Dear Harold, 1/17/99

Enclosed are the last several pages of Tainting Evidence. I made a copy of this because it relates directly to the qualifications of someone who goes back to the Hoover-era, Paul Stombaugh. Also, the authors make clear that the "new" FBI and Louis Freeh is still intent on protecting its image above all else.

Jerry McKnight has been sending me e-mail updates on Lil's surgery. We hope she can make a full recovery. Our thoughts and prayers are with both of you.

Best,
Jerry

century without being able to recognize a lemon when he saw one. The FBI had initially been involved in interviewing witnesses, but the army's Criminal Investigative Division (CID) had always had the lead role. It was their decision in April 1970, a mere seven weeks after the murders, to investigate Jeffrey MacDonald as the sole suspect. It was also the army's decision after a two-month preliminary hearing in the summer of 1970 to drop court-martial charges, prompting Jeffrey MacDonald to accept an army discharge.

Despite this, there were ominous signs for MacDonald. In the end the charges were dismissed for reasons of "insufficient evidence," not because they were considered unfounded. Prosecutors and CID agents presented their case at the military hearings as if they had encountered no physical evidence at the crime scene to support MacDonald's story. In particular, they ignored eyewitness evidence about the woman in the floppy hat and their own suspicions and information about Helena Stoeckley.

By 1971, Jeffrey MacDonald, although now a civilian, was back under illegal surveillance by the army's CID. By December 1971, Brian Murtagh, a small, bespectacled graduate of the Georgetown University School of Law, had joined CID headquarters in Washington as an army lawyer and the legal adviser on the case. By May 1972, J. Edgar Hoover had died at his post. All three of these events would help produce a grand jury investigation, an indictment, and then a trial in which the FBI lab, along with the prosecutors, would plummet to new depths.

In October 1974, with Hoover out of the way, Paul Stombaugh, the head of what was then known as the FBI lab's Chemistry Unit, was dispatched to Fort Bragg to examine the crime scene and study the evidence the CID had collected. In an interview with the authors, Stombaugh claimed that he simply conducted the examinations the army examiners "were not qualified to do."[55] However, a government memo shows that Stombaugh reexamined about 120 items of evidence already examined by the army's CID and then recommended the FBI accept the case.[56] It was a strange decision, ignoring the FBI lab's own policy of not doing "second opinions"; i.e., not accepting evidence for evaluation that had already been examined in the same manner by another government crime lab.

For the next quarter century, the FBI would struggle vainly with the

consequences of contravening its own basic rule. Government experts would contradict each other and the bureau would end up embarrassing itself trying to cover up evidence that had been suppressed, poorly collected, or inadequately stored. All the evidence of intruders, including the blonde saran fibers, would not just be overlooked but would be suppressed even more ruthlessly than before. New evidence would be necessary to secure a prosecution. Mysteriously, it would appear. Somehow, evidence that had not existed in the army lab—evidence the examiners there would hardly have ignored—materialized at the FBI lab. It included the appearance of some of the most incriminating items at the trial, in particular a cotton thread from Jeffrey MacDonald's pajamas intertwined with a bloody head hair from Colette, his wife, an indication of a struggle between the two, the prosecution alleged.

Fabrication of evidence aside, the means used to secure a conviction were methods that would become all too familiar in later years. First, key examiners, hair-and-fiber experts Dillard Browning of the CID and James Frier of the FBI for instance, would not take the stand. Stombaugh would, like Tom Thurman in the VANPAC case (see Chapter 3), become the prosecution's professional witness on virtually everything. He would help smooth over the contradictions, inadequacies, and omissions of the forensic investigations, much of which was obvious in the lab notes but not in the lab reports.

Second, almost nothing of any use, nothing detailing anything like the full picture, would be handed over to the defense. Discovery obligations would be abused shamelessly. Formal lab reports that had to be handed over to the defense would reach only one conclusion. Bench notes or anything else that included exculpatory data would be buried. The defense, in sum, would not see the evidence or the FBI lab's real view of the evidence until successive Freedom of Information Act requests forced the bureau's hand years later.

Third, affidavits or 302 form reports of interviews of forensic experts or witnesses who contradicted the government's version of events would be inaccurate, selective, or simply false. By 1990, when Malone and his fellow investigators worked wonders with the saran expert testimony, this particular path had been well worn. For instance, when in 1984, Dr. Ronald Wright, medical examiner of Broward County, Florida, concluded from a study of the government's recently released autopsy photos and

crime scene report that the blow that fractured Colette MacDonald's skull had been delivered by a left-handed person, FBI special agent James Reed filed an affidavit in July of that year saying Wright had retracted his statement. Dr. Wright had, in fact, done nothing of the sort.[57] The risk the government was prepared to take was a reflection of the importance of the issue—Jeffrey MacDonald is righthanded.

Such devices became ever more important as the FBI lab sorted, cataloged, and tested the evidence and quickly turned up some rather awkward facts. Murtagh was particularly worried about a blue acrylic fiber that had been found in Colette MacDonald's right hand. Splinters from the attack club had been found within her hand's grasp, suggesting that the source of the fiber had been her attacker. If it could not be related to something in the home this would suggest, once again, one or more intruders. Morris Clark, the assistant section chief of the FBI lab's Scientific Analysis Section, assigned James Frier of Microscopic Analysis and his assistant, Kathy Bond, to the task. The pair were unable to link the fiber to anything recovered from the home.

In trying to do so, however, Bond and Frier made some other rather startling discoveries about the work done by Dillard Browning of the army's CID back in 1970. Browning had matched one of the three fibers found near Colette MacDonald's mouth to Jeffrey MacDonald's pajama top, wording his report ambiguously so that all three might seem to have been matched. Frier found no such match, identifying just two black wool fibers of unknown source. Browning had labeled the three fibers taken from Colette's right bicep area as nylon; Frier identified them as a rayon fiber, a white wool fiber, and a black wool fiber. Again, none of these could be matched with any known source—i.e., everything in the house at the time of the murders. The evidence suggested they were from an external source and hence supported MacDonald's version of events, in particular indicating that Colette was set upon by more than one attacker.

By 1979 all this "new" evidence must have left Brian Murtagh with a real problem. The *Brady* ruling required that the details of clearly exculpatory evidence be released to the defense. Yet in a case being built exclusively on interpretations of physical evidence, his prosecution could easily fall apart if disclosure went ahead. Bernard Segal, MacDonald's then defense lawyer, and his forensic expert, Dr. John Thornton, had

been pestering the prosecution for access to the evidence and the release of lab notes and reports since just after the grand jury indictment in January 1975. The prosecution had refused persistently, arguing that the lab reports submitted to the defense included all the pertinent information. By January 1979 Segal had resorted to a Freedom of Information Act request for everything the FBI had in its case files, including all laboratory notes, bench notes and technicians' notes.

Murtagh's main protection during the four years leading up to the trial had been Franklin Dupree, the North Carolina district court judge handling the case. He had consistently refused to order the release of the lab documentation or order defense access to the evidence, accepting the government's case that everything was in the formal lab reports. But the discrepancies between the lab work of the CID and the FBI continued to alarm Brian Murtagh, who took every precaution to minimize the risks of information leaking out. On March 15, 1979, he picked up the formal FBI lab report and the items he had had reexamined personally, loading them into his station wagon. When the defense team's first Freedom of Information Act request reached him, having been fobbed off onto the army's CID by the FBI, Murtagh ordered them not to release anything, saying the defense had been denied access by the court and Judge Dupree.

On June 7, 1979, Murtagh spent the day searching the murder apartment, now sealed for more than nine years. Years later he would explain in court that he had been looking for the source of the blue acrylic fiber found in Colette MacDonald's hand and that he had forwarded a sleeveless blue sweater to the FBI lab as a result of his search. He telephoned his request and given that the report would be released to the defense, got a suitably evasive response. There was no match. The sweater was composed of wool, the FBI lab report concluded helpfully.

But Murtagh was still worried. Sometime during the summer of 1979 he assigned Jeffrey Puretz, one of the young law students in his office, to research a prosecutor's discovery obligations. Need the detailed data of a lab report, as opposed to just the conclusions, be disclosed? At what point in a criminal proceeding must exculpatory material be disclosed to the defense? Entering into the spirit of his boss's aims, Puretz went one step further and made a suggestion. Give the defense the "opportunity" to examine the evidence and they would automatically lose the right to charge the prosecution with suppressing exculpatory evi-

dence. Thus on July 6, ten days before the trial started, Brian Murtagh did a complete volte-face and personally petitioned the court to allow the defense to "microscopically examine fibers" connected with the physical evidence in the case.

The terms and conditions under which Murtagh and Judge Dupree would allow such examination to take place would soon make it clear that the issue was the law, not justice. And even within the scope of the law, the letter and the spirit would be two very different things. Defense expert John Thornton was to be allowed a one-time, supervised visit to the jail cell where the evidence was being held. He would then list the items he wanted to examine, not in his own lab in California, but in the lab of the North Carolina State Bureau of Investigation. Brian Murtagh would still have the right to challenge the defense team's right to test any specific item, with a final decision to be made by Judge Dupree.

Incredibly, the visit, the examinations, the challenges, and any rulings all had to be completed by July 12, just days away. The army lab had taken six months, the FBI lab had been at the evidence for nearly five years. Without the lab notes for guidance and comparison, Thornton and Segal had no way of even knowing whether the evidence in the hundreds of boxes stacked in the jail cell was that from the scene of the crime. There was no catalog or list of the hundreds of fibers, hairs, blood samples, and fabric remnants stored.

Although Thornton was convinced that the prosecution's behavior demonstrated that there was something to hide, being asked to look for the proverbial needle in a haystack with no map and no time seemed designed to ensure that the defense would not find it. "Murtagh held evidence of intruders in his closed hand, brought it near my face, then opened his hand in a flash and cleverly closed it again," laments Segal. "I had an innocent client, and we lost to a malicious prosecution."[58]

The trial began in Raleigh, North Carolina, on July 19, 1979, four and a half years after the grand jury indictment. With Judge Dupree, whose openly pro-prosecution sympathies would soon be the subject of good copy for the scores of journalists, on the bench, piles of physical evidence were paraded into the courtroom. There were vials containing the all-important hairs and fibers, pieces of rug, Jeffrey MacDonald's pajama top, bedsheets, blankets, photographs, bits of bloodstained wall—175 items of evidence in all. "Things do not lie," Assistant U.S. Attorney

James Blackburn, the lead prosecutor told the jury in his opening remarks. "But people can and do."[59] The refrain became his signature tune throughout the trial, a sad irony given the lies and liars on which the whole prosecution case was founded. Blackburn would eventually prove to be one of them, being sentenced to three years in jail in 1993 after pleading guilty to twelve counts of forgery, fraud, and embezzlement as a practicing lawyer.

As the trial began, Segal made one final plea for full disclosure of the handwritten lab notes. Once again, Judge Dupree refused to force the prosecution to hand them over, nonsensically promising the defense that they would "get reversal" if any of the lab notes were later shown to contain exculpatory *Brady* material. How such documents could be shown to contain such data without a court order forcing their release was not explained. The fact that the lab notes have since been released under Freedom of Information Act, that they have been shown to contain a mass of exculpatory data, and that Jeffrey MacDonald remains in jail, only serves to confirm the hollowness of Judge Dupree's promise.

Without their lab test results and with no lab notes, Bernard Segal and John Thornton were reduced to cross-examination of the forensic witnesses to try to ascertain what tests really had been done in both the CID and FBI labs. But here too they faced problems. They could cross-examine only on what had been raised in direct testimony, and then only those the prosecution called. And all this would still have to be done blind—without the lab notes. But the prosecution would still take no risks. James Frier, Kathy Bond, and a number of others who had done basic lab examinations in both the FBI and CID labs would not testify. Paul Stombaugh, now retired, and his technician, Shirley Green, would be the sole FBI lab personnel to take the stand. Those who had done the tests that constituted exculpatory evidence, who might through cross-examination reveal something of the full picture, were left off the witness rosters.

When Stombaugh's credentials as a textile-impression expert, a speciality in which he himself admitted he had never been qualified, were challenged in court, Judge Dupree became visibly angry and overruled Segal. In fact, defense research showed unsurprisingly that the white-haired, authoritative-sounding former head of the FBI's Chemistry Unit was not even a chemist, let alone a fabric-impression expert. He had a

bachelor of science degree from Furman University in Greenville, South Carolina, having majored in biology.

As such, it was hardly surprising that Stombaugh's fabric testimony was frequently embarrassing. He could not demonstrate in court how he had concluded that MacDonald's pajama top had been torn after being bloodied, failing to find a single stain visible across the tear in the fabric despite being supplied with a lightbox while on the stand. Stombaugh later admitted that his emphatic assertions that stains on a sheet found in the master bedroom were the murderer's hand and shoulder prints had no scientific basis. He went on to admit that no comparisons were even attempted let alone matched. He had also failed to use a microscope to search for hair follicle patterns within the bloodstains, a normal means of identifying such prints.

But two elements of Stombaugh's evidence testimony at trial were even more suspicious. In a vial containing debris collected from the bedspread in the master bedroom, Paul Stombaugh claimed to have found a hair of Colette's twisted around a blood-soaked thread of purple cotton, a thread from Jeffrey MacDonald's pajamas. This was, in one defense team researcher's words, almost "too cute" to be true—silent testimony of a life and death struggle between husband and wife. If Stombaugh had indeed found the intertwined hair and thread, no one else who had examined the evidence had seen it.

Lab notes released under the Freedom of Information Act well after the trial show that CID lab technician Dillard Browning had inventoried the same vial's contents on March 5, 1970, separating and identifying all the debris within a week. He concluded that the only hair in the vial was daughter Kimberley's, not Colette's, and he found no hair entwined with a pajama yarn or fiber. It seemed unlikely Browning had made a mistake. In fact, CID technicians eventually inventoried all the exhibits on which hairs were found and all the exhibits on which pajama fibers were found. Moreover, Browning himself had reexamined the hair and fiber evidence under a microscope six months after making his initial inventory.

Had there been any such evidence, there would be little doubt that the army would have used this golden nugget. Indeed, such was its significance that it may have tipped the scales in the decision on whether to press charges against Jeffrey MacDonald; it certainly would have been

at the center of any prosecutor's case. Equally dubious was the handling of this crucial evidence, which seemed to make its fabrication all too possible. The evidence had not only apparently not existed when the vial left the CID evidence depository on September 24, 1974, it had been transmitted not by the usual registered mail but carried personally by Brian Murtagh in his station wagon. Moreover, according to dispatch and receipt records, Murtagh had taken nine days to transport the evidence from Fort Gordon, Georgia, to the FBI lab in Washington, D.C.

In court, Paul Stombaugh admitted receiving the vial personally from Murtagh at FBI headquarters. When asked about its dubious origin, he categorically denied any possibility of foul play: "It's just a bunch of crap. That defense attorney has suggested everything. He's about as ethical as a one-legged dog."[60] Stombaugh insists that the hair and pajama thread—he recalled it as a yarn or clump of fibers—were listed among the evidence and intertwined when they were delivered to him at the FBI lab. "I know of no evidence—nothing that would indicate to me that something came from another source. Everything I looked at in that case had a reason to be there," he says.[61]

But the intertwined hair and yarn or thread were not the only crucial evidence that mysteriously changed in transit from the army CID depository to Stombaugh at the FBI lab. A short brown hair had been found in Colette MacDonald's left hand. Browning had described it as an "arm or body hair." His colleague Janice Glisson even drew a picture of the hair in her notes and made dozens of attempts at comparison with sample hairs from nine known people, starting rather optimistically with the blond Jeffrey MacDonald. A glass slide with the mounted mystery hair was handed over to Stombaugh along with the other evidence Murtagh delivered personally in October 1974.

Although it had already been used for multiple comparisons, Stombaugh deemed it worthless for others. "This hair fragment does not exhibit enough individual characteristics to be of value for comparison and identification purposes," he concluded in a lab report.[62] Had the hair been swapped, damaged, or tampered with in some way? Who was Stombaugh to make such a judgment? Janice Glisson did, in fact, testify at Jeffrey MacDonald's trial, but Murtagh was careful to qualify her only as a blood expert. As a result the jury not only heard nothing of the mystery hair

but also nothing of the comparison tests, evidence that in itself "could have destroyed the government's circumstantial case," according to Segal.[63]

But of all Stombaugh's inadequate forensics, it was perhaps his bizarre folding experiment with Jeffrey MacDonald's pajama top, the key government exhibit, that proved the most ridiculous. The prosecution alleged that MacDonald had stabbed his wife repeatedly with an ice pick through the folded pajama top. Even without the lab notes needed for proper cross-examination, Segal and Thornton managed to expose the efforts to match the forty-eight holes in the fabric with the twenty-one stab wounds in Colette's chest as improbable, unscientific, and incompetent. "I was just stunned by it all," recalls Jeffrey MacDonald. "Anyone with an IQ of more than ten could see that this guy was incompetent—it was beyond belief."[64]

Stombaugh's proof amounted to efforts to match the holes and wounds using skewers inserted into a dummy representing Colette. Yet it demonstrated nothing more than the fact that all the holes could be used by folding the garment in various ways. It did not prove that it had happened, and as defense expert John Thornton pointed out on the stand, it made the huge assumption that the pajama top had not shifted position after each forceful blow. On the stand, a comparison of photos of the crime scene and his own experiment forced Stombaugh to admit that he had not in any case managed to replicate the scene precisely. Segal then made him appear totally at Murtagh's bidding when he asked him why he had not considered the thirty punctures and eighteen cuts that had been made in Colette's own pajama top that had, according to the prosecution, lain between the body and the folded pajama top. "They did not ask that we do that," explained Stombaugh.[65]

The former FBI lab unit chief was also forced to admit that he had ignored the fact that the ice-pick blade was tapered: i.e., the width of the garment hole over a given wound would have to match, as would the actual depth of the wound. No measurements had been taken at the FBI lab, Stombaugh confessed. That fact quickly became obvious in court. Stombaugh had insisted that some of the holes in the pajama top proved that the ice pick had penetrated "up the hilt"—four and a half inches. In fact, the pathologist's report said the deepest wounds in Colette's chest

were about one and a half inches. Stombaugh admitted he had not actually read the autopsy report.

The false, flawed science of the pajama experiment should have been enough to warn off the jury, even without all the other evidence that they, like Segal and Thornton, had been denied. The full scale of that suppression was only to become obvious nearly a decade after the jury had taken less than six hours in August 1979 to find Jeffrey MacDonald guilty of triple murder. Working through the boxes of finally released documents in the late 1980s, Raymond Shedlick, Jr., a retired New York homicide detective, and his daughter, Ellen Dannelly, collated and studied more than 250 of the sets of handwritten lab notes that Brian Murtagh had denied MacDonald's defense lawyer. The notes dealt with sixty-four exhibits used in the trial as evidence; thirty-seven of these contained findings that challenged prosecution claims. Only three, less than a tenth of these thirty-seven findings, were transcribed into the typed formal lab reports that had been turned over to the defense.[66]

With her father dying of terminal lung cancer in an adjoining room, Dannelly, a private investigator in her own right, continued her research through January 1989, occasionally reporting what she was finding back to Shedlick. Dannelly finally concluded that the FBI and CID laboratories had disagreed over twenty-two hair exhibits and nineteen fiber exhibits.[67] The disagreements were often incredibly basic, including the numbers and types of hairs or fibers recovered from a particular place at the crime scene. If examiners could not even agree on how many or what type of hairs or fibers they had under the microscopes, Dannelly asked herself, how could they possibly match anything?

Jeffrey MacDonald remains in jail. During a series of appeals, the first made in 1984–85, he has been as much a victim of the judicial system as he was during the investigation and trial. In March 1985, Judge Dupree, by now revealed as the father-in-law of the first Justice Department lawyer to handle the MacDonald case, denied a defense team habeas corpus petition for a new trial. He ignored Helena Stoeckley's confession and, despite the evidence of the bloody syringe, the bloody palm print, the missing piece of skin, and the wiped fingerprints, ruled that: "No direct evidence of the alleged intruders was found to support MacDonald's version . . . of the murders."[68]

If the judge was ruling the appeal out because no laboratory evidence indicated intruders—a result of his own refusal to force Brian Murtagh to hand over the lab notes back in 1979—Harvey Silverglate, by then MacDonald's defense lawyer, aimed to give Dupree the opportunity to keep his promise about getting "reversal." As a result of the release of the lab notes in the 1980s, Silverglate was able for the first time in 1990 to file a motion highlighting the existence of the unmatched black wool and blonde saran fibers. After an oral hearing in Raleigh in June 1991, Dupree again ruled in favor of Brian Murtagh. The prosecutor had by now changed his tune—admitting the existence of such fibers but managing at the same time to dismiss them as insignificant.

In July 1991, Dupree ruled that the lab notes did indeed hold exculpatory information and that information had been withheld. But somewhat more predictably, Dupree went on to rule that the defense had been given the opportunity to examine the physical evidence itself in the jail cell, even though it was now known just how impossible that task had actually been.[69] The released lab notes had, for instance, revealed some apparently willful mislabeling. The blonde saran fibers had been stored in a container labeled "Black and Grey Synthetic Hairs."

The access to the evidence negated the fact that the defense had not seen the lab notes, Dupree ruled. In an ominous note, the judge also ruled that the black wool and blonde saran fibers, now known to have been described openly as wig hair by army CID examiner Janice Glisson in her lab notes, must be ruled out as "new" evidence. They could and should have been presented in the 1984–85 petition, Dupree ruled, since the ten thousand pages of documentation from which they were drawn had been released in 1983.[70] MacDonald's lawyer at the time, Brian O'Neill, who had chosen to concentrate on Helena Stoeckley's confession in the 1983–84 appeal, had lacked due diligence and thus the wig and black wool fibers were effectively "old" evidence, even though no jury had heard about them.

The problem was that by 1991 the goalposts had been moved during the twelve years MacDonald had been in jail. In an effort to cut down on frivolous appeals, a more rightward-leaning Supreme Court had, in April 1991, made it much more difficult for defendants to receive a second appeal hearing, even if they had discovered new evidence or had found proof that the government had withheld evidence. Evidence that in the

past would have been sufficient to secure a new trial now had to be sufficient in the view of the appeals court judges to prove actual innocence. It was a much higher threshold. Yet if ever there was a case with such evidence, this was it. Harvey Silverglate and his defense team, Philip Cormier and Alan Dershowitz, framed their February 1992 appeal to three judges at the Fourth Circuit Court of Appeals in Richmond, Virginia, accordingly.

The ruling in June 1992 was another bitter disappointment. The judges denied the petition on the basis of "procedural fault." Jeffrey MacDonald, they decided, should have presented his claims in the 1984–85 appeal, as Dupree had ruled. The judges did not even go beyond this technicality to consider the real issues, which by now included the extraordinary claim by the prosecution lawyers that the unmatched hairs and fibers the defense team were focusing on were "household rubbish." As Alan Dershowitz pointed out to the judges, this was effectively a denial of the Locard theory, allowing the prosecution to include evidence that inculpated Jeffrey MacDonald but exclude at will that which exculpated him. It was the ultimate articulation of the imperative that had driven the investigation from the start: only find, only examine, only present what you are looking for.

On the Richmond sidewalk outside the appeals court, Alan Dershowitz pushed a copy of one of the two texts that listed saran as a polymer used in wigs under the nose of a television reporter. "Can you get your camera on that? Can you see that? Well, so could the prosecutor. He lied to the judge moments ago. He lied to me. He lied to you," he fumed.[71] The prosecutor's alleged lie was of course based on Michael Malone's lie in the infamous affidavit, a document in which he had also reinterpreted Locard's theory to suit the case. "It should be noted that the presence of unknown or unmatched fibers on an individual or his clothing is so common that normally, it is not considered forensically significant," Malone swore.[72] The statement begged a simple question: what then was the purpose of Michael Malone's job as a hair-and-fiber examiner?

Lying was certainly part of the job, as the release of the pages of the FBI lab texts covering saran in 1993 was to prove and the IG's report covering Malone's testimony in the Alcee Hastings matter was to confirm. Such evidence now has become part of another appeal filed in April 1997, an appeal to examine the evidence in an independent lab, an

appeal for justice in the apparently endless case of Jeffrey MacDonald. With Judge Dupree now dead and the FBI lab exposed by the IG's report, a new judge, James Fox, is at the time of this writing looking at the evidence. In Harvey Silverglate's words: "The poor guy is going to need a little time."[73]

y MacDonald.
he IG's report,
looking at the
oing to need a

EPILOGUE

THE END OF THE BEGINNING

On November 5, 1997, Fred Whitehurst could be seen threading his way through dozens of dining tables at a formal luncheon at the Waldorf Astoria Hotel in Manhattan. To loud applause, he shook hands with William Worthy, a professor emeritus at Howard University in Washington, D.C., and accepted a Hugh M. Hefner First Amendment Award. The citation accompanying the plaque was unequivocal. Whitehurst had "with great courage, jeopardized his life's work and despite retaliation for his efforts, made public his assertions of fraud and scientific misconduct within the FBI crime lab." Still suspended from his post yet not fired, Whitehurst was unable to make a speech. He and his attorneys considered the Bureau's demand that he have anything he said cleared beforehand a violation of his First Amendment rights. To those present, the FBI's attitude seemed the perfect endorsement of Whitehurst's receipt of a freedom of speech award.

Until a settlement was reached in March 1998, Fred Whitehurst was in suspended animation, subject to the FBI's gag on speaking out yet forbidden to work, set foot on FBI property, or even talk to colleagues

about the issues he has raised. Even the Bureau seemed unclear about why they suspended him when, one Friday afternoon in January 1997, his gun and badge were confiscated and he was marched out of the J. Edgar Hoover Building by armed guards. On March 5, 1997, FBI director Louis Freeh told a congressional committee that the action against Whitehurst was taken "solely and directly" on the basis of a recommendation in the inspector general's report, as then unpublished.[1] The FBI director told the representatives that the IG's office "did not object" to the action.

Freeh's testimony drew a furious response from the IG himself, Mike Bromwich. The following day Bromwich sent Freeh a letter stating that his office had been consistently informed that the FBI had not taken action against Whitehurst solely on the basis of the IG's recommendations. He added that he had in fact consistently opposed any suspension, a position he had held for "more than a year when FBI representatives had repeatedly proposed firing Whitehurst or placing him on some sort of administrative leave."[2] Bromwich added that Freeh's testimony implied that the action had been based on the draft report. "The draft report contains no such recommendation, nor can it be fairly construed to imply that such action should be taken."[3]

Freeh quickly admitted that his testimony to Congress was incomplete and submitted an amendment to the record. However, letters to both Congressman William Rogers and Inspector General Michael Bromwich raised as many questions as they answered. If Freeh had recused himself from Whitehurst-related disciplinary or administrative matters in the face of the accusations about his conduct in the VANPAC case, as he maintained, what was he doing testifying about it to Congress or writing letters on the subject?[4] "What kind of recusal is this? Is this part of a Kafka novel?" asked Senator Grassley from the Senate floor on March 17.

What was clear is that the FBI wanted to get rid of Fred Whitehurst but to deflect the blame for doing so onto someone else. The fact remains that the three people most heavily criticized in the IG's report, Tom Thurman, Roger Martz, and David Williams, are still working for the FBI, but Fred Whitehurst is not. The FBI has suggested that it would be impossible for Fred Whitehurst to return to work given the accusations he made against colleagues. Yet many of those actually doing the work at the FBI lab seem to have no problem with Fred Whitehurst returning to work. "The only problem would be those that have in the past been in

the habit of unethical or unprofessional behavior," metallurgist Bill Tobin told congressional hearings in September 1997.[5] It is the FBI as an institution—not the individuals who make it up—that has a problem with Fred Whitehurst. For many lab staff, Whitehurst's return would act as a kind of guarantee that they could feel safe in coming forward with complaints in the future.

In dealing with Fred Whitehurst, the FBI has always aimed to shoot the messenger, to personalize the issue, to hide the failings of its science and management behind a smokescreen of disinformation, diversion, and disengagement. Louis Freeh's testimony to Congress in March 1997 was just one example. In the course of ten years of complaining, Fred Whitehurst has repeatedly found himself investigated while the issues he raised were ignored; he has been referred for psychiatric assessment to determine if he was "fit for work" and has been blackened by leaks to the press then investigated on the same charge—talking to the media. The FBI has released derogatory information about him to prosecutors in both the World Trade Center bombing and O. J. Simpson cases, set up a Whitehurst committee within the FBI to assess the impact of his allegations, and twice transferred him out of his own field of scientific expertise.

The IG determined that none of this was retaliatory, although this may only have meant that the FBI had covered its tracks well. As the IG's report admitted: "Our analysis is limited to determining whether a factual basis exists to conclude that the FBI made certain decisions with a retaliatory purpose. . . . [W]e did not attempt a full legal analysis of Whitehurst's retaliation claims under the technical requirements of the Whistleblower Protection Act (WPA) or any other legal theory of employer liability."[6] In fact the FBI was able to treat Whitehurst as it did only because the president and the attorney general had failed to extend the protections of the 1989 WPA to FBI staff, in defiance of congressional legislation.

These safeguards, which include an independent authority to review whistleblower claims, privacy provisions, and a ban on the distribution of information, were specifically designed to prevent an accused organization from retaliating. Only after Fred Whitehurst and his lawyers had filed an injunction in court requiring the White House to extend these protections to FBI employees—a move both the federal government and the FBI opposed in court—did President Clinton do just that. On April 14,

one day before the IG report was finally published, the president issued a memo ordering Attorney General Janet Reno to extend WPA rights to FBI employees.[7]

But the protection of the provisions of the WPA was only one way in which Fred Whitehurst has changed the whole landscape for FBI employees. In the last three years, Louis Freeh has prioritized instruction in ethics during FBI training partially, it seems, in response to the issues raised by Fred Whitehurst. The FBI's new recruits now receive eighteen rather than two hours of instruction in every form of abuse, from inflating overtime, or "banging the books" as it is known in the FBI, an issue Whitehurst first raised more than a decade ago, to "juicing the testimony" —stretching the truth or even lying on the witness stand, the core of Whitehurst's charges. Some reports say that the instruction involves role play and situational training based on the sort of dilemmas Fred Whitehurst faced when the FBI's internal investigation proved inadequate. "They use him as a role model yet throw him out. It's amazing hypocrisy," observes Kris Kolesnik, a senior aide to Senator Chuck Grassley.[8]

Using Fred Whitehurst as a model employee in training yet punishing him for what he did in practice is only one way in which appearance and reality continue to collide in the FBI. Whatever their director's declared beliefs about ethical standards and admitting mistakes, many FBI agents do not subscribe to them. In fact, many are convinced that such ethics are dangerous and impede their ability to do their job—securing prosecutions. Even the director himself seems to have been noticeably more reluctant to admit the shortcomings of the lab than the inadequacies of other areas of the FBI.

Faced with criticism of the lab, Louis Freeh and his press office have engaged in constant damage limitation by stressing that the IG's report criticized just thirteen of more than six hundred lab employees, just three of twenty-seven lab units. They go on to stress the changes made in the lab since Freeh was made FBI director and how fully the bureau is complying with the IG's recommendations for change. In all the public relations spin-doctoring, there is of course no recognition of the limited scope of the IG's investigation or even the merest hint of a willingness to embark on a genuine overhaul by addressing the really key issue: how and why

the FBI lab got into the state that necessitated the IG's investigation. The truth is that with thousands of cases at stake, the potential impact of any real recognition of the extent of the shortcomings in the lab is just too awful to contemplate. Moreover, many of these shortcomings have occurred or have continued on Louis Freeh's watch.

The FBI has always sought to make out that the problems at the FBI lab were isolated incidents, the result of explicable shortcomings or scientific disagreements, exaggerated by one obsessive employee whose credibility and even mental stability is suspect. The reality of course is that the problems in the FBI lab are systemic, deeply ingrained, and irresolvable within the current setup. An agency dedicated to securing prosecutions and controlled by law enforcement personnel cannot run a laboratory designed to report objective analytical results obtained by scientists. Many other western nations have come to realize this as a result of major miscarriages of justice; a number have reacted by removing crime labs from police control.

Louis Freeh is fully aware of this inherent conflict of interest yet rather than resolve it he has simply sharpened it. FBI agents are still employed in the lab and continue to dominate management ranks. Indeed, after the initial clean-out in favor of civilian scientists in 1994, the number of FBI agents in the lab has begun to increase again. Senior FBI officials have made it clear that there is no question of the FBI lab being put under independent government control or management. The problem of internal investigation has a simple solution: submit to more external oversight. Yet while saying he welcomes it, Freeh's actions make clear that such statements are primarily for public relations purposes only. The resistance shown to Senator Grassley's hearings is but one example.

Louis Freeh's response to demands for more external oversight has been to reinforce a completely failed internal structure, the Office of Professional Responsibility (OPR). In March, Freeh announced a new director and new resources for an office that has consistently whitewashed investigations. A press release from the FBI just weeks before the IG's report was published stated that the new OPR would be independent yet would report directly back to Louis Freeh and his deputy.[9] It was the sort of conflict of interest that had created a consistent record of failure in the first place. To many in the FBI the lesson of the IG's investigation is not

what it reported, but the very fact that it was allowed to report in the first place. Had OPR been more effective at keeping investigations in-house, had Whitehurst and his allegations not been allowed to get out of hand, there would have been no embarrassing scrutiny of the FBI lab by the IG.

There are many other indications that whatever the rhetoric, the reality remains unchanged, that the claim that everything is now rosy is as much a part of the image building as the original insistence that the FBI lab was the best forensic laboratory in the world. Lab officials are meeting with IG staff every six months to monitor implementation of the latter's forty recommendations for change. Both sides report the process is going well, with the FBI claiming that it is implementing all the recommendations. We only have their word for it. And on the one issue of significance that has come to light since the IG's report was published, the FBI lab has singularly failed to follow even its own recommendation.

In responding to the draft of the IG's report, the FBI announced that it was looking for a new lab chief. "Among the principal qualifications for the position will be an outstanding academic and practical background in forensic science and reputation for excellence in the forensic community," the FBI claimed.[10] In October, in a decision that seemed to thumb its nose at the IG and its critics, the FBI announced the appointment of Donald Kerr, a physicist-engineer and former director of the government's nuclear laboratory at Los Alamos in New Mexico. He was a man with no forensic science experience at all.

Many were deeply shocked by the appointment. Senator Grassley immediately denounced the choice as that of a "government and industry insider, whose instincts are to co-operate with management."[11] The appointment, he said, showed that the FBI had fallen miserably short of even its own standards, that its stated goals were mere "happy talk." On Donald Kerr himself, he added: "Lacking the requisite experience, how can the new lab director keep from getting snowed, forensically, by examiners who cut corners and who have gotten away with it before?"[12] William Moffitt, vice president of the National Association of Criminal Defense Lawyers, was equally irate: "Once again, the FBI has dealt with Congress and the public with incredible arrogance. . . . [B]ut why should we be surprised. The FBI has been shown to have lied time and time again in the past."[13]

The fact remains that seven years after the FBI established their

ASCLD Study Committee to prepare for accreditation, and five years after Louis Freeh took over as FBI director, the FBI lab remains both uninspected and unaccountable. The longer the delay, the more the suspicion has grown that the FBI lab or parts of it are not only unwilling to submit themselves to inspection but are unable to meet ASCLD/LAB accreditation criteria. That suspicion was only reinforced by the news in September 1997 that the FBI was intending to move the Latent Fingerprint Section out of the lab to the Bureau's Criminal Justice Information Systems Division in West Virginia, thereby removing the FBI's latent fingerprint examiners from ASCLD/LAB inspection.

In a tersely worded letter to Director Freeh, Frank Fitzpatrick, president of ASCLD, warned that the move would be a step backward given efforts "to embrace the principles of the scientific method of analysis."[14] Fitzpatrick added: "By moving Latent Fingerprints from the Laboratory Division, the public perception might be that there is something deficient in the quality assurance program in latent prints. . . . The relationship of the Latent Fingerprints Section with your other scientific sections is deep and strong. It should be allowed to remain under one management team —a team of forensic scientists."[15]

But whatever the future of the Latent Fingerprint Section and the rest of the FBI lab, the past will continue to cast a long shadow. It is now clear that thousands of old cases need to be reexamined; it is equally clear that the means of doing so, the task force within the Criminal Division of the Department of Justice that prosecuted these cases in the first place, involves as profound a conflict of interest as any in this whole story. At the congressional hearings in September 1997, Fred Whitehurst, accepting that he may never get his job back, appealed to senators to be allowed to spend the four and a half years of federal service he had left examining the case files the IG did not look at, rectifying the mistakes that as yet no one else even suspects.

There has been no formal response, but informally Whitehurst has already begun work, securing the release of the files of 150 cases under the Freedom of Information Act. Already he has exposed a raft of problems never touched on by the IG, including, he claims, the alteration of reports by five more examiners beyond those named in the report. It is yet more evidence of the systemic nature of the abuses in the FBI lab, yet more evidence that unless a full inquiry is begun now the issue will

simmer on for years, maybe decades, in case after case. On past performance, the FBI will almost certainly be happy to let that happen, relying on its image machine to cover the trail and limit the damage. The question is, are the American public and Congress prepared to do the same? And beyond that, can forensic science in America ever be run by scientists?