Congressional Research Service

Memorandum June 13, 2006

TO: Honorable Charles Grassley, Chairman,
Senate Committee on Finance

FROM: Morton Rosenberg
Specialist in American Public Law
American Law Division

SUBJECT: Substantiality of An Agency's Legal and Policy Objections In Refusing to Comply with Subpoenas for Documents and the Testimony of Agency Personnel

---

Pursuant to your Committee's authority under the Standing Rules of the Senate, Rule XXV, 1.(i), and its rules of procedure, 151 Cong. Rec. S425 (daily ed. Jan. 25, 2005), you initiated an investigation of the Food and Drug Administration's (FDA) approval and post-market surveillance of Ketek, an antibiotic manufactured by Aventis Pharmaceuticals (Aventis) for the treatment of community-acquired pneumonia, sinusitis, and acute exacerbation of chronic bronchitis. Your inquiry was spurred by substantial allegations that the FDA approved Ketek despite problems about the drug's safety and efficacy, and, the allegations continue, with full knowledge that some of the clinical data contained in a safety study conducted by Aventis (Study 3014) supporting its approval, was fraudulent, in whole or part, and that this information was withheld at the direction of FDA officials from an FDA advisory committee tasked with recommending the drug's approval or disapproval. Since April, 2006 you have been seeking pertinent documents and interviews with agency personnel with direct knowledge of who knew what and when. You advise that your staff's efforts to obtain documents critical to the inquiry have been stymied and that line employees they sought for interviews have been directed not to speak to anyone on the Committee. On May 19, 2006, the Committee issued two subpoenas, one to Health and Human Services (HHS) Department Secretary Michael O. Leavitt for documents related to Ketek; and a second to compel the personal appearance of Special Agent Robert West, one of the employees prevented from being interviewed by Committee staff. The document subpoena was specifically directed at relevant Ketek materials in FDA's office of Criminal Investigation, the Division of Scientific Investigations, the Office of the Commissioner of FDA, and the Office of Regulatory Affairs.

On May 30, 2006, the HHS Assistant Secretary for Legislation informed you that the Secretary would not comply with two broad categories of materials covered by the document subpoena, and would not allow Special Agent West to testify. More particularly, the

Assistant Secretary stated that all documents "that reflect the Agency's ongoing deliberations about pending matters," would be withheld because "the Department has a confidentiality interest in materials that reflect its ongoing deliberative process," citing a Department of Justice Office of Legal Counsel (OLC) opinion, which, in turn cites other OLC opinions but no pertinent judicial rulings. The HHS letter and the OLC opinions rest on the notion that revelations of such internal deliberations would have a "chilling effect" on employees and their "free and candid flow of ideas and recommendations would be jeopardized."

Also to be withheld are documents from components of the FDA responsible for conducting investigations regarding compliance with FDA statutes and regulations, including the Office of Criminal Investigation (OCI), the Division of Scientific Investigations (DSI) and the Office of Regulatory Affairs (ORA). Here it is claimed that any disclosure of information in open, ongoing investigations (as opposed to a closed matters, which may be disclosed) "poses an inherent threat to the Executive Branch's enforcement and litigation functions," relying again on OLC opinions that assert that such disclosures to Congress would be perceived by the public and the courts as an exercise of "undue political and congressional influence over enforcement decisions" as well providing a "road map" of ongoing work that could undermine and prejudice such investigations. The OLC opinions cite other OLC and Attorney General opinions and their "consistent" assertion of this position as authority.

Finally, the agency's direction to the Special Agent not to comply with the testimonial subpoena is supported on the ground that it would undermine its ability "to ensure that its agents can exercise the independent judgment essential to the integrity of law enforcement and prosecution functions and to public confidence in their decisions." Rather, it is suggested that it is more appropriate that the Committee question supervisors selected by the agency which will satisfy the Committee's oversight responsibilities "without undermining the independence of line agents, without raising the appearance of political interference in investigational and prosecutorial decisions, and without compromising potentially successful prosecutions." The HHS letter concludes with statement that it has "consulted with the Department of Justice and understands this statement to be consistent with longstanding Executive Branch assertions of interest."

Conducted at your request, our review of the historical experience and legal rulings pertinent to access to information regarding the law enforcement activities of executive agencies indicates that claims exactly like those asserted here–prosecutorial deliberative process, confidential communications, and an agency's prerogative to determine who will be interviewed or testify before a jurisdictional committee, have been consistently rejected and compliance has been forthcoming. Such assertions have predominately emanated from the Department of Justice, the principal executive law enforcement agency, but have been raised by other departments and agencies in the past, including HHS. In the last 80 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice (DOJ) activities. It appears that the fact that an agency, such as the Justice Department or any other agency exercising law enforcement authority, has determined for its own internal purposes that a particular item should not be disclosed, or that the information sought should come from one agency source rather than another, does not prevent either House of Congress, or its committees or subcommittees, from obtaining and publishing information it considers essential for the proper performance of its constitutional functions. We are aware of no court precedent that imposes a threshold burden on

committees to demonstrate, for example, a "substantial reason to believe wrongdoing occurred" before they may seek disclosure with respect to the conduct of specific open and closed criminal and civil cases. Indeed, the case law is quite to the contrary. An inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern. There has been no claim by HHS of a lack of jurisdiction of your committee, or that your inquiry is for an improper legislative purpose, or that testimony of the subpoenaed agent is not pertinent to the investigation.

Our discussion will proceed as follows. We will briefly review the legal basis for investigative oversight and then describe several prominent illustrative instances of congressional oversight, principally using examples involving DOJ, that reflect the milestones in the establishment of oversight prerogatives vis- a- vis all executive departments and agencies. In light of this history, and the case law developed in conjunction with these proceedings, we assess the efficacy of the HHS claims.

The Legal Basis for Congressional 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 their authority, Congress and its committees have virtually plenary power to compel information needed to discharge their legislative function from executive agencies, private persons and organizations, and within certain constraints, the information so obtained may be made public.

Although there is no express provision of the Constitution that specifically authorizes Congress to conduct investigations and take testimony for the purposes of performing its legitimate function, 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.[1] 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."[2] 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 statues."[3] The Court did not limit the power of congressional inquiry to cases of "wrongdoing." It emphasized, however, 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

---

[1] *E.g., McGrain v. Daugherty,* 273 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).

[2] 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra,* 360 U.S. at 111).

[3] 354 U.S. at 187.

corruption, inefficiency, or waste."[4] "[T]he first Congresses," it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"[5] 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."[6] Accordingly, the Court stated, it recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[7]

The breadth of a jurisdictional committee's investigative authority may be seen in the two seminal Supreme Court decisions emanating from the Teapot Dome inquiries of the mid-1920's. As part of its investigation, the Senate select committee issued a subpoena for the testimony of Mally S. Daugherty, the brother of the Attorney General. After Daugherty failed to respond to the subpoena, the Senate sent its Deputy Sergeant at Arms to take him into custody and bring him before the Senate. Daugherty petitioned in federal court for a writ of *habeas corpus* arguing that the Senate in its investigation had exceeded its constitutional powers. The case ultimately reached the Supreme Court, where, in a landmark decision, *McGrain v. Daugherty,*[8] the Court upheld the Senate's authority to investigate these charges concerning the Department:

> [T]he subject to be investigated 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 prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers - specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.[9]

The Court thus underlined that the Department of Justice, like all other executive departments and agencies, is a creature of the Congress and subject to its plenary legislative and oversight authority.

---

[4] *Id.*

[5] *Id.* at 182.

[6] *Id.* at 194-95

[7] *Id.* at 200 n. 33.

[8] 273 U.S. 135 (1927).

[9] 273 U.S. at 177-78.

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,*[10] 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."[11] The Supreme Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness' contention that the pendency of lawsuits provided 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."[12] The Court further explained: "It may be conceded that Congress is without authority to compel disclosure 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."[13]

Illustrative Instances of Congressional Committees Obtaining Prosecutorial Deliberative Materials and the Testimony of Line Personnel

The Teapot Dome scandal in the mid-1920's provided not only the model and indisputable authority for wideranging congressional inquiries. While the Senate Committee on Public Lands and Surveys focused on the actions of the Department of the Interior in leasing naval oil reserves, a Senate select committee was constituted to investigate "charges of misfeasance and nonfeasance in the Department of Justice"[14] in failing to prosecute the malefactors in the Department of the Interior, as well as other cases.[15] The select committee heard from scores of present and former attorneys and agents of the Department and its Bureau of Investigation, who offered detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. Not all of the cases upon which testimony was offered were closed, as one of the committee's goals in its questioning was to identify cases in which the statute of limitations had not run out and prosecution was still possible.[16]

The committee also obtained access to Department documentation, including prosecutorial memoranda on a wide range of matters. However, given the charges of widespread corruption in the Department and the imminent resignation of Attorney General Daugherty, it would appear that some of the documents furnished the committee early in the hearings may have been volunteered by the witnesses and not officially provided by the Department. Although Attorney General Daugherty had promised cooperation with the

---

[10] 279 U.S. 263 (1929).

[11] *Id.* at 290.

[12] *Id.* at 295.

[13] *Id.*.

[14] *McGrain v. Daugherty,* 273 U.S. 135, 151 (1927).

[15] Investigation of Hon. Harry M. Daugherty, Formerly Attorney General of the United States: Hearings Before the Senate Select Committee on Investigation of the Attorney General, vols. 1-3, 68th Congress, 1st Session (1924).

[16] *See, e.g., id.* at 1495-1503, 1529-30,2295-96.

committee, and had agreed to provide access to at least the files of closed cases,[17] such cooperation apparently had not been forthcoming.[18]

In two instances immediately following Daugherty's resignation, the committee was refused access to confidential Bureau of Investigation investigative reports pending the appointment of a new Attorney General who could advise the President about such production,[19] though witnesses from the Department were permitted to testify about the investigations that were the subject of the investigative reports and even to read at the hearings from the investigative reports. With the appointment of the new Attorney General, Harlan F. Stone, the committee was granted broad access to Department files. Committee Chairman Smith Brookhard remarked that "[Stone] is furnishing us with all the files we want, whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked."[20] For example, with the authorization of the new Attorney General, an accountant with the Department who had led an investigation of fraudulent sales of property by the Alien Property Custodian's office appeared and produced his confidential reports to the Bureau of Investigation. The reports described the factual findings from his investigation and his recommendations for further action, and included the names of companies and individuals suspected of making false claims. The Department had not acted on those recommendations, though the cases had not been closed.[21] A similar investigative report, concerning an inquiry into the disappearance of large quantities of liquor under the control of the Department during the prior administration of President Harding, was also produced.[22]

As part of its investigation, the select committee issued a subpoena for the testimony of Mally S. Daugherty, the brother of the Attorney General. After Mally Daugherty failed to respond to the subpoena, the Senate sent its Deputy Sergeant at Arms to take him into custody and bring him before the Senate. Daugherty petitioned in federal court for a writ of *habeas corpus* arguing that the Senate in its investigation had exceeded its constitutional powers. The case ultimately reached the Supreme Court, where, as noted above, in a landmark decision, *McGrain v. Daugherty,*[23] the Court upheld the Senate's authority to investigate these charges concerning the Department.

One of the most prominent congressional investigations of the Department of Justice grew out of the highly charged confrontation at the end of the 97th Congress concerning the refusal of Environmental Protection Agency Administrator Ann Gorsuch Burford, under orders from the President, to comply with a House subcommittee subpoena requiring the production of documentation about EPA's enforcement of the hazardous waste cleanup legislation. This dispute culminated in the House of Representative's citation of Burford for contempt of Congress, the first head of an Executive Branch agency ever to have been so cited by a House of Congress. It also resulted in the filing of an unprecedented legal action by the Department, in the name of the United States, against the House of Representatives

---

[17] *Id.* at 1120.

[18] *Id.* at 1078- 79.

[19] *Id.* at 1015-16 and 1159-60.

[20] *Id.* at 2389.

[21] *Id.* at 1495-1547.

[22] *Id.* at 1790.

[23] 273 U.S. 135 (1927).

and a number of its officials to obtain a judicial declaration that Burford had acted lawfully in refusing to comply with the subpoena.

Ultimately, the lawsuit was dismissed,[24] the documents were provided to Congress, and the contempt citation was dropped. However, a number of questions about the role of the Department during the controversy remained: whether the Department, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the United States Attorney for the District of Columbia not to present the contempt certification of Burford to the grand jury for prosecution and had made the decision to sue the House; and, generally, whether there was a conflict of interest in the Department's simultaneously advising the President, representing Burford, investigating alleged Executive branch wrongdoing, and enforcing the congressional criminal contempt statute. These and related questions raised by the Department's actions were the subject of an investigation by the House Judiciary Committee beginning in early 1983. The committee issued a final report on its investigation in December 1985.[25]

Although the Judiciary Committee ultimately was able to obtain access to virtually all of the documentation and other information it sought from the Department, in many respects this investigation proved as contentious as the earlier EPA controversy from which it arose. In its final report, the committee concluded that:

> [T]he Department of Justice, through many of the same senior officials who were most involved in the EPA controversy, consciously prevented the Judiciary Committee from obtaining information in the Department's possession that was essential to the Committee's inquiry into the Department's role in that controversy. Most notably, the Department deliberately, and without advising the Committee, withheld a massive volume of vital handwritten notes and chronologies for over one year. These materials, which the Department knew came within the Committee's February 1983 document request, contained the bulk of the relevant documentary information about the Department's activities outlined in this report and provided a basis for many of the Committee's findings.[26]

Among the other abuses cited by the committee were the withholding of a number of other relevant documents until the committee had independently learned of their existence,[27] as well as materially "false and misleading" testimony before the committee by the head of the Department's Office of Legal Counsel.[28]

The committee's initial request for documentation was contained in a February 1983 letter from its chairman, Peter Rodino, to Attorney General William French Smith. The

---

[24] *U.S. v. House of Representatives,* 557 F. Supp. 150 (D.D.C. 1983).

[25] See, Report of the House Comm. on the Judiciary on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-1983, H.R. Rep. No.99-435, 99th Cong., 1st Sess (1985) ("EPA Withholding Report").

[26] EPA Withholding Report at 1163; *see* also 1234-38.

[27] *Id.* at 1164.

[28] *Id.* at 1164- 65 & 1191-1231.

committee requested the Department to "supply all documents prepared by or in the possession of the Department in any way relating to the withholding of documents that Congressional committees have subpoenaed from the EPA."[29] The letter also specifically requested, among other things, a narrative description of the activities of each division or other unit of the Department relating to the withholding of the EPA materials, information about the Department's apparent conflict of interest in simultaneously advising the Executive Branch while being responsible for prosecuting the Burford contempt citation, and any instructions given by the Department to the United States Attorney for the District of Columbia not to present the Burford contempt to the grand jury.

At first the Department provided only publicly available documents in response to this and other document requests of the committee.[30] However, after a series of meetings between committee staff and senior Department officials, an agreement was reached whereby committee staff were permitted to review the materials responsive to these requests at the Department to determine which documents the committee would need for its inquiry.[31] Committee staff reviewed thousands of documents from the Land and Natural Resources Division, the Civil Division, the Office of Legal Counsel, the Office of Legislative Affairs, the Office of Public Affairs, and the offices of the Attorney General, the Deputy Attorney General, and the Solicitor General.[32]

In July 1983, the committee chairman wrote to the Attorney General requesting copies of 105 documents that committee staff had identified in its review as particularly important to the committee's inquiry.[33] By May 1984, only a few of those documents had been provided to the committee, and the chairman again wrote to the Attorney General requesting the Department's cooperation in the investigation. In that letter, the chairman advised the Attorney General that the committee's preliminary investigation had raised serious questions of misconduct, including potential criminal misconduct, in the actions of the Department in the withholding of the EPA documents.[34] The committee finally received all of the 105 documents in July 1984, a full year after it had initially requested access. The committee at that time also obtained the written notes and a number of other documents that had been earlier withheld.[35]

There was also disagreement about the access that would be provided to Department employees for interviews with committee staff. The Department demanded that it be permitted to have one or more Department attorneys present at each interview. The committee feared that the presence of Department representatives might intimidate the Department employees in their interviews and stated that it was willing to permit a Department representative to be present only if the representative was "walled-off' from Department officials involved with the controversy, if the substance of interviews was not revealed to subsequent interviewees, and if employees could be interviewed without a

---

[29] *Id.* at 1167 & 1182-83.

[30] *Id.* at 1184.

[31] *Id.* at 1168 & 1233.

[32] *Id.* at 1168.

[33] *Id.* at 1169.

[34] *Id.* at 1172.

[35] *Id.* at 1173.

Department representative present if so requested. The Department ultimately agreed to permit the interviews to go forward without its attorneys present. If a Department employee requested representation, the Department employed private counsel for that purpose. In all, committee staff interviewed twenty-six current and former Department employees, including four Assistant Attorney Generals, under this agreement.[36]

Partly as a result of these interviews, as well as from information in the handwritten notes that had been initially withheld, the committee concluded that it also required access to Criminal Division documents concerning the origins of the criminal investigation of former EPA Assistant Administrator Rita Lavelle in order to determine if the Department had considered instituting the investigation to obstruct the committee's inquiry. The committee also requested information about the Department's earlier withholding of the handwritten notes and other documents to determine whether Department officials had deliberately withheld the documents in an attempt to obstruct the committee's Investigation.[37] The Department at first refused to provide the committee with documents relating to its Lavelle investigation "[c]onsistent with the longstanding practice of the Department not to provide access to active criminal files."[38] The Department also refused to provide the committee with access to documentation related to the Department's handling of the committee's inquiry, objecting to the committee's "ever- broadening scope of ...inquiry."[39]

The committee chairman wrote the Attorney General and objected that the Department was denying the committee access even though no claim of executive privilege had been asserted.[40] The chairman also maintained that "[i]n this case, of course, no claim of executive privilege could lie because of the interest of the committee in determining whether the documents contain evidence of misconduct by executive branch officials."[41] With respect to the documents relating to the Department's handling of the committee inquiry, the chairman demanded that the Department prepare a detailed index of the withheld documents, including the title, date, and length of each document, its author and all who had seen it, a summary of its contents, an explanation of why it was being withheld, and a certification that the Department intended to recommend to the President the assertion of executive privilege as to each withheld document and that each document contained no evidence of misconduct.[42] With respect to the Lavelle documents, the chairman narrowed the committee's request to "predicate" documents relating to the opening of the investigation and prosecution of Lavelle, as opposed to FBI and other investigative reports reflecting actual investigative work conducted after the opening of the investigation.[43] In response, after a

---

[36] *Id.* at 1174-76.

[37] *Id.* at 1176- 77 & 1263-64.

[38] *Id.* at 1265.

[39] *Id.* at 1265.

[40] *Id.* at 1266.

[41] *Id.*

[42] *Id.* at 1268-69.

[43] *Id.* at 1269-70.

period of more than three months from the committee's initial request, the Department produced those two categories of materials.[44]

But this was not the last chapter of this affair. As has been the case in the present inquiry, in the past the Department has frequently made the broad 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 said to be 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. That argument was raised to a constitutional level in litigation that ensued after the Judiciary Committee filed its report and asked the Attorney General to appoint an independent counsel to pursue a criminal investigation of Department officials based on the Committee's findings. The appointment was made and during the course of the investigation one of the subjects, Theodore Olson, who at the time of the Burford affair was the Assistant Attorney General for the Office of Legal Counsel, was served with a subpoena and refused to comply, claiming that the independent counsel statute was unconstitutional on a variety of constitutional grounds.

When the case reached the Supreme Court it rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. Rather, the Court noted in *Morrison v. Olson,* [45] 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.[46] 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*.)[47]

A subsequent relevant case study involved a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology commenced a review of the plea bargain settlement by the Department of Justice of the government's investigation and prosecution of environmental crimes committed by Rockwell International Corporation in its capacity as manager and operating contractor at the Department of Energy's (DOE) Rocky Flats nuclear weapons facility.[48] The settlement was

---

[44] *Id.* at 1270.

[45] 487 U.S. 654 (1988).

[46] *Id.* at 691-92.

[47] *Id.* at 694.

[48] See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Committee on Science, Space and Technology, 102d Cong., 2d Sess., Vols. I and II (1992) ("Rocky Flats Hearings"); Meetings: To Subpoena Appearance by Employees of the Department of Justice and the FBI and To Subpoena

(continued...)

a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA's National Enforcement Investigation Centers, and the DOE Inspector General. The subcommittee was concerned with the size of the fine agreed to relative to the profits made by the contractor and the damage caused by inappropriate activities; the lack of personal indictments of either Rockwell or DOE personnel despite a DOJ finding that the crimes were "institutional crimes" that "were the result of a culture, substantially encouraged and nurtured by DOE, where environmental compliance was a much lower priority than the production and recovery of plutonium and the manufacture of nuclear "triggers"; and that reimbursements provided by the government to Rockwell for expenses in the cases and the contractual arrangements between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.

The subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the United States Attorney for the District of Colorado; an assistant U.S. Attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI field agent; and received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e).[49]

At one point in the proceedings all the witnesses who were under subpoena, upon written instructions from the Acting Assistant Attorney General, Criminal Division, refused to answer questions concerning internal deliberations in which decisions were made about the investigation and prosecution of Rockwell, the DOE and their employees. Two of the witnesses advised that they had information and, but for the DOJ directive, would have answered the subcommittee's inquiries. The subcommittee members unanimously authorized the chairman to send a letter to President Bush requesting that he either personally assert executive privilege as the basis for directing the witnesses to withhold the information or direct DOJ to retract its instructions to the witnesses. The President took neither course and the DOJ subsequently reiterated its position that the matter sought would chill Department personnel. The subcommittee then moved to hold the U .S. Attorney in contempt of Congress.

A last minute agreement forestalled the contempt citation. Under the agreement (1) DOJ issued a new instruction to all personnel under subpoena to answer all questions put to them by the subcommittee, including those which related to internal deliberations with respect to the plea bargain. Those instructions were to apply as well to all Department witnesses, including FBI personnel, who might be called in the future. Those witnesses were to be advised to answer all questions fully and truthfully and specifically instructed that they were allowed to disclose internal advice, opinions, or recommendations connected to the matter. (2) Transcripts were to be made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing. (3) Witnesses were to be interviewed by staff under oath. (4) The subcommittee

---

[48] (...continued)
Production of Documents From Rockwell International Corporation, Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology, 102d Congress, 2d Sess., (1992)("Subpoena Meetings").

[49] Rocky Flats Hearing, Vol. I, at 389-1009, 1111-1251; Vol. II.

reserved the right to hold further hearings in the future at which time it could call other Department witnesses who would be instructed by the Department not to invoke the deliberative process privilege as a reason for not answering subcommittee questions.[50]

The most recent and definitive exploration and resolution of the question of the nature and breadth of Congress' oversight prerogative with respect to DOJ operations occurred as a consequence of the President's December 2001 claim of executive privilege in response to a subpoena by the House Government Reform Committee. That subpoena sought, among other material, Justice Department documents relating to alleged law enforcement corruption in the Federal Bureau of Investigation's Boston office that occurred over a period of almost 30 years. During that time, FBI officials allegedly knowingly allowed innocent persons to be convicted of murder on the false testimony of two informants in order to protect the undercover activities of those informants, then knowingly permitted the two informants to commit some 21 additional murders during the period they acted as informants, and, finally, gave the informants warning of an impending grand jury indictment and allowed them to flee. The President directed the Attorney General not to release the documents because disclosure "would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions," and that committee access to the documents "threatens to politicize the criminal justice process" and to undermine the fundamental purpose of the separation of power doctrine, "which was to protect individual liberty." In defending the assertion of the privilege the Justice Department claimed a historical policy of withholding deliberative prosecutorial documents from Congress in both open and closed civil and criminal cases.[51]

Initial congressional hearings after the claim was made demonstrated the rigidity of the Department's position. The Department later agreed there might be some area for compromise, and on January 10, 2002, White House Counsel Gonzales wrote to Chairman Burton conceding that it was a "misimpression" that congressional committees could never have access to deliberative documents from a criminal investigation or prosecution. "There is no such bright-line policy, nor did we intend to articulate any such policy." But, he continued, since the documents "sought a very narrow and particularly sensitive category of deliberative matters" and "absent unusual circumstances, the Executive Branch has traditionally protected these highly sensitive deliberatiive documents against public or congressional disclosure" unless a committee showed a "compelling or specific need" for the documents.[52] The documents continued to be withheld until a further hearing, held on February 6, 2002, when the committee heard expert testimony describing over 30 specific instances since 1920 of the Department of Justice giving access to prosecutorial memoranda for both open and closed cases and providing testimony of subordinate Department employees, such as line attorneys, FBI field agents and U.S. attorneys, and included detailed testimony about specific instances of DOJ's failure to prosecute meritorious cases. In all instances, investigating committees were provided with documents respecting open and closed cases that often included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during undercover operations, and documents presented to grand juries not protected by Rule 6(e), among other

---

[50] Rocky Flats Hearings, Vol. I at 9-10,25-31,1673-1737; Subpoena Hearings, at 1-3,82-86, 143-51.

[51] Louis Fisher, "The Politics of Executive Privilege," Carolina Academic Press, 108 (2004)(Fisher).

[52] Fisher, *Id.*

similar "sensitive materials." Six days after the hearing the Committee was given access to the disputed documents.[53]

The instances of successful committee access to DOJ documents and witnesses cataloged in the above referenced hearing encompassed a wide number of divisions, bureaus, and offices at Main Justice and U.S. Attorneys offices in the field, and involved the Department's "sensitive" Public Integrity Section,[54] and provide a substantial basis for arguing that no element of the DOJ is exempt from oversight by a jurisdictional committee of the Congress. Indeed, other congressional investigations not cataloged have reached still other DOJ elements, including the DOJ Office of Professional Responsibility. That occurred during the 1995 investigation by the Senate Judiciary Committee's Subcommittee on Terrorism, Technology and Government Information of allegations that several branches of the Department of Justice and the Department of the Treasury had engaged in serious criminal and professional misconduct in the investigation, apprehension and prosecution of Randall Weaver and Kevin Harris at Ruby Ridge, Idaho. The Subcommittee held 14 days of hearings in which it heard testimony from 62 witnesses, including Justice, Federal Bureau of Investigation, and Treasury officials, line attorneys and agents, and obtained various Justice, FBI and Treasury internal reports,[55] and issued a final report.[56]

The Subcommittee's hearings revealed that the involved federal agencies conducted at least eight internal investigations into charges of misconduct at Ruby Ridge, none of which has ever been publically released.[57] DOJ expressed reluctance to allow the Subcommittee to see the documents out of a concern they would interfere with the ongoing investigation but ultimately provided some of them under conditions with respect to their public release. The most important of those documents was the Report of the Ruby Ridge Task Force.[58] The Task Force was established by the DOJ after the acquittals of Randy Weaver and Kevin

---

[53] "Everything Secret Degenerates: The FBI's Use of Murderers As Informants," House Report No. 108-414, 108th Cong., 2d Sess. 121-134 (2004); Hearings, " Investigation Into Allegations of Justice Department Misconduct In New England-Volume I", House Comm. on Government Reform, 107th Cong., 1st and 2d Sess's. 520-556, 562-604 (May 3, December 13, 2001; February 6, 2002) (Hearings); *McIntyre v. United States*, 367 F.3d 38, 42-51 (1st Cir. 2004)(recounting background of FBI corrupt activities); *United States v. Salemme*, 91 Fed. Supp. 2d 141, 148-63, 208-15, 322 (D.Mass. 1993) (same); *United States v. Flemmi,* 195 F. Supp 243, 249-50 (D. Mass. 200); (same) Charles Trefer, "President Bush's First Executive Privilege Claim: The FBI/Boston Investigation", 33 Pres. Stud. Q. 201(2003).

[54] See Hearings, *supra*, at 549-50, 555.

[55] Hearings, "The Federal Raid on Ruby Ridge, Idaho," before the Senate Subcomm. On Terrorism, Technology, Government Information, Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (Ruby Ridge Hearings).

[56] Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary (Ruby Ridge Report). The 154-page document appears not to have been officially reported by the full Committee. A bound copy may be found in the United States Senate Library, catalogue number HV 8141.U56 1995.

[57] Ruby Ridge Report at 1; Ruby Ridge Hearings at 722, 954, 961.

[58] The Task Force Report was never publically released or printed in the Subcommittee's hearing record. A bound copy of the Report provided the Subcommittee may be found in the United States Senate Library, catalogue number HV814.U55 1995.

Harris of all charges in the killing of a Deputy United States Marshal[59] to investigate charges that federal law enforcement agents and federal prosecutors involved in the investigation, apprehension and prosecution of Weaver and Harris may have engaged in professional misconduct and criminal wrongdoing. The allegations were referred to DOJ's Office of Professional Responsibility (OPR). The Task Force was headed by an Assistant Counsel from OPR and consisted of four career attorneys from DOJ's Criminal Division and a number of FBI inspectors and investigative agents. The Task Force submitted a 542 page report to OPR on June 10, 1994, which found numerous problems with the conduct of the FBI, the U.S. Marshals Service, and the U.S. Attorneys office in Idaho, and made recommendations for institutional changes to address the problems it found. It also concluded that portions of the rules of engagement issued by the FBI during the incident were unconstitutional under the circumstances, and that the second of two shots taken by a member of the FBI's Hostage Rescue Team (HRT), which resulted in the death of Vicki Weaver, was not reasonable. The Task Force recommended that the matter of the shooting be referred to a prosecutorial component of the Department for a determination as to whether a criminal investigation was appropriate. OPR reviewed the Task Force Report and transmitted the Report to the Deputy Attorney General with a memorandum that dissented from the recommendation that the shooting of Vicki Weaver by the HRT member be reviewed for prosecutorial merit based on the view that given the totality of circumstances, the agent's actions were not unreasonable. The Deputy Attorney referred the Task Force recommendation for prosecutorial review to the Criminal Section of the Civil Rights Division which concluded that there was no basis for criminal prosecution. The Task Force Report was the critical basis for the Subcommittee's inquiries during the hearings and its discussion and conclusions in its final report.[60]

Claims of Deliberative Process Privilege

Assertions of deliberative process privilege by agencies have not been uncommon in the past. In essence it is argued that congressional demands for information as to what occurred during the policy development process of an agency would unduly interfere, and perhaps "chill," the frank and open internal communications necessary to the quality and integrity of the decisional process. It may also be grounded on the contentions that it protects against premature disclosure of proposed policies before they are fully considered or actually adopted by the agency, and to prevent the public from confusing matters merely considered or discussed during the deliberative process with those on which the decision was based. However, as with claims of attorney-client privilege and work product immunity, congressional practice has been to treat their acceptance as discretionary with the committee. Moreover, a 1997 appellate court decision underlines the understanding that the deliberative process privilege is a common law privilege of agencies that is easily overcome by a showing of need by an investigatory body, and other court rulings and congressional practice have recognized the overriding necessity of an effective legislative oversight process.

---

[59] Weaver was convicted for failure to appear for a trial and for commission of an offense while on release.

[60] See, *e.g.*, Ruby Ridge Hearings at 719-737, 941-985; Ruby Ridge Report at 10-11 ("With the exceptions of the [Ruby Ridge] Task Force Report, which was partially disavowed by the Department, and the April 5, 1995 memorandum of Deputy Attorney General Jamie Gorelick, it appeared to the Subcommittee that the authors of every report we read were looking more to justify agency conduct than to follow the facts wherever they lead."), 61-69, 115, 122-23, 134-35, 139, 145-49.

The appeals court ruling in *In re sealed Case (Espy)*[61] is of special note. The case involved, *inter alia*, White House claims of executive and deliberate process privileges for documents subpoenaed by an independent counsel. At the outset of the appeals court's unanimous ruling it carefully distinguished between the "presidential communications privilege" and the "deliberative process privilege." Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decisionmaking. But the deliberative process privilege applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and "disappears altogether when there is any reason to believe government misconduct has occurred.[62] The court's recognition of the deliberative process privilege as a common law privilege which, when claimed by executive department and agency officials, is easily overcome, and which "disappears" upon the reasonable belief by an investigating body that government misconduct has occurred, may severely limit the common law claims of agencies against congressional investigative demands. A demonstration of need of a jurisdictional committee would appear to be sufficient, and a plausible showing of fraud waste, abuse or maladministration would be conclusive.

Even before *Espy,* courts and committees have consistently countered such claims of agencies as attempts to establish a species of agency privilege designed to thwart congressional oversight efforts. Thus it has been pointed out that the claim that such internal communications need to be "frank" and "open" does not lend it any special support and that coupling that characterization with the notion that those communications were part of a "deliberative process" will not add any weight to the argument. In effect, such arguments have been seen as attempting to justify a withholding from Congress on the same grounds that an agency would use to withhold such documents from a citizen requester under Exemption 5 of the Freedom of Information Act (FOIA).[63]

Such a line of argument is likely to be found to be without substantial basis. As has been indicated above, Congress has vastly greater powers of investigation than that of citizen FOIA requesters. Moreover, in the FOIA itself, Congress carefully provided that the exemption section "is not authority to withhold information from Congress."[64] The D.C. Circuit in *Murphy v. Department of the Army*,[65] 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

---

[61] 121 F. 3d 729 (D.C. Cir. 1997).

[62] 121 F. 3d at 745, 746; see also *id*. at 737-738("[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government'").

[63] 5 U.S.C. 553 (b)(5)(1994).

[64] 5 U.S. C. 552 (d).

[65] 613 F. 2d 1151 (D.C. Cir. 1979).

> 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.[66]

Further, it may be contended that the ability of an agency to assert the need for candor to ensure the efficacy of internal deliberations as a means of avoiding information demands would severely undermine the oversight process. If that were sufficient, an agency would be encouraged to disclose only that which supports its positions, and withhold those with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering the whole evidence, and become little more than a set-piece of entertainment in which an agency decides what to present in a controlled "show and tell" performance.

Moreover, every federal official, including attorneys, could assert the imperative of timidity--that congressional oversight, by holding up to scrutiny the advice he gives, will frighten him away from giving frank opinions, or discourage others from asking him for them. This argument, not surprisingly, has failed over the years to persuade legislative bodies to cease oversight. Indeed, when the Supreme Court discussed the "secret law" doctrine in *NLRB v. Sears, Roebuck & Co.*[67] it addressed why federal officials--including those giving legal opinions--need not hide behind such fears:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if *adopted*, will become public is slight. First, when adopted, the reasoning becomes that of agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports . . .[disclosure].[68]

The deliberative process objection is often raised by an agency to forestall congressional inquiries while it is engaged in the process of promulgating substantive rules. But it is difficult to persuasively contend that disclosure to Congress will do injury to the quality and integrity of the ongoing rulemaking proceeding. Rather, a rulemaking exercise would appear to be a quintessential object of legislative scrutiny. An agency may engage in substantive rulemaking only with an express grant of legislative authority. Often such delegations vest broad discretionary power in an agency. Congress has made agency lawmaking subject to the procedural requirements of the Administrative Procedure Act,[69] which has fostered widespread public participation in the process, and which the courts have attempted to ensure is meaningful. It has not, however, abdicated control over this vital function. Thus Congress may intervene in an agency rulemaking proceeding at any point. It is not limited simply to

---

[66] *Id.* at 1155-56, 1158.

[67] 421 U.S. 132 (1975).

[68] *Id.* at 161 (emphasis in original).

[69] See 5 U.S.C. 553 (1994).

withdrawing an agency's authority or to negating a particular rule by law after the fact. The courts have recognized that where the nature of a rulemaking is general policymaking it is akin to the legislative process[70] and that "[u]nder our system of government the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall."[71] It is therefore "entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policymaking . . . Administrative agencies are expected to balance congressional pressure with the pressures emanating from all other sources."[72]

Arguably, then, the integrity, even the legitimacy, of an agency rulemaking is more damaged by the attempted avoidance of oversight inquiries directed at the basis for proposed agency policy actions of general concerns than it would be by the temporary distress of officials and employees over revelation of positions taken during the policy development process. A commentator has succinctly made this point:

> The legitimacy and acceptability of the administrative process depends on the perception of the public that the legislature has some sort of ultimate control over the agencies. It is through the Congress that the administrative system is accountable to the public. If members of Congress "be corrupt, others may be chosen." The public may not, however, directly remove agency officials. The public looks to its power to elect representatives as its input into the administrative process. The public will perceive restrictions on reducing the accountability of agency officials. This will negatively affect the legitimacy of agency actions, as well as seriously erode notions of popular sovereignty. Even administrators, who may not perceive legislative intrusions into the administrative process as being particularly desirable, recognize congressional supervision as a necessary function in a democratic society. The nature of the government requires that the legislature maintain a careful supervision over agency action.[73]

Some heed also may be paid to the salutary admonition of the Third Circuit Court of Appeals for a court to be "sensitive to the legislative importance of Congressional committees of oversight and investigation and recognize their interest in the objective and efficient

---

[70] *Assoc. Of National Advertisers, Inc., v. FTC,* 627 F. 2d 1151(D.C. Cir. 1979), *cert. denied*. 447 U.S. 921 (1980).

[71] *Sierra Club v. Costle*, 657 F. 2d 298, 400-401 (D.C. Cir. 1981).

[72] *Id*. at 409-410.

[73] Comment, Judicial Limitation of Congressional Influence on Administrative Agencies, 73 Northwestern L. Rev. 931, 941 (1971) (footnotes omitted).

operation of regulatory agencies serves a legitimate and wholesome functions with which we should not interfere."[74]

Conclusion

Past congressional history and practice, as well as pertinent judicial precedent, appear to support the Committee's demands for the documents and testimony called for in its subpoenas. That history also contains instances demonstrating a sensitivity to the law enforcement concerns and duties of the Justice Department and other departments and agencies with law enforcement functions where there has been an absence of a reasonable belief of a jurisdictional committee that government misconduct has occurred. But where such a reasonable belief of maladministration, malfeasance or fraud exists, the observation by Iran-Contra Independent Counsel Lawrence E. Walsh is pertinent: "The legislative branch has the power to decide whether it is more important perhaps to even to destroy a prosecution that 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."[75]

---

[74] *Gulf Oil Corp.* v. FPC, 563 F. 2d 588, 611 (3d Cir. 1977).

[75] Lawrence E. Walsh, " The Independent Counsel and the Separation of Powers," 25 Hous. L. Rev. 1, 9 (1988).