COMPLIANCE BY NONPROFIT GROUPS WITH COMMITTEE SUBPOENAS

I. Introduction

During the course of the Special Investigation, the Committee on Governmental Affairs ("Committee") issued 427 subpoenas requiring the production of documents and/or the personal appearance of an individual for deposition or hearing testimony. The Committee directed a substantial number of these subpoenas to nonprofit organizations that were active participants in the 1996 elections.[1]

At the outset of the investigation, press reports described the increased use of so-called issue advocacy campaigns by nonprofit organizations. These press accounts raised questions about whether those groups were truly nonpartisan and independent from political parties and candidates, as required by federal law.[2] Because of allegations surrounding the activity of nonprofit groups in the 1996 election -- particularly relating to the use of issue advocacy

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[1] The Committee uses the phrase "nonprofit group" as a short-hand method of describing those entities organized for a noncommercial purpose that directly participate in the electoral process through contributions to candidates, the expenditure of funds on the behalf of candidates, or the expenditure of funds to educate the public on issues of public policy. These nonprofit groups are entities that are organized under either §§ 501(c) or 527 of the federal tax code. 26 U.S.C. §§ 501(c), 527 (1997).

Entities organized under these sections of the tax code receive preferential tax status so that their income is either totally or partially exempt from federal taxation. In order to qualify for this preferential tax status, these organizations must abide by specified limitations on their political activity. The degree of restriction on political activity varies widely.

[2] *E.g.*, Glenn F. Bunting et al., "Nonprofits Behind Attack Ads Prompt Senate Probe," *L.A. Times*, May 5, 1997, p. A1; Fred Wertheimer, "Investigate the G.O.P., Too," *N.Y. Times*, Feb. 18, 1997, p. A19. Elizabeth Drew's book, *Whatever It Takes*, examined in great detail the increased activity of nonprofit groups in the electoral process. Drew explored issue advocacy campaigns and the possibility that those campaigns were coordinated with the national parties and presidential candidates. *See* Elizabeth Drew, *Whatever It Takes* (1997).

campaigns -- the Committee decided to investigate the role of nonprofit organizations in the elections.

In order to further that investigation, the Committee subpoenaed thirty-two entities as well as the Republican National Committee ("RNC"), the Democratic National Committee ("DNC"), and the Dole for President ("DFP") and Clinton/Gore '96 campaigns. The Committee also subpoenaed for deposition testimony numerous individuals associated with these nonprofit organizations. In addition, the Committee issued subpoenas to banking institutions, seeking the financial records of several of the nonprofit groups.

Because the bulk of the allegations of illegal and improper conduct during the 1996 elections involved the national political parties and presidential candidates, the Committee served the DNC and the RNC with subpoenas *duces tecum* on April 10, 1997. On the same day, the Committee also served DFP and Clinton/Gore '96 with subpoenas demanding the production of documents.[3]

In addition to the candidate and party committees, the Committee investigated several nonprofit organizations that were supportive of the Republican agenda during the 1996 elections. By either developing policy or sponsoring issue advocacy campaigns, these groups advocated policy positions generally associated with the Republican Party. Accordingly, on April 9, 1997, the Committee issued subpoenas demanding the production of certain documents to the National Policy Forum ("NPF"), Americans for Tax Reform ("ATR"), Triad Management Services, Inc.

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[3] The compliance of the DNC and Clinton/Gore '96 campaign is not discussed in this section of the Committee's report but receives full consideration in other portions of the report. See below for discussion of compliance with Committee subpoenas by the DNC and Clinton-Gore '96 campaign.

("Triad"), the Coalition for Our Children's Future, Inc. ("CCF"), Citizens for the Republic Education Fund, Inc. ("CREF"), and Citizens for Reform, Inc. ("CR").[4]

The AFL-CIO (hereinafter referred to as "the AFL-CIO" or "the Federation") was another group that was very active during the 1996 election cycle. Press accounts linked the leadership of the AFL-CIO with an illegal conspiracy to funnel general treasury funds from the International Brotherhood of Teamsters ("IBT") to the reelection campaign of IBT President Ron Carey. In addition, the Federation sponsored a massive, $35 million dollar issue advocacy campaign overtly designed to return control of Congress to the Democratic Party.[5] Because of allegations of illegality and impropriety surrounding these activities, the Committee unanimously issued a subpoena *duces tecum* to the AFL-CIO on May 23, 1997.

The Committee issued additional document subpoenas to a host of nonprofit groups on July 30, 1997. These nonprofit organizations, which spanned the ideological spectrum, were allegedly involved in a variety of questionable campaign practices during the 1996 elections. Press reports suggested that some of these groups might have violated their tax status and committed election law infractions. The subpoenaed groups included Citizen Action, Citizen Vote, Inc. ("Vote Now '96"), the National Education Association ("NEA"), the International

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[4] Triad is a for-profit organization. However, Triad managed issue advocacy campaigns sponsored by CR and CREF and, thus, enjoyed a unique relationship to the nonprofit organizations. Because many of the compliance questions that arose during the investigation of CR and CREF relate to the Minority staff's efforts to obtain information about CR and CREF from Triad, the Committee is treating Triad as a nonprofit organization for the purposes of this discussion.

[5] The Annenberg Public Policy Center, in its report on issue advocacy campaigns in the 1996 elections, dubbed the AFL-CIO "the-800 pound gorilla of issue advocacy advertisers during the 1996 campaign." Paul Taylor, *Introduction* to Deborah Beck, et al., *Issue Advocacy Advertising During the 1996 Campaign* 3 (Annenberg Public Policy Center 1997).

Brotherhood of Teamsters ("IBT"), the National Council of Senior Citizens ("NCSC"), the Sierra Club, the Campaign to Defeat 209, the Democratic Leadership Council, Inc. ("DLC"), EMILY's List, the National Committee for an Effective Congress ("NCEC"), the Association of Trial Lawyers of America ("ATLA"), Americans United for Separation of Church and State ("Americans United"), the American Defense Institute ("ADI"), the American Defense Foundation ("ADF"), the National Right to Life Committee, Inc. ("NRLC"), Citizens for a Sound Economy ("CSE"), the Christian Coalition, Inc., the Better American Foundation, Inc. ("BAF"), the American Cause, the Republican Exchange Satellite Network ("RESN"), The Coalition: Americans Working for Real Change ("Coalition"), Women for Tax Reform ("WTR"), the Heritage Foundation, and Citizens Against Government Waste.

The Committee encountered substantial resistance to these subpoenas. Entirely apart from the ten individuals who fled the country or the thirty-five witnesses who invoked their Fifth Amendment right against self-incrimination, a large number of individuals who had been subpoenaed for depositions simply refused to appear or declined to answer substantive questions. A still larger number of nonprofit organizations, led in particular by the AFL-CIO, refused in whole or in part to produce documents pursuant to lawfully issued subpoenas *duces tecum.*

Compliance comprises several elements: 1) the timeliness of production, 2) the thoroughness of production, and 3) good faith -- evidencing a genuine desire to cooperate with the Committee. Clearly, compliance is a relative term. With some notable exceptions, most of the entities failed to comply with the Committee's subpoenas.[6] Some of these nonprofit groups

[6] The Committee notes that the NPF initially resisted the Committee's efforts to learn the identities of donors to the group. *See* Order of Chairman Fred Thompson, July 3, 1997 (Ex. 1).

refused to produce any docunly provided documents specifically requested by Committee staff, while a few produced only publicly available material.[7]

Many of the nonprofit groups claimed that the Committee's subpoenas sought information beyond the scope of its legitimate investigative authority. Several nonprofit groups alleged that the Committee's subpoenas violated constitutional guarantees, including the First Amendment right to freedom of expression and association.[8] Some of the organizations baldly asserted that they could not be investigated since they did not engage in illegal or improper behavior during the 1996 federal elections.[9]

The NPF also objected to efforts by the Committee to investigate activities occurring prior to the 1996 federal election cycle. Id. One NPF witness, Michael Baroody, refused to answer questions during a deposition on the grounds that the questions sought information beyond the scope of the Committee's legitimate authority. *Id.* After Chairman Thompson issued an order overruling these objections, NPF fully complied by producing witnesses for depositions and answering each and every question put to them. See below for discussion of the NPF's compliance with Committee subpoenas.

[7] For almost three months, the AFL-CIO repeatedly refused to produce any documents to the Committee as required by the subpoena. Eventually, the Federation produced only 4,145 pages of material, all of which had been made publicly available. Letter from Robert M. Weinberg and Robert F. Muse, Counsel for AFL-CIO, to Michael J. Madigan, Chief Counsel, and Alan I. Baron, Minority Chief Counsel, Aug. 20, 1997 (Ex. 3).

[8] ATLA, the Christian Coalition, Citizen Action, Citizens Against Government Waste, the IBT, NCSC and the NRLC submitted joint objections to the Committee's subpoenas, arguing that those subpoenas exceeded the Committee's authority and infringed on the First Amendment rights of the members of the various organizations. *See* Letter from ATLA, Christian Coalition, Citizen Action, Citizens Against Government Waste, the IBT, NCSC and the NRLC to Michael J. Madigan, Chief Counsel, and Alan I. Baron, Minority Chief Counsel, Sept. 3, 1997 (Ex. 4).

[9] For example, Counsel for ATR objected to the Committee's subpoena on the grounds that ATR had no documents relating to "illegal or improper activities" in connection with the 1996 elections. *See, e.g.,* Letter from Thomas E. Wilson, ATR Counsel, to Madigan J. Madigan, Chief Counsel, June 11, 1997 (Ex. 5).

In addition, some of the nonprofit groups -- most notably the AFL-CIO, the IBT, and the Christian Coalition -- refused to produce witnesses pursuant to deposition subpoenas, or to allow the Committee to interview persons affiliated with those groups.[10] Several of the organizations produced witnesses for depositions but, on advice of counsel, those witnesses declined to answer substantive questions.[11]

In Senate Resolution 39, which authorized the Special Investigation, the full Senate imposed a deadline of December 31, 1997 on the investigation. As a result of this deadline, the Committee found it virtually impossible to enforce its subpoenas. Enforcing a contempt of Congress citation is a time consuming and lengthy process.[12] As a result, the December 31, 1997 deadline severely hampered the Committee's ability to threaten and conduct enforcement proceedings.

In the pages that follow, the Committee discusses the organized resistance to its subpoenas by some of the nonprofit groups and the impact that this resistance had on other nonprofit organizations that had previously been cooperating with the Special Investigation.[13] The Committee then outlines the prevailing legal and constitutional standards governing

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[10] Following the lead of the AFL-CIO, many of these nonprofit groups jointly refused to comply with the Committee's subpoenas. Neil A. Lewis, "Nonprofit Groups to Defy Subpoenas in Senate Inquiry," *N.Y. Times*, Sept. 4, 1997, p. A16.

[11] For example, on advice of counsel, witnesses affiliated with Triad, CR and CREF refused to answer substantive questions during their depositions. *E.g.*, Deposition of Carolyn Malenick, Sept. 16, 1997, pp. 5-29; Deposition of Lyn Nofziger, Sept. 16, 1997, pp. 6-22; Deposition of Carlos A. Rodriguez, Sept. 17, 1997, pp. 5-23.

[12] See below for detailed analysis of contempt procedures.

[13] See below for discussion of resistance to Committee subpoenas.

congressional subpoena power.[14] The Committee closes with an analysis of the contempt procedures and discusses the manner in which the December 31, 1997 deadline rendered those compliance procedures useless to the Committee.[15]

As the following discussion makes clear, this record of noncompliance presents a troubling precedent. The Committee shares the grave concerns expressed by Senator Joseph Lieberman, "[t]he message is: if you ignore a congressional subpoena, you're immune. That's an awful precedent."[16]

II. DISCUSSION

A. Subpoena Compliance by Nonprofit Groups

1) Contagious Noncompliance

The Special Investigation encountered more than sporadic resistance in its effort to learn about illegal and improper activities by nonprofit groups in the 1996 election. In fact, noncompliance was contagious. By the close of the Committee's investigation**,** most of the nonprofit groups had publicly declared their intent to defy subpoenas.[17] Quite a few groups that had theretofore complied with subpoenas ceased cooperating with the Committee after several prominent organizations publicly defied the Committee with impunity.

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[14] See below for discussion of legal standards governing congressional subpoena power.

[15] See below for discussion of December 31, 1997 deadline and its impact on Committee's investigation.

[16] Guy Gugliotta, "Congressional Investigations: More Partisan and Less Powerful," *Wash. Post*, Nov. 20, 1997, p. A23.

[17] Neil A. Lewis, "Nonprofit Groups to Defy Subpoenas in Senate Inquiry," *N.Y. Times*, Sept. 4, 1997, p. A16 (stating that 26 nonprofit groups subpoenaed by the Committee would not comply with requests for documents and witnesses).

This pattern of noncompliance had its genesis in the obstructionist tactics of the AFL-CIO. Indeed, until the AFL-CIO publicly announced its intention -- on August 20, 1997 -- to withhold virtually all of the documents and witnesses requested by the Committee, most of the nonprofit groups were cooperative. After the AFL-CIO took the lead in defying the Committee's subpoenas, compliance by nonprofit groups declined precipitously.

For instance, before the AFL-CIO openly refused to comply with document and deposition subpoenas on August 20, 1997, Triad, CR and CREF produced virtually all documents requested by the Committee. Triad, CR and CREF also produced four witnesses for depositions and scheduled several additional witnesses requested by the Minority staff. Following the AFL-CIO's letter informing the Committee that it would not cooperate, Counsel for Triad, CR and CREF instructed their clients to appear for depositions but not to answer substantive questions.[18]

2) The AFL-CIO's Strategy of Obstruction

Therefore, in order to understand why the Committee encountered enormous opposition to its subpoenas, it is first necessary to understand the circumstances of the AFL-CIO's noncompliance. On May 23, 1997, the Committee subpoenaed the AFL-CIO, demanding the production of all responsive documents by June 15, 1997. The subpoena listed forty-eight specifications, of which Nos. 14 through 48 sought information directly related to the Federation's electoral and political action efforts during the 1996 election cycle.

Counsel for the AFL-CIO responded to the subpoena on June 5, 1997, and immediately objected to the production of documents, arguing that the subpoena exceeded the Committee's

[18] *E.g.*, Malenick deposition, pp. 5-29; Nofziger deposition, pp. 6-22; Rodriguez deposition, pp. 5-23.

mandate and abridged the Federation's First Amendment rights of free speech and association.[19] The Committee staff met with the Federation's Counsel on June 19, 1997, and attempted to accommodate their concerns by asking the attorneys to identify the specific specifications to which they objected. Consistent with the Committee's policy of working with subpoenaed entities to encourage maximum compliance, the Committee offered to narrow the scope of the subpoena in return for the Federation commencing a rolling production schedule.

On July 11, 1997, a full month after the initial return date, the AFL-CIO informed the Committee that it would not articulate specific objections to the scope of the subpoena and declined to begin a rolling production of documents.[20] In response, the Committee again offered to limit the documents initially requested in order to facilitate compliance. The Committee asked that the Federation produce the requested documents by July 30, 1997, and warned that the failure to agree on a proposed production schedule would require the Committee to institute contempt proceedings.[21]

Throughout most of August, the AFL-CIO refused to cooperate and declined repeated efforts by the Committee to establish even a modest production schedule. On August 15, 1997, the Committee summarized the stalemate as follows:

> This is not a complex situation. Nearly three months have passed since the subpoena issued and yet you have not produced a single page of material to the Committee. We

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[19] Letter from Robert M. Weinberg and Robert F. Muse, AFL-CIO Counsel, to Michael J. Madigan, Chief Counsel, and Alan I. Baron, Minority Chief Counsel, June 5, 1997 (Ex. 6).

[20] Letter from Robert M. Weinberg and Robert F. Muse, AFL-CIO Counsel, to Philip Perry and James A. Brown, Majority Counsel, July 11, 1997 (Ex. 7).

[21] Letter from Philip Perry and James A. Brown, Majority Counsel, to Robert M. Weinberg, AFL-CIO Counsel, July 17, 1997 (Ex. 8).

> have made every effort to facilitate compliance by you, including by repeatedly offering to negotiate a reduction in the breadth of the AFL-CIO subpoena, and by indicating a narrow range of high priority documentation for an initial segment of a rolling production process. At no point have you cooperated in this process.[22]

On August 20, 1997, the AFL-CIO produced three boxes of documents totaling 4,145 pages, which its counsel acknowledged were "materials already in the public domain -- e.g., public disclosure forms filed with the Federal Election Commission, publicly filed tax documents, Department of Labor disclosure forms, press releases, television advertisements, and leaflets and handbills."[23] This production obviously included none of the highly relevant documents sought by the Committee.

At the same time, the AFL-CIO submitted its first brief to the Committee, which set forth constitutional and legal objections to the subpoena. In the brief, the Federation cited First Amendment free speech and associational rights and argued that the Committee's subpoena exceeded the scope of its enabling resolution.[24]

> The Committee responded to those objections on August 25, 1997, stating that
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> our review to date has demonstrated that such objections lack significant legal support. It is also clear from the character of such objections that the AFL-CIO has chosen, without

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[22] Letter from Michael J. Madigan, Chief Counsel, and Philip Perry, Majority Counsel, to Robert M. Weinberg and Robert F. Muse, Counsel for AFL-CIO, Aug. 15, 1997 (Ex. 9).

[23] Ex. 3.

[24] *In the Matter of: A Subpoena to the AFL-CIO, Memorandum of Points and Authorities in Support of AFL-CIO's Objections to Subpoena Duces Tecum*, Aug. 20, 1997 (Ex. 10).

> consulting the Committee, to construe the subpoena in as overbroad a manner as possible in order to attempt to justify its continuing delays in compliance.[25]

In the same letter, the Committee significantly narrowed the scope of the subpoena to encourage voluntary compliance so the Committee could proceed expeditiously with its investigation. It did so by amending eleven specifications and unilaterally agreeing not to enforce seventeen others.[26]

After reviewing the AFL-CIO's objections, Chairman Thompson issued an order on September 3, 1997, that instructed the AFL-CIO to produce the requested documents.[27] The order limited the production of documents as set forth in the Committee's August 25, 1997 letter, and indicated that the Committee would not enforce any other specifications in the subpoena.[28]

The AFL-CIO refused to comply with the Chairman's order. Instead, the AFL-CIO's Counsel submitted a second letter brief reasserting the constitutional and other arguments set forth in their August 20, 1997 letter.[29] The Committee never sought to compel compliance by the AFL-CIO. Because of the likelihood that a contempt citation against the Federation would meet a prolonged filibuster on the floor of the Senate, the Committee concluded that it was simply not

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[25] Letter from Michael J. Madigan, Chief Counsel, to Robert M. Weinberg and Robert F. Muse, Counsel for AFL-CIO, Aug. 25, 1997 (Ex. 11).

[26] *Id*.

[27] AFL-CIO Production Order, Sept. 3, 1997 (Ex. 12).

[28] *Id*.

[29] Letter from Robert M. Weinberg and Robert F. Muse, Counsel for AFL-CIO, to Chairman Fred Thompson and Senator John Glenn, Sept. 8, 1997 (Ex. 13). In addition to the document subpoena noted above, the Committee also issued five subpoenas requiring deposition testimony from individuals affiliated with the AFL-CIO. With the exception of Geoffrey Garin, a pollster that worked with the AFL-CIO, those witnesses refused to appear. All five of those individuals, including two consultants retained by the AFL-CIO, were represented by Counsel for the AFL-CIO.

viable to pursue contempt with only a few months until the expiration of the December 31, 1997 deadline.

The Committee concludes that the AFL-CIO not only failed to comply with subpoenas, but that it deliberately adopted an obstructionist strategy designed to thwart production of responsive and relevant documents. The Committee believes that the Federation intentionally adopted this strategy in the cynical hope of escaping scrutiny, knowing that the Committee was operating under a December 31, 1997 deadline that rendered calls for contempt an empty threat.

3) The AFL-CIO Encouraged Noncompliance by Other Nonprofit Groups

The AFL-CIO's obstructionist tactics hampered the Committee's ability to draw any kind of reasonable conclusions about the Federation's activities in the 1996 election cycle. Even more damaging to the Committee's efforts, however, was the encouragement of unwarranted defiance that the AFL-CIO provided other subpoenaed entities.

The Federation openly encouraged other nonprofit groups to resist the Committee's subpoenas. For example, on August 20, 1997, the NEA's Counsel contacted the Committee and stated that he had received a copy of the AFL-CIO memorandum in opposition to the Committee's subpoena.[30] He added that "[t]he arguments that the AFL-CIO makes with regard to the invasion of constitutional rights, exceeding the Committee's mandate, and overbreadth largely are applicable to the NEA subpoena."[31] The Committee notes that the NEA's letter, which was received via facsimile, arrived at the Committee's offices before the AFL-CIO's

[30] Ex. 2, p.2.

[31] *Id.*

memorandum in opposition. Following the lead of the AFL-CIO, the NEA did not produce a single document to the Committee.

The NEA is not the only nonprofit group that took guidance from the AFL-CIO. On September 3, 1997, the same day that the Federation was ordered to comply with the Committee's subpoena or face a contempt citation, a diverse coalition of nonprofit groups filed joint objections to the Committee's subpoenas.[32] The groups, which represented the entire political spectrum, complained that the Committee's subpoenas 1) exceeded the Committee's delegated authority, 2) demanded documents the confidentiality of which were protected by federal law, 3) were overbroad, burdensome and oppressive, and 4) violated the First Amendment rights of the subjected organizations and their members.[33]

The merits of these objections will be addressed in greater detail below but, after a careful review of the authorities and arguments offered by the groups, the Committee finds the objections to without merit.[34]

Like the NEA, several of the groups that submitted joint objections to the Committee on September 3, 1997 conceded in late August that the AFL-CIO had shared its legal brief with the organizations. For example, on August 21, 1997 -- the day after the AFL-CIO submitted its formal objections to the Committee -- the IBT's Counsel advised the Committee that she had received a copy of the Memorandum of Points and Authorities in Support of AFL-CIO's

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[32] Ex. 4.

[33] *Id.*

[34] See below for discussion of congressional subpoena power and its constitutional and legal limitations.

Objections to Document Subpoena, and that "we agree with the AFL-CIO's legal analysis."[35] On the same day, Citizen Action's Counsel wrote to the Committee that her client "agree[d] with many of the objections raised by the AFL-CIO in its opposition . . ."[36]

The impact of the AFL-CIO's obstructionist tactics cannot be overstated. The NCSC, which has a long-standing affiliation with the AFL-CIO, initially agreed to comply with the Committee's subpoena. In fact, on August 13, 1997, the NCSC's Counsel contacted Committee staff and asked that the return date be extended until mid-September because key organization officials were on vacation and unable to respond to the subpoena.[37] Committee staff met with NCSC's Counsel on August 14, 1997, at which time the NCSC agreed to comply with eleven specifications by September 7, 1997. However, on August 20, 1997 -- the same day that the AFL-CIO filed its legal brief in opposition to the Committee's subpoena -- the NCSC's Counsel stated that "on closer examination of the subpoena, we see further First and Fourth Amendment problems, together with what appears to be a demand for records far in excess of the Committee's jurisdiction."[38]

As this correspondence indicates, the AFL-CIO actively encouraged other nonprofit organizations -- even groups that had already agreed to cooperate with the Committee -- to defy

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[35] Letter from Leslie Berger Kiernan, Counsel for IBT, to Michael J. Madigan, Chief Counsel, and Alan I. Baron, Minority Chief Counsel, Aug. 21, 1997, p. 2 (Ex. 14).

[36] Letter from Lyn Utrecht, Counsel for Citizen Action, to Michael J. Madigan, Chief Counsel, and Alan I. Baron, Minority Chief Counsel, Aug. 21, 1997, p.1 (Ex. 15).

[37] Letter from Robert Mozer, Counsel for NCSC, to Michael J. Madigan, Chief Counsel, and Alan I. Baron, Minority Chief Counsel, Aug. 13, 1997 (Ex. 16).

[38] Letter from Robert J. Mozer, Counsel for NCSC, to Michael J. Madigan, Chief Counsel, and Alan I. Baron, Minority Chief Counsel, Aug. 20, 1997 (Ex. 17)

subpoenas. A cursory comparison of the letter from these groups and the brief submitted by the Federation on August 20, 1997 indicates that the organizations supported their joint objections with the same arguments raised by the AFL-CIO.[39] Furthermore, the AFL-CIO's defiance of the Committee's deposition subpoenas encouraged other groups, who did not want their employees or officers testifying before the Committee, to follow suit.

B. Congressional Subpoena Power and Its Limitations

1) The Nonprofits' Objections to the Committee's Subpoenas

As explained above, many of the nonprofit groups justified their noncompliance by arguing that the Committee's subpoenas sought documents beyond the scope of its mandate and/or that the subpoenas impinged on various constitutional rights. In particular, the AFL-CIO -- and the groups that followed its lead -- claimed that the Committee's subpoenas violated First Amendment rights to freedom of speech and association.[40] ATLA also suggested that the subpoenas violated the Fourth Amendment's protection against unreasonable searches and seizures.[41] After a careful review of the materials submitted by the various nonprofit groups, the Committee concludes that -- with a rare exception -- these objections were baseless.

The Committee will first address the objections that were raised as to the Committee's legislative authority. A congressional committee's authority to issue and enforce a subpoena is

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[39] Ex. 4.

[40] Ex. 10; *see also* Ex. 4.

[41] Letter from Roger S. Ballentine, ATLA Counsel, to Michael J. Madigan, Chief Counsel, and Alan I. Baron, Minority Chief Counsel, Aug. 14, 1997 (Ex. 18).

derived from its enabling resolution. In this case, the Committee derived its authority from Senate Resolution 39 and Senate Report 105-7.

It is well established that such a resolution and the accompanying report shall be interpreted first by reference to the language of the resolution, and then, by resorting to the legislative history.[42] Both Senate Resolution 39 and Senate Report 105-7 clearly demonstrate that the Committee possessed the authority to conduct a broad-scale inquiry into the 1996 election campaign, and that the full Senate approved the scope of the Special Investigation.

The Majority Leader originally proposed a version of Senate Resolution 39 which would have allocated $3 million for "conducting an investigation of illegal activities in connection with [the] 1996 Federal election campaigns." As envisioned by the original resolution, the Committee on Rules and Administration would have conducted the investigation.[43]

The Committee on Governmental Affairs subsequently approved an amendment that greatly increased the investigation's budget, granted jurisdiction to the Committee on Governmental Affairs, and expanded the investigation's scope to include "illegal *or improper* activities in connection with 1996 Federal election campaigns."[44] Majority Leader Lott

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[42] *See, e.g., Wilkinson v. United States*, 365 U.S. 399, 408-409 (1961); *Barenblatt v. United States*, 360 U.S. 109, 117 (1959); *Watkins v. United States*, 354 U.S. 178, 209-15 (1957). *See also United States v. Rumely*, 345 U.S. 41, 43 (1953) (holding that "the problem [of interpreting a congressional resolution] is much the same as that which confronts the Court when called upon to construe a statute").

[43] *Congressional Record*, Mar. 11, 1997, p. S2096.

[44] Senate Report 105-7, p. 3 (emphasis added).

subsequently agreed to the Committee's amendment and offered the amendment on the Senate floor.[45]

As set forth in Senate Report 105-7, the Committee's authority extended to an investigation relating, but not limited to, the following activities:

> The independence of presidential campaigns from the political activities pursued for their behalf by outside individuals or groups;
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> the misuse of charitable and tax-exempt organizations in connection with political or fundraising activities;
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> unregulated (soft) money and its effect on the American political system;
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> promises and/or the granting of special access in return for political contributions or favors;
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> the effect of independent expenditures (whether by corporations, labor unions, or otherwise) upon our current campaign finance system, and the question as to whether such expenditures are truly independent; and
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> contributions to and expenditures by entities for the benefit or in the interest of public officials.[46]

The scope of the Committee's proposed inquiry was "a testament to the patent need for a through and wide-ranging investigation into the role of big money in federal elections, both presidential and congressional."[47] In fact, the Minority members of the Committee stated that "[w]e agree wholeheartedly with the description of the scope of the investigation as set forth by the majority

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[45] See above for introduction discussing Committee's mandate.

[46] Senate Report 105-7, p. 3.

[47] *Id.* at pp. 2-3.

report."[48] The Senate ultimately enacted the Committee's amendment to Resolution 39, as offered by the Majority Leader.

Thus, while much of the nonprofit activity under investigation by the Committee would clearly be illegal, the language of Senate Resolution 39 included more than simply illegal conduct. It allowed the Committee to examine practices that might be legal yet improper or unethical. In addition to the text of Senate Resolution 39, a thorough reading of the legislative history -- including the ensuing floor debate -- clearly shows that the subpoenas issued to the various nonprofit groups did not exceed the scope of the Committee's mandate.

For example, Subpoena No. 72, which was issued to Triad, required the production of the following types of documents:

> 1) Documents referring or relating to the founding of the organization, its structure, management, and tax status;
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> 2) Bank records for all Triad accounts;
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> 3) Documents used for fundraising, marketing, polling as well as information concerning advertising and other voter education activity, including phone banks and direct mail;
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> 4) Documents relating to any communications by Triad and an agent of any political committee as well as any donations or contributions to or from a national party committee; and
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> 5) Documents relating to any donations to nonprofit organizations related to Triad.[49]

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[48] *Id.* at pp. 5-6.

[49] With the exception of requiring the production of documents involving persons specifically associated with each group, the language of this subpoena is identical to the language used in the other subpoenas that were issued on April 9, 1997. These subpoenas included those served on the NPF, CR, CREF, ATR and CCF.

This subpoena only requires the production of documents that relate or refer to the group's voter education and election activities.

Similarly, Subpoena No. 95, which the Committee issued to the AFL-CIO, sought only the production of documents directly related to the Federation's voter education, electoral and political activities. Subpoena No. 95 required the AFL-CIO to produce the following types of documents:

> 1) All documents relating to the organizational structure, management, annual reports, annual financial statements, board minutes involving federal elections, campaigns or candidates, as well as employee manuals or handbooks relating to political activity;
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> 2) All documents relating to contributions to any federal political committee or candidate;
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> 3) All documents related to the AFL-CIO's political action committee as well as voter education efforts, including precinct targeting efforts;
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> 4) All documents relating to political or voter education advertising, including polling and other support materials;
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> 5) All documents that relate or refer to any federal election, candidate or campaign;
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> 6) All documents relating to other political action committees working with the AFL-CIO; and
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> 7) All documents relating to grass roots political organizing by the AFL-CIO.[50]

Finally, the language of the last group of subpoenas, which the Committee issued to nonprofit organizations on July 30, 1997, is also well within the broad legislative mandate of Senate Resolution 39. For example, Subpoena 296, which was issued to the National Right to Life Committee, requires the production of the following types of documents:

> 1) Documents referring or relating to the founding of the organization, its structure, management, and tax status;

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[50] The AFL-CIO subpoena is the only subpoena containing this exact language.

2) All financial statements and annual reports;

3) Documents used for fundraising, marketing, polling as well as information concerning advertising and other voter education activity, including phone banks and direct mail;

4) Documents relating to any communications by the National Right to Life Committee and an agent of any political committee as well as any donations or contributions to or from a national party committee; and

5) Documents relating to any donations from the National Right to Life to any federal candidate, political committee or campaign.[51]

As these three examples illustrate, the Committee's subpoenas sought only information related to the voter education, political and electoral activities of the various nonprofit groups.

It was argued that the Committee's subpoenas were invalid because the term "improper" in Senate Resolution 39 was impermissibly vague. It is specious to argue that the term "improper" is vague and undefined by Senate Resolution 39 and the accompanying Report. "Improper" as a functional matter can be defined from several sources, including the Committee's authorizing resolution and statements of Chairman Thompson and other members of the Committee. Consequently, the Committee rejects all of the objections as to scope that were raised by the nonprofit groups during the investigation.

Most of the nonprofit groups also objected to Committee subpoenas on constitutional grounds. For the most part, the Committee finds those objections unpersuasive. While the power of Congress to investigate is broad, "its range and scope" is not unlimited.[52] The "scope of the

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[51] With the exception of requiring the production of documents involving persons specifically associated with each group, the language of this subpoena is identical to the language used in the other subpoenas that were issued on July 30, 1997. These subpoenas include the bulk of the nonprofit groups under investigation. See above for listing of entities subpoenaed on July 30, 1997.

[52] *Barenblatt*, 360 U.S. at 112 (quotation omitted).

[Committee's] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[53] This power is extremely broad so long as the Committee pursues a legitimate legislative interest.

The cases relied upon by the nonprofit groups to justify their noncompliance are inapposite, since they involved attempts by state legislatures to obtain the membership lists of private, volunteer organizations.[54] None of those cases are applicable to Congress. Moreover, it is clear from reading the specifications contained in the various subpoenas that the Committee never sought donor information or membership lists. In fact, Chairman Thompson specifically refused to order nonprofit groups to produce membership or donor information except with respect to foreign members and donors.[55]

The other cases cited by the nonprofit groups to support noncompliance are equally distinguishable because they concern the investigative authority of regulatory bodies.[56] Because the Senate's investigative authority is vested in the Constitution itself, these cases are inapposite.

Notwithstanding the limitations in the Bill of Rights, the Supreme Court has generally acknowledged the broad subpoena authority of Congress. For example, in *Packwood v. Senate*

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[53] *Id.* at 111.

[54] *E.g.*, *Gibson v. Florida Legis. Investig. Comm.*, 372 U.S. 539 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[55] Ex. 1.

[56] *E.g.*, *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924) (addressing whether an adjudicatory agency has the legal authority to subpoena documents related to a price-fixing investigation); *Hearst v. Black*, 87 F.2d 68 (1936) (involving a Federal Communication Commission subpoena of all telegraphs made over a certain time period).

Select Committee on Ethics,[57] the Supreme Court ruled that a subpoena seeking a senator's personal diaries was not overly broad and did not violate either his First or Fourth Amendment rights. The Supreme Court also rejected a First Amendment objection to a Senate subpoena in *Eastland v. United States Servicemen's Fund*.[58]

As a result, the Committee concludes that only three valid objections could be raised by the nonprofit groups. First, the Committee recognized the assertion of an individual's Fifth Amendment right against self-incrimination. Second, the Committee did not *challenge* assertions of the attorney-client and work-product privileges.[59] Third, the Committee recognized the First Amendment rights of the nonprofit groups to maintain the secrecy of their domestic members and donors. Therefore, the Committee believes that the remaining objections as to scope and constitutionality were baseless and frivolous.

C. Enforcement of Committee Subpoenas

1) Contempt Procedures and the December 31, 1997 Deadline

A contempt citation is the only mechanism available to the United States Senate for enforcing a subpoena against a party in noncompliance. As outlined in the preceding pages, many of the nonprofit groups were, at best, in "partial compliance" with the Committee's document and

[57] 510 U.S. 1319 (1994).

[58] 421 U.S. 491 (1975).

[59] The Senate has never officially recognized these common law privileges, *see Jurney v. MacCracken*, 294 U.S. 125, 146 (1935), but the Committee did not elect to challenge their assertion during the Special Investigation.

deposition subpoenas.[60] Partial compliance and outright noncompliance obstructed the Committee's efforts to investigate allegations of improper or illegal campaign finance abuses during the 1996 federal election cycle.

Although the Committee attempted to secure full compliance with its subpoenas, these efforts were severely hampered by the full Senate's imposition of a December 31, 1997 deadline for the Special Investigation. As is explained in the succeeding pages, the contempt process is very time consuming. Thus, the deadline substantially reduced the Committee's leverage and weakened its ability to threaten contempt proceedings as a means of forcing compliance.

2) Classifications of Contempt

The ability to issue contempt citations is an inherent power of both chambers of Congress.[61] There are three types of contempt proceedings - inherent, statutory criminal and statutory civil contempt.[62] Civil contempt is available to the Senate only.[63] Criminal contempt citations are "after the fact" punishments for failure to comply, whereas the civil citation compels cooperation with the subpoena in order to obtain the information requested. The Senate has used the civil citation six times since its inception in 1978, and the criminal citation has not been used by the Senate since the creation of the civil contempt procedures.

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[60] See above for discussion of noncompliance with Committee subpoenas by nonprofit groups.

[61] *See Anderson v. Dunn*, 19 U.S. (6 Wheat) 204 (1821). *See also* Jay R. Shampansky, *Congress' Contempt Power*, CRS Report No. 86-83A, Feb. 28, 1986.

[62] *See Groppi v. Leslie*, 404 U.S. 496 (1972); 2 U.S.C. §§ 192 & 194; 2 U.S.C. § 288d; 28 U.S.C. § 1365.

[63] *See* 2 U.S.C. § 288d; 28 U.S.C. § 1365.

The "inherent contempt" power has not been used by the House or Senate in over sixty years. It is a cumbersome procedure that requires the Senate's Sergeant-at-Arms to physically bring the recalcitrant party before the Senate. There, the party is tried. Conviction by the Senate can result in confinement in the Capitol Jail until compliance or the expiration of a specified time period.[64]

The "statutory criminal contempt" procedure is set forth in 2 U.S.C. §§ 192 and 194, which state that a party under subpoena who refuses to testify or produce documents, or who appears before the Committee and refuses to respond to questions, is subject to a criminal contempt citation from the Senate. The citation must be approved by the Senate to issue. Once passed by the Senate, the President Pro Tempore must certify the criminal contempt citation and then submit it for prosecution to the United States Attorney for the District of Columbia.[65] Upon submission to the United States Attorney, it becomes the "duty" of the United States Attorney to "bring the matter to a grand jury for action."[66]

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[64] The time period can be either the end of the current session of Congress or the life of the Committee. *See* Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice and Procedures of Congressional Inquiry*, Apr. 7, 1995, p. 14.

[65] 2 U.S.C. § 194. If Congress is not in session, the citation can be approved by the "presiding officer." *Id.*

[66] *Id.*; *see also* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 *N.Y.U.L. Rev.* 563 (1991); "Prosecution of Contempt of Congress," Subcommittee on Administrative Law and Governmental Relations, House Comm. on the Judiciary, 98th Cong., 1st Sess. 21-35 (1983) (citing testimony of Stanley Brand). It is unclear whether the United States Attorney retains discretion under the statute to decline prosecution of the recalcitrant party.

Criminal contempt requires a "willful" violation of the Senate subpoena.[67] This form of contempt is punitive and not compulsory. Therefore, if the Senate -- and ultimately the court -- holds a recalcitrant party in criminal contempt, that party cannot purge the contempt penalty by producing the subpoenaed information.[68]

The "statutory civil contempt" procedure is available only to the Senate pursuant to 2 U.S.C. § 288d(a). The committee issuing the subpoena, when faced with noncompliance, must file a report to the full Senate.[69] This report must outline the procedure followed to issue the subpoena; the extent to which the party has complied with the subpoena; any objections raised by the subpoenaed party; and supply the reasons the committee is pursuing civil enforcement, rather than certifying a criminal action for contempt of Congress or initiating a contempt proceeding directly before the Senate.[70]

The civil contempt citation and its accompanying report constitute a Senate Resolution, which is a privileged motion. A privileged motion means that the resolution goes to the Senate floor immediately and is not subject to amendments.[71] Once the resolution reaches the Senate floor, however, it is subject to the rules of the chamber, including filibuster. The Senate, after

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[67] 2 U.S.C. § 192.

[68] 2 U.S.C. § 192. The recalcitrant party can be found guilty of a misdemeanor, which is punishable by a fine up to $1,000 and imprisonment for one year. *Id.*

[69] *Id.* § 288d. In order to be reported out of Committee, the report must be approved by a majority of members voting and present. Id. § 288d(c)(1).

[70] *Id.* § 288d(c)(2).

[71] *Id.* § 288j(a)(1).

considering the report, may adopt a resolution directing the Senate Legal Counsel to initiate civil contempt proceedings against the recalcitrant party.[72]

After adoption of the resolution, Senate Legal Counsel submits an application to the United States District Court for the District of Columbia. The civil action, filed in the committee's name, will request either declaratory relief or an order compelling compliance with the subpoena. In the district court, the recalcitrant party can make motions and interpose objections. If the district court rejects those objections, the court issues an order requiring compliance with the Senate subpoena.

If the party still refuses to comply, the court may try the person in summary proceedings for contempt of court by applying for an order to show cause why the party should not be held in contempt for failure to comply with the court's order. If the court overrules the party's objections to the contempt order, it will impose sanctions in order to compel the recalcitrant party to comply with the subpoena.[73] The contempt order can be purged by the recalcitrant party. Even if the Senate prevails in the district court, the recalcitrant party may still exercise its right to appeal.[74]

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[72] *Id.* § 288d(a).

[73] The judicial contempt power supplements, but does not supplant, the Senate's contempt power. *See id.* § 288d(g).

[74] 28 U.S.C. § 1291.

The entire process can take as long as three months.[75] If the recalcitrant party appeals from the district court, the process can extend for years.

3) Summary

The contempt procedures are the only vehicles by which a Senate committee can ensure compliance with duly issued subpoenas. In order for a Senate committee to conduct a thorough and complete investigation against parties who are willing to withstand public pressure to cooperate, a committee must be able to force the recalcitrant parties to comply with lawful Senate process. Due to the lengthy and arduous procedures for civil and criminal contempt, it is essential that future Senate investigations be free of arbitrary time deadlines. Such deadlines encourage stalling, gamesmanship and outright resistance to committee authority. In fact, the conduct of the nonprofit and other groups illustrates how the Senate imposed deadline of December 31, 1997 impeded the Special Investigation.

III. CONCLUSION

Senate Resolution 39 granted the Committee explicit authority to examine the numerous press accounts of illegal and improper conduct by nonprofit groups in connection with the 1996 federal election cycle. In order to fulfill its responsibilities, the Committee issued subpoenas to those nonprofit groups that were most active during the 1996 elections. Those subpoenas did not exceed the Committee's mandate or its constitutional authority to investigate matters relevant to

[75] For example, during the controversy over the Senate Ethics Committee's attempts to secure former Oregon Senator Bob Packwood's diaries, the Committee's civil contempt order and report issued on October 20th; the full Senate considered the civil contempt citation on November 1st and 2nd; the Senate's filed its application to the district court on December 16th; and, the district court issued its order requiring production of the diaries on January 7th of the following year.

the Senate's consideration of reforms to the federal campaign finance system. Despite the exercise of lawful process, most of the nonprofit groups did not comply with Committee requests for documents and deposition testimony.

Most troubling to the Committee, however, is the manner in which its investigation was obstructed. Prior to the AFL-CIO's open defiance of the Committee, most of the nonprofit groups displayed a general willingness to cooperate with the investigation. Most of the organizations readily produced documents and scheduled witnesses for depositions. Once the AFL-CIO refused to comply with the Committee's subpoenas by raising specious and unsupported legal objections, the other nonprofit groups had no reason -- other than public spiritedness -- to cooperate. In other words, after the AFL-CIO thwarted the Committee's investigation with impunity, the remaining nonprofit groups did not fear the Committee's threats of contempt.

Had the Committee been able to pursue contempt proceedings against the AFL-CIO, or even credibly threaten contempt proceedings, the Committee might have avoided the obstructionist tactics of the AFL-CIO and others. Those threats lacked credibility, however, because the nonprofit groups understood that the Committee could not obtain a contempt of Congress citation from a federal district court before the expiration of the December 31, 1997 deadline. Moreover, even if the Committee could have obtained such a citation, the right of the organizations to appeal a finding of contempt guaranteed that the Committee could not effectively utilize the contempt procedures.

Therefore, the Committee concludes that the Senate's imposition of an arbitrary deadline dramatically impeded the course of the Special Investigation. As is discussed in more detail in

other sections of the report, absent the necessary evidence, the Committee was unable to draw any meaningful conclusions about the activities of nonprofit groups during the 1996 elections.