was to cooperate with the FBI as an informant while he simultaneously dodged the Chicago Police. Either way, the affidavit is unreliable in another material respect, which speaks to why it cannot be used in this hearing.

E. CONCLUSION

For the foregoing reasons, both factually and legally, the affidavit of FBI Agent Butler, cannot be and should not be admitted into evidence for any purpose as no foundation has been, or will be, provided to establish that it is reliable.

WHEREFORE, Representative Derrick Smith, respectfully requests that the affidavit of FBI Agent Butler not be admitted into evidence for any purpose and for such other and further relief as is deemed just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, Victor P. Henderson, an attorney, hereby certifies that the **RESPONSE TO HOUSE MANAGERS' REPLY TO RESPONDENT'S OBJECTION** was served on July 18, 2012 by first class mail on the following:

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