

# CRS Report for Congress

## Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry

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# **INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY**

## **SUMMARY**

The adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations or confirmation exercises. While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and of disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress' role in our constitutional scheme of separated powers and checks and balances. The rich history of congressional investigations from the failed St. Clair expedition in 1792 through Teapot Dome, Watergate, Iran-Contra and Whitewater has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.

This report will provide an overview of some of the more common legal, procedural and practical issues, questions, and problems that committees have faced in the course of an investigation. Following a summary of the case law developing the scope and limitations of the power of inquiry, the essential tools of investigative oversight--subpoenas, staff interviews and depositions, grants of immunity, and the contempt power -- are described. Next, some of the special problems of investigating the executive are detailed, with particular emphasis on claims of presidential executive privilege, the problems raised by attempts to access information with respect to open or closed civil or criminal investigative matters, or to obtain information that is part of the agency deliberative process, and the effect on congressional access of statutory prohibitions on public disclosure. The discussion then focuses on various procedural and legal requirements that accompany the preparation for, and conduct of, an investigative hearing, including matters concerning jurisdiction, particular rules and requirements for the conduct of such proceedings, and the nature, applicability and scope of certain constitutional and common law testimonial privileges that may be claimed by witnesses. The case law and practice respecting the rights of minority party members during the investigative process is also reviewed. The report concludes with a description of the roles played by the offices of House General Counsel and Senate Legal Counsel in such investigations.

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# INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY

## I. INTRODUCTION

The adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations or confirmation exercises.<sup>1</sup> While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and of disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress' role in our constitutional scheme of separated powers and checks and balances. The rich history of congressional investigations from the failed St. Clair expedition in 1792 through Teapot Dome, Watergate, Iran-Contra and Whitewater has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.

This report will provide an overview of some of the more common legal, procedural and practical issues, questions, and problems that committees have faced in the course of an investigation. Following a summary of the case law developing the scope and limitations of the power of inquiry, the essential tools of investigative oversight--subpoenas, staff interviews and depositions, grants of immunity, and the contempt power -- are described. Next, some of the special problems of investigating the executive are detailed, with particular emphasis on claims of presidential executive privilege, the problems raised by attempts to access information with respect to open or closed civil or criminal investigative matters, or to obtain information that is part of the agency deliberative process, and the effect on congressional access of statutory prohibitions on public disclosure. The discussion then focuses on various procedural and legal requirements that accompany the preparation for, and conduct of, an investigative hearing, including matters concerning jurisdiction, particular rules and requirements for the conduct of such proceedings, and the nature, applicability and scope of certain constitutional and common law testimonial privileges that may be claimed by witnesses. The case law and practice respecting the rights of minority party members during the investigative process is also reviewed. The report concludes with a description of the roles played by the offices of House General Counsel and Senate Legal Counsel in such investigations.

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<sup>1</sup> For a general overview of the oversight process see Congressional Research Service, Congressional Oversight Manual (February 1995).

## II. THE LEGAL BASIS FOR OVERSIGHT

Numerous Supreme Court precedents establish and support a broad and encompassing power in the Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees, have virtually, plenary power to compel information needed to discharge its legislative function from executive agencies, private persons and organizations, and within certain constraints, the information so obtained may be made public.

More particularly, although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the purposes of performing its legitimate functions, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress.<sup>2</sup> Thus, in *Eastland v. United States Servicemen's Fund* the Court explained that "[t]he scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."<sup>3</sup> In *Watkins v. United States* the Court further described the breadth of the power of inquiry: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."<sup>4</sup> The Court went on to emphasize that Congress' investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."<sup>5</sup> "[T]he first Congresses", it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"<sup>6</sup> and subsequently, in a series of decisions, "[t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered."<sup>7</sup> Accordingly, the Court stated, it recognizes

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<sup>2</sup> *E.g.*, *McGrain v. Daugherty*, 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1950); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); see also, *United States v. A.T.T.*, 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

<sup>3</sup> 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra*, 360 U.S. at 111).

<sup>4</sup> 354 U.S. at 187.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 182.

<sup>7</sup> *Id.* at 194-95

"the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."<sup>8</sup>

But while the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only "in aid of the legislative function"<sup>9</sup> and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress ... nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself, it must be related to, and in furtherance of, a legitimate task of the Congress."<sup>10</sup> Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by its parent body.<sup>11</sup> But once having established its jurisdiction and authority, and the pertinence of the matter under inquiry to its area of authority, a committee's investigative purview is substantial and wide-ranging.<sup>12</sup>

The foundation cases establishing Congress' broad power to probe are illustrative and illuminating. They arose out of the Teapot Dome investigations, the 1920's scandal regarding oil company payoffs to officials in the Harding Administration. A major concern of the congressional oversight investigation was the failure of Attorney General Harry M. Daugherty's Justice Department to prosecute the alleged government malefactors. When congressional committees attempting to investigate came up against refusals by subpoenaed witnesses to provide information, the issue went to the Supreme Court and provided it with the opportunity to issue a seminal decision describing the constitutional basis and reach of congressional oversight. In *McGrain v. Daugherty*,<sup>13</sup> the Supreme Court focused specifically on Congress' authority to study "charges of misfeasance and nonfeasance in the Department of Justice." The 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 in respect of the institution and

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<sup>8</sup> *Id.* at 200 n. 33.

<sup>9</sup> *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

<sup>10</sup> *Watkins v. United States*, *supra*, 354 U.S. at 187.

<sup>11</sup> *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); *Watkins v. United States*, *supra*, 354 U.S. at 198.

<sup>12</sup> *Wilkinson v. United States*, 365 U.S. 408-09 (1961).

<sup>13</sup> 273 U.S. 135, 151 (1927).

prosecution of proceedings to punish crimes ...."<sup>14</sup> In its decision, the Court sustained the contempt arrest of the Attorney General's brother for withholding information from Congress, since Congress "would be materially aided by the information which the investigation was calculated to elicit."<sup>15</sup> Thus, the Supreme Court unequivocally precluded any blanket claim by the Executive that oversight could be barred regarding "whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings."<sup>16</sup>

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States*,<sup>17</sup> a different witness at the congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts. . . and shall respectfully decline to answer any questions propounded by your committee."<sup>18</sup> The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits gave an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."<sup>19</sup>

The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."<sup>20</sup> In other words, those persons having evidence in their possession, including officers and employees of executive agencies, can not lawfully assert that because lawsuits are pending involving the government, "the authority of [the Congress], directly or through its committees, to require pertinent disclosures" is somehow "abridged."

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<sup>14</sup> *Id.* at 177.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 279 U.S. 263 (1929).

<sup>18</sup> *Id.*, at 290.

<sup>19</sup> *Id.* at 295.

<sup>20</sup> *Id.* at 295.



The Supreme Court in the Teapot Dome cases therefore enunciated in the clearest manner the independence of Congress' power to probe. The coincidental focus on the Justice Department and the ability of committees to look deeply into all aspects of its sensitive law enforcement function underlines the potential breadth of that power with respect to other Executive Branch agencies and private sector entities as well.

### III. THE TOOLS OF OVERSIGHT

#### A. The Subpoena Power

The power of inquiry, with the accompanying process to enforce it, has been deemed "an essential and appropriate auxiliary to the legislative function."<sup>21</sup> A properly authorized subpoena issued by a committee or subcommittee has the same force or effect as a subpoena issued by the parent House itself.<sup>22</sup> To validly issue a subpoena, individual committees or subcommittees must be delegated this authority. Both Senate<sup>23</sup> and House<sup>24</sup> rules presently empower all standing committees and subcommittee to require the attendance and testimony of witnesses and the production of documents. Special or select committees must be specifically delegated that authority by Senate or House resolution.<sup>25</sup> The rules or practices of standing committees may restrict the issuance of subpoenas only to full committees or in certain instances allow issuance by a committee chairman alone, with or without the concurrence of the ranking minority member.

As previously indicated, committees may issue subpoenas in furtherance of an investigation within their subject matter jurisdiction as defined by Senate<sup>26</sup> and House<sup>27</sup> rules which confer both legislative and oversight jurisdiction. Subpoenas may be issued on the basis of either source of authority.

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<sup>21</sup> *McGrain v. Daugherty, supra*, 273 U.S. at 174-75.

<sup>22</sup> *Id.* at 158.

<sup>23</sup> Senate Rule XXVI(1)(All Senate rules hereinafter cited were in effect as of 1993 unless otherwise indicated and may found in Sen. Doc. No. 103-3 compiled by the Senate Committee on Rules and Administration).

<sup>24</sup> House Rule XI(2)(m)(1)(All House rules hereinafter cited were in effect as of 1993 unless otherwise indicated and may be found in "Rules Adopted By The Committee of the House of Representatives", compiled by the House Rules Committee as a committee print).

<sup>25</sup> See, e.g., S.Res. 23, 100th Cong. (Iran-Contra); Sen. Res. 495, 96th Cong. (Billy Carter/Libya).

<sup>26</sup> Senate Rule XXV.

<sup>27</sup> House Rule X.

Congressional subpoenas are most frequently served by the U.S. Marshal's office or by committee staff, or less frequently by the Senate or House Sergeants-at-Arms. Service may be effected anywhere in the United States. The subpoena power reaches aliens present in the United States.<sup>28</sup> Securing compliance of United States nationals and aliens residing in foreign countries presents more complex problems.<sup>29</sup>

A witness seeking to challenge the legal sufficiency of a subpoena, *i.e.*, the committee's authority, alleged constitutional rights violations, subpoena breadth, has only limited remedies available to raise such objections. The Supreme Court has ruled that courts may not enjoin the issuance of a congressional subpoena, holding that the Speech or Debate Clause of the Constitution<sup>30</sup> provides "an absolute bar to judicial interference" with such compulsory process.<sup>31</sup> As a consequence, a witness' sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise objections as a defense in a contempt prosecution.

Challenges to the legal sufficiency of subpoenas must overcome formidable judicial obstacles. The standard to be applied in determining whether the congressional investigating power has been properly asserted was articulated in *Wilkinson v. United States*: (1) the committee's investigation of the broad subject matter area must be authorized by Congress; (2) the investigation must be pursuant to "a valid legislative purpose"; and (3) the specific inquiries must be pertinent to the broad subject matter areas which have been authorized by the Congress.<sup>32</sup>

With respect to authorization, a committee's authority derives from the enabling rule or resolution of its parent body. In construing the scope of such authorizations, the Supreme Court has adopted a mode of analysis not unlike that ordinarily followed in determining the meaning of a statute: it looks first to the words of the authorizing rule or resolution itself, and then, if necessary, to the usual sources of legislative history, including floor statements, reports and past committee practice.<sup>33</sup>

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<sup>28</sup> *Eisler v. United States*, 170 F.2d 273, 279 (D.C. Cir. 1948), *cert. dismissed*, 338 U.S. 883 (1949).

<sup>29</sup> See generally, Gary E. Davidson, Congressional Extraterritorial Investigative Powers: Real or Illusory ?, 8 *Emory International Law Review* 99 (1994).

<sup>30</sup> U.S. Const., Art. I, sec. 6, cl. 1.

<sup>31</sup> *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-07 (1975).

<sup>32</sup> 365 U.S. 399, 408-09 (1961).

<sup>33</sup> *Barenblatt v. United States*, 360 U.S. 109, 117 (1959); *Watkins v. United States*, *supra*, 354 U.S. at 209-215.

As to the requirement of "valid legislative purpose," the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation.<sup>34</sup> When the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of Congress exceeds its power when it seeks information in such areas.<sup>35</sup>

Finally, in determining the pertinency of questions to the subject matter under investigation, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.<sup>36</sup> An argument that pertinence must be shown "with the degree of explicitness and clarity required by the Due Process Clause" has been held to confuse the standard applicable in those rare cases when the constitutional rights of individuals are implicated by congressional investigations with the far more common situation of the exercise of legislative oversight over the administration of the law which does not involve an individual constitutional right or prerogative. It is, of course, well established that the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members.<sup>37</sup> But "[w]here constitutional rights are not violated, there is no warrant to interfere with the internal procedures of Congress."<sup>38</sup>

## B. Staff Depositions

Committees normally rely on informal staff interviews to gather information preparatory to investigatory hearings. However, with more frequency in recent years, congressional committees have utilized staff conducted depositions as a tool in exercising the investigatory power.<sup>39</sup> Staff depositions afford a number of advantages for committees engaged in complex investigations. Staff depositions may assist committees in obtaining sworn

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<sup>34</sup> *In re Chapman*, 166 U.S. 661, 669 (1897).

<sup>35</sup> *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

<sup>36</sup> *Sinclair v. United States*, *supra*, 279 U.S. at 299; *Ashland Oil, Inc. v. F.T.C.*, 409 F.Supp. at 305.

<sup>37</sup> *See, e.g., Yellin v. United States*, 374 U.S. 109, 143, 144 (1969); *Watkins v. United States*, *supra*; *United States v. Ballin*, 144 U.S. 1, 5 (1892).

<sup>38</sup> *Exxon Corporation v. F.T.C.*, 589 F.2d 582, 590 (D.C. Cir. 1978). The issues raised by witness claims of constitutional and common law privileges are more fully discussed below at pp. 53-85. On claims that a committee subpoena is overbroad or burdensome see discussions, *infra*, at pp. 40-42.

<sup>39</sup> *E.g.*, S. Res. 229, 103d Cong. (Whitewater); S. Res. 23, 100th Cong. (Iran-Contra); H. Res. 12, 100th Cong. (Iran-Contra); H. Res. 320, 100th Cong. (impeachment proceedings of Judge Alcee Hastings); S. Res. 495, 96th Cong. (Billy Carter/Libya).

testimony quickly and confidentially without the necessity of Members devoting time to lengthy hearings which may be unproductive because witnesses do not have the facts needed by the committee or refuse to cooperate. Depositions are conducted in private and may be more conducive to candid responses than would be the case at a public hearing. Statements made by witnesses that might defame or even tend to incriminate third parties can be verified before they are repeated in an open hearing. Depositions can enable a committee to prepare for the questioning of witnesses at a hearing or provide a screening process which can obviate the need to call some witnesses. The deposition process also allows questioning of witnesses outside of Washington thereby avoiding the inconvenience of conducting field hearings requiring the presence of Members.

Certain disadvantages may also inhere. Unrestrained staff may be tempted to engage in tangential inquiries. Also depositions present a "cold record" of a witness's testimony and may not be as useful for Members as in person presentations. Finally, in the current absence of any definitive case law precedent, legal questions may be raised concerning the ability to enforce a subpoena for a staff deposition by means of contempt sanctions, and to the applicability to such a deposition of various statutes that proscribe false material statements.<sup>40</sup>

At present neither House has rules that expressly authorize staff depositions. On a number of occasions such specific authority has been granted pursuant to Senate and House resolutions.<sup>41</sup> When granted, a committee will normally adopt procedures for taking depositions, including provisions for notice (with or without a subpoena), transcription of the deposition, the right to be accompanied by counsel, and the manner in which objections to questions are to be resolved.<sup>42</sup>

### C. Congressional Grants of Immunity

The Fifth Amendment to the Constitution provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself . . ." The privilege against self-incrimination is available to a witness in a congressional investigation.<sup>43</sup> When a witness before a committee asserts his

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<sup>40</sup> See Jay R. Shampansky, Staff Depositions in Congressional Investigations, CRS Report No. 91-679, August 27, 1991 (suggesting that the criminal contempt procedure would be available if a committee adopted rules of procedure providing for Member involvement if a witness raises objections and refuses to answer; and that analogous case law under false statements and obstruction of Congress statutes would support prosecutions for false statements made during a deposition.).

<sup>41</sup> See examples cited at note 39, *supra*.

<sup>42</sup> See, e.g., Senate Permanent Committee on Investigations Rule 9; House Iran-Contra Committee Rule 6, H. Res. 12, 133 Cong. Rec. 822 (1987).

<sup>43</sup> See *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955).

constitutional privilege, the committee may obtain a court order which compels him to testify and grants him immunity against the use of his testimony and information derived from that testimony in a subsequent criminal prosecution. He may still be prosecuted on the basis of other evidence.

The privilege against self-incrimination is an exception to the public's right to every person's evidence. However, a witness' Fifth Amendment privilege can be restricted if the government chooses to grant him immunity. Immunity is considered to provide the witness with the constitutional equivalent of his Fifth Amendment privilege.<sup>44</sup> Immunity grants may be required in the course of an investigation because "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."<sup>45</sup> Such grants may be militated when a committee is convinced that the testimony elicited will produce new or vital facts that would otherwise be unavailable or to allow a witness to implicate persons of greater rank or authority. Grants of immunity have figured prominently in a number of major congressional investigations, including Watergate (John Dean and Jeb Magruder) and Iran-Contra (Oliver North and John Poindexter).

The scope of the immunity which is granted, and the procedure to be employed, are outlined in 18 U.S.C. §§ 6002, 6005. If a witness before the House or Senate or a committee or subcommittee of either body asserts his privilege, or if a witness who has not yet been called is expected to assert his privilege, an authorized representative of the House or of the committee may apply to a federal district court for an order directing the individual to testify or provide other information sought by the Congress.<sup>46</sup> If the testimony is to be before the full House or Senate, the request for the court order must be approved by an affirmative vote of a majority of the Members present of the House or Senate. If the testimony is to be given before a committee or subcommittee, the request for the order must be approved by an affirmative vote of two-thirds of the Members of the full committee.<sup>47</sup>

At least ten days prior to applying to the court for the order, the Attorney General<sup>48</sup> must be notified of the Congress' intent to seek the order,<sup>49</sup> and

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<sup>44</sup> See generally *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>45</sup> *Kastigar v. United States*, 406 U.S. at 446.

<sup>46</sup> 18 U.S.C. § 6005(a); See also *Application of Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981).

<sup>47</sup> 18 U.S.C. § 6005(b).

<sup>48</sup> Notice should be given to an independent counsel where one has been appointed, since he would have the powers usually exercised by the Justice Department. See 28 U.S.C. § 594.

issuance of the order will be delayed by the court for as much as twenty additional days at the request of the Attorney General.<sup>50</sup> Notice to the Attorney General is required so that he can identify in his files any information which would provide an independent basis for prosecuting the witness, and place that information under seal. Neither the Attorney General nor an independent counsel would have a right to veto a committee's application for immunity.<sup>51</sup> The role of the court in issuing the order is ministerial and therefore, if the procedural requirements under the statutes are met, the court may not refuse to issue the order or impose conditions on the grant of immunity.<sup>52</sup> However, although the court lacks power to review the advisability of granting immunity, it might be able to consider the jurisdiction of Congress and the committee over the subject area and the relevance of the information that is sought to the committee's inquiry.<sup>53</sup>

After an immunity order has been issued by the court and communicated to the witness by the chairman, the witness can no longer decline to testify on the basis of his privilege, "but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."<sup>54</sup> The immunity that is granted is "use" immunity, not "transactional" immunity.<sup>55</sup> That is, neither the immunized testimony that the witness gives to the committee, nor information derived from that testimony, may be used against him in a subsequent criminal prosecution, except one for falsely testifying to the committee or for contempt. However, he may be convicted of the crime (the "transaction") on the basis of evidence independently obtained by the prosecution and sealed before his congressional testimony, and/or on the basis of information obtained after his congressional appearance but which was not derived, either directly or indirectly, from his congressional testimony.

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<sup>49</sup>(...continued)

<sup>49</sup> 18 U.S.C. § 6005(b). The Justice Department may waive the notice requirement. *Application of Senate Permanent Subcommittee on Investigations*, 655 F.2d at 1236.

<sup>50</sup> 18 U.S.C. § 6005(c).

<sup>51</sup> See H.R. Rept. No. 91-1549, 91st Cong., 2d Sess. 43 (1970).

<sup>52</sup> *Id.* See also S.Rept. No. 91-617, 91st Cong., 1st Sess. 145 (1969); *Application of U.S. Senate Select Committee on Presidential Campaign Activities*, 361 F.Supp. 1270 (D.D.C. 1973).

<sup>53</sup> *Application of U.S. Senate Select Committee*, 361 F.Supp. at 1278-79.

<sup>54</sup> 18 U.S.C. § 6002.

<sup>55</sup> The constitutionality of granting a witness only use immunity, rather than transactional immunity, was upheld in *Kastigar v. United States*, *supra*.

In determining whether to grant immunity to a witness, a committee may consider, on the one hand, its need for his testimony in order to perform its legislative, oversight, and informing functions, and on the other, the possibility that the witness' immunized congressional testimony could jeopardize a successful criminal prosecution against him. If a witness is prosecuted after giving immunized testimony, the burden is on the prosecutor to establish that the case was not based on the witness' previous testimony or evidence derived therefrom.<sup>56</sup>

Recent appellate court decisions reversing the convictions of key Iran-Contra figures Lt. Colonel Oliver North<sup>57</sup> and Rear Admiral John Poindexter<sup>58</sup> appear to make the prosecutorial burden substantially more difficult, if not insurmountable, in high profile cases. Despite extraordinary efforts by the Independent Counsel and his staff to avoid being exposed to any of North's or Poindexter's immunized congressional testimony, and the submission of sealed packets of evidence to the district court to show that the material was obtained independently of any immunized testimony to Congress, the appeals court in both cases remanded the cases for a further determination whether the prosecution had directly or indirectly used immunized testimony.

The court of appeals in *North* emphasized that the insulation of the prosecution from exposure to the immunized congressional testimony does not automatically prove that this testimony was not used against the defendant.<sup>59</sup> The court held that "*Kastigar* is instead violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony."<sup>60</sup> From this the court reasoned that "the use of immunized testimony . . . to augment or refresh recollection is an evidentiary use" and must therefore be strictly scrutinized under the *Kastigar* standard.<sup>61</sup> Thus, the court of appeals held that the presentation of "testimony of grand jury or trial witnesses that has been derived from or influenced by the [defendant's]

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<sup>56</sup> *Kastigar v. United States, supra*, 406 U.S. at 460.

<sup>57</sup> *United States v. North*, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990) cert. denied, 111 S.Ct. (1991).

<sup>58</sup> 951 F.2d 369 (D.C. Cir. 1991).

<sup>59</sup> *United States v. North*, 920 F.2d at 942.

<sup>60</sup> *Id.* (emphasis in original).

<sup>61</sup> *United States v. North*, 910 F.2d at 860. Because several years passed between the events at issue and the trial of North, the Independent Counsel had allowed potential witnesses to refresh their recollection with North's immunized testimony before they testified at the grand jury and at trial. *Id.*

immunized testimony" was a forbidden use of the compelled testimony under both the Fifth Amendment and *Kastigar*.<sup>62</sup>

Upon remanding the case to the district court, the court of appeals insisted that a strict application of the *Kastigar* test be applied to the government's evidence if the prosecution of *North* was to continue. The lower court was required to hold a full *Kastigar* hearing that would:

inquire into the content as well as the sources of the grand jury and trial witnesses' testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item. For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by the Office of Independent Counsel in questioning the witness. This burden may be met by establishing that the witness was never exposed to North's immunized testimony, or that the allegedly tainted testimony contains no evidence not "canned" by the prosecution before such exposure occurred.<sup>63</sup>

Similarly, in *Poindexter*, the D.C. Circuit Court of Appeals reversed all five of Poindexter's convictions because the Independent Counsel failed to show that Poindexter's compelled testimony was not used against him at his trial, in violation of 18 U.S.C. § 6002 and the Fifth Amendment.<sup>64</sup> Relying on the *North* standards outlined above, the appeals court held that the testimony of many of the prosecution's key witnesses, including that of Oliver North himself, was impermissibly influenced by the witnesses' exposure to Poindexter's immunized testimony for purposes of refreshment.<sup>65</sup> Upon remand in both cases, the Independent Counsel moved to dismiss the prosecutions upon his determination that he could not meet the strict standards set by the appeals court in its decisions.

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<sup>62</sup> *Id.* at 865. See also *id.* at 869 ("Where immunity testimony is used before a grand jury, the prohibited act is simultaneous and coterminous with the presentation; indeed, they are one and the same."). The court of appeals criticized the district court for failing to inquire into "the extent to which the substantive content of the witnesses' testimony may have been shaped, altered, or affected by the [defendant's] immunized testimony." *Id.* at 863. The court further noted that it was legally irrelevant under *Kastigar* if the witnesses themselves, rather than the government, presented the immunized testimony. *Id.* at 871.

<sup>63</sup> *Id.* at 872.

<sup>64</sup> *United States v. Poindexter, supra*, 951 F.2d at 375-77.

<sup>65</sup> *Id.*



While the *North* and *Poindexter* rulings in no way diminish a committee's authority to immunize testimony or the manner in which it secures immunity pursuant to the statute, it does alter the calculus as to whether to seek such immunity. Independent Counsel Lawrence E. Walsh observed that "[t]he legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance."<sup>66</sup> It has been argued that the constitutional dimensions of the crisis created by the Iran-Contra affair required the type of quick, decisive disclosures that could result from a congressional investigation but not from the slower, more deliberate criminal investigation and prosecution process.<sup>67</sup> Under this view, the demands of a national crisis may justify sacrificing the criminal prosecution of those involved in order to allow Congress to uncover and make public the truth of the matter at issue. The role of Congress as overseer, informer, and legislator arguably warrants this sacrifice. The question becomes more difficult as the sense of national crisis in a particular circumstance is less acute, and the object is, for example, to trade-off a lesser figure in order to reach someone higher up in a matter involving "simple" fraud, abuse or maladministration at an agency. In the end, case-by-case assessments by congressional investigators will be needed, guided by the sensitivity that these are political judgments.

#### IV. ENFORCEMENT OF THE INVESTIGATIVE POWER

##### A. The Contempt Power

While the threat or actual issuance of a subpoena often provides sufficient leverage for effective compliance with investigative information demands, it is through the contempt power that Congress may act with ultimate force in response to actions which obstruct the legislative process in order to punish the contemnor and/or to remove the obstruction. The Supreme Court early recognized the power as an inherent attribute of Congress' legislative authority, reasoning that if it did not possess this power, it "would be exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."<sup>68</sup>

There are three different kinds of contempt proceedings available. Both the House and Senate may cite a witness for contempt under their inherent contempt power or under a statutory criminal contempt procedure. The Senate

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<sup>66</sup> Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Hous. L. Rev. 1, 9 (1988).

<sup>67</sup> Michael Gilbert, *The Future of Congressional Use Immunity After United States, v. North*, 30 Amer. Crim.L.Rev. 417, 430-31 (1993). See also, Arthur L. Limon and Mark A. Belnick, *Congress Had to Immunize North*, Wash. Post, July 29, 1990, at p. C7.

<sup>68</sup> *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204 (1821).

also has a third option, enforcement by means of a statutory civil contempt procedure. The three proceedings may be briefly described.<sup>69</sup>

### (1) Inherent Contempt

Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned in the Capitol jail. The purpose of the imprisonment or other sanction may be either punitive or coercive. Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period (but not, at least in the case of the House, beyond the end of the Congress) until he agrees to comply. When a witness is cited for contempt under the inherent contempt process, prompt judicial review is available by means of a petition for a writ of *habeas corpus*. In an inherent contempt proceeding, although Congress would not have to afford the contemnor the whole panoply of procedural rights available to a defendant in a criminal case, notice and an opportunity to be heard would have to be granted. Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure might be mandated by the due process clause in the case of inherent contempt proceedings.<sup>70</sup>

The inherent contempt power has not been exercised by either House in over sixty years because it has been considered to be too cumbersome and time consuming for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar.

### (2) Statutory Contempt

Recognizing the problems with use of the inherent contempt process, a statutory criminal contempt procedure was enacted in 1857 which, with only minor amendments, is codified today at 2 U.S.C. §§192 and 194. Under 2 U.S.C. § 192, a person who has been subpoenaed to testify or produce documents before the House or Senate or a committee and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine of up to \$1,000 and imprisonment for up to one year. Section 194 establishes the procedure to be followed if the House or Senate refers a witness to the courts for criminal prosecution. A contempt citation must be approved by the subcommittee, the full committee, and the full House or Senate (or by the presiding officer if Congress is not in session). The criminal procedure is punitive in nature. It is not coercive because a witness generally will not be able to purge himself by testifying or supplying subpoenaed documents after he has been voted in contempt by the committee and the House or the Senate. Under the statute, after a contempt has been certified by the President of the

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<sup>69</sup> For a more comprehensive treatment of the history and legal development of the congressional contempt power, see Jay R. Champansky, *Congress' Contempt Power*, CRS Report No. 86-83A, February 28, 1986.

<sup>70</sup> See, *Groppi v. Leslie*, 404 U.S. 496 (1972).

Senate or the Speaker of the House, it is the "duty" of the U.S. Attorney "to bring the matter before the grand jury for its action." It remains unclear whether the "duty" of the U.S. Attorney to present the contempt to the grand jury is mandatory or discretionary, since the sparse case law that is relevant to the question provides conflicting guidance.<sup>71</sup>

This potential conflict between the statutory language of §194 and the U.S. Attorney's prosecutorial discretion was highlighted by the inability of the House of Representatives in 1982 to secure a contempt prosecution against the Administrator of the Environmental Protection Agency, Ann Burford. Burford, at the direction of President Reagan, had asserted executive privilege as grounds for refusing to respond to a subpoena demand for documents. She was cited for contempt by the full House and the contempt resolution was certified by the Speaker and forwarded to the U.S. Attorney for the District of Columbia for presentment to the grand jury. Relying on his prosecutorial discretion he deferred doing so.

The Burford controversy may be seen as unusual, involving highly sensitive political issues of the time. In the vast majority of cases there is likely to be no conflict between the interests of the two political branches, and the U.S. Attorney can be expected to initiate prosecution in accordance with § 194.

### (3) Civil Contempt

As an alternative to both the inherent contempt power of each House and criminal contempt, Congress enacted a civil contempt procedure which is applicable only to the Senate.<sup>72</sup> Upon application of the Senate,<sup>73</sup> the federal district court is to issue an order to a person refusing, or threatening to refuse, to comply with a Senate subpoena. If the individual still refuses to comply, he may be tried by the court in summary proceedings for contempt of court, with sanctions being imposed to coerce his compliance. Civil contempt might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues than with punishing the contemnor. Civil contempt can be more expeditious than a criminal proceeding and it also provides an element of flexibility, allowing the subpoenaed party to test his legal defenses in court without necessarily risking a criminal prosecution. Civil contempt is not authorized for use against executive branch officials refusing to comply with a subpoena.

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<sup>71</sup> See Todd D. Peterson, Prosecuting Executive Branch Officials for Contempt of Congress, 66 NYUL Rev. 563 (1991); Hearing, "Prosecution of Contempt of Congress", Before the Subcomm. on Administrative Law and Governmental Relations, House Comm. on the Judiciary, 98th Cong. 1st Sess. 21-35 (1983) (Statement and Testimony of Stanley Brand).

<sup>72</sup> See 2 U.S.C. 288d and 28 U.S.C. 1364.

<sup>73</sup> Usually brought by the Senate Legal Counsel. 2 U.S.C 288 d(a).

#### (4) Alternatives to Contempt

When an executive branch official refuses to comply with a congressional subpoena and the dispute cannot be resolved by negotiation and compromise, none of the three types of contempt proceedings may be completely satisfactory. The statutory civil contempt procedure in the Senate is inapplicable in the case of a subpoena to an executive branch official. Inherent contempt has been described as "unseemly" and cumbersome. And if the criminal contempt method is utilized, the U.S. Attorney, who is an executive branch appointee may, as occurred in the Burford case, rely on the doctrine of prosecutorial discretion as grounds for deferring seeking an indictment. There are, however, various alternatives to the three modes of contempt in the case of an executive branch official. (1) The contemnor could be cited for criminal contempt and be prosecuted by an independent counsel, rather than by the U.S. Attorney, if the standards under the law governing the appointment of such counsels are satisfied; (2) the committee can seek declaratory or other relief in the courts; (3) the appropriations for the agency or department involved can be cut off or reduced when requested information has not been supplied; and (4) in an exceptional case, the official might be impeached.

### B. Perjury and False Statements Prosecutions

#### (1) Testimony Under Oath

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury under 18 U.S.C. 1621 of the United States Code. The essential elements for such prosecution are: (1) a false statement, (2) "willfully" made, (3) before a "competent tribunal", (4) involving a "material matter." The requirement of a competent tribunal is important to note because it is an element of the offense within the particular control of committees.

For a legislative committee to be competent for perjury purposes a quorum must be present.<sup>74</sup> The problem has been ameliorated in recent years with the adoption of rules establishing less than a majority of Members as a quorum for taking testimony, normally two members for House committees<sup>75</sup> and one member for Senate committees.<sup>76</sup> The requisite quorum must be present at the time the alleged perjurious statement is made, not merely at the time the session convenes. No prosecution for perjury will lie for statements made only in the presence of committee staff unless the committee has deposition authority and has taken formal action to allow it.

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<sup>74</sup> *Christoffel v. United States*, 378 U.S. 89 (1949).

<sup>75</sup> House Rule XI (2) (h) (1).

<sup>76</sup> Senate Rule XXVI (7) (a) (2).

## (2) Unsworn Statements

Most statements made before Congress, at both the investigatory and hearing phases of oversight, are unsworn. The practice of swearing in all witnesses at hearings is a rare practice. But prosecutions may be brought to punish congressional witnesses for giving willfully false testimony not under oath. Under 18 U.S.C. 1001 false statements before a "department or agency of the United States" are punishable by a fine of up to \$10,000 or imprisonment up to five years, or both. The courts have held that section 1001 is applicable to false statements made to congressional committees.<sup>77</sup>

Until recently it was thought that 18 U.S.C. 1505, which proscribes attempts to obstruct congressional proceedings, was applicable to unsworn false statements. However, the Court of Appeals for the District of Columbia Circuit ruled in 1991 that section 1505 applies only to corrupt efforts to obstruct congressional inquiries by subverting witnesses, not to false statements by the defendant himself in such proceedings.<sup>78</sup>

## V. INVESTIGATING THE EXECUTIVE BRANCH

When Congress directs its investigatory powers at Executive Branch departments and agencies, and at times at the White House itself, such probes have often become contentious, provoking the Executive to assert rights to shield from disclosure information Congress deems essential to carry out its oversight functions. The variety of grounds proffered are often lumped in an undifferentiated manner under the rubric "executive privilege". However, in order to evaluate and assess the weight of such withholding claims, it is more useful, and accurate, to distinguish between claims that have a constitutional basis and those that do not, and then to separate out amongst the non-constitutional claims those based on law from those resting on executive policy preferences.

### A. Presidential Claims of Executive Privilege

In some, rare, instances the executive response to a congressional demand to produce information may be an assertion of presidential executive privilege, a doctrine which, like Congress' powers to investigate and cite for contempt, has constitutional roots. No decision of the Supreme Court has yet resolved the question whether there are any circumstances in which the Executive Branch can refuse to provide information sought by the Congress on the basis of executive privilege. Indeed, most such disputes are settled short of litigation

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<sup>77</sup> *United States v. Bramlett*, 348 U.S. 503, 509 (1955); *United States v. Poindexter*, 951 F.2d 369, 386-88 (D.C. Cir. 1991).

<sup>78</sup> *United States v. Poindexter*, *supra*, 951 F.2d at 377-86.

through employment of the political process and negotiations,<sup>79</sup> and the few that reach a judicial forum find the courts highly reluctant to rule on the merits.<sup>80</sup> However, in *United States v. Nixon*,<sup>81</sup> involving a judicial subpoena issued to the President at the request of the Watergate Special Prosecutor,<sup>82</sup> the Supreme Court found a constitutional basis for the doctrine of executive privilege in "the supremacy of each branch within its own assigned area of constitutional duties" and in the separation of powers,<sup>83</sup> and although it considered presidential communications with close advisors to be "presumptively privileged," the Court rejected the President's contention that the privilege was absolute, precluding judicial review whenever it is asserted.<sup>84</sup>

Having concluded that in the case before it the claim of privilege was not absolute, the Court resolved the "competing interests" (the President's

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<sup>79</sup> Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J. of Law and Politics, 717, 735-46(1993); Peter M. Shane, *Legal Disagreements and Negotiation in a Government of Laws*, 71 Minn. L. Rev. 461 (1987); Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigatory Authority of Congress and the Courts*, 3 J. of Law and Politics 183 (1986); Richard Ehlke, *Congressional Access To Information From The Executive: A Legal Analysis*, CRS Report No. 86-50A, March 10, 1986.

<sup>80</sup> See, e.g., *United States v. AT&T*, 551 F.2d 784 (D.C. Cir. 1976) and 567 F.2d 121 (D.C. Cir 1977), where the appeals court twice refused to balance the asserted constitutional interests, instead remanding the case for further negotiations under the supervision of the district court; and *United States v. U.S. House of Representatives*, 556 F.2d 150, 152 (D.D.C. 1983), where the district court refused to enjoin transmission by the House of Representatives of a contempt citation of the Administrator of the EPA to the United States Attorney on grounds alleging constitutional executive privilege, stating that when "constitutional disputes arise concerning the separation of powers of the legislative and executive branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted . . . judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution." In both instances negotiated resolutions ultimately ended the immediate disputes.

<sup>81</sup> 418 U.S. 683 (1974).

<sup>82</sup> The subpoena was for certain tape recordings and documents relating to the President's conversations with aides and advisors. The materials were sought for use in a criminal trial.

<sup>83</sup> 418 U.S. at 705, 706. See also *id.* at 708, 711.

<sup>84</sup> *Id.* at 705, 708. Citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), the Court held that it had the authority to review the President's claim of executive privilege. 418 U.S. at 703-05. The materials in question in *United States v. Nixon* related to confidential communications between the President and his advisors. The Court indicated that it might proceed differently and accord more deference to the executive's claims in a case involving military or diplomatic matters. *Id.* at 706.

need for confidentiality vs. the judiciary's need for the materials in a criminal proceeding) "in a manner that preserves the essential functions of each branch,"<sup>85</sup> and held that the judicial need for the tapes outweighed the President's "generalized interest in confidentiality ..." <sup>86</sup> The Court was careful to limit the scope of its decision, noting that "we are not here concerned with the balance between the President's generalized interest in confidentiality ... and congressional demands for information".<sup>87</sup>

Although *United States v. Nixon* did not involve a presidential claim of executive privilege in response to a congressional subpoena, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,<sup>88</sup> the court of appeals, prior to the *Nixon* ruling, reviewed the President's assertion of executive privilege as grounds for not complying with a Senate committee subpoena for tape recordings.<sup>89</sup> The appeals court found that "the presumption that the public interest favors confidentiality [in presidential communications] can be defeated only by a strong showing of need by another institution of government - a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations . . . ." According to the court, "the showing required to overcome the presumption favoring confidentiality" rests "on the nature and appropriateness of the function in the performance of which the material [is] sought, and the degree to which the material [is] necessary to its fulfillment . . . . [T]he sufficiency of the committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the committee's functions."<sup>90</sup> The court found that, in the circumstances of that case, the need for the tapes was "merely cumulative" in light of the fact that the House Judiciary Committee had begun an inquiry, with express constitutional authority, into impeachment of the President, and the fact that the Judiciary Committee already had copies of the tapes subpoenaed by the Senate Committee.<sup>91</sup>

Since the Kennedy Administration it has been established by executive policy directives that presidential executive privilege may be asserted only by the

<sup>85</sup> *Id.* at 707.

<sup>86</sup> *Id.* at 713.

<sup>87</sup> *Id.* at 712, n. 19.

<sup>88</sup> 498 F.2d 725 (D.C. Cir. 1974).

<sup>89</sup> The subpoena was for tapes of conversations between the President and presidential counsel John Dean. The committee sought a declaratory judgment that its subpoena was lawful and that the President's refusal to comply with it, on the basis of executive privilege, was unlawful.

<sup>90</sup> 498 F.2d at 730.

<sup>91</sup> *Id.* at 732-33.

President personally. The latest such directive, issued by President Reagan in November 1982,<sup>92</sup> and still in effect, requires that when an agency head believes that a congressional information request raises substantial questions of executive privilege he is to notify and consult with the Attorney General and the Counsel to the President. If the matter is deemed to justify invocation of the privilege, it is reported to the President who makes his decision. If the President invokes the privilege, the agency head advises the requesting committee.

There has been only one instance in which the full House or Senate has voted a contempt citation against the head of an executive department or agency, that of Anne Gorsuch Burford, Administrator of the Environmental Protection Agency, in 1982.<sup>93</sup> Several cabinet members have been found in contempt by committees or subcommittees, although these disputes were resolved before contempt votes by the parent body. In two instances, cabinet members were cited for contempt by full committees.<sup>94</sup> Five other cabinet secretaries have been cited for contempt by subcommittees.<sup>95</sup>

### **B. Effect of Statutory Prohibitions on Public Disclosure on Congressional Access**

Upon occasion Congress has found it necessary and appropriate to limit its access to information it would normally be able to obtain by exercise of its

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<sup>92</sup> Memorandum from the President to the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information (November 4, 1982), *reprinted in* Congressional Oversight Manual, *supra* note 1, at pp. 197-98. The Department of Justice Office of Legal Counsel lists 64 instances of presidential invocation of executive privilege in the face of congressional requests for information between 1792 and October 1981. 6 OLC 751 (1982). President Reagan invoked the privilege in November 1982 in the EPA investigation. See, "Contempt of Congress", H. Rept. No. 97-968, 97th Cong., 2d Sess. 1982. The last recorded invocation was by President Bush in August 1991. See Congressional Oversight Manual at pp. 199-204; and Mark J. Rozell, *Executive Privilege in the Bush Administration: Constitutional Problems, Bureaucratic Responses*, 1 *Miller Center Journal* 63, 71-72 (1994).

<sup>93</sup> H. Res. 632, 97th Cong., 128 Cong. Rec. 31746-76 (1982).

<sup>94</sup> H.R. Rept. No. 94-693, 94th Cong., 1st Session (1975)(Secretary of State Henry R. Kissinger); H.R. Rept. No. 97-898, 97th Cong. 2d Sess. (1982)(Secretary of the Interior James G. Watt).

<sup>95</sup> Secretary of Commerce Rogers C.B. Morton (1975); Secretary of Health Education and Welfare Joseph Califano (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James Edwards (1980); and Attorney General William French Smith (1984).



constitutional oversight prerogatives.<sup>96</sup> But where a statutory confidentiality or non-disclosure provision barring public disclosure of information is not explicitly applicable to the Congress, the courts have consistently held that agencies and private parties may not deny Congress access to such information on the basis of such provisions.<sup>97</sup> Release to a congressional requestor is not deemed to be disclosure to the public generally.<sup>98</sup> Moreover, courts may not require agencies to delay the surrender of documents to Congress in order to give advance notice to affected parties, "for the judiciary must refrain from slowing or otherwise interfering with the legitimate investigating functions of Congress".<sup>99</sup> Once documents are in congressional hands, the courts have held they must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.<sup>100</sup> Nor may a court block congressional disclosure of information obtained from an agency or private party, at least when disclosure would serve a valid legislative purpose.<sup>101</sup> Finally, the legal obligation to surrender requested documents has been held to arise from the official request<sup>102</sup>

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<sup>96</sup> See, e.g., 1 U.S.C. 112b limiting congressional access to international agreements, other than treaties, where, in the opinion of the President, public disclosure would be prejudicial to the national security, to the foreign relations committees of each House under conditions of secrecy removable only by the President; 26 U.S.C. 6103(d), 6104(a)(2) limiting inspection of tax information to the Senate Finance Committee, House Ways and Means Committee, and the Joint Committee on Taxation, or any committees "specifically authorized by a resolution of the House or Senate"; 10 U.S.C. 1582, which provides that in reporting to Congress on certain sensitive positions created in the Defense Department, "the Secretary may omit any item if he considers a full report on it would be detrimental to the national security"; and under 50 U.S.C. 402g, j(b), the Congress' ability to obtain information about the Central Intelligence Agency, particularly with regard to expenditures, is very limited.

<sup>97</sup> See, e.g., *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. F.T.C.*, 589 F.2d 582, 585-86 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *Ashland Oil Co., Inc. v. F.T.C.* 548 F.2d 977, 979 (D.C. Cir. 1976).

<sup>98</sup> *F.T.C. v. Owens-Corning Fiberglass Corp.* 626 F.2d at 970; *Exxon Corp. v. F.T.C.*, 589 F.2d at 589; *Ashland Oil Co., Inc. v. F.T.C.*, 548 F.2d at 979; *Moon v. CIA*, 514 F.Supp. 836, 840-41 (SDNY 1981).

<sup>99</sup> *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *F.T.C. v. Anderson*, 631 F.2d 741, 747 (D.C. Cir. 1970); *Exxon Corp. v. F.T.C.*, 589 F.2d at 588-9.

<sup>100</sup> *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *Exxon Corp. v. F.T.C.*, 589 F.2d at 589; *Ashland Oil Corp. v. F.T.C.*, 548 F.2d at 979; *Moon v. CIA*, 514 F.Supp at 849-51.

<sup>101</sup> *Doe v. McMillan*, 412 U.S. 306 (1973); *F.T.C. v. Owens-Corning Fiberglass Corp.* 626 F.2d at 970.

<sup>102</sup> *Ashland Oil Co., Inc. v. F.T.C.*, 548 F.2d at 980-81.

Executive agencies have in the past unsuccessfully raised several statutes of general applicability as potential barriers to the disclosure of information to congressional committees. Agencies have attempted to withhold documents on the basis of the deliberative process exemption incorporated by Exemption 5 of the Freedom of Information Act (FOIA).<sup>103</sup> But the courts have made it plain that the agency privileges made applicable to public requesters by Exemption 5, as well as all the other exemptions of the FOIA, are expressly inapplicable to the legislature: "This section is not authority to withhold information from Congress."<sup>104</sup> In *Murphy v. Department of the Army* an appeals court explained that FOIA exemptions were no basis for withholding from Congress because of "the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others. 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 responsibilities effectively. If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private persons, that is but an incidental consequence of the need for informed and effective lawmakers".<sup>105</sup> A similar provision in the Privacy Act also prevents its use as a withholding vehicle against Congress.<sup>106</sup>

A frequently cited statute used to justify non-disclosure is the Trade Secrets Act, 18 U.S.C. 1905, a criminal provision which generally proscribes the disclosure of trade secrets and confidential business information by a federal officer or employee "unless otherwise authorized by law." There is no indication in the legislative history of its revision and codification that it was intended to prevent agency disclosures to committees or to have it apply to Congress and its employees or any other legislative branch support agency or its employees,<sup>107</sup> and as a matter of statutory construction it would have been unusual for Congress to have subjected, *sub silentio*, its staff to criminal sanctions for such disclosures, particularly in light of its well-established oversight and investigative prerogatives, and its speech or debate privilege. In any event, there appears little doubt that disclosure to Congress of proprietary information covered by § 1905 would be deemed to be "authorized by law". The Supreme Court in *Chrysler v. Brown*<sup>108</sup> held that disclosure authorization can stem from both congressional enactments and agency regulations. In this instance, there are at least two potential sources of disclosure authorization. The first is

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<sup>103</sup> 5 U.S.C. 552(b)(5).

<sup>104</sup> 5 U.S.C. 552(d).

<sup>105</sup> 612 F.2d 1151, 1155-58 (D.C. Cir. 1979).

<sup>106</sup> 5 U.S.C. 552a (b)(9).

<sup>107</sup> See discussion of legislative history in *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1144-52 (D.C. Cir. 1987).

<sup>108</sup> 441 U.S. 281, 301-16 (1979).

2 U.S.C. 190d, which directs all standing committees of the Congress to engage in continuous legislative oversight of the administration and application of laws within their respective jurisdictions, and "may require a Government agency" to assist in doing so. In 1955, the Attorney General of the United States opined that the authorization required by the Trade Secrets Act was "reasonably implied" under § 190d.<sup>109</sup> A second source is the rules of each House authorizing committee oversight.

### **C. Accessing Information in Open and Closed Civil and Criminal Cases: The Special Problem of Overseeing the Justice Department**

Congressional oversight of the conduct of civil and criminal enforcement matters by agencies, and most particularly the Department of Justice (DOJ), has raised sensitive questions respecting the exercise of prosecutorial discretion by the executive and interference with protected rights of individuals who may be the subject of such enforcement actions. However, a review of congressional investigations that have implicated DOJ or DOJ investigations over the past 70 years, from the Palmer Raids and Teapot Dome to Watergate and through Iran-Contra and Rocky Flats,<sup>110</sup> demonstrates that DOJ has been consistently obliged to submit to congressional oversight, regardless of whether litigation is pending, so that Congress is not delayed unduly in investigating misfeasance, malfeasance, or maladministration in DOJ or elsewhere. A number of these inquiries spawned seminal Supreme Court rulings that today provide the legal foundation for the broad congressional power of inquiry.<sup>111</sup> All were contentious and involved Executive claims that committee demands for agency documents and testimony were precluded on the basis of constitutional or common law privilege or policy.

In the majority of instances reviewed, the testimony of subordinate DOJ employees, such as line attorneys and FBI field agents, was taken formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. In all instances, investigating committees were provided with documents respecting open or

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<sup>109</sup> 41 Op. Atty. Gen. 221 (1955).

<sup>110</sup> See Morton Rosenberg, "Legal and Historical Substantiality of Former Attorney General Civilette's Views as to the Scope and Reach of Congress' Authority to Conduct Oversight of the Department of Justice," CRS, October 15, 1993, *reprinted in* Hearing, "EPA's Criminal Enforcement Program", before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, 103d Cong., 1st Sess. 12-41 (1993). For an in-depth description of the most recent investigation of the DOJ, see Staff Report, *Damaging Disarray: Organizational Breakdown and Reform in the Justice Department's Environmental Crimes Program*, House Subcomm. on Oversight and Investigations, Comm. on Energy and Commerce, 103rd Congress., 2d Session (Dec. 1994) (Comm. Print No. 103-T).

<sup>111</sup> See notes, 13-20, *supra*, and accompanying text for a review of *McGrain v. Daugherty* and *Sinclair v. United States*.

closed cases that included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases, confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrests of suspects, and documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, among other similar "sensitive" materials.

The reasons advanced by the Executive for declining to provide information to Congress about civil proceedings have included avoiding prejudicial pre-trial publicity, protecting the rights of innocent third parties, protecting the identity of confidential informants, preventing disclosure of the government's strategy in anticipated or pending judicial proceedings, the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys, and precluding interference with the President's constitutional duty to faithfully execute the laws.<sup>112</sup>

As has been recounted previously, the Supreme Court has repeatedly reaffirmed the breadth of Congress' right to investigate the government's conduct of criminal and civil litigation.<sup>113</sup> The courts have also explicitly held that agencies may not deny Congress access to agency documents, even in situations where the inquiry may result in the exposure of criminal corruption or maladministration of agency officials. The Supreme Court has noted, "[B]ut surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding . . . or when crime or wrongdoing is exposed."<sup>114</sup> Nor does the actual pendency of litigation disable Congress from the investigation of facts which have a bearing on that litigation, where the information sought is needed to determine what, if any, legislation should be enacted to prevent further ills.<sup>115</sup>

Although several lower court decisions have recognized that congressional hearings may have the result of generating prejudicial pre-trial publicity, they have not suggested that there are any constitutional or legal limitations on Congress' right to conduct an investigation during the pendency of judicial proceedings. Instead, the cases have suggested approaches, such as granting a

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<sup>112</sup> A leading statement of the executive branch position is found in an opinion of Attorney General Robert Jackson. 40 Op. A.G. 45 (1941).

<sup>113</sup> See discussion of case law, *supra* at notes 2-8 and 13-20, and accompanying text.

<sup>114</sup> *Hutcheson v. United States*, 369 U.S. 599, 617 (1962).

<sup>115</sup> *Sinclair v. United States*, 279 U.S. 263, 294 (1929).

continuance or a change of venue, to deal with the publicity problem.<sup>116</sup> For example, the court in one of the leading cases, *Delaney v. United States*, entertained "no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it" but went on to describe the possible consequences of concurrent executive and congressional investigations:

We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.<sup>117</sup>

The *Delaney* court distinguished the case of a congressional hearing generating publicity relating to an individual not under indictment at the time (as was *Delaney*):

Such a situation may present important differences from the instant case. In such a situation the investigative function of Congress has its greatest

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<sup>116</sup> See e.g., *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *United States v. Mitchell*, 372 F.Supp. 1239, 1261 (S.D.N.Y. 1973). For discussion of issues in addition to prejudicial publicity that have been raised in regard to concurrent congressional and judicial proceedings, including allegations of violation of due process, see, Contempt of Congress, H.R. Rpt. No. 97-968, 97th Cong., 2d Sess. 58 (1982; and the discussion of the potential consequences of congressional grants of testimonial immunity on criminal trials, *supra*, at notes 57-67 and accompanying text.

<sup>117</sup> 199 F.2d 107, 114 (1st Cir. 1952). The court did not fault the committee for holding public hearings, stating that if closed hearings were rejected "because the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was of course free to go ahead with its hearing, merely accepting the consequence that the trial of *Delaney* on the pending indictment might have to be delayed." 199 F.2d at 114-5. It reversed *Delaney's* conviction because the trial court had denied his motion for a continuance until after the publicity generated by the hearing, at which *Delaney* and other trial witnesses were asked to testify, subsided. See also, *Hutcheson v. United States*, 369 U.S. 599, 613 (1962)(upholding contempt conviction of person who refused to answer committee questions relating to activities for which he had been indicted by a state grand jury, citing *Delaney*.)

utility: Congress it is informing itself so that it may take appropriate legislative action; it is informing the Executive so that existing laws may be enforced; and it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity. Also, if as a result of such legislative hearing an indictment is eventually procured against the public official, then in the normal case there would be a much greater lapse of time between the publicity accompanying the public hearing and the trial of the subsequently indicted official than would be the case if the legislative hearing were held while the accused is awaiting trial on a pending indictment.<sup>118</sup>

The absence of indictment and the length of time between congressional hearing and criminal trial have been factors in courts rejecting claims that congressionally generated publicity prejudiced defendants.<sup>119</sup> Finally, in the context of adjudicatory administrative proceedings, courts on occasion have held that pressures emanating from questioning of agency decisionmakers by Members of Congress may be sufficient to undermine the impartiality of the proceeding.<sup>120</sup> But the courts have also made clear that mere inquiry and oversight of agency actions, including agency proceedings that are quasi-adjudicatory in nature, will not be held to rise to the level of political pressure designed to influence particular proceedings that would require judicial condemnation.<sup>121</sup>

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<sup>118</sup> 199 F.2d at 115.

<sup>119</sup> See, *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 102 (1971)(claim of prejudicial pretrial publicity rejected because committee hearings occurred five months prior to indictment); *Beck v. United States*, 298 F.2d 622 (9th Cir. 1962)(hearing occurred a year before trial); *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976), *cert. denied*, 433 U.S. 933 (1977); *United States v. Ehrlichman*, 546 F.2d 910, 917 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977); *United States v. Mitchell*, 372 F.Supp. 1239, 1261 (S.D.N.Y. 1973)(post-indictment Senate hearing but court held that lapse of time and efforts of committee to avoid questions relating to indictment diminished possibility of prejudice); *United States v. Mesarosh*, 223 F.2d 449 (3rd Cir. 1955)(hearing only incidentally connected with trial and occurred after jury selected).

<sup>120</sup> See, *e.g.*, *Pillsbury Co. v. FTC*, 354 F.2d 952 5th Cir. (1968).

<sup>121</sup> See *e.g.*, *ATX, Inc. v. Department of Transportation* 41 F.3d 1522 (D.C. Cir. 1994); *State of California v. FERC*, 966 F.2d 154 (9th Cir. 1992); *Peter Kiewit Sons' v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983); *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); *United States v. Armada Petroleum Corp.*, 562 F.Supp 43 (S.D. Tex. 1982). See also, Morton Rosenberg and Jack Maskell, *Congressional Intervention in the Administrative Process: Legal and Ethical Considerations* (CRS Report No 90-440A, Sept. 7, 1990).

Thus, the courts have recognized the potentially prejudicial effect congressional hearings can have on pending cases. While not questioning the prerogatives of Congress with respect to oversight and investigation, the cases pose a choice for the Congress: congressionally generated publicity may result in harming the prosecutorial effort of the Executive; but access to information under secure conditions can fulfill the congressional power of investigation and at the same time need not be inconsistent with the authority of the Executive to pursue its case. Nonetheless, it remains a choice that is solely within Congress' discretion to make irrespective of the consequences.<sup>122</sup>

In the past the executive frequently has made a broader claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is thereby limited. Prosecutorial discretion is seen as off-limits to congressional inquiry and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor with respect to pursuing criminal cases.

Initially, it must be noted that the Supreme Court has rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. Rather, the Court noted in *Morrison v. Olson*,<sup>123</sup> sustaining the validity of the appointment and removal conditions for independent counsels under the Ethics in Government Act, that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by Executive Branch officials, but held that the exercise of prosecutorial discretion is in no way "central" to the functioning of the Executive Branch.<sup>124</sup> The Court therefore rejected a claim that insulating the independent counsel from at-will presidential removal interfered with the President's duty to "take care" that the laws be faithfully executed. Interestingly, the *Morrison* Court took the occasion to reiterate the fundamental nature of Congress' oversight function (" . . . receiving reports or other information and oversight of the independent counsel's activities . . . [are] functions that we have recognized as generally incidental to the legislative function of Congress," citing *McGrain v. Daugherty*.)<sup>125</sup>

The breadth of *Morrison's* ruling that the prosecutorial function is not an exclusive function of the Executive was made clear in a recent decision of the Ninth Circuit Court of Appeals in *United States ex rel Kelly v. The Boeing Co.*,<sup>126</sup> which upheld, against a broad based separation of powers attack, the

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<sup>122</sup> See remarks of Independent Counsel Lawrence E. Walsh, *supra* n.66 and accompanying text.

<sup>123</sup> 487 U.S. 654 (1988).

<sup>124</sup> *Id.* at 691-92.

<sup>125</sup> *Id.* at 694.

<sup>126</sup> 9 F.3d 743 (9th Cir. 1993).

constitutionality of the *qui tam* provisions of the False Claims Act vesting enforcement functions against agencies by private parties.<sup>127</sup>

Prosecution, not being a core or exclusive function of the Executive, cannot claim the constitutional stature of Congress' oversight prerogative. In the absence of a credible claim of encroachment or aggrandizement by the legislature of essential Executive powers, the Supreme Court has held the appropriate judicial test is one that determines whether the challenged legislative action "prevents the Executive Branch from accomplishing its assigned functions,"

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<sup>127</sup> Boeing argued, *inter alia*, that Congress could not vest enforcement functions outside the Executive Branch in private parties. Applying *Morrison* the appeals court emphatically rejected the contention.

Before comparing the *qui tam* provisions of the FCA to the independent counsel provisions of the Ethics in Government Act, we must address Boeing's contention that only the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law. *It is clear to us that no such absolute rule exists. Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "it is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "there is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." 487 U.S. at 692 (emphasis added). Use of the word "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not always be undertaken by Executive Branch officials. See Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? *Morrison v. Olson* and the Framers' Intent, 99 Yale L.J. 1069, 1070 (1990) (Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). Thus, we reject Boeing's assertion that all prosecutorial power of any kind belongs to the Executive Branch.

9 F.3d at 751 (emphasis supplied).



and, if so, "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress'." <sup>128</sup>

Congressional oversight and access to documents and testimony, unlike the action of a court, cannot stop a prosecution or set limits on the management of a particular case. Access to information by itself would not seem to disturb the authority and discretion of the Executive Branch to decide whether to prosecute a case. The assertion of prosecutorial discretion in the face of a congressional demand for information is arguably akin to the "generalized" claim of confidentiality made in the Watergate executive privilege cases. That general claim -- lacking in specific demonstration of disruption of Executive functions - - was held to be overcome by the more focused demonstration of need for information by a coordinate branch of government. <sup>129</sup>

Given the legitimacy of congressional oversight and investigation of the law enforcement agencies of government, and the need for access to information pursuant to such activities, a claim of prosecutorial discretion by itself would not seem to be sufficient to defeat a congressional need for information. The congressional action itself does not and cannot dictate prosecutorial policy or decisions in particular cases. Congress may enact statutes that influence prosecutorial policy and information relating to enforcement of the laws would seem necessary to perform that legislative function. Thus, under the standard enunciated in *Morrison v. Olson* and *Nixon v. Administrator of General Services*, the fact that information is sought on the Executive's enforcement of criminal laws would not in itself seem to preclude congressional inquiry.

In light of the Supreme Court's consistent support of the power of legislative inquiry, and in the absence of a countervailing constitutional prerogative of the Executive, it is likely that a court will be "sensitive to the legislative importance of congressional committees on oversight and investigations and recognize that their interest in the objective and efficient operation of ... agencies serves a legitimate and wholesome function with which we should not lightly interfere." <sup>130</sup>

#### **D. Access to Grand Jury Materials**

Rule 6(e) of the Federal Rules of Criminal Procedure provides that members of the grand jury and those who attend the grand jury in its proceedings may not "disclose matters occurring before the grand jury, except as otherwise

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<sup>128</sup> *Nixon v. Administration of General Services*, 433 U.S. 425,433 (1977); *Commodity Futures Trading Commission v. Schor*, 487 U.S. 833, 851 (1986); *Morrison v. Olson*, 487 U.S. 654, 693-96 (1988).

<sup>129</sup> *U.S. v. Nixon*, 418 U.S. 683, 705-706, 711-712 (1974).

<sup>130</sup> *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 610 (3d Cir. 1977).

provided in these rules."<sup>131</sup> The prohibition does not ordinarily extend to witnesses.<sup>132</sup> Violations are punishable as contempt of court.<sup>133</sup>

There is some authority for the proposition that Rule 6(e), promulgated as an exercise of congressionally delegated authority and reflecting pre-existing practices, is not intended to address disclosures to Congress.<sup>134</sup> As a general rule, however, neither Congress nor the courts appear to have fully embraced the proposition.

But, not all matters presented to a grand jury are embraced by the secrecy rule. Thus, "when testimony or data is sought for its own sake - for its intrinsic value in the furtherance of a lawful investigation - rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury."<sup>135</sup> Congressional committees have gained access to documents under this theory, the courts ruling that the committee's interest was in the documents themselves and not in the events that transpired before the grand jury.<sup>136</sup> However, with respect to matters that "reflect exactly what transpired in the grand jury," such as transcripts of witness testimony, Rule 6(e) has been held to be a bar to congressional access.<sup>137</sup>

<sup>131</sup> Fed. R. Crim. Pro. 6 (e) (2).

<sup>132</sup> *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983); *In re Sealed Motion*, 880 F.2d 1367, 1373 (D.C. Cir. 1989).

<sup>133</sup> Fed. R. Crim. Pro. 6(e) (2).

<sup>134</sup> See *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F.Supp. 1072, 1074-75 (S.D. Fla. 1987), *aff'd on other grounds*, 833 F.2d 1438 (11th Cir. 1987); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F.Supp. 1219, 1230 9D.C.C. 1974), *petitions for writs of prohibition and mandamus den'd sub nom., Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974); *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. 1299, 1304-308 (M.D. Fla. 1977).

<sup>135</sup> *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. (1960)). See also, *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C.C. Cir. 1980); *In re Grand Jury Investigation (New Jersey State Commission of Investigation)*, 630 F.2d 996 (3rd Cir. 1980); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972).

<sup>136</sup> *In re Grand Jury Impanelled October 2, 1978*, 510 F.Supp. 112, 115 (D.C.C. 1981); *In re Grand Jury Proceedings, Newport News Drydock & Shipbuilding Co., Mem. Opinion* (E.D. Va. Nov. 12, 1984); *In re Senate Banking Committee Hearings*, 19 F.R.D. 410 (N.D. Ill. 1956).

<sup>137</sup> *In re Grand Jury Investigation Uranium Industry, 1979-2 Trade Cas. 78, 639 (D.D.C. (1979))*; *In re Grand Jury Impanelled October 2, 1978*, 510 F.Supp. 112 (D.D.C. 112 (D.D.C. 1981)).

The case law would appear to indicate that Rule 6(e) would not preclude disclosure of the following types of documents:

1. Documents within the possession of the Department of Justice concerning a particular case or investigation, other than transcripts of grand jury proceedings and material indicating "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." Material that would not otherwise be identifiable as grand jury material does not become secret by Department of Justice identification.<sup>138</sup>
2. Immunity letters, draft pleadings, target letters, and draft indictments.<sup>139</sup>
3. Plea agreements as long as particular grand jury matters are not expressly mentioned.<sup>140</sup>
4. Third party records which pre-exist the grand jury investigation even if they are in the possession of the Department of Justice as custodian for the grand jury.<sup>141</sup>
5. Memoranda, notes, investigative files, and other records of FBI agents or other government investigators except to the extent those documents internally identify or clearly define activities of the grand jury.<sup>142</sup>

## VI. INVESTIGATIVE OVERSIGHT HEARINGS

### A. Jurisdiction and Authority

A congressional committee is a creation of its parent House and only has the power to inquire into matters within the scope of the authority that has been delegated to it by that body. Thus, the enabling rule or resolution which gives the committee life is the charter which defines the grant and limitations of the committee's power.<sup>143</sup> In construing the scope of a committee's authorizing charter, courts will look to the words of the rule or resolution itself,

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<sup>138</sup> *Senate of Puerto Rico v. U.S. Department of Justice*, 823 F.2d 574, 583, 583n. 30 (D.C. Cir. 1987); *In Grand Jury Impanelled October 2, 1978 (79-2)*, 510 F.Supp. 112, 114-15 (D.D.C. 1981).

<sup>139</sup> *In re Harrisburg Grand Jury -- 83-2*, 638 F.Supp. 43, 47 n.4 (M.D. Pa. 1986); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 n.4 (3d Cir. 1982)

<sup>140</sup> *Washington Post v. Robinson*, 935 F.2d 282, 290-91 (D.C. Cir. 1991).

<sup>141</sup> *S.E.C. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1382-83 (D.C. Cir. 1980); *United States ex rel Woodard v. Tynan*, 757 F.2d 1085, 1087-88 (10th Cir. 1985).

<sup>142</sup> *Anaya v. United States*, 815 F.2d 1373, 1380-81 (10th Cir. 1987).

<sup>143</sup> *United States v. Rumely*, 345 U.S. 41, 44 (1957); *Watkins v. United States*, 354 U.S. 178, 201 (1957); *Gojack v. United States*, 384 U.S. 202, 208 (1966).

and then, if necessary to the usual sources of legislative history such as floor debate, legislative reports, past committee practice and interpretations.<sup>144</sup> Jurisdictional authority for a "special" investigation may be given to a standing committee,<sup>145</sup> a joint committee of both houses,<sup>146</sup> or a special subcommittee of a standing committee,<sup>147</sup> among other vehicles. In view of the specificity with which Senate<sup>148</sup> and House<sup>149</sup> rules now confer jurisdiction on standing committees, as well as the care with which most authorizing resolutions for select committees have been drafted in recent years, sufficient models exist to avoid a successful judicial challenge by a witness that noncompliance was justified by a committee's overstepping its delegated scope of authority.

## B. Rules Applicable to Hearings

Rules of both Houses<sup>150</sup> require that committees adopt written rules of procedure and publish them in the Congressional Record. The failure to publish has resulted in the invalidation of a perjury conviction.<sup>151</sup> Once properly promulgated, such rules are judicially cognizable and must be "strictly observed."<sup>152</sup> The House<sup>153</sup> and many individual Senate committees require that all witnesses be given a copy of the committee's rule.

Both the House and Senate have adopted rules permitting a reduced quorum for taking testimony and receiving evidence. House hearings may be

<sup>144</sup> *Barenblatt v. United States*, 360 U.S. 109, 117 (1959); *Watkins v. United States*, *supra*, 209-215.

<sup>145</sup> See Senate Resolution 229, 103d Cong., 2d Sess., directing the Senate Banking, Housing and Urban Affairs Committee to conduct a limited hearing on the Whitewater affair. 140 Cong. Rec. S 6675 (daily ed. June 9, 1994).

<sup>146</sup> See Sen. Res. 23 and H.Res. 100th Cong., 1st Sess. (1987), establishing the Iran-Contra joint investigating committee.

<sup>147</sup> A Senate Judiciary Subcommittee to Investigate Individuals Representing the interests of Foreign Governments was created by unanimous consent agreement of the Senate. 126 Cong. Rec. 19544-46 (1980).

<sup>148</sup> Senate Rule XXV.

<sup>149</sup> House Rule X.

<sup>150</sup> House Rule XI(2); Senate Rule XXVI(2).

<sup>151</sup> *United States v. Reinecke*, 524 F.2d 435 (D.C. Cir 1975)(failure to publish committee rule setting one Senator as a quorum for taking hearing testimony held sufficient ground to reverse perjury conviction).

<sup>152</sup> *Gojack v. United States* 384 U.S. 702, 708 (1966); *Yellin v. United States*, 374 U.S. 109 (1963).

<sup>153</sup> House Rule XI(2)(k)(2).

conducted if at least two members are present;<sup>154</sup> the Senate permits hearings with one only member in attendance.<sup>155</sup> Although most committees have adopted the minimum quorum requirement, some have not, while others require a higher quorum for sworn rather than unsworn testimony. For perjury purposes, the quorum requirement must be met at the time the allegedly perjured testimony is given, not at the beginning of the session.<sup>156</sup> Reduced quorum requirement rules do not apply to authorization for the issuance of subpoenas. Senate rules require a one-third quorum of a committee or subcommittee and the House a quorum of a majority of the members, unless a committee delegates authority for issuance to its chairman.<sup>157</sup>

Senate and House rules limit the authority of their committees to meet in closed session.<sup>158</sup> A House rule provides, however, that testimony "shall" be held in closed session if a majority of a committee or subcommittee determines it "may tend to defame, degrade, or incriminate any person".<sup>159</sup> Such testimony taken in closed session is normally releasable only by a majority vote of the committee.<sup>160</sup> Similarly, confidential material received in a closed session requires a majority vote for release.<sup>161</sup> A release of confidential materials in accordance with applicable rules effectively minimizes objections by a submitting witness.<sup>162</sup> Moreover, the Speech or Debate clause<sup>163</sup> will protect a member who discloses such information on the floor from legal redress, although not from the possibility of internal discipline.<sup>164</sup>

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<sup>154</sup> House Rule XI(2)(h)(1).

<sup>155</sup> Senate Rule XXVI(7)(a)(2).

<sup>156</sup> *Christoffel v. United States*, 338 U.S. 84 (1949).

<sup>157</sup> Senate Rule XXVI(7)(a)(2); House Rule XI(2)(h)(1).

<sup>158</sup> Senate Rule XXVI(5)(b); House Rule X1(2)(g)(2).

<sup>159</sup> House Rule XI(2)(k)(5).

<sup>160</sup> House Rule XI(2)(k)(7).

<sup>161</sup> *Id.*

<sup>162</sup> *Doe v. McMillan*, 566 F.2d 713, 713-16 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

<sup>163</sup> Art. I, sec. 6, cl. 2.

<sup>164</sup> The purposes of the Speech or Debate Clause are to assure the independence of Congress in the exercise of its legislative functions and to reinforce the separation of powers established in the Constitution. *Eastland v. United States Servicemen's Fund*, 421 U.S. 502-03 (1975). The Supreme Court has read the Clause to broadly effectuate its purposes. *Id.*; *United States v. Swindall*, 971 F. 2d 1531, 1534 (11th Cir. 1992). The Clause protects "purely legislative activities", including those inherent in the legislative (continued...)

House Rule XI(3)(e) provides that the broadcast of open committee hearings may be permitted by a majority vote of the committee in accordance with written rules adopted by the committee. Individual committees have adopted a variety of rules with respect to such coverage. House Rule XI(3)(f)(2) affords an absolute right to a subpoenaed witness to demand no broadcast or photographic coverage of his testimony. There is comparable rule in the Senate, that body allowing each committee to adopt its own policy.<sup>165</sup>

### C. Conducting Hearings

The chairman of a committee or subcommittee, or in his or her absence, the ranking majority member present, normally presides over the conduct of a hearing. An opening statement by the chair is usual, and in the case of an investigative hearing is an important means of defining the subject matter of the hearing and thereby establishing the pertinence of questions asked the witnesses. Not all committees swear in their witnesses; some committees require that all witnesses be sworn. Most leave it to the discretion of the chair. If a committee wishes the potential sanction of perjury to apply, it should swear its witnesses, though false statements not under oath are subject to criminal sanctions.<sup>166</sup>

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<sup>164</sup>(...continued)

process. *Chastain v. Lundquist*, 833 F. 2d 311, 314 (D.C. Cir. 1987) (quoting *U.S. v. Brewster*, 408 U.S. 501, 512 (1972), cert. denied 487 U.S. 1240 (1988)). Actions protected under the provisions include those taken in the regular course of the legislative process and the motivations of the legislators for their actions. *United States v. Helstoski*, 442 U.S. 477, 489 (1979). In addition to shielding "words spoken in debate", *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880), the Clause encompasses such activity integral to lawmaking as voting, *id.*, circulation of information to other members, *Doe v. McMillan* 412 U.S. 306 (1973), *Gravel v. United States*, 408 U.S. 606, 625 (1972), and participation in committee investigative proceedings, and reports. *Id.*, *Eastland v. U.S. Servicemen's Fund*, *supra*; *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

However, activities only casually or incidentally related to legislative affairs are outside the ambit of Speech or Debate protection. Thus newsletter and press releases circulated by a member to the public are not shielded because they are "primarily means of informing those outside the legislative forum". *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Also a member may be prosecuted for accepting a bribe or for other unlawful conduct so long as the prosecution "does not draw in question the legislative act of the defendant Member of Congress". *United States v. Brewster*, *supra*, 408 U.S. at 510 (quoting *United States v. Johnson*, 383 U.S. at 185). The key consideration is the act presented for examination, not the actor. Activities integral to the legislative process may not be examined, but peripheral activities not closely connected to the business of legislating do not enjoy the protection of the Clause. *Walker v. Jones*, 733 F. 2d, 927, 929 (D.C. Cir. 1984).

<sup>165</sup> Senate Rule XXVI(3)(c).

<sup>166</sup> See discussion, *supra* at notes 77-78 and accompanying text.

A witness does not have a right to make a statement before being questioned,<sup>167</sup> but that opportunity is usually accorded. Committee rules may prescribe the length of such statements and may also require that written statements be submitted in advance of the hearing. Questioning of witnesses may be structured so that members alternate for specified length of time. Questioning may also be done by staff. Witnesses may be allowed to review a transcript of their testimony and to make non-substantive corrections.

The right of a witness to be accompanied by counsel is recognized by House rule<sup>168</sup> and the rules of Senate committees. The House rule limits the role of counsel as solely "for the purpose of advising them [witnesses] concerning their constitutional rights." Some committees have adopted rules specifically prohibiting counsel from "coaching" witness during their testimony.<sup>169</sup> A committee has complete authority to control the conduct of counsel. Indeed, House Rule XI(2)(k)(4) provides that "[t]he chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure or exclusion from the hearings; and the committee may cite the offender for contempt." Some Senate committees have adopted similar rules.<sup>170</sup> There is no right of cross-examination of adverse witnesses during an investigative hearing.<sup>171</sup>

#### **D. Constitutional and Common Law Testimonial Privileges of Witnesses**

##### (1) Constitutional Privileges

It is well established that the protections of the Bill of Rights extend to witnesses before a legislative inquiry,<sup>172</sup> and thus may pose significant limitations on congressional investigations. The scope of the protections of the Fifth, First and Fourth amendments and the manner of their invocation are briefly reviewed.

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<sup>167</sup> 2 U.S.C. 191.

<sup>168</sup> House Rule XII(2)(k)(3).

<sup>169</sup> See, e.g., Senate Permanent Committee on Investigations Rule 8.

<sup>170</sup> See, e.g., Senate Aging Committee Rule V. 8; Senate Permanent Subcommittee on Investigations Rule 7.

<sup>171</sup> *United States v. Fort*, 443 F.2d 620, 678-79 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

<sup>172</sup> 2 U.S.C. 191.

## (a) Fifth Amendment

The Fifth Amendment provides that "no person ... shall be compelled in any criminal case to be a witness against himself." The privilege is personal in nature,<sup>173</sup> and may not be invoked on behalf of a corporation,<sup>174</sup> small partnership,<sup>175</sup> labor union,<sup>176</sup> or other artificial entity.<sup>177</sup> The privilege protects a witness against being compelled to testify but not against a subpoena for existing documentary evidence.<sup>178</sup> However, where compliance with a subpoena *duces tecum* would constitute an implicit testimonial authentication of the documents produced, the privilege may apply.<sup>179</sup>

There is no particular formulation of words necessary to invoke the privilege. All that is required is that the witness' objection be stated in a manner that the "committee may be reasonably expected to understand as an attempt to invoke the privilege".<sup>180</sup> To the extent there is any doubt about the witness' intent, it is incumbent on the committee to ask the witness whether he or she is in fact invoking the privilege.<sup>181</sup> But a witness before a congressional committee may not remain silent. The privilege must be invoked

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<sup>173</sup> See *McPhaul v. United States*, 364 U.S. 372 (1960).

<sup>174</sup> *Hale v. Henkel*, 201 U.S. 43 (1906).

<sup>175</sup> *Bellis v. United States*, 417 U.S. 85 (1974).

<sup>176</sup> See *United States v. White*, 322 U.S. 694 (1944).

<sup>177</sup> *Bellis v. United States*, 417 U.S. at 90. See also *Rogers v. United States*, 340 U.S. 367 (1951)(Communist Party).

<sup>178</sup> *Fisher v. United States*, 425 U.S. 391, 409 (1976); *Andresen v. Maryland*, 427 U.S. 463 (1976). These cases concerned business records and there may be some protection available in the case of a subpoena for personal papers. However, in *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp 17, 22-23 (D.D.C, 1994), *stay pending appeal denied*, 114 S.Ct. 1036 (1994), the court upheld disclosure to the Senate Ethics Committee of a Senator's diaries, holding that the Fifth Amendment "does not protect against [the diaries'] incriminating *contents* voluntarily committed to paper before the government makes demand for them" (emphasis in original).

<sup>179</sup> *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976). But *c.f.*, *Doe v. United States*, 487 U.S. 201 (1988), where the Court upheld a lower court order compelling the target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal, holding it not to be testimonial in nature.

<sup>180</sup> *Emspak v. United States*, *supra*, 349 U.S. at 194.

<sup>181</sup> *Quinn v. United States*, *supra*, 349 U.S. at 164.



in response to a specific question that might incriminate him. Nor may a witness refuse to take the oath on Fifth Amendment grounds.<sup>182</sup>

A witness may plead the Fifth Amendment not only to questions whose answers would in themselves support a conviction, but also to those questions which, if answered, would serve as a "link in the chain of evidence" that would tend to incriminate him.<sup>183</sup>

The committee can review the assertion of the privilege by a witness to determine its validity, but the witness is not required to prove the precise hazard that he fears. In regard to the assertion of the privilege in judicial proceedings, the Supreme Court has advised:

To sustain the privilege, it need only be evident, from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result .... To reject a claim, it should be perfectly clear from a careful consideration of all the circumstances of the case that the witness is mistaken and that the answers cannot possibly have a tendency' to incriminate.<sup>184</sup>

The basis for asserting the privilege was elaborated upon in a lower court decision:

The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answer would furnish some evidence upon which he could be convicted of a criminal offense... or which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution therefor.... Once it has become apparent that the answers to a question would expose a witness to the danger of conviction

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<sup>182</sup> *Eisler v. United States*, 170 F.2d 273 (D.C. Cir. 1948), *cert denied*, 338 U.S. 887 (1949).

<sup>183</sup> *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Where a witness asserts the privilege, a committee may seek a court order under 18 U.S.C. 6002, 6005 which directs him to testify and grants him immunity against use of his testimony, or other evidence derived from his testimony, in a subsequent criminal prosecution. See discussion of procedure to obtain such an immunity order, *supra* at notes 45-56 and accompanying text.

<sup>184</sup> *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

or prosecution, wider latitude is permitted the witness in refusing to answer other questions.<sup>185</sup>

The privilege against self-incrimination may be waived by declining to assert it, specifically disclaiming it, or testifying on the same matters as to which the privilege is later asserted. However, because of the importance of the privilege, a court will not construe an ambiguous statement of a witness before a committee as a waiver.<sup>186</sup>

Finally it should be noted that the due process clause of the Fifth Amendment requires that "the pertinency of the interrogation to the topic under the ...committee's inquiry must be brought home to the witness at the time the questions are put to him."<sup>187</sup> "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto."<sup>188</sup> Additionally, to satisfy both the requirement of due process as well as the statutory requirement that a refusal to answer be "willful", a witness should be informed of the committee's ruling on any objections he raises or privileges which he asserts.<sup>189</sup>

#### (b) First Amendment

Although the First Amendment, by its terms, is expressly applicable only to *legislation* that abridges freedom of speech, press, or assembly, the Court has held that the amendment also restricts Congress in conducting investigations.<sup>190</sup> In the leading case involving the application of First Amendment rights in a congressional investigation, *Barenblatt v. United States*,<sup>191</sup> the Court held that "where first amendment rights are asserted to bar government interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Thus, unlike the Fifth Amendment

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<sup>185</sup> *United States v. Jaffee*, 98 F.Supp. 191, 193-94 (D.D.C. 1951). See also *Simpson v. United States*, 241 F.2d 222 (9th Cir. 1957)(privilege inapplicable to questions seeking basic identifying information such as the witness' name and address).

<sup>186</sup> *Emspak v. United States*, 349 U.S. 190 (1955). See also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>187</sup> *Deutch v. United States*, 367 U.S. 456, 467-68 (1961). As the court explained in that case, there is a separate *statutory* requirement of pertinency.

<sup>188</sup> *Watkins v. United States*, 354 U.S. 178, 214-15 (1957).

<sup>189</sup> *Id.*; *Deutch v. United States*, 367 U.S. 456 (1961).

<sup>190</sup> *Watkins v. United States*, 354 U.S. 178, 197 (1957).

<sup>191</sup> 360 U.S. 109, 126 (1959).

privilege against self-incrimination, the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.<sup>192</sup>

The Court has held that in balancing the personal interest in privacy against the congressional need for information, "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."<sup>193</sup> In order to protect the rights of witnesses, in cases involving the First Amendment the courts have emphasized the requirements discussed above concerning authorization for the investigation, delegation of power to investigate to the committee involved, and the existence of a legislative purpose.<sup>194</sup>

The Supreme Court has recognized the application of the First Amendment to congressional investigations, and although the Amendment has frequently been asserted by witnesses as grounds for not complying with congressional demands for information, the Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.<sup>195</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Watkins v. United States*, 354 U.S. at 198. A balancing test was also used in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the leading case on the issue of the claimed privilege of newsmen not to respond to demands of a grand jury for information. In its 5-4 decision, the Court concluded that the need of the grand jury for the information outweighed First Amendment considerations, but there are indications in the opinion that "the infringement of protected first amendment rights must be no broader than necessary to achieve a permissible governmental purpose," and that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on first amendment rights." *Id.* at 699-700. For application of the compelling interest test in a legislative investigation, see *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). See also, James J. Mangan, Contempt for the Fourth Estate: No Reporter's Privilege Before a Congressional Investigation, 83 Geo. L.J. 129 (1994) (arguing that bases for reporter's privilege are outweighed by governmental interests in a congressional investigation).

<sup>194</sup> *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Rumely*, 345 U.S. 41 (1953).

<sup>195</sup> Although it was not in the criminal contempt context, one court of appeals has upheld a witness' First Amendment claim. In *Stamler v. Willis*, 415 F.2d 1365 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970), the court ordered to trial a witness' suit for declaratory relief against the House Un-American Activities Committee in which it was alleged that the committee's authorizing resolution had a "chilling effect" on plaintiff's First Amendment rights. In other cases for declaratory and injunctive relief brought against committees on First Amendment grounds, relief has been denied although the courts indicated that relief could be granted if the circumstances were more compelling. *Sanders v. McClellan*, 463 F.2d 894 (D.C. Cir. 1972); *Davis v. Ichord*, 442 F.2d 1207 (D.C. Cir. 1970); *Ansara v. Eastland*, 442 F.2d 751 (D.C. Cir. 1971). However, in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), the Supreme Court

(continued...)

However, the Court has narrowly construed the scope of a committee's authority so as to avoid reaching a First Amendment issue.<sup>196</sup> And the Court has ruled in favor of a witness who invoked his First Amendment rights in response to questioning by a state legislative committee.<sup>197</sup>

(c) Fourth Amendment

*Dicta* in opinions of the Supreme Court indicate that the Fourth Amendment's prohibition against unreasonable searches and seizures is applicable to congressional committees.<sup>198</sup> It appears that there must be probable cause for the issuance of a congressional subpoena.<sup>199</sup> The Fourth Amendment protects a congressional witness against a subpoena which is

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<sup>195</sup>(...continued)

held that the Constitution's Speech or Debate clause (art. I, sec. 6, cl. 1) generally bars suits challenging the validity of congressional subpoenas on First Amendment or other grounds. Thus, a witness generally cannot raise his constitutional defenses until a subsequent criminal prosecution for contempt unless, in the case of a Senate committee, the statutory civil contempt procedure is employed. See *United States v. House of Representatives*, 556 F.Supp. 150 (D.D.C. 1983).

<sup>196</sup> *United States v. Rumely*, 345 U.S. 41 (1953).

<sup>197</sup> *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). In the majority opinion, Justice Goldberg observed that "an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition [is] that the State convincingly show a substantial relation [or nexus] between the information sought and a subject of overriding and compelling state interest". *Id.* at 546.

<sup>198</sup> *Watkins v. United States*, 354 U.S. 178, 188 (1957); *McPhaul v. United States*, 364 U.S. 372 (1960).

<sup>199</sup> Fourth Amendment standards apply to subpoenas, such as those issued by committees, as well as to search warrants. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). A congressional subpoena may not be used in a mere "fishing expedition." See *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936), quoting, *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924) ("It is contrary to the first principles of justice to allow a search through all the record, relevant or irrelevant, in the hope that something will turn up."). Cf. *United States v. Groves*, 188 F.Supp. 314 (W.D. Pa. 1937) (*dicta*). But see *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975), in which the Court recognized that an investigation may lead "up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result".

unreasonably broad or burdensome.<sup>200</sup> The Court has delineated the test be used in judging the reasonableness of a congressional subpoena:

Petitioner contends that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment.... 'Adequacy or excess in the breath of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry' . . . The subcommittee's inquiry here was a relatively broad one ... and the permissible scope of materials that could reasonably be sought was necessarily equally broad. It was not reasonable to suppose that the subcommittee knew precisely what books and records were kept by the Civil Rights Congress, and therefore the subpoena could only 'specify ... with reasonable particularity, the subjects to which the documents...relate....' The call of the subpoena for 'all records, correspondence and memoranda' of the Civil Rights Congress relating to the specified subject describes them 'with all of the particularity the nature of the inquiry and the [subcommittee's] situation would permit' ....' The description contained in the subpoena was sufficient to enable [petitioner] to know what particular documents were required and to select them accordingly.<sup>201</sup>

If a witness has a legal objection to a subpoena *duces tecum* or is for some reason unable to comply with a demand for documents, he must give the grounds for his noncompliance upon the return of the subpoena. As a court of appeals stated in one case:

If [the witness] felt he could refuse compliance because he considered the subpoena so broad as to constitute an unreasonable search and seizure within the prohibition of the Fourth Amendment, then to avoid contempt for complete noncompliance

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<sup>200</sup> *McPhaul v. United States*, 364 U.S. 372 (1960); *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969). In *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp. 17, 20-21 (D.D.C. 1994), *stay pending appeal denied*, 114 S.Ct. 1036 (1994), the court rejected a claim of overbreadth with regard to a subpoena for a Senator's personal diaries, holding that committee's investigation was not limited in its investigatory scope to its original demands "even though the diaries might prove compromising in respects the committee has not yet foreseen".

<sup>201</sup> *McPhaul v. United States*, 364 U.S. at 382.

he was under [an] obligation to inform the subcommittee of his position. The subcommittee would then have had the choice of adhering to the subpoena as formulated or of meeting the objection in light of any pertinent representations made by [the witness].<sup>202</sup>

Similarly, if a subpoenaed party is in doubt as to what records are required by a subpoena or believes that it calls for documents not related to the investigation, he must inform the committee. Where a witness is unable to produce documents he will not be held in contempt "unless he is responsible for their unavailability... or is impeding justice by not explaining what happened to them . . ."<sup>203</sup>

The application of the exclusionary rule to congressional committees is in some doubt and will depend on the precise facts of the situation. It seems that documents which were unlawfully seized at the direction of a congressional investigating committee may not be admitted into evidence in a subsequent unrelated criminal prosecution because of the command of the exclusionary rule.<sup>204</sup> In the absence of a Supreme Court ruling, it remains unclear whether the exclusionary rule bars the admission into evidence in a contempt prosecution of a congressional subpoena which was issued on the basis of documents obtained by the committee following their unlawful seizure by another investigating body (such as a state prosecutor).<sup>205</sup>

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<sup>202</sup> *Shelton v. United States*, 404 F.2d at 1299-1300.

<sup>203</sup> *McPhaul v. United States*, 364 U.S. at 378.

<sup>204</sup> *Nelson v. United States*, 268 F. 2d 505 (D.C. Cir.), *cert denied*, 346 U.S. 827 (1953)

<sup>205</sup> In *United States v. McSurely*, 473 F.2d 1178, 1194 (D.C. Cir. 1972), the court of appeals reversed contempt convictions where the subcommittee subpoenas were based on information "derived by the subcommittee through a previous unconstitutional search and seizure by [state] officials and the subcommittee's own investigator." The decision of the court of appeals in the contempt case was rendered in December, 1972. In a civil case brought by the criminal defendants, Alan and Margaret McSurely, against Senator McClellan and the subcommittee staff for alleged violations of their constitutional rights by the transportation and use of the seized documents, the federal district court in June, 1973, denied the motion of the defendants for summary judgment. While the appeal from the decision of the district court in the civil case was pending before the court of appeals, the Supreme Court held in *Calandra v. United States*, 414 U.S. 338 (1974), that a grand jury is not precluded by the Fourth Amendment's exclusionary rule from questioning a witness on the basis of evidence that had been illegally seized. A divided court of appeals subsequently held in *McSurely v. McClellan*, 521 F.2d 1024, 1047 (D.C. Cir. 1975), that under *Calandra* "a congressional committee has the right in its investigatory capacity to use the product of a past unlawful search and seizure."

(continued...)

## (2) The Common Law Attorney-Client and Work Product Privileges

The precedents of the Senate and the House of Representatives, which are founded on Congress' inherent constitutional prerogative to investigate, establish that the acceptance of a claim of attorney-client or work product privilege rests in the sound discretion of a congressional committee regardless of whether a court would uphold the claim in the context of litigation. In practice, committee resolutions of claims of these privileges have involved a pragmatic assessment of the needs of the individual committee to accomplish its legislative mission and the potential burdens and harms that may be imposed on a claimant of the privilege if it is denied.

Thus the exercise of committee discretion whether to accept a claim of attorney-client work product privilege has turned on a "weighing [of] the legislative need for disclosure against any possible resulting injury."<sup>206</sup> More particularly, the process of committee resolution of claims of privilege has

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<sup>205</sup>(...continued)

The decision of the three-judge panel in the civil case was vacated and on rehearing by the full District of Columbia Circuit, five judges were of the view that *Calandra* was applicable to the legislative sphere and another five judges found it unnecessary to decide whether *Calandra* applies to committees but indicated that, even if it does apply to the legislative branch, the exclusionary rule may restrict a committee's use of unlawfully seized documents if it does not make mere "derivative use" of them but commits an independent Fourth Amendment violation in obtaining them. *McSurely v. McClellan*, 553 F.2d 1277, 1293-94, 1317-25 (D.C. Cir. 1976) (*en banc*). The Supreme Court granted *certiorari* in the case, 434 U.S. 888 (1977), but subsequently dismissed *certiorari* as improvidently granted, with no explanation for this disposition of the case, *sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978). Jury verdicts were eventually returned against the Senate defendants, but were reversed in part on appeal. 753 F.2d 88 (D.C. Cir. 1985), *cert. denied*, U.S. (1985).

More recently, in a contextually relevant situation, a district court quashed subpoenas issued on behalf of tobacco companies against two members of Congress for testimony and production of documents relating to a congressional investigation of the company's knowledge of the health hazards and addictiveness of tobacco. *Maddox v. Williams*, 855 F. Supp. 406 (D.D.C. 1994), *appeal pending in the D.C. Circuit*. The companies had contended that the documents had been stolen and disclosed in violation of the attorney-client privilege. The court held that "use by a congressional committee of information that is gathered illegally is nevertheless protected by the Speech or Debate Clause, provided the use occurs in the course of a legitimate congressional investigation, and Congressmen were not personally involved in the criminal activity." 855 F. Supp. at 411-12 (citing, *inter alia*, *Dombroski v. Eastland*, 387 U.S. 82,85,87 (1967) and *Eastland v. United States Servicemen's Fund*, *supra*, 421 U.S. at 501). The court also rejected the companies' reliance on *McSurely* as "misplaced". Its opinion described *McSurely* as "holding that, even if material comes to a legislative committee by means that are unlawful, subsequent committee use of that material is nevertheless privileged", 855 F. Supp at 412 note 18, 417.

<sup>206</sup> Hearings, "International Uranium Cartel", Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Vol. 1, 123 (1977).

traditionally been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of laws that fall within its jurisdiction,<sup>207</sup> against any possible injury to the witness. In the particular circumstances of any situation, a committee may consider and evaluate the strength of a claimant's assertion in light of the pertinency of the documents or information sought to the subject of the investigation, the practical unavailability of the documents or information from any other source, the possible unavailability of the privilege to the claimant if it were to be raised in a judicial forum, and the committee's assessment of the cooperation of the witness in the matter, among other considerations. A valid claim of privilege, free of any taint of waiver, exception or other mitigating circumstance, would merit substantial weight. But any serious doubt as to the validity of the asserted claim would diminish its compelling character.

The discussion will begin with a brief overview of the constitutional origins and basis for Congress' discretionary control over such claims of privilege and recent examples of committee exercises of that discretion, followed by a review of the requirements for assertion of the attorney-client and work product privileges. Next the law with respect to waiver of the privilege and exceptions to assertion of the privilege is detailed.

(a) The nature and development of Congress' discretionary control over witness' claims of privilege

As with the legislature's inherent authority to investigate,<sup>208</sup> the discretion to entertain claims of privilege traces back to the model of the English Parliament. Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, the definitive authority on English parliamentary procedure, specifically notes:

A witness is, however, bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client ... some of which would be sufficient grounds of excuse in a court of law.<sup>209</sup>

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<sup>207</sup> See 2 U.S.C. 190d.

<sup>208</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

<sup>209</sup> Erskine May's *Treatise* at 746-747 (20th ed. 1983). May's *Treatise* has been relied upon as an authoritative guide to parliamentary and congressional investigatory authority. See, e.g., *McGrain v. Daugherty*, *supra*, 273 U.S. at 161 note 15.



The rare instances of the exercise of the prerogative to deny use of the privileges have been consistent in the rejection of the applicability of the privileges. In the nineteenth century, Charles W. Woolley, an attorney, was found in contempt of the House and imprisoned for refusal to answer questions about a scheme for bribing senators during Andrew Johnson's impeachment proceeding despite a claim of attorney-client privilege.<sup>210</sup> Also, in the notable investigation into the financing of the Union Pacific Railroad and the activities of the Credit Mobilier, a House Committee held Joseph B. Stewart in contempt notwithstanding his assertion of attorney-client privilege.<sup>211</sup> More recently, a Subcommittee of the House Energy and Commerce Committee has on a number of occasions rejected claims of attorney-client privilege.<sup>212</sup> No court has ever questioned the assertion of the prerogative, and both Houses of Congress have rejected opportunities to impose the attorney-client privilege as a binding rule for committee investigations.<sup>213</sup> Contemporary congressional practice has, in fact, evolved a delicate balancing process to ensure its fair application. Thus the exercise of committee discretion has been held to turn on a "weighing [of] the legislative need against any possible injury" to one asserting the privilege and the application of this test has involved painstaking examinations of potential detriment and relevant judicial precedents.<sup>214</sup>

Perhaps the most emphatic and authoritative assertion of the committee prerogative in this area is the 1986 House action holding Ralph and Joseph Bernstein in contempt for refusal to give the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs requested information pertaining to their relations with Ferdinand and Imelda Marcos. Their refusal

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<sup>210</sup> Millet, *The Applicability of Evidentiary Privileges For Confidential Communications Before Congress*, 21 John Marshall L. Rev. 309, 312-313 (1988)(Millet).

<sup>211</sup> Millet, *ibid.*, at 313-314. See also, *Stewart v. Blaine*, 1 MacArthur 453 (D.C. 1874); Eberling, *Congressional Investigations 349-350* (1928); *Proceedings Against Ralph Bernstein and Joseph Bernstein*. H.Rept. No. 99-462, 99th Cong., 2d Sess. 13 notes 12-14 (1986)(Bernstein Contempt Report.).

<sup>212</sup> See, *Attorney-Client Privilege, Memoranda Opinions of the American Law Division, Library of Congress, Committee Print 98-I*, (98th Cong. June 1983)(CRS Memoranda). See also *Hearings, International Uranium Cartel, before Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. Vol. 1* (1977).

<sup>213</sup> See, S. Rept. No. 2, 84th Cong., 1st Sess. 27-28 (1954); CRS Memoranda, *supra* note 212, at 24-26.

<sup>214</sup> See, *e.g.*, *Hearings on the International Uranium Cartel Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 60, 123* (1977); see also CRS Memoranda, *supra*, at 1-2, 27-36, 108-115.

rested primarily on the assertion of attorney-client privilege.<sup>215</sup> The Subcommittee rejected these claims on two grounds: "That the claim of privilege would not be upheld even in a court, and that a congressional committee was obliged to decide whether to accept such claims of privilege apart from whether a court would uphold the claim."<sup>216</sup> The full Committee, bowing to the concerns and preferences of some members that it was not necessary under the circumstances of the matter to rely equally on the broader second ground, recommended that "the U.S. attorney, in presenting this matter, proceed primarily and strongly with emphasis on the primary ground relied on by the Subcommittee that this claim of privilege would not have been upheld even in a court."<sup>217</sup> Thus it is clear that the recommendation to the full House, which was adopted by an overwhelming vote of 352-34,<sup>218</sup> encompassed full recognition of the prerogative to deny assertions of attorney-client privilege.

Senate practice and precedent are in strong and complementary accord with that of the House. Two denials by Senate committees of claims of privilege serve to illustrate. In March of 1989, the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works commenced investigating claims that settlement agreements were being entered between employers and employees of nuclear facilities which placed restrictions on an employee's ability to testify in Nuclear Regulatory Commission proceedings relating to licensing and safety matters with respect to such facilities. The Subcommittee was seeking to determine the nature and extent of such restrictive agreements at a particular facility and the prevalence and potential impact of such agreements in the industry generally. Subpoenas were issued and several were not complied with on the grounds of the attorney-client and work product privileges. On July 19, 1989, the Subcommittee issued a formal opinion rejecting the claim of privilege. The opinion asserted that

[W]e start with the jurisdictional proposition that this Subcommittee possesses the authority to determine the validity of any attorney-client privilege that is asserted before the Subcommittee. A committee's or subcommittee's authority to receive or compel testimony derives from the constitutional authority of the Congress to conduct investigation and take testimony as necessary to carry out its legislative powers. As an independent branch of government with such constitutional authority, the Congress must necessarily have the independent authority to determine the

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<sup>215</sup> 132 Cong. Rec. 3028-3062 (1986); Bernstein Contempt Report, *supra* note 211, at 1.

<sup>216</sup> Bernstein Contempt Report, at 14.

<sup>217</sup> *Id.* at 14-15.

<sup>218</sup> 132 Cong. Rec. at 3061-62.

validity of non-constitutional evidentiary privileges that are asserted before the Congress.<sup>219</sup>

The opinion continued by observing that while it recognized its "independent authority to rule on an assertion of the attorney-client privilege... the Subcommittee will nonetheless look to judicial and other rulings in this area to guide the Subcommittee's determination."<sup>220</sup> Finding that the holder of the privilege (the employee in question) "has made extensive disclosures concerning communications between himself and his attorneys [the claimants of the privilege] regarding the agreement, and has called the competence of his former attorneys into question," the Subcommittee ruled that the privilege would have been deemed waived by a court, denied the claim, and ordered the attorneys to testify.<sup>221</sup>

More recently, the Senate Permanent Subcommittee on Investigations of the Governmental Affairs Committee denied a claim of attorney-client privilege under unusual circumstances. The Subcommittee was investigating allegations that under the Medicare Secondary Payer (MSP) program insurance companies, including Provident Life and Accident Company (Provident), had failed to comply with their obligations to pay certain claims as the primary payer with Medicare being the secondary payer, which resulted in sizeable overpayments by Medicare. The Subcommittee subpoenaed many documents, including one from Provident which it refused to give upon the ground that it was cloaked by the attorney-client privilege. Provident also argued that the Subcommittee was bound by a ruling to that effect made by a Federal district court in a pending civil suit. In order to prevent the author of the document from testifying before the Subcommittee, Provident sought an injunction from the district court to prevent her testimony. The court denied the injunction, ruling that Provident had failed to allege a case or controversy, that the issue was not ripe for judicial determination, and that Provident had failed to fulfill the equitable requirements for preliminary injunctive relief. The court also noted that its earlier ruling on the attorney-client privilege "which is not of constitutional dimensions, is certainly not binding on the Congress of the United States."<sup>222</sup> Subsequently, the Chairman heard testimony and arguments on the claim in executive session. He noted that "[t]he burden, then, as I see it, is on you as the party claiming the privilege to demonstrate that the privilege exists and to tell us why." On June 15, 1990 the Chairman ruled that Provident had waived any

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<sup>219</sup> "Subcommittee on Nuclear Regulation [Senate Committee on Environment and Public Works] Ruling on Claims of Attorney-Client Privilege," to Ms. Billie P. Garde from Chairman John Breaux and Senator Alan K. Simpson, dated July 19, 1989, at pp. 12-13 (Copy on file in the American Law Division, CRS).

<sup>220</sup> *Id.* at 14.

<sup>221</sup> *Id.* at 15, 18-19.

<sup>222</sup> *In the Matter of Provident Life & Accident Co.*, E.D. Tenn., S.D., CIV-1-90-219, June 13, 1990 (per Edgar, J.).

privilege that might have attached to the document in question when it provided the document to the Department of Justice.<sup>223</sup>

This historic congressional practice appears reflective of the widely divergent nature of the judicial and legislative forums. The attorney-client privilege is a product of a judicially developed public policy designed to foster an effective and fair adversary system. The courts view the privilege as a means to foster client confidence and encourage full disclosure to an attorney. It is argued that free communication facilitates justice by promoting proper case preparation.<sup>224</sup> It is also suggested that frivolous litigation is discouraged when, based on full factual disclosure, an attorney finds that his client's case is not a strong one.<sup>225</sup> Of critical importance here is the understanding that the role of attorney-client privilege is designed for, and properly confined to, the adversary process: the adjudicatory resolution of conflicting claims of individual obligations in a civil or criminal proceeding. But the necessity to protect the individual interest in the adversary process is less compelling in an investigative setting where a legislative committee is not empowered to adjudicate the liberty or property interests of a witness. This is the import of those cases which have recognized that "only infrequently have witnesses ... [in congressional hearings] been afforded procedural rights normally associated with an adjudicative proceeding."<sup>226</sup>

Indeed, the suggestion that the investigatory authority of the legislative branch of government is subject to non-constitutional, common law rules developed by the judicial branch to govern its proceedings is arguably contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedures and is therefore difficult to reconcile with the constitutional authority granted each House of Congress to determine its own rules.<sup>227</sup> Moreover, importation of the privileges and procedures of the judicial forum is likely to have a paralyzing effect on the investigatory process of the legislature. Such judicialization is antithetical to the consensus, interest oriented approach to policy development of the legislative process.

Finally, an assertion that the denial of the privilege in the congressional setting would destroy the privilege elsewhere appears neither supported by

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<sup>223</sup> See, Hearings before the Senate Permanent Subcomm. on Investigations, Committee on Governmental Affairs, "Health Care Fraud/Medicare Secondary Payee Program," 101st Cong., 2d Sess., July 11 and 12, 1990, at pp. 3-10.

<sup>224</sup> See, e.g., *Upjohn v. United States*, 449 U.S., 382, 389 (1981).

<sup>225</sup> *Id.*

<sup>226</sup> *Hannah v. Larche*, 363 U.S. 420, 425 (1960); see also, *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (rejecting contention that the constitutional right to cross-examine witnesses applied to a congressional investigation).

<sup>227</sup> U.S. Const., Art. I, Sec. 5, cl. 2.

experience nor reason. Parliament's rule has not impaired the practice of law in England nor has its limited use here inflicted any apparent damage on the practice of the profession. Congressional investigations in the face of claims of executive privilege or the revelations of trade secrets have not diminished the general utility of these privileges nor undermined the reasons they continue to be recognized by the courts. Moreover, the assertion implies that current law is an impregnable barrier to disclosure of confidential communications when in fact the privilege is, of course, an exception to the general rule of disclosure and, is riddled with qualifications and exceptions, and has been subject as well as to the significant current development of the waiver doctrine. Thus, there can be no absolute certainty that communications with an attorney will not be revealed.<sup>228</sup>

Moreover, with respect to the work-product privilege, it has always been recognized that it is a qualified privilege which may be overcome by a sufficient showing of need. The Supreme Court indicated, in the very case in which it created the doctrine, that "[w]e do not mean to say that all [ ] materials obtained or prepared ... with an eye toward litigation are necessarily free from discovery in all cases."<sup>229</sup> Thus, the courts have repeatedly held that the work product privilege is not absolute, but rather is only a qualified protection against disclosure.<sup>230</sup> As one court has indicated, "its immunity retreats as necessity and good cause is shown for its production in a balance of competing interests."<sup>231</sup>

In fact, because the work product doctrine is so readily overcome when production of material is important to the discovery of needed information, some courts have refused to call the doctrine a privilege. For instance, in *City of Philadelphia v. Westinghouse Corp.*,<sup>232</sup> the court stated that the work product principle "is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case."

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<sup>228</sup> For example, see discussion of difficulties in corporate confidentiality and the development of the doctrine of waiver, in CRS Memoranda, *supra* note 212 at 26-32, 102-107. See also *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (In shareholder derivative suits "the availability of the privilege [should] be subject to the right of stockholders to show cause why it should not be invoked in the particular instance.").

<sup>229</sup> *Hickman v. Taylor*, 329 U.S. 495, 511 (1974).

<sup>230</sup> See, e.g., *Central National Insurance Co. v. Medical Protective Co. of Fort Wayne, Indiana*, 107 F.R.D. 393, 395 (E.D. Mo. 1985); *Chepanno v. Champion International Corp.*, 104 F.R.D. 395, 396 (D. Or. 1984); *American Standard, Inc. v. Bendix Corp.* 71 F.R.D. 443, 446 (W.D. Mo. 1976).

<sup>231</sup> *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968).

<sup>232</sup> 210 F.Supp. 483, 485 (E.D. Pa. 1962), *cert. denied sub. nom. General Electric Co. v. Kirkpatrick*, 372 U.S. 943 (1963).

## (b) Requirements for Assertion of the Attorney-Client Privilege

In making the assessment whether to accept a claim of attorney-client privilege, committees often have reference to whether a court would accept the claim had it been in that forum. This section and those that follow detail the judicial requirements for a proper assertion of the claim, how the privilege may be waived, and circumstances under which it may not be claimed at all.

Although the attorney-client privilege today is seen to rest on the theory that encouraging clients to make the fullest disclosure to their attorneys enables them to act more effectively, justly, and expeditiously, and that these benefits outweigh the risks posed by not allowing full disclosure in court,<sup>233</sup> even its leading proponent, Dean Wigmore, concedes the unverifiability of the assumption and advises that its use be strictly limited.

Its benefits are all indirect and speculative, its obstruction is plain and concrete...It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.<sup>234</sup>

The courts have heeded Wigmore's admonition.<sup>235</sup>

One important manifestation of the judicial policy of strict confinement is the universal recognition that the burden of establishing the existence of the privilege rests with the party asserting the privilege.<sup>236</sup> Moreover, blanket

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<sup>233</sup> *Fisher v. United States*, 425 U.S. 391 (1976).

<sup>234</sup> 8 Wigmore, *Evidence*, §2291 at 554 (McNaughton rev. 1961).

<sup>235</sup> *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983). See also, *In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984); *U.S. v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *U.S. v. Goldfarb*, 328 F.2d 280 (6th Cir.) cert denied 370 U.S. 976 (1964).

<sup>236</sup> See, e.g., *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450-51 (6th Cir. 1983); *U.S. v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982); *In re Walsh*, 623 F.2d 489, 493 (7th Cir.), cert denied, 449 U.S. 994, 101 S. Ct. 531, 66 L.Ed. 2d 291 (1980); *Liew v. Breen* 640 F. 2d 1046, 1049 (9th Cir. 1981); *United States v. Stern* 511 F.2d 1364, 1367 (2nd Cir. 1975); *United States v. Landof* 591 F.2d 36, 38 (9th Cir. 1978); *In re Grand Jury Empaneled February 14, 1978 (Markowitz)*, 603 F.2d 469, 474 (3d Cir. 1979); *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974); *United States v. Tratner*, 511 F.2d 248, 251 (7th Cir. 1975); *United States v. Demauro*, 581 F.2d 50, 55 (2d Cir. 1978); *United States v. Ponder*, 475 F.2d 37, 39 (5th Cir. 1973); *United States v. Bartlett*, 449 F.2d 700, 703 (8th Cir. 1971), cert. denied, 405 U.S. 932 (1972); *In re Application of John Doe, Esq.*, 603 F.Supp. 1164, 1166 (E.D.N.Y. 1985); *In re Grand Jury Subpoena December 18, 1981*, 561 F.Supp. 1247, 1251 (E.D.N.Y. 1981).

assertions of the privilege have been deemed "unacceptable"<sup>237</sup>, and are "strongly disfavored."<sup>238</sup> The proponent must conclusively prove each element of the privilege. Thus a claimant must reveal specific facts which would establish that the relationship was one of attorney and client. Conclusory assertions are insufficient. And it must demonstrate that the privilege has not expressly or impliedly waived.

Finally, it should be noted that the assertion that the disclosure of privileged material to a congressional committee would waive the privilege in any future litigation was specifically considered, and rejected, by the D.C. Circuit Court of Appeals in *Murphy v. Department of the Army*.<sup>239</sup> Indeed, there appears to be no case holding otherwise and several which have followed *Murphy*.<sup>240</sup>

### (c) Waiver of the Attorney-Client Privilege

Because of the privilege's inhibitory effect on the truth-finding process and its impairment of the public's "right to every man's evidence,"<sup>241</sup> modern liberal discovery rules have taken a narrow view of the privilege.<sup>242</sup> This tendency toward limiting the privilege is most clearly manifested in the strict standard of waiver.<sup>243</sup> Thus the voluntary disclosure of privileged information, whether by the client or the attorney with the client's consent, waives the privilege<sup>244</sup> because it destroys the confidentiality of a communication and thereby undermines the justification for preventing

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<sup>237</sup> *SEC v. Gulf and Western Industries, Inc.*, 518 F.Supp. 675, 682 (D.D.C. 1981).

<sup>238</sup> *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 454 (6th Cir. 1983); *U.S. v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 382 (9th Cir. 1982); *U.S. v. Davis*, 636 F.2d 1028, 1044 n. 20 (5th Cir. 1981); *U.S. v. Cromer*, 483 F.2d 99, 102 (9th Cir. 1973); *Colton v. U.S.*, 306 F.2d 633, 639 (2d Cir. 1962).

<sup>239</sup> 613 F.2d 1151, 1155 (D.C. Cir. 1979).

<sup>240</sup> See, *In re Sunrise Securities Litigation*, 109 Bankr. 658, 1990 U.S. Dist. Lexis 168, U.S.D.C. E.D.Pa., Jan. 9, 1990; *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 9 E.B.C. 1929, 1987 U.S. Dist. Lexis 10912, U.S.D.C. N.D. Ill.

<sup>241</sup> 8 J. Wigmore §2192, at 70.

<sup>242</sup> *Magida ex rel. Vilcon Detinning Co. v. Continental Can Co.*, 12 F.R.D. 74, 77 (S.D.N.Y. 1951).

<sup>243</sup> See, e.g., *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981); *United States v. AT & T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

<sup>244</sup> 8 J. Wigmore, §2327, at 632-39.

compelled disclosures.<sup>245</sup> Waiver need not be express,<sup>246</sup> nor is it necessary that the client waive the privilege knowingly.<sup>247</sup> Waiver may be evidenced by word or act,<sup>248</sup> but may be inferred from a failure to speak or act when words or action would be necessary to preserve confidentiality.<sup>249</sup> Courts regularly hold that the privilege is waived as to the material disclosed when the client or his attorney deliberately discloses the contents of a privileged communication, such as when answering interrogatories, testifying in court or at examination before trial, submitting affidavits or pleadings to the Court, or in transacting business with a third party.<sup>250</sup>

Furthermore, the courts have held that less than full disclosure will often cause a waiver, not only as to disclosed communications, but also as to communications relating to the same subject matter that were not themselves disclosed.<sup>251</sup> By partial disclosure, the client may be voluntarily waiving the privilege as to that which he considers favorable to his position, but attempting to invoke the privilege as to the remaining material, which he considers unfavorable.<sup>252</sup> Selective assertion or disclosure usually involves a material issue in the proceeding, and there is a great likelihood that the information disclosed is false or intended to mislead the other party.<sup>253</sup> Thus, pleading an "advice of counsel" defense, which puts the attorneys advice in issue,<sup>254</sup> has

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<sup>245</sup> *United States v. AT & T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *In re Horowitz*, 482 F.2d 72, 82 (2d Cir.) *cert. denied*, 414 U.S. 867 (1973).

<sup>246</sup> *Blackburn v. Crawford*, 70 U.S. (3 Wall.) 175, 194 (1965).

<sup>247</sup> *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979).

<sup>248</sup> *Magida ex rel. Vulcan Determining Co. v. Continental Can Co.*, 12 F.R.D. 74, 77 (S.D.N.Y. 1951).

<sup>249</sup> *Id.*

<sup>250</sup> 8 J. Wigmore, §2327.

<sup>251</sup> *Teachers Ins. & Annuity Assn. of America v. Shamrock Broadcasting Co.*, 521 F.Supp. 638, 641 (S.D.N.Y. 1981); *R.J. Hereley & Sons Co. v. Stotler & Co.*, 87 F.R.D. 358, 359 (N.D. Ill. 1980); *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 156 (D. Del. 1977); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1161-62 (D.S.C. 1974).

<sup>252</sup> *Perrigrion v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 461 (N.D. Calif. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Eel. 1977); *Duplan v. Deering Milliken*, 397 F.Supp. 1146, 1161-62 (D.S.C. 1974); *IT & T v. United Tel. Co.*, 60 F.R.D. 177, 188-86 (M.D. Gla. 1973).

<sup>253</sup> *United States v. Aronoff*, 466 F.Supp. 855, 862 (S.D.N.Y. 1979).

<sup>254</sup> *E.g., United States v. Woodall*, 438 F.2d 1317, 1323-24 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971); *Transworld Airlines v. Hughes*, 332 F.2d 602, 615 (2d Cir. (continued...))



been held to waive the privilege as to all communications relating to that advice. The rationale for the subject matter waiver rule is one of fairness. Professor Wigmore has stated the principle as follows: "[W]hen [the client's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. It is therefore designed to prevent the client from using the attorney-client privilege offensively, as an additional weapon."

The courts also have severely limited the attorney-client privilege through the development of an implied waiver doctrine. Thus where a client shares his attorney-client communications with a third party, the communications between attorney and client are no longer strictly "confidential", and the client has waived his privilege over them.<sup>255</sup> Even if the client attempts to keep communications confidential by having the third party agree not to disclose the communications to anyone else the courts will still consider "confidentiality" between attorney and client breached and the communication no longer privileged.<sup>256</sup> Courts have applied this concept of confidentiality narrowly to prevent corporations from sharing an attorney-client communication with an ally and then shielding the communication from a grand jury or adversary.<sup>257</sup> As a general rule, courts also apply the waiver rule to disclosures made to government agencies.<sup>258</sup> Thus a person or corporation who voluntarily discloses confidential attorney-client communications to a government agency loses the right to later assert privilege for those communications.

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<sup>254</sup>(...continued)

1964), *cert. dismissed*, 380 U.S. 248 (1965); *Barr Marine Prods. v. Borg-Warner Corp.*, 84 F.R.D. 631, 635 (E.D. Pa. 1979); *Hangards, Inc. v. Johnson & Johnson*, 413 F.Supp. 926, 929 (N.D. Calif. 1976).

<sup>255</sup> See, e.g., *United States v. El Paso Co.*, 682 F.2d 530, 539, 540 (5th Cir. 1982) (documents created with knowledge that independent accountants may need access to them to complete audit waives privilege.); *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (disclosure of documents to SEC waives privilege); *United States v. Miller*, 660 F.2d 563, 567-68 (5th Cir. 1981) (previous delivery of accounting books to IRS vitiates privilege.); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464 (E.D. Mich. 1954) (privilege waived on disclosure to Justice Department).

<sup>256</sup> 8 J. Wigmore, *Evidence*, §2367 at 636 (McNaughton rev. ed. 1961).

<sup>257</sup> *Permian Corp. v. U.S.*, 665 F.2d 1214, 1221-22 (D.C. Cir. 1981).

<sup>258</sup> See, e.g., *United States v. Miller*, 660 F.2d 563, 567-68 (5th Cir. 1981) (disclosure to IRS); *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 915 (1979) (to Antitrust Div. of Dept. of Justice); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 585 (N.D. Ill. 1981) (to Dept. of Labor); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 27 Fed. R. Serv. 2d (Callaghan) 819 (S.D.N.Y. 1979) (to district attorney); *In re Penn. Cent. Commercial Paper Litig.*, 61 F.R.D. 453, 462-64 (S.D.N.Y. 1973) (to SEC); *D'Ippolito v. Cities Serv. Co.*, 39 F.R.D. 610 (S.D.N.Y. 1965) (to Antitrust Div. of Dept. of Justice).

While some lower courts have adopted a "limited waiver" rule, which allows corporations to share their confidential attorney-client communications with agencies such as the SEC without having to waive the privileged status of these documents against other parties,<sup>259</sup> it is a distinctly minority view. The prevailing view, enunciated in decisions of the Second<sup>260</sup>, Fourth<sup>261</sup>, and District of Columbia Circuits,<sup>262</sup> hold that "if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information, as well as 'the details underlying the data which was to be published', will not enjoy the privilege."<sup>263</sup>

The facts and circumstances of *In re Martin Marietta Corporation*<sup>264</sup> illustrate the strict manner in which the courts have applied the waiver doctrine. In that case a mail fraud defendant sought documents, and the underlying factual details for statements made in them, submitted by his former employer to the United States Attorney and the Department of Defense in its efforts to settle criminal and administrative proceedings then pending against it. The court noted that in a Position Paper to the U.S. Attorney describing why the company should not be indicted, it was asserted: "of those consulted within the Company all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud" and "there is no evidence, testimonial or documentary, that any company officials in the meeting [of November 17, 1983] except Mr. Pollard and his Maxim employees, understood that Maxim had departed from the strict procedures of its IVI contract."<sup>265</sup> The appeals court held that these, and similar disclosures made to the Defense Department in an Administrative Settlement Agreement, waived whatever privilege it had with respect to the submitted documents and their underlying details.

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<sup>259</sup> See, e.g., *Diversified Industries v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977); *Byrnes v. IDS Realty Trust Co.*, 85 F.R.D. 679, 687-89 (S.D.N.Y. 1980); *In re Grand Jury Subpoena*, 478 F.Supp. 368, 372-73 (E.D. Wisc. 1979).

<sup>260</sup> *In re John Doe Corporation*, 675 F.2d 482 (2d Cir. 1982).

<sup>261</sup> *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984).

<sup>262</sup> *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

<sup>263</sup> *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

<sup>264</sup> *Id.*

<sup>265</sup> 856 F.2d at 623.

## (d) Exceptions to the Attorney-Client Privilege

Absent waiver, the attorney-client privilege generally protects from disclosure communications from a client to his lawyer or his lawyer's agent relating to the lawyers rendering of legal advice which was made with the expectation of confidentiality, but not in furtherance of a future crime, fraud, or tort. However, the courts have strictly confined the privilege and developed a number of important qualifications and exceptions.

First, the case law has consistently emphasized that one of the essential elements of the attorney-client privilege is that the attorney be acting as an attorney and that the communication be made for the purpose of securing legal services. The privilege therefore does not attach to incidental legal advice given by an attorney acting outside the scope of his role as attorney. "Acting as a lawyer' encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice."<sup>266</sup>

In order to ascertain whether an attorney is acting in a legal or business advisory capacity the courts have held it proper to question either the client or the attorney regarding the general nature of the attorney's services to his client, the scope of his authority as agent and the substance of matters which the attorney, as agent, is authorized to pass along to third parties.<sup>267</sup> Indeed, invocation of the privilege may be predicated on revealing facts tending to establish the existence of an attorney-client relation.

A further manifestation of the judicial proclivity to confine the scope of the privilege is the general rule requiring disclosure of the fact of employment, the identity of the person employing him or the name of the real party in interest, the terms of the employment, and such related facts as the client's address, occupation or business and the amount of the fee and who paid it.<sup>268</sup> The courts have reasoned that the existence of the relation of attorney and client is not a privileged communication. The privilege pertains to the subject matter and not to the fact of the employment as attorney.

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<sup>266</sup> *Zenith Radio Corp. v. Radio Corp. of America*, 121 F.Supp. 792, 794 (D. Del. 1954) (emphasis supplied); *SCM Corp. v. Xerox Corp.*, 70 FRD 508, 517 (D. Conn. 1976).

<sup>267</sup> *Colton v. U.S.*, 306 F.2d 633, 636, 638 (2d Cir. 1962); *U.S. v. Tellier*, 255 F.2d 441 (2d Cir. 1958); *J.P. Foley & Co., Inc. v. Vanderbilt*, 65 FRD 523, 526-27 (S.D.N.Y. 1974).

<sup>268</sup> *In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451-52 (6th Cir. 1983); *In re Grand Jury Proceedings in Matter of Freeman*, 208 F.2d 1581, 1575 (11th Cir. 1983); *In re Grand Jury Proceedings (Robert Twist, Sr.)*, 689 F. 2d 1351, 1352 (11th Cir. 1982); *Colton v. United States*, 306F.2d 633, 637-38 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Pape*, 144 F.2d 778, 783 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944).

Another significant exception to the privilege occurs when a communication between client and attorney is for the purpose of committing a crime or perpetuating a fraud at some future time.<sup>269</sup> The policy reasons for this exception are obvious. Society has an interest in protecting the confidences of a client to his lawyer even concerning already committed crimes, frauds and torts. The harm from nondisclosure is limited because the past event can no longer be prevented. Society also has an interest in protecting the confidence of a client who seeks legal advice about neutral acts. But society has no interest in facilitating the commission of contemplated but not yet committed crimes, torts or frauds. On the contrary, society has every interest in forestalling such acts. Therefore, the attorney-client privilege has been held not to attach to such acts.

## VII. RIGHTS OF MINORITY PARTY MEMBERS IN THE INVESTIGATORY PROCESS

The role of members of the minority party in the investigatory oversight process is governed by the rules of each House and its committees. While minority members are specifically accorded some rights (*e.g.*, whenever a hearing is conducted on any measure or matter, the minority may, upon the written request of a majority of the minority members to the chairman before the completion of the hearing, call witnesses selected by the minority, and presumably request documents<sup>270</sup>), no House or committee rules authorize ranking minority members or individual members on their own to institute official committee investigations, hold hearings or to issue subpoenas. Individual members may seek the voluntary cooperation of agency officials or private persons. But no judicial precedent has recognized a right in an individual member, other than the chair of a committee,<sup>271</sup> to exercise the authority of a committee in the context of oversight without the permission of a majority of the committee or its chair.

The question of the nature and scope of the rights of minority party members in the investigatory process came into sharp focus in the 103d Congress. Then, for the first time in over a decade, both Houses and the White House were in the control of one party, while at the same time the Whitewater

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<sup>269</sup> See, *e.g.*, *In re John Doe Corporation*, 675 F.2d 482 (2d Cir. 1982); *Union Camp Corp. v. Lewis*, 385 F.2d 143, 144-45 (4th Cir. 1967); *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939).

<sup>270</sup> House Rule XI 2(j)(1); House Banking Committee Rule IV. 4.

<sup>271</sup> *Ashland Oil Co., Inc., v. FTC*, 548 F.2d 977, 979-80 (D.C. Cir. 1976), *affirming* 409 F.Supp. 297 (D.D.C. 1976). See also *Exxon v. Federal Trade Commission*, 589 F.2d 582, 592-93 (D.C. Cir. 1978) (acknowledging that the "principle is important that disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members ..."); and *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 791 (5th Cir. 1979)(refusing to permit two congressmen from intervening in private litigation because they "failed to obtain a House Resolution or any similar authority before they sought to intervene.")

matter began to emerge as a matter of serious political importance. Principal jurisdiction over many of the areas of concern fell within mandates of the House and Senate Banking Committees.

The Ranking Minority Member of the House Banking Committee was particularly aggressive in seeking to obtain documents and testimony from the Office of Thrift Supervision (OTS) and the Resolution Trust Corporation (RTC), the agencies handling the investigation of the failure of the Madison Guarantee Savings & Loan Association and related matters. The agencies refused to turn over what were claimed by the Ranking Minority Member to be key documents and were supported by the chairman of the Banking Committee who directed the agencies not to cooperate on the grounds that no investigation had been authorized by the committee nor were hearings on the matter contemplated. The Ranking Minority Member brought suit to compel disclosure of the documents.<sup>272</sup>

An obstacle to the suit was a 1983 court ruling in *Lee v. Kelley*.<sup>273</sup> There a court held, *inter alia*, that an attempt by Senator Jesse Helms to intervene in the case in order to unseal FBI tapes and transcripts concerning Martin Luther King to enable him to utilize the information as part of the debate on legislation proposing to establish a national holiday commemorating King's birth, would be dismissed as an exercise of the courts "equitable discretion" because Senator Helms' action was an effort to enlist the court in his dispute with fellow legislators. Helms had argued that because no committee hearings were being conducted to inform Senators of facts to justify or defeat the passage of the legislation, he was seeking to fill that void by performing the investigative function the Senate leadership had decided to forego.<sup>274</sup> The district court ruled that "[i]t is not for this court to review the adequacy of the deliberative process of the Senate leadership ... [T]o conclude otherwise would represent an obvious intrusion by the judiciary into the legislative arena. In any event, the proper forum for this [dispute] is the Senate, 'for [i]t would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle.'<sup>275</sup>

In an attempt to avoid the adverse consequences of *Lee*, the Ranking Minority Member sought to compel disclosure of the documents under the

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<sup>272</sup> *Leach v. Resolution Trust Corporation*, 860 F.Supp 868 (D.D.C. 1994). Unless otherwise indicated, the factual context of the suit is as described in court's opinion and the briefs submitted by the parties.

<sup>273</sup> *Lee v. Kelley*, 99 F.R.D. 340 (D.D.C. 1983), *aff'd sub. nom. Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984),

<sup>274</sup> 99 F.R.D. at 342.

<sup>275</sup> *Id.* at 343. The appeals court affirmed on the ground that Senator Helms lacked standing because he had not asserted any interest protected by the Constitution, and that his complaint was actually with his fellow Senators. 747 F.2d at 779-81.

Freedom of Information Act (FOIA),<sup>276</sup> which explicitly exempts Congress from its withholding provisions,<sup>277</sup> and under the Administrative Procedure Act (APA),<sup>278</sup> alleging that the documents were arbitrarily and capriciously withheld. It was not successful. While finding the claims "technically justiciable",<sup>279</sup> the district court held that it had to invoke the District of Columbia Circuit's doctrine of equitable or remedial discretion and dismiss the claims since this was a case "in which a congressional plaintiff's dispute is primarily with his or her fellow legislators." The court concluded that "[i]t is clear . . . that Representative Leach's complaint derives solely from his failure to persuade his colleagues to authorize his request for the documents in question, and that Plaintiff thus has a clear 'collegial remedy' capable of affording him substantial relief."<sup>280</sup>

Despite the apparent difficulty in obtaining judicial redress, some measure of practical success was achieved as a result of intense public pressure brought to bear by the minority and its supporters on the majority party and the White House. A Justice Department investigation into the handling of the RTC recommendation to the United States Attorney's office for a further criminal investigation was commenced in November 1993; the White House in December, 1993 authorized turning over Whitewater documents to the Justice Department team investigating the handling of the matter; in January 1994 the White House agreed to the appointment by the Attorney General of an independent counsel with broad authority to investigate Whitewater matters; both Houses agreed in principle in March 1994 to hold hearings; and in July and August 1994 hearings were held by the House and Senate Banking Committees. The legal challenge thus may be viewed as part the overall strategy to force public hearings by Congress, although in the long run the precedent established may have virtually foreclosed future resort to the courts under analogous circumstances.

The *Leach* court also suggested that the possibility of a "collegial remedy" for the minority exists, pointing to 5 U.S.C. 2954 under which small groups of members of the House Government Reform and Oversight and Senate Governmental Affairs Committees can request information from executive

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<sup>276</sup> 5 U.S.C. 552 (1988).

<sup>277</sup> See 5 U.S.C. 552(d) stating that "This section is not authority to withhold information from Congress."

<sup>278</sup> 5 U.S.C. 702, 706 (1988).

<sup>279</sup> 860 F.Supp. at 871-72.

<sup>280</sup> *Id.* at 874-76.

agencies without the need of formal committee action.<sup>281</sup> However, the precise scope and efficacy of this provision is uncertain.

5 U.S.C. 2954 is derived from section 2 of the Act of May 29, 1928,<sup>282</sup> which originally referred not to the current committees generally overseeing government agency operations but their predecessors, the House and Senate Committees on Expenditures in the Executive Departments. The principal purpose of the 1928 Act, embodied in its first section, was to repeal legislation which required the submission to the Congress of some 128 reports, many of which had become obsolete in part, and which, in any event, had no value, served no useful purpose, and were not printed by the House of Representatives.<sup>283</sup>

Section 2 of the 1928 Act contains the language which has been codified in 5 U.S.C. 2954. The legislative history, however, indicates that the purpose of the 1928 Act was not to assert a sweeping right of Congress to obtain any information it might desire from the executive branch. Rather, the aim of the section was far more limited. Thus, the Senate Report stated that its purpose was to make "it possible to require any report discontinued by the language of this bill to be resubmitted to either House upon its necessity becoming evident to the membership of either body."<sup>284</sup> Or, in the words of the House Report: "To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments or upon the request of any seven members thereof."<sup>285</sup>

It would appear, then, that the scope of 5 U.S.C. 2954 is closely tied to the 128 reports abolished by section 1 of the 1928 legislation.<sup>286</sup> Moreover, the

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<sup>281</sup> *Id.* at 876 note 7. 5 U.S.C. 2954 provides: "An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee."

<sup>282</sup> 45 Stat. 996.

<sup>283</sup> H.R. Rep. No. 1757, 70th Cong., 1st Sess., pp. 2 - 3 (1928). A study of the Bureau of Efficiency had recommended their elimination. H.R. Rep. 1757, at p. 2; S. Rep. No. 1320, 70th Cong., 1st Sess., p. 1 (1928).

<sup>284</sup> S. Rep. No. 1320, *supra*, at 4.

<sup>285</sup> H.R. Rep. No. 1757, *supra*, at 1.

<sup>286</sup> In codifying Title 5 in 1966, Congress made it clear that it was effecting no substantive changes in existing laws: "The legislative purpose in enacting sections 1-6 of this Act is to restate, without substantive change, the laws replaced by those sections on the effective date of this Act." Pub. L. 89-544, sec. 7(a).

provision lacks a compulsory component. Agency refusals to comply would not be subject to existing contempt processes, and the outcome of a civil suit to compel production on the basis of the provision is problematic despite the *Leach* court's suggestion. Further, the provision applies only to the named committees; thus members of all other committees would still face the *Leach* problem. Finally, even members of the named Committees are still likely to have to persuade a court that their claim is no more than an intramural dispute.

The rules of the Senate provide substantially more effective means for individual minority party members to engage in "self-help" to support oversight objectives than their House counterparts. Senate rules emphasize the rights and prerogative of individual Senators and, therefore, minority groups of Senators.<sup>287</sup> The most important of these rules are those that effectively allow unlimited debate on a bill or amendment unless an extraordinary majority vote to invoke cloture.<sup>288</sup> Senators can use their right to filibuster, or simply the threat of filibuster, to delay or prevent the Senate from engaging in legislative business. The Senate's rules also are a source of other minority rights that can directly or indirectly aid the minority in gaining investigatory rights. For example, the right of extended debate applies in committee as well as on the floor, with one crucial difference: the Senate's cloture rule may not be invoked in committee. Each Senate committee decides for itself how it will control debate, and therefore a filibuster opportunity in a committee may be even greater than on the floor. Also, Senate Rule XXVI prohibits the reporting of any measure or matter from a committee unless a majority of the committee are present, another point of possible tactical leverage. Even beyond the potent power to delay, Senators can promote their goals by taking advantage of other parliamentary rights and opportunities that are provided by the Senate's formal procedures and customary practices such as are afforded by the processes dealing with floor recognition, committee referrals, and the amending process.<sup>289</sup>

## VIII. ROLE OF THE OFFICES OF SENATE LEGAL COUNSEL AND HOUSE GENERAL COUNSEL

For almost two decades the offices of Senate Legal Counsel and House General Counsel have developed parallel yet distinctly unique and independent roles as institutional legal "voices" of the two bodies they represent. Familiarity with the structure and operation of these offices and the nature of the support they may provide committees in the context of an investigative oversight proceeding is essential.

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<sup>287</sup> See Stanley Bach, *Minority Rights and Senate Procedures*, Congressional Research Service, Report No. 94-978, December 5, 1994.

<sup>288</sup> Senate Rule XIX.

<sup>289</sup> See Bach, *supra* note 287 at pp. 8-11.



## A. Senate Legal Counsel

The Office of Senate Legal Counsel<sup>290</sup> was created by Title VII of the Ethics in Government Act of 1978<sup>291</sup> "to serve the institution of congress rather than the partisan interests of one party or another."<sup>292</sup> The Counsel and Deputy Counsel are appointed by the President pro tempore of the Senate upon the recommendation of the Majority and Minority Leaders. The appointment of each is made effective by a resolution of the Senate, and each may be removed from office by a resolution of the Senate. The term of appointment of the Counsel and Deputy Counsel is two Congresses. The appointment of the Counsel and Deputy Counsel and the Counsel's appointment of Assistant Senate Legal Counsel are required to be made without regard to political affiliation. The office is responsible to a bipartisan Joint Leadership Group, which is comprised of the Majority and Minority Leaders, the President pro tempore, and the chairman and ranking minority member of the Committees on the Judiciary and on Rules and Administration.<sup>293</sup>

The Act specifies the activities of the office, two of which are of immediate interest to committee oversight concerns: representing committees of the Senate in proceedings to aid them in investigations and advising committees and officers of the Senate.<sup>294</sup>

### (1) Proceedings to Aid Investigations by Senate Committees

The Senate Legal Counsel may represent committees in proceedings to obtain evidence for Senate investigations. Two specific proceedings are authorized.

18 U.S.C. § 6005 provides that a committee or subcommittee of either House of Congress may request an immunity order from a United States district court when the request has been approved by the affirmative vote of two-thirds of the Members of the full committee. By the same vote, a Committee may

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<sup>290</sup> A full description of the work of the Office of Senate Legal Counsel and its work may be found in Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, S.Doc. No. 28, 101st Cong., 2d Sess. 1236 (1992).

<sup>291</sup> Pub. L. No. 95-520, secs. 701 *et seq.*, 92 Stat. 1824, 1875 (1978), *codified principally in* 2 U.S.C. secs. 288, *et seq.*

<sup>292</sup> S.Rep. No. 95-170, 95th Cong., 2d Sess. 84 (1978).

<sup>293</sup> 2 U.S.C. 288(a) and (b), 288a.

<sup>294</sup> In addition, the Office is called upon to defend the Senate, its committees, officers and employees in civil litigation relating to their official responsibilities or when they have been subpoenaed to testify or to produce Senate records; and to appear for the Senate when it intervenes or appears as *amicus curiae* in lawsuits to protect the powers or responsibilities of the Congress.

direct the Senate Legal Counsel to represent it or any of its subcommittees in an application for an immunity order.<sup>295</sup>

The Senate Legal Counsel may also be directed to represent a committee or subcommittee of the Senate, and also the Office of Senate Fair Employment Practices,<sup>296</sup> in a civil action to enforce a subpoena. Prior to the Ethics in Government Act of 1978, subpoenas of the Senate could be enforced only through the cumbersome method of a contempt proceeding before the bar of the Senate or by a certification to the United States attorney and a prosecution for criminal contempt of Congress under 2 U.S.C. §§ 192, 194. The Ethics Act authorizes a third method to enforce Senate subpoenas, through a civil action in the United States District Court for the District of Columbia.<sup>297</sup> The House chose not to avail itself of this procedure and this enforcement method applies only to Senate subpoenas. Senate subpoenas have been enforced in several civil actions. See, for example proceedings to hold in contempt a recalcitrant witness in the impeachment proceedings against Judge Alcee L. Hastings<sup>298</sup> and proceedings to enforce a subpoena *duces tecum* for the production of diaries of Senator Bob Packwood.<sup>299</sup>

The statute details the procedure for directing the Senate Legal Counsel to bring a civil action to enforce a subpoena. In contrast to an application for an immunity order, which may be authorized by a committee, only the full Senate by resolution may authorize an action to enforce a subpoena.<sup>300</sup> The Senate may not consider a resolution to direct the Counsel to bring an action unless the investigating committee reports the resolution by a majority vote. The statute specifies the required contents of the committee report; among other matters, the committee must report on the extent to which the subpoenaed party has complied with the subpoena, the objections or privileges asserted by the witness, and the comparative effectiveness of a criminal and civil proceeding.<sup>301</sup> A significant limitation on the civil enforcement remedy is that it excludes from its coverage actions against officers or employees of the federal government

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<sup>295</sup> 2 U.S.C. 288b(d),(e), 288f.

<sup>296</sup> 2 U.S.C. 1207(f).

<sup>297</sup> The procedure for applying for an immunity order is detailed, *supra*, at notes 47-56 and accompanying text.

<sup>298</sup> See S.Rep. No. 98, 101st Cong., 1st Sess. (1989).

<sup>299</sup> See, *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp 17 (D.D.C. 1994), *petition for stay pending appeal denied*, 114 S.Ct. 1036 (1994).

<sup>300</sup> 2 U.S.C. 288d and 28 U.S.C. 1365.

<sup>301</sup> See R.Rep. No. 98, 101st Cong., 1st Sess. (1989).

acting within their official capacities. Its reach is limited to natural persons and to entities acting or purporting to act under the color of state law.<sup>302</sup>

(2) Advice to committees and officers of the Senate and other duties.

The Ethics Act details a number of advisory functions of the Office of Senate Legal Counsel. Principal among these are the responsibility of advising officers of the Senate with respect to subpoenas or requests for the withdrawal of Senate documents, and the responsibility of advising committees about their promulgation and implementation of rules and procedures for congressional investigations. The office also provides advice about legal questions that arise during the course of investigations.<sup>303</sup>

The Act also provides that the Counsel shall perform such other duties consistent with the non-partisan purposes and limitations of Title VII as the Senate may direct.<sup>304</sup> Thus in 1980 the Office was used in the investigation relating to Billy Carter and Libya and worked under the direction of the chairman and vice-chairman of the subcommittee charged with the conduct of that investigation.<sup>305</sup> Members of the Office have also undertaken special assignments such as the Senate's investigation of Abscam and other undercover activities,<sup>306</sup> the impeachment proceedings of Judge Harry Claiborne,<sup>307</sup> Judge Walter L. Nixon, Jr.,<sup>308</sup> and Judge Alcee L. Hastings, Jr.,<sup>309</sup> and the confirmation hearings of Justice Clarence E. Thomas.

In addition, the Counsel's office provides information and advice to Members, officers and employees on a wide range of legal and administrative matters relating to Senate business. Unlike the House practice, the Senate Legal Counsel plays no formal role in the review and issuance of subpoenas. However, since it may become involved civil enforcement proceedings, it has welcomed the opportunity to review proposed subpoenas for form and substance prior to their issuance by committees.

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<sup>302</sup> See, *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp 17 (D.D.C. 1994), *petition for stay pending appeal denied*, 114 S.Ct. 1036 (1994).

<sup>303</sup> 2 U.S.C. 288g(a)(5) and (6).

<sup>304</sup> 2 U.S. 288g(c).

<sup>305</sup> See S.Rep. No. 1015, 96th Cong., 2d Sess. (1980).

<sup>306</sup> See S.Rep. No. 682, 97th Cong., 2d Sess. (1982).

<sup>307</sup> See S.Rep. No. 812, 99th Cong., 2d Sess. (1986).

<sup>308</sup> See S.Rep. No. 164, 101st Cong., 1st Sess. (1989).

<sup>309</sup> See S.Rep. No. 164, 101st Cong., 1st Sess. (1989).

## B. House General Counsel

A non-statutory office, the House General Counsel has evolved in an ad hoc, incremental manner since the mid-1970's, from its historic role as a legal advisor to the Clerk of the House on a range of administrative matters that fell within the jurisdiction of the Clerk's office, to that of lawyer for the institution. At the beginning of the 103d Congress it was made a separate House office, reporting directly to the Speaker, charged with the responsibility "of providing legal assistance and representation to the House."<sup>310</sup> However, as a consequence of administrative restructuring at the start of the 104th Congress, the Office was again placed in the Clerk's Office. While the function and role of the House General Counsel and the Senate Legal Counsel with respect to oversight assistance to committees and protection of institutional prerogatives are similar,<sup>311</sup> there are significant differences that need be noted.

The General Counsel and the Deputy General Counsel are appointed by the Speaker and serve at his pleasure. Traditionally the General Counsel has tendered his resignation to a new incoming Speaker. Authorization for actions by the General Counsel to represent the interests of the House in court is often given by the Joint Leadership Group, consisting of the Speaker, Majority Leader, Majority Whip, Minority Leader and Minority Whip.<sup>312</sup> On other occasions, the Office will act pursuant to the direction of the majority leadership or the Speaker alone.<sup>313</sup>

Unlike the Senate, subpoenas may only be issued over the seal of the Clerk of the House. In practice, committees work closely with the General Counsel in drafting subpoenas and every subpoena issued by a committee or officer is reviewed by the Office for substance and form. Similarly, in the absence of civil enforcement authority, committees often seek the assistance of the General Counsel in navigating the statutory contempt process in instances of witness non-compliance with a subpoena which may culminate in a floor proceeding to authorize a contempt citation. For example, during a committee investigation into the real estate holdings in the United States of the Philippines President Ferdinand E. Marcos and his wife, two brothers who allegedly assisted the Marcos's in their dealings were called to testify. They declined to answer numerous questions, claiming attorney-client privilege. The General Counsel

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<sup>310</sup> See H.Res. 5, sec. 11, 139 Cong. Rec. H5 (daily ed. Jan. 5, 1993).

<sup>311</sup> Thus, like the Senate Legal Counsel, the House General Counsel may be called upon to defend the House, its committees, officers, and employees in civil litigation relating to their official responsibilities, or when they have been subpoenaed to testify or to produce House records (see House Rule 50); and to appear for the House when it intervenes or appears as *amicus curiae* in lawsuits to protect the powers or responsibilities of the Congress.

<sup>312</sup> See, e.g., *U.S. v. McDade*, 28 F.3d 283 (3th Cir. 1994).

<sup>313</sup> See, e.g., *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994).

was called in to evaluate the claims and to render an opinion whether contempt proceedings would be appropriate. His findings served as the basis for the resolution passed by the House holding the brothers in contempt.<sup>314</sup>

Like the Senate Legal Counsel's office, the House General Counsel's office devotes a large portion of its time rendering informal advice to individual members and committees. Unlike its Senate counterpart, however, the General Counsel will often provide formal advice in the form of memorandum opinions<sup>315</sup> and, at times, testimony at hearings.<sup>316</sup>

Finally, the Office also takes on special tasks as, for example, when the deputy general counsel served as special counsel to the joint committee investigation the Iran-Contra affair and played an active role in establishing procedures for the investigation.

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<sup>314</sup> See, 132 Cong. Rec. 3036-38 (1986).

<sup>315</sup> See, e.g., 131 Cong. Rec. 25793-95 (1985)(opinion on the constitutionality of the Competition in Contracting Act.)

<sup>316</sup> See, e.g., Hearings, "Environmental Crimes at the Rocky Flats Nuclear Facility", before the Subcommittee on Investigation and Oversight, Committee on Science, Space and Technology, 101st Cong., 2d Sess. 1645-67 (1992) (Statement of Deputy General Counsel Charles Tiefer on requiring the President to claim executive privilege.)

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