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Congressional Oversight

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Summary

Congressional oversight of policy implementation and administration, which has occurred throughout the U.S. government experience under the Constitution, takes a variety of forms and utilizes various techniques. These range from specialized investigations by select committees, to annual appropriations hearings, to informal communications between Members or congressional staff and executive personnel, and to the use of extra congressional mechanisms, such as offices of inspector general and study commissions. Oversight, moreover, is supported by a variety of authorities—the Constitution, public law, and chamber rules—and is an integral part of the system of checks and balances between the legislature and the executive.

Organization and Operations

Congressional oversight refers to the review, monitoring, and supervision of federal agencies, programs, activities, and policy implementation. Congress exercises this power largely though its standing committee system. However, oversight, which dates to the earliest days of the Republic, also occurs in a wide variety of congressional activities and contexts. These include authorization, appropriations, and legislative hearings by standing committees; specialized investigations by select committees; and reviews and studies by congressional support agencies and staff.

Congress's oversight authority derives from its "implied" powers in the Constitution, public laws, and House and Senate rules. It is an integral part of the American system of checks and balances.

Principles and Purposes

Underlying the legislature's ability to oversee the executive are democratic principles as well as practical purposes. John Stuart Mill, the British Utilitarian philosopher, insisted that oversight was the key feature of a meaningful representative body: "The proper office of a representative assembly is to watch and control the government."[1] Woodrow Wilson —a future President—describing *Congressional Government*, as a young scholar in 1885, equated oversight with lawmaking, which was usually seen as the supreme function of a legislature. He wrote, "Quite as important as legislation is vigilant oversight of administration."[2]

The philosophical underpinning for oversight is the Constitution's system of checks and balances among the legislature, executive, and judiciary. James Madison, known as the "Father of the Constitution," described the system in *Federalist* No. 51 as establishing "subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other."

Oversight, as an outgrowth of this principle, ideally serves a number of overlapping objectives and purposes:

- improve the efficiency, economy, and effectiveness of governmental operations;
- evaluate programs and performance;
- detect and prevent poor administration, waste, abuse, arbitrary and capricious behavior, or illegal and unconstitutional conduct;
- protect civil liberties and constitutional rights;
- inform the general public and ensure that executive policies reflect the public interest;
- gather information to develop new legislative proposals or to amend existing statutes;
- ensure administrative compliance with legislative intent; and
- prevent executive encroachment on legislative authority and prerogatives.

In sum, oversight is a way for Congress to check on, and check, the executive.

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[1] John Stuart Mill, *Considerations on Representative Government* (London: Parker, Son, and Bourn, 1861), p. 104.

[2] Woodrow Wilson, *Congressional Government* (Boston: Houghton Mifflin, 1885), p. 297.

Powers and Prerogatives

The U.S. Constitution

Although the Constitution grants no formal, express authority to oversee or investigate the executive or program administration, oversight is implied in Congress's impressive array of enumerated powers.[3] The legislature is authorized to appropriate funds; raise and support armies; provide for and maintain a navy; declare war; provide for organizing and calling forth the national guard; regulate interstate and foreign commerce; establish post offices and post roads; advise and consent on treaties and presidential nominations (Senate); and impeach (House) and try (Senate) the President, Vice President, and civil officers for treason, bribery, or other high crimes and misdemeanors.

Reinforcing these powers is Congress's broad authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The authority to oversee derives from these constitutional powers. Congress could not carry them out reasonably or responsibly without knowing what the executive is doing; how programs are being administered, by whom, and at what cost; and whether officials are obeying the law and complying with legislative intent. The Supreme Court has legitimated Congress's investigative power, subject to constitutional safeguards for civil liberties. In 1927, the High Court found that, in investigating the administration of the Department of Justice, Congress was considering a subject "on which legislation could be had or would be materially aided by the information which the investigation was calculated to elicit."[4]

Statutes

The "necessary and proper" clause also allows Congress to enact laws that mandate oversight by its committees, grant relevant authority to itself and its support agencies, and impose specific obligations on the executive to report to or consult with Congress, and even seek its approval for specific actions.

Broad oversight mandates exist for the legislature in several significant statutes. The Legislative Reorganization Act of 1946 (P.L. 79-601), for the first time, explicitly called for "legislative oversight" in public law. It directed House and Senate standing committees "to exercise continuous watchfulness" over programs and agencies under their jurisdiction; authorized professional staff for them; and enhanced the powers of the Comptroller General, the head of Congress's investigative and audit arm, the General Accounting Office (GAO). The Legislative Reorganization Act of 1970 (P.L. 91-510) authorized each standing committee to "review and study, on a continuing basis, the application, administration and execution" of laws under its jurisdiction; increased the professional staff

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[3] Article I, Sec. 8 and Article II, Secs. 2 and 4.

[4] *McGrain* v. *Daugherty*, 273 U.S. 135, 177 (1927); see also *Watkins* v. *United States*, 354 U.S. 178, 187 (1957), and *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1959).

of committees; expanded the assistance provided by the Congressional Research Service; and strengthened the program evaluation responsibilities of GAO. The Congressional Budget Act of 1974 (P.L. 93-344) allows committees to conduct program evaluation themselves or contract out for it; strengthens GAO's role in acquiring fiscal, budgetary, and program-related information; and upgrades GAO's review capabilities.

Besides these general powers, numerous statutes direct the executive to furnish information to or consult with Congress. For example, the Government Performance and Results Act of 1993 (P.L. 103-62) requires agencies to consult with Congress on their strategic plans and report annually on performance plans and results. In fact, more than 2,000 reports are submitted each year to Congress by federal departments, agencies, commissions, bureaus, and offices. Offices of inspector general, for instance, report their findings about waste and abuse, and their recommendations for corrective action semiannually; they are also instructed to issue special reports concerning particularly serious problems. In addition, Congress creates commissions to study and make recommendations for select policy areas that can also involve examination of executive operations and organizations.

There is a long history behind executive reports to Congress. Indeed, one of the first laws of the First Congress—the 1789 Act to establish the Treasury Department (1 Stat. 66)—called upon the Secretary and the Treasurer to report on public expenditures and all accounts. The Secretary was also required "to make report, and give information to either branch of the legislature ... respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office."

Separate from such reporting obligations, public employees may provide information to Congress on their own. In the early part of the 20th century, Congress enacted legislation to overturn a "gag" rule, issued by the President, that prohibited employees from communicating directly with Congress (5 U.S.C. 7211 (1994)). Current "whistleblower" statutes guarantee the right of government employees to petition or furnish information to Congress or a Member.

House and Senate Rules

Chamber rules also reinforce the oversight function. House and Senate rules, for instance, provide for "special oversight" or "comprehensive policy oversight," respectively, for specified committees over matters that relate to their authorizing jurisdiction. In addition, House rules direct each standing committee to require its subcommittees to conduct oversight or to establish an oversight subcommittee for this purpose . House rules also call for each committee to submit an oversight agenda, listing its prospective oversight topics for the ensuing Congress, to the House Committee on Government Reform and Oversight, which compiles and prints them.

The House Government Reform and Oversight Committee and the Senate Governmental Affairs Committee, which have oversight jurisdiction over virtually the entire federal government, moreover, are authorized to review and study the operation of government activities to determine their economy and efficiency and to submit recommendations based on GAO reports. House rules also require that the findings and recommendations from its Government Reform and Oversight Committee be considered by authorizing panels, if presented to them in a timely fashion.

Activities and Avenues

Oversight occurs through a wide variety of congressional activities and avenues. Some of the most obvious are highly publicized investigations by select committees into a major scandal or into executive branch operations gone awry. Temporary select committee inquiries into the Iran-Contra affair in 1987, intelligence agency abuses in 1975-1976, and "Watergate" in 1973-1974 are cases in point. The precedent for this kind of oversight actually goes back two centuries: in 1792, a special House committee investigated the ignominious defeat of an Army force by confederated Indian tribes. By comparison, congressional inquiries in the 104th and 105th Congresses into Whitewater, access to Federal Bureau of Investigation files, White House Travel Office firings, and campaign financing have relied upon standing committees.

Although such highly visible endeavors are significant, they usually reflect only a small portion of Congress's total oversight effort. More routine and regular review, monitoring, and supervision occur in other congressional activities and contexts. Especially important are appropriations hearings on agency budgets as well as authorization hearings for existing programs. Separately, staff and support agency examinations of executive operations and the implementation of programs provide for additional oversight.

Selected References

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CRS Report 95-464. *Investigative Oversight*, by Morton Rosenberg.

Brett-
The library had a looseleaf book on Congressional investigations. Let me know if you want more chapters. I also printed the committee rules. Any more for now?
-Jason

3 Congressional Tools of Inquiry

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§ 3.1. A PENETRATING POWER

The Supreme Court has said that the scope of Congress' power to conduct investigations is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[1] In the words of Chief Justice Earl Warren:

> That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[2]

This chapter examines the major tools of inquiry utilized by the Congress in the exercise of this broad power to investigate.

§ 3.2. CONGRESSIONAL SUBPOENA POWER

Among the tools of inquiry available to Congress in conducting investigations, none is more essential than the power to require by subpoena the attendance of witnesses and the production of documents. Congress first exercised its subpoena power in 1792, in conjunction with the House investigation of General St. Clair's military defeat on the Ohio frontier.[3] Since that time, subpoenas have been used by Congress with ever increasing frequency and have become an integral element of the process of congressional investigations.

[a] Source of the Subpoena Power

The Constitution does not expressly grant Congress the subpoena power. Rather, the Supreme Court has found this power to be an

1. Barenblatt v. United States, 360 U.S. 109, 111 (1959).
2. Watkins v. United States, 354 U.S. 178, 187 (1957).
3. *See supra* Chapter Two, § 2.2.

"indispensable ingredient"[4] of the legislative powers granted to Congress by the Constitution. The rationale for this implied subpoena power is that:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[5]

A properly authorized subpoena issued by a committee or subcommittee has the same force and effect as a subpoena issued by the parent house itself.[6] For a subpoena to be validly issued, a committee or subcommittee must act with adequate authority. While each house of Congress has inherent constitutional authority to investigate, individual committees and subcommittees must be delegated this authority. Both the Senate[7] and House[8] rules now confer upon all standing committees and subcommittees[9] the power to require by subpoena the attendance and testimony of witnesses and the production of documents. Special or select committees must be specifically delegated that authority by Senate or House resolution.[10]

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4. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975). *See also* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

5. McGrain v. Daugherty, 273 U.S. at 175.

6. *See id.* at 158.

7. Senate Rule XXVI(1).

8. House Rule XI(2)(m)(1).

9. Although both House and Senate subcommittees have been conferred subpoena authority by these rules, some committees, either expressly in their rules or informally in practice, may restrict this power and require that subpoenas be issued only by the full committee.

10. *See infra* Appendix A, which sets forth the enabling resolution of the Senate Select Iran-Contra Committee.

Additionally, committees or subcommittees may only issue subpoenas in furtherance of an investigation within their subject matter jurisdiction. As discussed in the next chapter, the subject matter jurisdiction of standing committees is defined by the Senate and House rules,[11] while that of select committees would be set forth in the resolution creating them.

[b] Procedure for Issuance

An area of frequent misconception concerns the authority of a committee or subcommittee chairman, acting on his or her own, to issue subpoenas. It is often assumed (including by some on Capitol Hill) that committee chairmen have inherent authority in this regard. However, the courts have consistently held otherwise. In a 1963 case, *Shelton v. United States,*[12] the D.C. Circuit invalidated a Senate subpoena on the ground that it had been issued by a subcommittee chairman without any vote or participation by the membership of the subcommittee as was required by its enabling resolution. The court held that the full subcommittee, not just its chairman, had to act to invoke the subcommittee's subpoena authority. Under *Shelton* and subsequent holdings,[13] a committee or subcommittee may adopt a rule delegating to its chairman the authority to issue subpoenas,[14] but in the absence of such a rule, a vote by the committee or subcommittee membership is necessary before a subpoena may be properly issued.[15]

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11. House Rule X; Senate Rule XXV. *See infra* Chapter Four, notes 24-35 and accompanying text. These rules confer both legislative jurisdiction—the authority to report measures to the parent House—and oversight jurisdiction—the committee's review and oversight functions; subpoenas may be issued on the basis of either source of jurisdiction.

12. 327 F.2d 601 (D.C. Cir. 1963).

13. The *Shelton* holding was reaffirmed in Liveright v. United States, 347 F.2d 473, 475-76 (D.C. Cir. 1965) and Exxon Corp. v. Federal Trade Commission, 589 F.2d 582, 592 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 943 (1979).

14. House Rule XI(m)(2)(A) expressly provides that "[t]he power to authorize and issue subpoenas... may be delegated to the chairman of the committee pursuant to such rules and under such limitations as the Committee may prescribe."

15. This would require a majority vote by a quorum, generally one-third of the membership for Senate committees, Senate Rule XXVI(7)(a)(1), and a majority for House committees, House Rule XI(2)(M)(2)(A). These quorum requirements are discussed in greater detail *infra* in Chapter Five, notes 13-18 and accompanying text.

Most committees have adopted such rules. Some of these rules delegate authority to the chairman alone, others to the chairman with the agreement of the ranking minority member. Some require notice to committee members, others provide a mechanism by which dissenting committee members may object to the issuance of the subpoena.[16] Although the language and the requirements of these rules differ, all meet the *Shelton* requirement that committee rules delegate subpoena *authority* to the chairman, rather than merely providing for the *issuance* of subpoenas by the chairman.

A congressional subpoena typically will set forth the name of the issuing committee or subcommittee (or of the house of Congress on the rare occasion the subpoena is issued by the parent body) and the date, time, and place of the hearing in which the witness is required to appear. With respect to subpoenas *duces tecum,* the subpoena will be returnable at a committee hearing, providing a way for a witness who objects to production to obtain a ruling from the committee.[17] Frequently, however, a committee only seeks access to documents, and not testimony, from a document custodian, or may want access to the documents in advance of a hearing and the testimony of a witness. Accordingly, committees will often specify on the subpoena that no personal appearance by the document custodian will be required if the documents are delivered in advance of a specified date at the committee offices. An example of a congressional subpoena is included as Appendix F.

Congressional subpoenas are usually served by the U.S. Marshall's office or by committee staff. Although done with less frequency than in the past, the Senate or House Sergeant-at-Arms can also carry out this function. Because the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are inapplicable to congressional subpoenas, the territorial limitations on the service of subpoenas set forth in those rules do not limit the Congress. Service may be affected anywhere in the United States, and not only within a certain distance from the Capitol.

An issue that has occasionally arisen—most recently in 1985 when a Senate committee sought to serve a subpoena on a Soviet sailor on

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16. *See, e.g.*, Senate Labor Rule 17(c); Senate Small Business Rule 3(c); Senate Armed Services Rule 9; Senate Foreign Relations Rule 7; House Armed Services Rule 13; House Foreign Affairs Rule 22.

17. *Cf.* United States v. Bryan, 339 U.S. 323, 332-33 (1950).

board a Soviet freighter temporarily in American waters and in 1986 with respect to various House investigations concerning the exiled former president of the Philippines, Ferdinand Marcos—concerns the issuance of subpoenas abroad or upon aliens in this country. It is well established that aliens in the United States may be summoned by subpoena before a congressional committee.[18] With respect to the issuance of a subpoena to a witness residing on foreign soil, the simple answer is that the Congress may issue and seek to serve a subpoena anywhere, whether in this or any other country; to obtain attendance, a house of Congress retains its historical power to enforce its subpoenas by issuing a warrant ordering its Sergeant-at-Arms to arrest a witness and bring him or her before the bar of the parent body.[19] If the witness were outside of the country, however, the only realistic means of securing compliance would be judicial enforcement. If, as seems likely, a court would enforce a congressional subpoena in circumstances similar to that in which it would enforce its own subpoenas, Congress would likely be able to obtain enforcement of a subpoena issued to a United States national in a foreign country,[20] but not a subpoena issued to an alien abroad.[21]

[c] Challenges to Sufficiency of Subpoenas

If a congressional subpoena is invalid in part, it will generally be held to be unenforceable in its entirety. For example, in *United States v. Patterson*,[22] the court dismissed a contempt indictment on the ground that disregarding a subpoena that sought information beyond the scope of the committee's authority, even though a portion of the material

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

19. *See, e.g.*, Barry v. United States ex rel. Cunningham, 279 U.S. 597, 619 (1929).

20. Congress has by statute provided a mechanism for the issuance of judicial subpoenas upon United States nationals in foreign countries. *See* 28 U.S.C. § 1783 (1987).

21. *See* United States v. Best, 76 F. Supp. 138, 139 (D. Mass. 1948), *aff'd*, 184 F.2d 131 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 939 (1951) ("Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena. They owe no allegiance to the United States.").

22. 206 F.2d 433 (D.C. Cir. 1953).

sought included pertinent matters, could not amount to contempt. The court believing that "[o]ne should not be held in contempt under a subpoena that is part good and part bad,"[23] concluded that "[t]he burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad."[24] However, with respect to subpoenas *duces tecum,* it should be noted that even if the subpoena is improperly authorized or otherwise invalid, if a witness knows from receiving the subpoena that the committee is seeking access to particular documents, and the witness thereafter conceals or destroys those documents, he or she may nonetheless be prosecuted for obstruction of justice under 18 U.S.C. § 1515.[25]

Furthermore, minor irregularities in form will not invalidate a subpoena so long as its meaning is clear to the person to whom it is directed. For example, courts have rejected objections to a subpoena erroneously issued to the United Professional (rather than Public) Workers of America[26] as well as objections to another that, read literally, commanded the House Sergeant-at-Arms, not the witness, to produce the identified documents.[27]

A witness who believes that a subpoena is beyond the issuing committee's authority, violates his or her constitutional rights, or is otherwise objectionable has only limited remedies available to raise those objections. In *Eastland v. United States Servicemen's Fund,*[28] a Senate subcommittee investigating internal security matters issued a subpoena *duces tecum* directing a bank to produce bank records of the United Servicemen's Fund, an organization suspected of subversive activity. The fund sued various members and staff of the subcommittee to enjoin issuance of the subpoena on the ground that it infringed upon the First Amendment and privacy rights of its members. The Court refused to enjoin the issuance of the subpoena, holding that the Speech

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23. *Id.* at 434 (quoting Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951)).

24. *Id.*

25. United States v. Presser, 292 F.2d 171, 174 (6th Cir.), *aff'd,* 371 U.S. 71 (1962), discussed further in this chapter *infra* at note 135 and accompanying text.

26. Flaxer v. United States, 235 F.2d 821 (D.C. Cir. 1956), *vacated on other grounds and remanded,* 354 U.S. 929 (1957).

27. Kamp v. United States, 176 F.2d 618 (D.C. Cir. 1948), *cert. denied,* 339 U.S. 957 (1950).

28. 421 U.S. 491 (1975).

or Debate Clause of the Constitution[29] provides "an absolute bar to judicial interference" with a congressional subpoena.[30] The holding does not mean that congressional subpoenas are immunized from judicial review. However, it does mean that the witness' sole remedy generally[31] is to refuse to comply, run the risk of being cited for contempt, and then raise the objection as a defense in a contempt prosecution.[32]

§ 3.3. STAFF DEPOSITIONS

Another investigative tool that is being used with more frequency in recent years by congressional committees is the staff deposition, which provides a means of obtaining sworn testimony from a witness without requiring members to be present for a formal hearing. Committees have always relied upon informal staff interviews to obtain information; the advantage of a deposition is that the testimony is taken under oath and a transcript of the testimony is made, which is filed with the committee and can be used like the transcript of a regular hearing. The deposition procedure may be used for varied reasons when it is expedient to obtain testimony without a member present—for example, to fill in the details of a complex investigation, to question witnesses outside of Washington while avoiding the inconvenience of conducting a field hearing, or to provide background information for use in later questioning of witnesses at a hearing. Depositions may also be used by a committee in place of closed hearings, with a large number of members and staff present, to minimize leaking of witness' testimony in advance of public hearings. An intensive investigation like that of the Iran-Contra affair often will make ample use of this

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29. U.S. CONST. art. I, §6, cl. 1, discussed in greater detail *infra* in Chapter Seven, § 7.2.

30. 421 U.S. at 503-07.

31. Although a congressional subpoena has never been enjoined on this ground, there is a suggestion in the case law that if documents sought by the subpoena are in the hands of a neutral third party, and the person claiming injury from the subpoena is powerless to raise his constitutional objection himself by refusing to comply, then an action might lie against the third party to enjoin compliance with the subpoena. *See id.* at 513-18 (Marshall, J., concurring); United States v. AT&T, 567 F.2d 121, 129 (D.C. Cir. 1977).

32. *See also* Minns v. McCarthy, 209 F.2d 307 (D.C. Cir. 1953).

technique, having its staff take hundreds of depositions throughout the world.

Staff may take depositions only if the committee is given that authority by its parent house.[33] The procedure for taking depositions is usually set forth in the committee's rules,[34] and is not unlike that familiar to attorneys in civil litigation. Depositions must be noticed, either by the chairman or a designated staff member. Although depositions may be noticed without a subpoena, most committee rules provide that contempt proceedings for a witness' failure to appear for a deposition will be instituted only if the notice is accompanied by a subpoena. Depositions are taken in private before a court reporter and the transcript is filed with the committee. A witness may be accompanied by counsel. If a witness refuses to answer particular questions, the staff member taking the deposition may proceed with other questions or immediately obtain a ruling on the objection from the chairman or other designated committee member; if the chairman or member overrules the objection, he may order the witness to answer or refer the matter to the full committee. Under most of the rules that have been adopted, a committee cannot institute contempt proceedings against a witness unless the witness has been directed to answer by a member of the committee.

§ 3.4. CONGRESSIONAL CONTEMPT POWER

Just as the Constitution does not expressly grant Congress the power to subpoena testimony and materials, so too it is silent as to Congress' power to punish recalcitrant witnesses for contempt.[35] Nevertheless, Congress first asserted its power to punish for contempt

33. *See, e.g.*, S. RES. 23, 100th Cong. 1st Sess., § 5(d)(5), 133 CONG. REC. S90 (daily ed. Jan. 6, 1987) [reprinted *infra* in Appendix A] (granting Senate Iran-Contra Committee authority "[t]o take depositions and other testimony under oath anywhere within the United States or any other country").

34. *See, e.g.*, Senate Permanent Subcommittee on Investigations Rule 9; Senate Aging Committee Rule VI; Senate Iran-Contra Committee Rule 6; House Iran-Contra Committee Rule 7. These rules also all provide a procedure for serving written interrogatories upon witnesses; *see also* 28 U.S.C. § 1364(a) (providing for civil enforcement of Senate interrogatories).

35. The sole exception is the power of each house of Congress, granted by Art. 1, sec. 5, cl. 2 of the Constitution, to remedy contempts committed by its own members.

in 1795,[36] just seven years after the adoption of the Constitution,[37] and the power from an early time has been recognized by the Supreme Court as an inherent attribute of Congress' legislative authority.[38]

[a] Inherent Contempt Power

These early exercises of Congress' contempt power were all pursuant to its inherent "self-help" contempt power, under which a house of Congress may order its Sergeant-at-Arms to arrest an offender for trial before the bar of that house. The contemptuous witness faces possible imprisonment, historically in the District of Columbia jail or guardhouse in the Capitol basement, and may challenge the legality of the confinement in the courts with a writ of habeas corpus.[39] Under Congress' self-help contempt power, imprisonment is limited to the duration of the pending session of Congress.[40] Feeling that harsher penalties were necessary,[41] Congress in 1857 enacted a statute provid-

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36. This first contempt arose from an attempted bribe of three House members. 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 1599-1603 (1907) [hereinafter HINDS' PRECEDENTS]. The Senate first exercised its contempt power in 1800, arising from the refusal of a newspaper editor, who had printed an allegedly libelous newspaper article attacking the Senate and one of its committees, to appear before the Senate. *Id.* at § 1604.

37. Prior to the adoption of the Constitution, the colonial assemblies and the Continental Congress exercised the power to punish for contempt, as did England's House of Lords and House of Commons. *See generally,* Jurney v. MacCracken, 294 U.S. 125, 148-49 (1935); McGrain v. Daugherty, 273 U.S. 135, 175 (1927); Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. PA. L. REV. 691, 708-12 (1926).

38. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). The Court reasoned that if Congress did not possess this power, it "would be exposed to every indignity and interruption, that rudeness, caprice or even conspiracy, may mediate against it." *Id.* at 228.

39. *See* Marshall v. Gordon, 243 U.S. 521 (1917); Kilbourn v. Thompson, 103 U.S. 168, 177 (1880).

40. Anderson v. Dunn, 19 U.S. at 231; *see also* Watkins v. United States, 354 U.S. 178, 207 n.45 (1957). Although it has never been directly tested, there has always been doubt whether this limitation should apply to the Senate, which is a "continuing body" with only one-third of its membership elected each Congress.

41. *See* CONG GLOBE, 34th Cong., 3d Sess. 405 (1857) (congressional contempt statute passed "to inflict a greater punishment than the Committee believes the House possesses the power to inflict.").

ing criminal penalties for contempt of Congress.[42] Although Congress continued to exercise its inherent contempt powers after enacting the 1857 criminal statute,[43] reliance on the statutory procedure soon predominated as increased legislative responsibilities made time-consuming congressional trials impractical. Although Congress still retains its self-help powers,[44] it last resorted to this procedure in 1934.[45]

[b] Statutory Criminal Contempt

The 1857 statute remains essentially unchanged in the current federal code, codified at 2 U.S.C. §§ 192, 194.[46] Section 192 provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes

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42. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155. The first contempt action under the 1857 act was instituted in 1858. *See* 3 HINDS' PRECEDENTS at § 167.

43. For example, the Senate in 1860 brought before it and imprisoned Thadders Hyatt, who had refused to appear before a Senate select committee investigating John Brown's raid at Harpers Ferry. *See* 3 HINDS' PRECEDENTS at § 1722.

44. The 1857 act was enacted to supplement, not supersede, Congress' inherent authority. *See* In re Chapman, 166 U.S. 661, 671-72 (1897). To the extent that Congress, or a state legislature, exercises such inherent powers, the contemptuous witness would be afforded the protections of due process. *See* Groppi v. Leslie, 404 U.S. 496 (1972). The Supreme Court in *Groppi* did not attempt to define precisely the requirements of due process in such a legislative proceeding; Chief Justice Burger suggested that the full panoply of protections afforded defendants in criminal trials would not be required, though he indicated that, at the very least, the witness would have to be given an opportunity to answer the charges against him before the house of Congress or at least a committee of that house. Whether, for example, the accused would have a constitutional right to be represented by counsel or to call witnesses on his behalf remains unclear, though in past exercises of Congress' self-help powers, such protections were frequently granted. *See* 2 HINDS' PRECEDENTS at §§ 1597-1640.

45. *See* Jurney v. MacCracken, 294 U.S. at 143.

46. The constitutionality of this provision was upheld in In re Chapman, 166 U.S. 661 (1897) and United States v. Fort, 443 F.2d 670, 678 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

> default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Because this is a criminal statute by which Congress invokes the aid of the federal courts in its enforcement, the accused contemptor is entitled to all of the safeguards accorded defendants in criminal cases.[47] Accordingly, the burden is on the prosecution to prove all of the elements of the offense beyond a reasonable doubt,[48] the defendant is entitled to a jury trial,[49] and, as with any criminal action, an acquittal cannot be appealed.

There are four primary elements of the offense of criminal contempt of Congress—a) authority, b) legislative purpose, c) pertinency, and d) willfulness, all of which have been the subject of substantial judicial definition.

[1] Authority

Section 192 provides that the contemptor must have been summoned as a witness by either house of Congress. Each house may delegate the power to conduct investigations to a committee or subcommittee and may vest in that committee the power to compel testimony by the issuance of subpoenas. The Senate and House rules provide all standing committees and subcommittees with the authority to investigate and to issue subpoenas within their jurisdiction; special and select committees must be provided that authority by resolution.[50] A witness may not be found in contempt on a matter outside the committee's specifically delegated area of authorization, and the

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47. Russell v. United States, 369 U.S. 749, 755 (1962); Watkins v. United States, 354 U.S. at 208.

48. Flaxer v. United States, 358 U.S. 147, 151 (1958); Quinn v. United States, 349 U.S. 155, 165 (1955).

49. Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974); United States v. Brewster, 154 F. Supp. 126, 136 (D.D.C. 1957), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958).

50. *See supra* notes 6-10 and accompanying text.

authority of the committee must be clearly made known to the witness, requirements discussed in detail in the next chapter.[51] To the extent that a committee lacks authority to investigate a matter that is the subject of a contempt action, the action of a house in certifying the contempt to the U.S. Attorney for prosecution cannot serve to cure the defect retroactively; the duty of the witness to answer imposed by § 192 is judged as of the time of the refusal.[52]

All of the formal requirements for the service of subpoenas imposed upon committees by statute or rule[53] must be observed in order for a contempt conviction to lie. For example, a committee must formally authorize a subpoena's issuance in the absence of a rule providing the committee chairman with such authority.[54] Similarly, all rules adopted by a committee to protect witnesses must be strictly followed. For example, in *Yellin v. United States,*[55] the Supreme Court reversed the contempt conviction of a witness because of the failure of the House Committee on Un-American Activities to observe its rule requiring the full committee to consider the potential injury to a witness' reputation before determining whether to question him in open session.

A final point in this regard is worth noting. Section 192 refers to individuals "summoned as a witness." Though the overwhelming majority of prosecutions for contempt of Congress have involved witnesses who have been subpoenaed by a committee, a witness who voluntarily appears but subsequently refuses to testify may also be prosecuted under § 192.[56]

[2] Valid Legislative Purpose

A second element of contempt imposed by § 192 is that the witness be called to testify or produce documents "upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress."

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51. *See infra* Chapter 4, § 4.1[b]
52. United States v. Rumely, 345 U.S. 41, 48 (1953).
53. *See supra* § 3.2.
54. Shelton v. United States, 327 F.2d 601 (D.C. Cir. 1963), discussed *supra* at notes 12-16 and accompanying text.
55. 374 U.S. 109 (1963).
56. Sinclair v. United States, 279 U.S. 263 (1929).

Although this language refers to *any* matter under inquiry, the provision has been interpreted to require the existence of a proper legislative purpose.[57] A discussion of the judicial definition of this requirement is contained in the next chapter.[58]

[3] Willful Default

Section 192 refers to witnesses who "willfully make default." Willfulness has to do with intentional conduct,[59] not bad faith or moral turpitude;[60] the requirement is satisfied if "the refusal was deliberate and intentional and was not a mere inadvertence or an accident."[61] An otherwise intentional violation of the statute will not be excused by the witness' mistake of law[62] or advice of counsel.[63] Defaults include all forms of failure to testify—refusing to appear, to be sworn, to answer questions, as well as leaving a hearing before being excused by the committee.[64] With respect to failures to produce documents called for by a subpoena *duces tecum,* default occurs upon the return date of the subpoena.[65]

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57. *See* In re Chapman, 166 U.S. 661, 667 (1897).

58. *See infra* Chapter 4, § 4.1[a].

59. United States v. Bryan, 339 U.S. 323 (1950).

60. Braden v. United States, 365 U.S. 431, 437 (1961).

61. Field v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947), *cert. denied,* 332 U.S. 851 (1948).

62. Watkins v. United States, 354 U.S. at 208 ("An erroneous determination on [the witness'] part, even if made in the utmost good faith, does not exculpate him.").

63. Sinclair v. United States, 279 U.S. 263, 299 (1929); Livacoli v. United States, 294 F.2d 207 (D.C. Cir.), *cert. denied,* 366 U.S. 936 (1961). Moreover, although case law in this area is less than clear, there are no cases that directly hold that the defense of superior orders justifies a government official's noncompliance with a congressional subpoena. United States v. Tobin, 195 F. Supp. 588, 614 (D.D.C. 1961), *rev'd on other grounds,* 306 F.2d 270 (D.C. Cir.), *cert. denied,* 371 U.S. 902 (1962), rejected such a defense raised by the Executive Director of the Port of New York Authority, who disregarded a House subpoena upon orders from the governors of New York and New Jersey. Although holding that the defense provides no legal justification for failure to comply, the court left open the possibility that an order from a superior, if unsolicited by the disobedient official, might demonstrate a lack of willfulnesses as required by § 192 for conviction. *Id.* at 613-16.

64. *See, e.g.,* United States v. Costello, 198 F.2d 200 (2d Cir.), *cert. denied,* 344 U.S. 874 (1952); Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948), *cert. dismissed,* 338 U.S. 883 (1949); Townsend v. United States, 95 F.2d 352 (D.C. Cir.), *cert. denied,* 303 U.S. 664 (1938).

65. United States v. Bryan, 339 U.S. 323, 330 (1950).

[4] Pertinency

Lastly, § 192 refers to refusals to answer questions "pertinent" to the subject under inquiry. This requirement is also addressed in the next chapter.[66]

[5] Procedural Aspects

The procedure by which a contempt of Congress is certified by a house of Congress to the U.S. Attorney for prosecution is set forth at 2 U.S.C. § 194, which provides in full:

> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

Under both the Senate and House rules, generally only committees have the power to report to the parent house.[67] Accordingly, the report

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66. *See infra* Chapter Four, § 4.1[c].

67. *See* Senate Rule XXVI(7)(a)(1); House Rule XI(2)(1)(1). These rules require a report to be approved by a majority of members of the committee. With respect to joint committees, it is not settled whether the joint committee could make its report to only one house or whether a report to both houses is necessary.

of a witness' failure to testify will be made to the House or Senate by the full committee, even if the contemptuous conduct occurred before a subcommittee. Under § 194, committees make such reports to the President of the Senate or the Speaker of the House during periods when Congress is not in session. An issue has arisen concerning whether the certification of contempt by the Speaker or Senate President to the U.S. Attorney, when Congress is not in session, is mandatory or discretionary. Although an early district court decision took the position that these certification procedures are mandatory, and that the Speaker and President are without discretion,[68] it now appears settled that the certification procedures of § 194 are indeed discretionary.[69]

An unsettled issue concerning the procedures for certification under § 194 is whether the U.S. Attorney has discretion to refuse to prosecute violations of the section once certified by a house of Congress. The literal language of § 194 and scattered judicial dicta support the view that it is the U.S. Attorney's "duty" to present a contempt citation certified by the House or Senate to the grand jury.[70] However, it is generally assumed that prosecutorial discretion is a purely executive function; as stated by the Supreme Court in *United States v. Nixon,*[71] "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." This potential conflict between the statutory language of § 194 and the U.S. Attorney's prosecutorial discretion was highlighted by the inability of

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68. Ex parte Frankfeld, 32 F. Supp. 915, 916 (D.D.C. 1940).

69. Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966). The court reversed a contempt conviction where the Speaker automatically certified the contempt to the U.S. Attorney when the House was not in session, in the belief that he had no discretion to make an inquiry into the background of the committee's statement of facts or to take any other action. The court in *Wilson* disagreed. It held that in enacting the criminal statute, Congress did not contemplate an empty ceremony. Under § 194, the Speaker or President of the Senate "provide a substitute for the kind of consideration which would be provided by the house involved if it were still in session." *Id.* at 204.

70. *See, e.g.*, United States v. Brewster, 154 F. Supp. 126, 136 (D.D.C. 1957) ("United States Attorney [has]... duty... to bring the matter before the grand jury for its action."), *rev'd,* 255 F.2d 899 (D.C. Cir.), *cert. denied,* 358 U.S. 842 (1958); Ex parte Frankfeld, 32 F. Supp. at 916 (U.S. Attorney "is required, under the language of the statute, the submit the facts to the grand jury."); *accord* R. GOLDFARB, THE CONTEMPT POWER 42 (1963); J. HAMILTON, THE POWER TO PROBE 94 (1976).

71. 418 U.S. 683, 693 (1974).

the House of Representatives in 1982 to secure the contempt prosecution of the Administrator of the Environmental Protection Agency, Ann Gorsuch Burford.

Burford appeared in 1981 before the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation. Under orders from President Reagan, she asserted executive privilege and refused to provide the subcommittee with certain subpoenaed documentation concerning EPA enforcement activities. After the full committee reported a contempt citation, the House cited Burford for contempt of Congress,[72] the first time a house of Congress had ever held the head of an executive agency or department in contempt. Pursuant to § 194, the Speaker certified the contempt resolution to the U.S. Attorney for the District of Columbia, Stanley S. Harris, for presentment to the grand jury. Relying on the prosecutorial discretion of the executive branch, Harris refused to present the contempt citation to the grand jury.[73]

Nevertheless, even if it were squarely held that the U.S. Attorney has no discretion with regard to the presentment of a certified contempt citation to the grand jury, it would not seriously limit executive branch control over criminal contempt proceedings. The U.S. Attorney has considerable influence over the grand jury and could attempt to convince it that no indictment should issue, because a valid defense of executive privilege exists. Although a grand jury has the power to present an indictment despite the U.S. Attorney's opposition,[74] the

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72. H.R. RES. 632, 97th Cong., 2d Sess., 128 CONG. REC. H10,061 (daily ed. Dec. 16, 1982).

73. In later testimony before the House Committee on Public Works and Transportation, Harris argued "that the use of the word 'shall' in a statute like 2 U.S.C. § 194 is directory rather than mandatory." Statement of Stanley S. Harris, United States Attorney for the District of Columbia, Before the House Committee on Public Works and Transportation at 5, June 16, 1983, *cited in* Hamilton & Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J. on Leg. 145, 154 n.56 (1984). Indeed, the U.S. Attorney not only refused to present the contempt citation to the grand jury, but joined the Justice Department and Burford in an unprecedented legal action seeking a declaratory judgment that Burford had lawfully withheld these documents from the House. That action was dismissed shortly thereafter for lack of ripeness. United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983), discussed further in Chapter Six, notes 35-38 and accompanying text *infra*.

74. *See, e.g.*, United States v. Smyth, 104 F. Supp. 283, 294 (D. Cal. 1952); In re Miller, 17 F. Cas. 295 (No. 92,552) (C.C.D. Ind. 1878).

indictment will not be valid and no criminal indictment may proceed unless it is signed by the U.S. Attorney,[75] who has absolute discretion in deciding whether to affix his signature.[76]

The Burford controversy was unusual. In the great majority of cases there will be no conflict between the interests of the two political branches of government, and the U.S. Attorney will initiate prosecution in accordance with § 194. In order for the prosecution to lie, Rule 7(c) of the Federal Rules of Criminal Procedure requires that the indictment contain "a statement of the essential facts constituting the offense charged." According to the case law this includes the subject under inquiry to which the questions that the witness refused to answer were addressed,[77] and perhaps the authority of the committee to conduct the inquiry[78] and the pertinence of the question to that inquiry.[79]

Also relating to the indictment, a witness may be indicted for multiple counts of contempt under § 192 for each document the witness refuses to produce or each question he or she refuses to answer.[80] However, if the separate questions relate to a single subject of inquiry, or seek to establish a single fact, only one penalty for contempt may be imposed.[81]

[6] Purging Criminal Contempt

A final issue is whether a witness can purge himself or herself of the contempt by subsequent compliance with the congressional order. Unlike the civil contempt provision, to which we next turn, § 192 imposes a criminal sanction directed not at enforcing compliance, but on punishing the contumacious witness for past defiance and deterring

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75. *See* Fed. R. Crim. P. 7(c).

76. *See* United States v. Cox, 342 F.2d 167, 171-72 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1967).

77. Russell v. United States, 369 U.S. 749, 764 (1962).

78. *Compare* Sacher v. United States, 252 F.2d 828 (D.C. Cir.), *rev'd on other grounds*, 356 U.S. 576 (1958) *with* United States v. Lamont, 236 F.2d 312 (2d Cir. 1956).

79. *Compare* Sinclair v. United States, 279 U.S. 263, 269 (1929) *with* Braden v. United States, 272 F.2d 653, 662 (5th Cir. 1959), *aff'd*, 365 U.S. 431 (1961).

80. United States v. Emspak, 95 F. Supp. 1012, 1014 (D.D.C. 1951).

81. United States v. Orman, 207 F.2d 148, 160 (3d Cir. 1953).

future contempts. Accordingly, it is well settled that defendants may not purge themselves of contempt by testifying or otherwise complying with the congressional order.[82] However, courts may attempt to temper the severity of this result by suspending sentence upon a defendant's compliance with the subpoena, especially when there is a good-faith question regarding the necessity of compliance and the only way to test the issuing body's authority is by risking contempt.[83] Although imprisonment or other punishment would thus be avoided in such a case, the witness would nevertheless remain guilty of a criminal act.

[c] Civil Contempt

Congress has supplemented its contempt powers by enacting a statutory mechanism for the civil enforcement of Senate, but not House, subpoenas. Created as part of the Ethics in Government Act of 1978,[84] and codified at 2 U.S.C. § 288d and 28 U.S.C. § 1364, this Senate civil subpoena enforcement procedure gives the U.S. District Court for the District of Columbia[85] jurisdiction over any civil action brought by the Senate, or an authorized committee or subcommittee,[86] to enforce Senate subpoenas.[87]

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82. *See* United States v. Brewster, 154 F. Supp. 126, 136-37 (D.D.C. 1951), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958).

83. *See, e.g.*, United States v. Tobin, 195 F. Supp. 588, 617 (D.D.C. 1961), *rev'd on other grounds*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

84. Pub. L. No. 95-521, § 705(f)(1), 92 Stat. 1824 (1978).

85. Under the statute, even an action to enforce a subpoena arising out of a Senate committee field hearing outside of the capital would be prosecuted in the District of Columbia District Court. 28 U.S.C. § 1364(a).

86. Actions may be brought in the name of a Senate committee or subcommittee to secure enforcement of its subpoenas only if authorized by the full Senate, 2 U.S.C. § 288b(d), a procedure consistent with 2 U.S.C. § 194, which requires that a criminal contempt resolution be voted by a full house of Congress. *See* note 67 and accompanying text *supra*. A committee must report to the Senate the procedure it followed in issuing the subpoena, the extent to which the subpoenaed party has complied, any privileges or objections raised by the subpoenaed party, and the comparative effectiveness of bringing a civil action, certifying a criminal contempt, or initiating a contempt proceeding at the bar of the Senate. 2 U.S.C. § 288d(c). The requirement that the committee describe to the Senate any defenses of the witness "institutionalizes a procedure whereby the objections and privileges raised by the subpoenaed party will be placed before the [Senate] for its consideration. This will ensure that the [Senate] will have all relevant information before it when making its determination. By requiring a committee to note both objections as well as privileges,

This is a civil rather than a criminal sanction; its purpose is "to compel obedience to the order of the court."[88] Accordingly, "the [contemptuous] party may terminate his liability by complying with the court's order. The party, therefore, carries the keys to the jail in his own pocket and is given every incentive to comply with the court order. Upon compliance all sanctions against the witness are suspended."[89]

Because this is a civil sanction, it is not necessary to prove that the recalcitrant party intended to violate the court order; it is enough to show that the party had knowledge of it.[90]

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all arguments made by the subpoenaed party with respect to the subpoena will be presented for consideration—whether or not legally dispositive." S. REP. NO. 170, 95th Cong., 2nd Sess., *reprinted in*, 1978 U.S. CODE CONG. & AD. NEWS 4216, 4307.

Section 1364 provides that the Standing Order of the Senate "authorizing suits by Senate Committees" does not permit suit under the section. In 1928, the Senate passed a resolution authorizing its committees to "bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate or other law." S. RES. 262, 70th Cong., 1st Sess., 69 CONG. REC. 10,596 (1928). The Senate passed this resolution in response to the Supreme Court's holding in Reed v. Board of County Comm'rs, 277 U.S. 376, 388 (1928), that a Senate committee was without power to bring a civil suit to enforce its subpoena because the Senate had not authorized it to do so. Resolution 262 is now part of the Standing Orders of the Senate. *See* S. JOUR. NO. 572, 70-1, May 28, 1928.

87. The Senate need not wait for a witness to fail to comply before seeking judicial enforcement. In reporting the bill that contained this provision, the Senate Governmental Affairs Committee stated that "Congress may also act before a party refuses to comply with a subpoena or order if that party threatens not to comply," noting, for example, that "[a]ny action by a party indicating an intent to flee from the country or to destroy subpoenaed documents would justify the bringing of an action to prevent such acts." S. REP. NO. 170, *supra* note 86, at 90. The committee observed, however, that "[c]ivil actions should not be authorized merely as a precaution or as a matter of routine, but if the progress of a committee investigation would be seriously impaired by a party delaying in responding to a subpoena, that fact would be relevant in determining whether bringing a civil action would be justified." *Id.*

The Act applies not only to Senate subpoenas, but to other orders, such as an order to answer interrogatories, 28 U.S.C. § 1364(a). Such orders have been utilized on occasion by committees. *See, e.g.*, S. Res. 23, § 5(d)(5), 100th Cong., 1st Sess., 133 CONG. REC. 590 (daily ed. Jan. 6, 1987) (Senate Iran-Contra Committee authorized "to issue orders which require witnesses to answer written interrogatories under oath"). *See also* note 34 *supra*.

88. 28 U.S.C. § 1364(b).

89. S. REP. NO. 170, *supra* note 86, at 41. Confinement is also limited to the period of the pendency of the investigation. *See infra* note 93.

90. S. REP. NO. 170, *supra* note 86, at 93.

In addition to excluding from its coverage actions to enforce House subpoenas,[91] the statute does not apply to actions to enforce Senate subpoenas directed at officials of the federal government acting in their official capacity, including the President.[92] To date, there have only been two civil actions brought, both successfully, under the new statute to enforce Senate subpoenas.[93]

An interesting, though as yet unresolved, question is whether the House, or the Senate with respect to a subpoena directed at an executive branch official, might have jurisdiction to secure civil

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91. The act, as passed by the Senate, would have provided for civil enforcement of both Senate and House subpoenas; the House conferees refused to agree to the provision as it applied to the House because it had not been considered by the appropriate House committees with jurisdiction. *See* H. CONF. REP. NO. 1756, 95th Cong., 2d.Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4381, 4396.

92. 28 U.S.C. § 1364(a) ("This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity."). *See also* S. REP. NO. 170, *supra* note 86, at 4307-08. Congress evidently excluded from the Ethics in Government Act actions to enforce subpoenas directed at executive officials because of the strong objections raised by the Justice Department to a similar provision in an earlier proposal, the Watergate Reorganization and Reform Act of 1975, S. 495, 94th Cong., 1st Sess. § 101, 121 CONG. REC. 1828-32 (1975). *See also* 123 CONG. REC. 2961 (1977) (remarks of Sen. Abourezk). For a legislative proposal for the civil enforcement of congressional subpoenas to executive branch officials, *see* Hamilton & Grabow, *supra* note 73.

93. Both actions arose from the failure of alleged organized crime figures to testify before the Senate Permanent Subcommittee on Investigations. In re Application of Senate Permanent Subcommittee on Investigations (Cammisano), Misc. No. 80-0102 (D.D.C. Dec. 29, 1980), *aff'd*, 655 F.2d 1232 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981); In re Subpoena to Anthony J. Accardo, Misc. No. 83-0338 (D.D.C. Nov. 16, 1983). In both instances, the witnesses were provided an opportunity to testify after the issuance of the court's order, an opportunity that was accepted by Accardo. In the first case under the statute, however, the witness, William Cammisano, reasserted his refusal to testify and was ordered incarcerated. As was previously noted, under Congress' inherent self-help contempt powers, also a civil remedy, incarceration is limited to the duration of the pending session of the Contress, *see supra* note 40 and accompanying text. Under the statutory civil contempt procedure, 28 U.S.C. § 1364(b), a witness may be incarcerated beyond adjournment *sine die* at the end of a Congress if the committee securing the enforcement of its subpoena certifies to the court its continued interest in the information sought. Cammisano was incarcerated for a period of eighteen months, at which point the Senate Permanent Subcommittee on Investigations indicated no further interest in obtaining his testimony. Interestingly, Cammisano's eighteen month imprisonment for civil contempt of Congress was a full

enforcement of a subpoena under the general federal question jurisdiction provision, 28 U.S.C. § 1331. In *Senate Select Committee v. Nixon,*[94] Judge Sirica dismissed the Senate Watergate Committee's action against President Nixon for lack of subject matter jurisdiction, rejecting federal question jurisdiction on the ground that the then-applicable $10,000 amount in controversy was not met.[95] Congress, however, eliminated the amount-in-controversy requirement for federal question litigation in 1980,[96] removing at least that barrier to jurisdiction.[97] Although there has on occasion been consideration given by both House and Senate committees to bringing a direct action against an executive official under this theory of jurisdiction, the power has never been tested, and its existence remains unsettled.

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six months longer than the maximum penalty available under 28 U.S.C. § 194 for criminal contempt.

In addition, in 1987 the Senate unsuccessfully sought enforcement under the civil contempt statute of an order of the Senate Iran-Contra Committee requiring Richard Secord to execute a consent directive waiving foreign bank secrecy laws. This incident is discussed *infra* in Chapter Four at note 80 and accompanying text.

94. 366 F. Supp. 51, 59-61 (D.D.C. 1973).

95. In response to Judge Sirica's dismissal, Congress enacted a law, Act of Dec. 18, 1973, Pub. L. No. 93-190, 87 Stat. 736 (1973), conferring jurisdiction on the District of Columbia District Court over civil actions brought by the Senate Watergate Committee to enforce its subpoenas.

96. 28 U.S.C. § 1331 (1976), *as amended* Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369. The legislative history of the 1980 amendment makes no suggestion that it was intended to provide a jurisdictional basis for the enforcement of congressional subpoenas. The legislative history of the Senate civil contempt statute, however, provides that the exception for subpoenas directed at federal officers acting in an official capacity "is not intended to be a congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal Government. However, if the federal courts do not now have this authority, this statute does not confer it." S. REP. NO. 170, *supra* note 86, at 4307-08.

97. Even before the amount-in-controversy requirement was eliminated, the D.C. Circuit in United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976), held that a similar congressional subpoena dispute presented claims arising under the Constitution and that subject matter jurisdiction was present under § 1331. The court found the then applicable amount-in-controversy requirement satisfied, stating that "[w]here fundamental constitutional rights are involved, this court has been willing to find satisfaction of the jurisdictional amount requirement for federal question jurisdiction." *Id.* at 389. The Watergate Committee had urged this position on Judge Sirica, but to no avail. *See* Senate Select Comm. v. Nixon, 366 F. Supp. at 58.

§ 3.5. PERJURY FOR FALSE TESTIMONY BEFORE CONGRESS

[a] Testimony Under Oath

[1] Essential Elements of a Violation

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury. Perjury prosecutions are generally brought under § 1621 of Title 18 of the federal code, which provides:

> Whoever-
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> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true... is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.[98]

If the perjured testimony occurs in Washington, D.C. (as opposed to occurring at a field hearing) prosecution may also be brought under a provision of the District of Columbia Code, 22 D.C. Code § 2501. Although the penalties for violation of the two provisions differ slightly, the statutes are similarly worded and the elements required for prosecution are identical. The essential elements are: 1) a false statement, 2) "willfully" made, 3) before a "competent tribunal," 4) involving a "material matter."

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98. Related sanctions are provided for subornation of perjury, the procuring of another to commit perjury. Such conduct is punishable under 18 U.S.C. § 1622, as well as the District of Columbia Code, 22 D.C. Code § 2501. *See generally,* Stein v. United States, 337 F.2d 14 (9th Cir. 1964), *cert. denied,* 380 U.S. 907 (1965).

Proving that the statement is *false* would seem simple enough. However, peculiar to perjury prosecutions is the evidentiary requirement that the falsity of a statement be established in conformity with the "two-witness rule." The two-witness rule prohibits proof of a witness' perjury by the uncorroborated testimony of a single witness, requiring instead either the testimony of two or more witnesses or of a single witness plus some other independent evidence, either circumstantial or direct.[99]

The requirement of *willfulness* demands that the statement not only be false, but that it was known to be false by the witness at the time of his testimony. In other words, the witness must have an intent to deceive. Though the legal requirement itself is straightforward, this element can present difficult matters of proof and is frequently a stumbling block to successful prosecution.

The requirement that the statement be *material* has been given differing interpretations in the context of congressional investigations. Some cases have suggested that it is enough that the statement concerns a matter pertinent to a legitimate subject of inquiry of the committee;[100] other cases have required that the statement be capable of influencing the committee's investigation.[101] However, even if the stricter standard is applied, there is no requirement that the statement actually impede the committee's inquiry; it is sufficient that it would "have a tendency to influence, impede, or hamper a tribunal from pursuing its investigation."[102]

The final requirement is that the statement be made before a *competent tribunal*. For a legislative committee to be competent, a quorum must be present.[103] This has proved an obstacle to conviction in the past, when the allegedly perjurious statement was made with less than a quorum of members present.[104] This problem has been lessened

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99. United States v. Manfredonia, 414 F.2d 76 (2d Cir. 1969); La Placa v. United States, 354 F.2d 56 (1st Cir. 1965), *cert. denied,* 383 U.S. 927 (1966); United States v. Goldberg, 290 F.2d 729,731-33 (2d Cir.), *cert. denied,* 368 U.S. 999 (1961).

100. United States v. Norris, 300 U.S. 564, 573 (1937). On pertinency generally, *see infra* Chapter Four, § 4.1[c].

101. United States v. Icardi, 140 F. Supp. 383, 388-89 (D.D.C. 1956).

102. United States v. Anfield, 539 F.2d 674, 678 (9th Cir. 1976).

103. *See* Meyers v. United States, 171 F.2d 800, 811 (D.C. Cir. 1948), *cert. denied,* 336 U.S. 912 (1949).

104. *See* Christoffel v. United States, 338 U.S. 84 (1949); *see also* United States v. Reinecke, 524 F.2d 435 (D.C. Cir. 1975).

in recent years with the adoption of rules establishing less than a majority of members as a quorum for taking testimony—usually two members for House committees and one member for Senate committees.[105] Nevertheless, the requisite quorum must be present at the time the statement is made, not merely at the time the committee convenes.[106]

Although this requirement can be satisfied by always having present the one or two members needed to constitute a quorum, often committees will take testimony (particularly during closed sessions) with no members in attendance. No prosecution for perjury may lie for statements made only in the presence of committee staff.[107]

[2] Objections of Vagueness

Another ground that has on occasion been successfully raised by congressional witnesses to defeat perjury prosecutions is that the allegations of the indictment are too vague to satisfy the Sixth Amendment requirement that the accused be informed of the accusation against him with sufficient clarity to permit him to prepare a defense. An example of the application of this principle is the 1950s perjury prosecution of Owen Lattimore.[108] Brought before the Senate Internal Security Subcommittee for thirteen days of contentious questioning, Lattimore, an expert on Far Eastern affairs, denied repeated accusations that he was a Communist Party member, a Soviet spy, or a "fellow traveler." Lattimore was charged with a number of counts of perjury arising from his testimony, including the charge that he had falsely testified that he had never "been a sympathizer or any other kind of promoter of Communism or Communist interests." The

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105. These rules are discussed *infra* in Chapter Five, § 5.3.

106. *Christoffel,* 338 U.S. at 90.

107. Unless perhaps, the committee had deposition authority, *see supra* § 3.3, and took formal action to transform the hearing into a staff deposition.

Although not enacted, the Senate Watergate Committee had recommended that the perjury statutes be amended to permit prosecutions for perjury when no members are present (just as a witness can be convicted for perjured statements made during depositions or grand jury testimony with no judge present). *See* J. HAMILTON, *supra* note 70, at 71.

108. United States v. Lattimore, 112 F. Supp. 507 (D.D.C. 1953), *aff'd in relevant part, rev'd in part,* 215 F.2d 847 (D.C. Cir. 1954).

charge was dismissed on Sixth Amendment grounds, the court finding "that this charge is so nebulous and indefinite that a jury would have to indulge in speculation in order to arrive at a verdict."[109] The government then reindicted Lattimore, charging him with falsely testifying that he was not a "follower of the Communist line" and had never been a "promoter of Communist interests." On the same ground of vagueness, the second set of charges was dismissed as well.[110]

[3] Unresponsive or Misleading Testimony

One area that falls outside the scope of the perjury statute is unresponsive or misleading testimony by a witness.[111] The nature of this problem was vividly illustrated by the attempts of Reagan administration officials, revealed during the Iran-Contra hearings, to mislead the Congress about the administration's secret efforts to provide support to the Nicaraguan Contras. For example, during November 1986 testimony before the Senate Intelligence Committee, Assistant Secretary of State Elliot Abrams was asked whether he had "any knowledge or indication that the Contras were receiving funds from Israeli or other Mideastern sources?" Abrams said no, though he had himself just recently solicited $10 million from the Sultan of Brunei. Abrams later maintained that his denial was "literally correct" because, though Brunei is a Moslem, oil-producing country, it is located on the South China Sea and, strictly speaking, is not in the Mideast.[112] Likewise, National Security Adviser John Poindexter justified letters he helped draft to the Congress—indicating that the National Security Council staff was complying with the "letter and spirit" of the Boland Amendment[113]—on the ground that since he

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109. *Id.* at 516.

110. United States v. Lattimore, 127 F. Supp. 405 (D.D.C.), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955).

111. However, a witness who falsely claims he does not recall something may be prosecuted for perjury. *See* Gebhard v. United States, 422 F.2d 281, 287-88 (9th Cir. 1970). The two-witness rule, *see supra* note 99 and accompanying text, does not apply to such a prosecution; circumstantial evidence alone is sufficient. *Gebhard*, 422 F.2d at 288.

112. *See supra*, Chapter 2, note 34.

113. At the time, the Boland Amendment prohibited the Central Intelligence Agency, the Department of Defense, and all other U.S. agencies "involved in intelligence activity" from providing military support to the Contras.

interpreted the Boland amendment as not applying to the NSC, the staff could not possibly have violated it.[114] A similar attitude was expressed by Poindexter in the following description of earlier false testimony by his aide, Lt. Col. Oliver North:

> I did not authorize him to make false statements. I did think he would withhold information and be evasive frankly in answering questions. My objective all along was to withhold from the Congress exactly what the [NSC] staff was doing in carrying out the President's policy....As I've said before, I did not expect him to lie to the committee. I expected him to be evasive....[W]ith his resourcefulness, I thought he could handle it.[115]

While such testimony may be actionable under other theories,[116] it is clearly not actionable as perjury under 18 U.S.C. § 1621 as the sanction has been interpreted by the Supreme Court. In the mid-1960s, a bankrupt movie producer, Samuel Brantson, testified as follows during a bankruptcy proceeding:

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
> A. No, sir.
> Q. Have you ever?
> A. The company had an account there for about six months, in Zurich.
> Q. Have you any nominees who have bank accounts in Swiss banks?
> A. No sir.
> Q. Have you ever?
> A. No sir.[117]

Like the above testimony before Congress about the Reagan administration's Contra support efforts, Branston's testimony was intentionally misleading but literally true. Branston and his company

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114. *See supra* note 112.
115. *See id.*
116. For example, obstruction of justice, *see infra* § 3.5[b][2]
117. Branston v. United States, 409 U.S. 352, 354 (1973).

both had Swiss bank accounts, a fact that Branston, while intentionally withholding a responsive answer, never directly lied about. The trial court and the Second Circuit found Branston's testimony to be perjurious: "for purposes of 18 U.S.C. § 1621, an answer containing half of the truth which also contains a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury."[118]

In a unanimous decision, the Supreme Court squarely rejected that reasoning. While acknowledging that Branston's answers were "not guileless,"[119] the Court found them to be nonperjurious. The perjury statute is not "invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth.... If the witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."[120]

[b] Unsworn False Statements

Many statements made before Congress are unsworn. Much of the investigatory work of Congress is performed through informal staff interviews, where it is likely that only a summary, and not a verbatim transcript, will be prepared. Even testimony at committee hearings may be unsworn. Though a few committees require all witnesses at hearings to be sworn,[121] that practice is the rare exception, and witnesses frequently present unsworn testimony.

Although no prosecutions have been brought against congressional witnesses for willful false testimony not under oath, at least two sanctions may be available to punish such conduct.

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118. *Quoted in id.* at 356.

119. *Id.* at 362.

120. *Id.* at 358-60. The Supreme Court's holding was based upon its interpretation of Congress' intent in enacting 18 U.S.C. § 1621, 409 U.S. at 358, which is a general perjury provision typically applied in a setting "of adversary questioning and cross-examination... largely in the hands of counsel...." *Id.* at 358 n.4. Given the different context of congressional hearings, with most questioning by members of Congress, not trial attorneys, Congress could, but has not, enacted a separate perjury statute with relaxed requirements for testimony before it.

121. *See infra* Chapter Five, note 72 and accompanying text.

[1] The False Statements Statute

False statements before a "department or agency of the United States" are prohibited by 18 U.S.C. § 1001.[122] There is no doubt that this provision applies at least to certain false statements or representations made before Congress. The Supreme Court stated in a 1955 case that § 1001 "calls for an unrestricted interpretation" and that the word " 'department,' as used in this context, was meant to describe the executive, legislative and judicial branches of Government."[123] A similar statement was made more recently in a case upholding the prosecution of Representative George Hanson under the statute: "[Section 1001] embraces false statements made to the House of Representatives."[124] However, none of these cases on their facts involved unsworn oral statements to congressional investigators; all involved the submission of various fraudulent financial statements to Congress.

Some congressional committees have in the past expressed the belief that this statute is applicable to their investigations,[125] but a line of highly contradictory cases concerning the application of the statute to unsworn statements made to the Federal Bureau of Investigation suggested that this was not a certain proposition.[126] These questions may have been put to rest by a 1984 decision of the Supreme Court, *United States v. Rodgers*.[127] In that case, the Supreme Court reversed

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122. Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

123. United States v. Bramlett, 348 U.S. 503, 509 (1955).

124. United States v. Hansen, 566 F. Supp. 162, 163 (D.D.C. 1983), *aff'd*, 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 106 S.Ct. 1262 (1986). *Accord* Diggs v. United States, 613 F.2d 988, 999 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

125. For example, the Senate Watergate Committee. *See* J. HAMILTON, *supra* note 70, at 76.

126. *Compare* Friedman v. United States, 374 F.2d 363 (8th Cir. 1967) *and* United States v. Ehrlichman, 379 F. Supp. 291 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977) *with* United States v. Lambert, 501 F.2d 943 (5th Cir. 1974) (en banc) *and* United States v. Adler, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).

127. 466 U.S. 475 (1984).

the lower court's ruling that § 1001 was inapplicable to false statements made by Larry Rodgers to the FBI and the Secret Service. (Rodgers had told them that his wife, who had previously left him, had been kidnapped and that she was a part of a plot to assassinate the President.) Although the *Rodgers* Court noted that it was expressing no opinion on the validity of cases distinguishing between housekeeping—arguably similar to congressional financial filing requirements—and other functions of departments or agencies,[128] the decision suggests strongly that the scope of the statute is sufficiently broad to encompass other kinds of false statements made to Congress. The Court emphasized that the statute "embraces false statements made 'in *any* matter within the jurisdiction and *any* department or agency of the United States,'"[129] and stated that the broad language of the statute seeks to further the " 'valid legislative interest in protecting the integrity of... official inquiries.' "[130]

[2] Obstruction of Justice

Another sanction potentially applicable to unsworn false statements is an action for obstruction of justice pursuant to 18 U.S.C. § 1505.[131] Although this statute has never been applied to punish a witness' unsworn false oral statement, it has been held applicable to a wide range of activities—evasive answers or false memory lapses under

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128. *Id.* at 483 n.4.

129. *Id.* at 479 (emphasis in original).

130. *Id.* at 481-82. In 1987, the House and Senate Iran-Contra committees took the position in their joint report that § 1001 applies to unsworn false statements made before congressional committees. *See Report of the Congressional Committees Investigating the Iran-Contra Affair,* S. REP. NO. 216, H. REP. NO. 433, 100th Cong., 1st Sess. (1987) *(Iran-Contra Final Report)* at 421 n.40.

131. Section 1505 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

See also 18 U.S.C. § 201(h) (proscribing bribery to influence congressional testimony).

oath,[132] submitting a false sworn written statement to a congressional committee,[133] influencing a witness to testify falsely or to otherwise give false information to congressional investigations,[134] and destroying or concealing documents that the witness knew a congressional committee wanted (even though improperly subpoenaed).[135] To convict a witness under this provision, the obstruction need not be successful; § 1505 is violated if a witness "endeavors" to obstruct proceedings.[136]

§ 3.6. CONGRESSIONAL IMMUNITY

[a] The Use Immunity Statute

Even though a witness has the right to assert the Fifth Amendment privilege before congressional proceedings,[137] a committee may obtain an immunity order from a U.S. district court compelling the witness to answer questions or to produce records. Under the Omnibus Crime Control Act of 1970,[138] an immunized witness receives "use" immunity from his congressional testimony. Use immunity does not bar subsequent prosecution involving matters to which the witness testifies; it only prohibits the use of any "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)... against the witness in any criminal case, except a prosecution for perjury, giving a

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132. United States v. Alo, 439 F.2d 751 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). A witness may not be convicted under 18 U.S.C. § 1621 for perjury for giving testimony under oath that is literally true, but unresponsive or misleading. *See supra* notes 117-20 and accompanying text.

133. United States v. Lavelle, 751 F.2d 1266 (D.C. Cir.), *cert. denied*, 474 U.S. 817 (1957).

134. Stein v. United States, 337 F.2d at 16.

135. United States v. Presser, 292 F.2d 171 (6th Cir. 1961), *aff'd*, 371 U.S. 71 (1962).

136. United States v. Vixie, 532 F.2d 1277, 1278 (9th Cir. 1976). In addition, the "two witness rule," *see supra* note 99, is inapplicable to prosecutions under the obstruction statute. Stein v. United States, 337 F.2d at 20.

137. The privilege against self-incrimination is discussed *infra* in Chapter Four, § 4.2[a].

138. 18 U.S.C. §§ 6001-6005. The congressional immunity statute, *id.* at § 6002, is a part of a broad statutory recodification of nearly 50 separate federal immunity statutes into this single, uniform immunity statute.

false statement, or otherwise failing to comply with the order."

Use immunity contrasts with "transactional" immunity, which immunizes the witness from prosecution for any transaction about which the witness testifies. An earlier nineteenth century congressional immunity statute provided sweeping transactional immunity for congressional testimony, stating that

> no person examined and testifying before either House of Congress or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture, for any fact or act touching which he shall be required to testify before either House of Congress, or any committee of either House, as to which he shall have testified, whether before or after this act;... Provided, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.[139]

As might be expected, wrongdoers rushed to testify before Congress in order to obtain complete immunity for their past misdeeds. "The investigating committees became, during the brief period the law was in force, a kind of bargain-basement confessional where easy absolution could be secured."[140] The widespread problem of "immunity baths" became so great that some congressional committees were reluctant to conduct investigations at all out of a fear of exculpating "great rascals" from criminal liability.[141] As a result, the transactional immunity statute was soon repealed.

The current use immunity statute protects the witness from criminal prosecution[142] on the basis of the witness' own testimony[143] or

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139. *Quoted in* T. TAYLOR, GRAND INQUEST 215-16 (1955).

140. A. BARTH, GOVERNMENT BY INVESTIGATION 131 (1955).

141. *See* CONG. GLOBE, 37th Cong., 2d Sess. 364, 428-31, *cited in* T. TAYLOR, *supra* note 139, at 329.

142. Immunity extends to federal or state criminal prosecution on the basis of the witness' testimony. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

143. An issue that arose during the Iran-Contra hearings was whether a grant of congressional immunity extends to a witness' testimony at a staff deposition. Although the Iran-Contra committees believed that staff depositions were encompassed by the term "proceedings" in the congressional immunity statute, 18 U.S.C. § 6002, in order to avoid controversy when this issue was raised by a witness the committees had a quorum of two members present at those depositions, so that they would qualify as

any evidence derived directly or indirectly from that testimony. In addition to the express statutory exception permitting a witness to be prosecuted for perjury arising from his or her immunized testimony, there is no bar on utilizing a witness' immunized testimony in noncriminal proceedings, such as state or federal civil or administrative proceedings.[144] Of course, an immunized witness' testimony can be used against others.

[b] The Timing of Granting Immunity

Though a witness given immunity remains subject to prosecution for the transaction about which he or she testifies, under the Supreme Court's holding in *Katsinger v. United States,*[145] a heavy burden rests on the prosecutor to establish that the evidence against the accused was secured independently of the compelled congressional testimony. Indeed, the "burden of proof... is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[146]

Because of this burden on the prosecution, the issue of the timing of granting immunity is a significant one. In order to avoid taking an action that will have the likely effect of precluding subsequent prosecution, a congressional committee may postpone granting a witness immunity until such time as the Department of Justice has had the opportunity to isolate under seal the evidence it has in its possession. Thus, the prosecutors may carry their burden of establishing that it was secured independently of the compelled congressional testimony.

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closed hearings. In their final report, the committees recommended that the congressional immunity statute be amended to clarify any ambiguity in this regard. *Iran-Contra Final Report, supra* note 130 at 426.

144. United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir.), *cert. denied,* 420 U.S. 925 (1975).

145. 406 U.S. 441, 460 (1972). *Katsinger* also upheld the constitutionality of use immunity, *id.* at 446, answering the previously unsettled question whether a grant of use, as opposed to full transactional, immunity was sufficient to withdraw a witness' Fifth Amendment privilege.

146. *Id. See also* United States v. Romano, 583 F.2d 1, 7-9 (1st Cir. 1978).

Nevertheless, Congress may have very different interests in immunity than that of the prosecutor. The goal of a prosecutor is usually to grant immunity to lower-level wrongdoers whose testimony will lead to conviction of "bigger fish." Congress, on the other hand, typically wants to grant immunity directly to whoever is most culpable, since that witness will likely have the most to tell. During the Iran-Contra affair, for example, Independent Counsel Lawrence Walsh was seeking as long a delay as possible in the granting of congressional immunity to two of the principal targets of his investigation, Admiral John Poindexter and Lt. Col. North. Many committee members (especially Republicans, who wanted to get this testimony out as quickly as possible to minimize its potential impact on the 1988 presidential election) favored immediately granting the two immunity. Ultimately, a compromise was reached between Walsh and the committee chairmen; it was agreed that the committees would defer voting on immunity to Poindexter and North until late in the investigation, at which time Walsh would not invoke his statutory right to defer the granting of immunity for twenty days.[147] In all, the Iran-Contra committees granted immunity to twenty-six individuals, including North and Poindexter.[148]

[c] Requirements for Immunity

The requirements for an immunity application, as set forth at 18 U.S.C. § 6005, are twofold. First, the application, made to a federal district court, must be approved by an affirmative vote of a majority of either house or, as is more common, by two-thirds of the members of a full committee (not of the subcommittee and not merely two-thirds of the members of the committee who are present at the vote).[149] Second, to give the Department of Justice[150] an opportunity to isolate preexisting evidence in its possession, the U.S. Attorney General must be notified of the intent to apply for an immunity order at least ten days

147. *See infra* note 152 and accompanying text.
148. *See supra* Chapter 2, §2.6.
149. 18 U.S.C. § 6005(b)(2) (1982).
150. Or an inedependent counsel, if appointed.

before the application is made.[151] Pursuant to this notification, the Attorney General may require the court to defer the entry of an immunity order for an additional twenty days.[152] However, the Attorney General has no power to veto a request for immunity,[153] and the court has only a "ministerial duty," with no discretion to refuse to enter an immunity order, provided these two procedural prerequisites are satisfied.[154]

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151. *Id.* § 6005(b)(3). In practice, this ten-day notice requirement may be waived by the Department of Justice. In addition, the immunity statute authorizes the grant of immunity for any witness who "has been or *may be called* to testify," *id.* § 6005(a) (emphasis supplied), thus permitting a committee to initiate an immunity proceeding before a witness actually appears and asserts his privilege against self-incrimination if it is known in advance or suspected that the witness will refuse to testify or answer certain questions.

152. *Id.* § 6005(c).

153. The model for the immunity statute enacted in 1970 originated with the National Commission on the Reform of Federal Criminal Laws. The Commission drafters explained that the Attorney General's role was so limited because "[i]n the special instance of congressional inquiries... it would be virtually unthinkable to give the Attorney General the additional power of disapproval of immunity, because in a Teapot Dome-type congressional investigation the Attorney General himself would be the focus of the inquiry." *Quoted in* Application of United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1277 (D.D.C. 1973).

154. *Id.* at 1275-76. Nevertheless, while a court would have no role in determining the wisdom of conferring immunity, it might refuse to enter an immunity order if a committee's investigation lacked a proper legislative purpose or exceeded its authority, or if the testimony sought was irrelevant to that authorized area of inquiry. *See id.* at 1278-79. Three limitations on the exercise of Congress' investigatory power are discussed in the next chapter.

Because of the limited role of the court in immunity applications, applications may be decided *ex parte* without a hearing. Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978).

4 Limitations on Congressional Power to Investigate

§ 4.1 Legislative Purpose, Authority, and Pertinency
- [a] Legislative Purpose
- [b] Authority
- [c] Pertinency

§ 4.2 Protections of the Bill of Rights
- [a] The Fifth Amendment
  - [1] Applicability to Congressional Proceedings
  - [2] Invoking the Fifth Amendment
  - [3] Committee Action
  - [4] Waiver of the Privilege
  - [5] Congressional Immunity
- [b] The First Amendment
- [c] The Fourth Amendment
- [d] The Sixth Amendment

§ 4.3 Common Law Testimonial Privileges

§ 4.1. LEGISLATIVE PURPOSE, AUTHORITY, AND PERTINENCY

[a] Legislative Purpose

Although Congress' power to investigate is broad,[1] it is not unlimited. A threshold limitation on the power to investigate is that it may be exercised only "in aid of the legislative function."[2] Thus, it has been stated that Congress has no power "to expose for the sake of exposure,"[3] or to inquire into matters that are within the exclusive province of one of the other branches of government[4] or are reserved to the states.[5] Although statements to this effect are often repeated in the case law, the receptivity of the courts to these claims in actual practice has varied dramatically since the Supreme Court first addressed the issue in an 1880 decision, *Kilborn v. Thompson*.[6]

Hattie Kilborn was imprisoned for his refusal to answer questions of a House select committee created to investigate a real estate pool in which he and Jay Cooke & Co., a federal depository, had participated. He thereafter brought an action for false imprisonment against the House Sergeant-at-Arms. The Supreme Court, offering an extremely narrow interpretation of Congress' investigatory power, held that Kilborn had been wrongly imprisoned because the purpose of the investigation was to pry improperly "into the personal affairs of individuals . . . [and] could result in no valid legislation on the subject to which the inquiry referred."[7] In addition, because the matter under investigation was concurrently the subject of bankruptcy proceedings in the federal courts, the Court held that the committee had improperly sought to exercise powers granted exclusively to the judiciary.[8]

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1. *See supra* Chapter Three, § 3.1.
2. Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).
3. Watkins v. United States, 354 U.S. 178, 200 (1957)
4. Barenblatt v. United States, 360 U.S. 109, 112 (1959) ("Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive.").
5. *Cf.* Tobin v. United States, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).
6. 103 U.S. 168 (1880).
7. *Id.* at 195.
8. *Id.*

However, subsequent cases, describing *Kilborn* as "severely discredited,"[9] have entertained a broader view of the legislative function, and presume that the object of congressional inquiries is legitimate and directed at the potential enactment of legislation. For example, the Court in *In re Chapman,*[10] upheld an investigation into charges of corruption against several senators accused of speculating in sugar stocks during consideration of a tariff bill, even though the authorizing resolution did not expressly set forth the relationship of the investigation to a proper legislative purpose. The Court stated that "[w]e cannot assume on this record that the action of the Senate was without a legitimate object," noting that "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."[11]

Further evidence of the Court's willingness to presume a valid legislative purpose is seen in two cases growing out of the Teapot Dome scandal, *McGrain v. Daugherty*[12] and *Sinclair v. United States.*[13] In the first case, the House Sergeant-at-Arms had arrested the Attorney General's brother, Mally Daugherty, for his failure to respond to a subpoena that sought information about alleged corruption and maladministration in the Department of Justice. Relying upon *Kilbourn,* a district court judge released Daugherty on a writ of habeus corpus, declaring that "[w]hat [the Senate] is proposing to do is to determine the guilt of the Attorney General.... In so doing it is executing the judicial function.... This it has no power to do."[14] The Supreme Court reversed, holding that:

> It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of

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9. *E.g.*, Hutcheson v. United States, 369 U.S. 599, 613 n.16 (1962), and cases cited therein. *Kilbourn* was written by Justice Samuel Miller. Miller's biographer wrote that Miller was disturbed at the time by the "headlong pace at which the Congress during the Reconstruction period was carrying along the whole governmental system," quoting a letter from Miller expressing the view "that the House is gradually absorbing all of the powers of the government." C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 332-33 (1939), *quoted in* Carr, *Constitutional and Statutory Limitations on Congressional Investigations,* 5 Cap. Studies 11, 19 n.14 (1977).

10. 166 U.S. 661 (1897).

11. *Id.* at 670

12. 273 U.S. 135 (1927).

13. 279 U.S. 263 (1929).

14. *Quoted in McGrain,* 273 U.S. at 177.

> legislation; but it does show that the subject to be investigated was the administration of the Department of Justice.... Plainly the subject was one in which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit....The only legitimate object the Senate could have in ordering the investigation was to aid in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object.[15]

Sinclair v. United States,[16] decided two years later, is to the same effect. There, the Court upheld a Senate investigation of fraudulent oil and gas leases on government property over the witness' objection that the committee's questions related to his "private affairs" and to matters cognizable only in the courts, where litigation was then pending. While agreeing that "Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits," the Court made clear that Congress' authority to investigate "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."[17]

The Supreme Court's willingness to presume a valid legislative purpose was tested in a series of decisions in the 1950s arising from Senate and House investigations of Communism in the United States. As the Court observed in 1957 in its seminal decision in *Watkins v. United States:*

> In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also contributed to the changed scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens. It brought before the courts novel questions of the appropriate limits of congressional inquiry.[18]

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15. *Id.* at 177-178.
16. 279 U.S. 263 (1929).
17. *Id.* at 295.
18. 354 U.S. at 195.

In *Watkins* the Court held that where rights protected by the Bill of Rights are threatened, "the mere semblance of legislative purpose would not justify [a congressional] inquiry."[19] *Watkins* additionally states, in language already quoted, "that there is no congressional power to expose for the sake of exposure."[20] Later cases of the Supreme Court, while repeating the admonition that Congress is powerless to "expose for the sake of exposure," have shown an extreme reluctance to question the motives of Congress and have never made that the basis of a decision striking down congressional action. These cases have avoided that result by consistently reaffirming that "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."[21]

The legislative purpose is generally inferred from the resolution authorizing the investigation, but courts will look to other sources to establish the existence of a valid legislative purpose. For example, in *Wilkinson v. United States*,[22] the Court found that a subcommittee of the House Committee on Un-American Activities was pursuing a valid legislative purpose in conducting a field hearing in Atlanta on Communist propaganda in the South, looking at references to potential remedial legislation in the committee resolution authorizing the Atlanta hearing, the chairman's opening statement, and a lengthy statement made by the committee's staff director in response to the witness' refusal to answer the subcommittee's questions.[23]

[b] Authority

A congressional committee is a creation of its parent body and only has the power to inquire into matters within the scope of authority

19. *Id.* at 198.

20. *Id.* at 200. Notwithstanding this strong language, in that same decision the Court held that "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." *Id.*

21. Barenblatt v. United States, 360 U.S. 109, 132 (1959). *See also* United States v. O'Brien, 391 U.S. 367, 382-86 (1968); Wilkinson v. United States, 365 U.S. 399, 412 (1961); Tenney v. Brandhove, 341 U.S. 367, 377-78 (1951). *See generally,* Chapter Seven, §7.2[f] *infra.*

22. 365 U.S. 399 (1961).

23. *Id.* at 410.

that has been delegated to it by that body.[24] In a manner similar to its treatment of legislative purpose, the Supreme Court has scrutinized the delegation of authority to congressional committees with special care when the constitutional rights of witnesses are at issue. In *United States v. Rumely,*[25] the Court reviewed the contempt conviction of Edward Rumely, the Executive Secretary of an extremist right-wing organization engaged in the distribution of literature characterized, in Justice Frankfurter's elegant understatement, by "a particular political tendentiousness."[26] In order to avoid resolution of the First Amendment claim asserted by Rumely to attack the legitimacy of the committee's inquiry, the Court construed narrowly the committee's authorizing resolution—which authorized it to investigate "all lobbying activities intended to influence, encourage, promote or retard legislation"[27]—to encompass only direct representations to Congress and not broader efforts to influence public opinion by the distribution of political literature. Using this interpretation, the Court held that the committee was without authority to require Rumely to identify individuals who had purchased those publications from his organization, avoiding resolution of the "potential constitutional questions [of] far reaching import" raised by Rumely's conviction.[28]

The *Watkins* decision also speaks to this point, reaffirming that "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter."[29] Though ultimately deciding the case on other grounds,[30] the Court declared that it was "difficult to imagine a less explicit authorizing resolution" than House Rule XI establishing the House Committee on Un-American Activities (HUAC),[31] and observed that the "more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress."[32]

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24. Likewise, a subcommittee may only act within the scope of authority delegated to it by the full committee. Gojack v. United States, 384 U.S. 702 (1966).

25. 345 U.S. 41 (1953).

26. *Id.* at 42.

27. *Id.* at 44.

28. *Id.* at 41. "[T]he Court's duty to avoid a constitutional issue, if possible, applies not merely to legislation technically speaking but also to Congressional action by way of resolution." *Id.* at 45. *Accord* Tobin v. United States, 306 F.2d at 274-75.

29. 354 U.S. at 198. 367 312.

30. *See supra* discussion at notes 18-21 and accompanying text.

31. *Id.* at 202, asking, "Who can define the meaning of 'un-American'?"

32. *Id.*

However, two years later in *Barenblatt v. United States*,[33] the Court backed away somewhat from that attack on the HUAC authorizing resolution, and rejected a challenge to HUAC's authority to compel Lloyd Barenblatt's testimony about his alleged Communist associations. While "granting the vagueness" of the resolution, the *Barenblatt* Court held that "we may not read it in isolation from its long history in the House.... [It] comes to us with a 'persuasive gloss of legislative history'... which shows beyond doubt that... the House has clothed [HUAC] with pervasive authority to investigate Communist activities in this country."[34]

The authority of standing committees is conferred by Senate or House rule, and that of special and select committees, by resolution. Given the specificity with which Senate Rule 25 and House Rule 10 now confer jurisdiction upon standing committees, as well as the care with which most authorizing resolutions for select committees have been drafted in recent years,[35] controversies in this area have been rare and it would seem unlikely that a witness would experience much success in convincing a court that his noncompliance was justified by a committee's overstepping its delegated scope of authority.

[c] Pertinency

A related but, in practice, more significant limitation on Congress' investigatory powers is the requirement that a committee's questions be pertinent to the subject of its investigation. Pertinency is a constitutional as well as a statutory requirement.[36] It is derived from the criminal contempt statute, which provides that a committee's questions must be "pertinent to the subject under inquiry."[37] Two separate

33. 360 U.S. 109, 117-18 (1959).

34. *Id.* (citation omitted).

35. *See, e.g.*, the enabling resolution of the Senate Iran-Contra Committee, set forth *infra* in Appendix A.

36. *See* Watkins v. United States, 354 U.S. at 206 ("[There] is a jurisdictional concept of pertinency drawn from the nature of a congressional comittee's source of authority. It is not wholly different from nor unrelated to the element of pertinency embodied in the criminal statute under which [the witness] was prosecuted.").

37. 2 U.S.C. § 192, discussed in Chapter Three *supra*. Although the criminal contempt statute refers solely to pertinent testimony and does not use the term in referring to the production of documents, the same requirements have been held to

elements must be present to satisfy the requirement of pertinency: 1) The committee's questions must relate to a constitutionally legitimate legislative purpose, and 2) the questions must fall within the grant of authority actually made by Congress to the committee.[38]

Because of the breadth of congressional investigations, the concept of pertinency in the legislative context is broader than that of relevance under the law of evidence. "A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad."[39] Stated somewhat more quaintly, pertinency merely requires that the committee's questions be a "usual and necessary stone in the arch of the bridge over which an investigation must go."[40]

Pertinency means "pertinent to a subject matter under inquiry, not generally pertinent to the person under interrogation."[41] It relates "to the particular question asked, not to unasked possibilities,"[42] and a witness may not defend his refusal to answer questions to which pertinence is clear on the ground that the committee's authorizing resolution was vague enough to create doubts about the pertinence of questions that might have been asked.

A congressional witness is subject to prosecution for contempt and "acts at his peril" when deciding whether or not to answer a committee's questions: "[A]n erroneous determination on his part, even if made in the utmost good faith, does not exculpate him if the court should later rule that the questions were pertinent to the question under inquiry."[43] However, the courts will carefully evaluate the

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apply equally to a committee's demand that a witness produce documents. *E.g.*, United States v. Orman, 207 F.2d 148, 153 (3d Cir. 1953).

38. *Id.*

39. Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938) (emphasis in original).

40. Wollman v. United States, 244 F.2d 212, 214 (9th Cir.), *rev'd sub nom.*, Simpson v. United States, 355 U.S. 7 (1957).

41. Rumely v. United States, 197 F.2d 166, 177 (D.C. Cir. 1953), *aff'd*, 345 U.S. 41 (1953).

42. Barsky v. United States, 167 F.2d 241, 248 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948). A witness' refusal to be sworn altogether satisfies the pertinency requirement for contempt because "[t]here is no question more pertinent to a subject under investigation than the question whether the witness before the tribunal will answer truthfully." United States v. Hintz, 193 F. Supp. 325, 328 (N.D. Ill. 1961).

43. *Watkins*, 354 U.S. at 208.

available means of ascertaining the subject matter of an investigation; "a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent... with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."[44]

Watkins suggests several sources from which the subject matter of an investigation may be shown: 1) the declaration of the question under inquiry found in the authorizing resolution or statute of the committee (or of a subcommittee from a committee), 2) the introductory remarks of the committee chairman or other members, 3) the response of the chairman to the witness' pertinency objection, 4) the question itself, or 5) the "nature of the proceedings."[45]

In *Watkins* the Court excused the defendant's refusal to answer the subcommittee's request for names of any of his past associates who had formerly been Communist Party members, finding that the pertinency of those questions was not established by any of these sources. Although the subcommittee chairman's introductory remarks had referred to an inquiry into Communist infiltration of organized labor, the Court found this to be a less than clear indication of the pertinency of the questions, since other sources rebutted the notion that this was the committee's purpose. For instance, over a quarter of the individuals Watkins was asked to identify were uninvolved with organized labor, including a beauty parlor operator and a watchmaker.[46] The Court stated that:

> Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.[47]

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44. *Id.* at 208-09. A related proposition is that the indictment of the witness must set forth in detail the subject under inquiry, and not merely state that the unanswered questions were pertinent to the subject under inqiury. Russell v. United States, 369 U.S. 749, 764 (1962).

45. 354 U.S. at 209-15.

46. *Id.* at 213.

47. *Id.* at 214-15 (footnote omitted).

Finding that requirement unsatified by the ambiguous record before it, the Court reversed Watkins's contempt conviction.[48]

One final point on pertinency: Ambiguity exists in the case law as to whether a witness waives an objection to the pertinency of a committee's questions by not raising the objection at the time of the testimony.[49] Thus, a witness seeking to object on the ground of pertinency should raise that objection before the committee to give the chairman or presiding member the opportunity to explain why the questions are pertinent to the subject under inquiry.

§ 4.2. Protections of the Bill of Rights

It is now well established that the constitutional requirements of the Bill of Rights must "be respected by the Congress as they are in a court of justice."[50] The most significant limitations on Congress' investigative powers are those imposed by the Fifth, Fourth, and First amendments.

[a] The Fifth Amendment

[1] Applicability to Congressional Proceedings

Of the constitutional limitations on congressional investigations, none is more basic to a witness, and more frequently asserted, than the Fifth Amendment privilege against self-incrimination. The Fifth Amendment has always been the subject of controversy and misunderstanding. The privilege has been characterized as "'a safeguard against heedless, unfounded or tyrannical prosecutions,'"[51] and "an important advance in the development of our liberty."[52] Yet, whether it

48. On pertinency generally, *see* Wilkinson v. United States, 365 U.S. 399, 413 (1961); Braden v. United States, 365 U.S. 431 (1961); Deutch v. United States, 367 U.S. 456 (1961); Flaxer v. United States, 358 U.S. 147 (1958); Sacher v. United States, 356 U.S. 576 (1958).

49. *Compare Watkins,* 354 U.S. at 214 and *Barenblatt,* 360 U.S. at 123 *with Orman,* 207 F.2d at 154.

50. Watkins v. United States, 354 U.S. at 188.

51. Quinn v. United States, 349 U.S. 155, 162 (1955).

52. Katsinger v. United States, 406 U.S. 441, 444 (1972).

be in response to the so-called "Fifth Amendment communists" of the 1950s or the Oliver Norths or John Poindexters of the 1980s, the privilege has also been attacked in various quarters as an historical vestige, acting more as a cloak for the guilty than a shield for the innocent.[53]

The Fifth Amendment, which provides that "no person... shall be compelled in any criminal case to be a witness against himself," on its face does not appear to apply to congressional investigations. However, at least from as early as 1834, when Nicolas Biddle and other directors of the Bank of the United States based their refusal to produce bank records in response to a House subpoena on their right not to incriminate themselves,[54] the protections of the Fifth Amendment have been deemed to apply to testimony before congressional committees. Several years later, in a House investigation of President Andrew Jackson's use of the spoils system, Jackson refused to produce a list of names of civil servants appointed without the consent of the Senate, writing that "[y]ou request myself and the heads of the Departments to become our own accusers, and to furnish the evidence to convict

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53. A particularly blunt, but by no means isolated, expression of this view was stated by Senator Joseph McCarthy, in reaction to the writer Dashiell Hammett's refusal to answer the Senator's question whether he was or had ever been a Communist:

> Well, now, you have told us that you will not tell us whether you are a member of the Communist Party today or not, on the ground that if you told us the answer might incriminate you. That is normally taken by this committee and the country as a whole to mean that you are a member of the Party, because if you were not you would simply say, "No," and it would not incriminate you. You see, the only reason that you have the right to refuse to answer is if you feel a truthful answer would incriminate you. An answer that you were not a Communist, if you were not a Communist, could not incriminate you. Therefore, you should know considerable about the Communist movement, I assume.

Hearings before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 83d Cong., 1st Sess., part. 1, *quoted in* T. TAYLOR, GRAND INQUEST 84-85 (1955).

54. *See* T. TAYLOR, *id.* at 193. The House committee, though divided on the proper application of the Fifth Amendment privilege to the testimony of Biddle and his fellow directors, were all in agreement as to the general applicability of the privilege to congressional proceedings: "It is a humane rule to be found in criminal law, which declares that no man shall be compelled to criminate himself, and one which the committee would be unwilling under any circumstances to deny." H.R. REP. NO. 481, 23d Cong., 1st Sess. (1834), *cited in id.* at 326 n.19.

ourselves."[55] Perhaps the most unequivocal recognition of the applicability of the Fifth Amendment to congressional proceedings was the enactment during the Civil War of a number of statutes designed to overcome the privilege by granting witnesses immunity from prosecution for their testimony before Congress.[56]

[2] Invoking the Fifth Amendment

Despite these early historical precedents, the Supreme Court did not actually consider the Fifth Amendment in the context of congressional proceedings until it decided three cases in 1955, *Quinn v. United States*;[57] *Emspack v. United States*;[58] and *Bart v. United States*,[59] all involving assertions of the privilege by witnesses before HUAC. By the time the three cases reached the Court, it was assumed that the Fifth Amendment applied to congressional proceedings and the issue addressed in these cases was not whether the privilege applied, but what a witness must do to invoke the privilege. The Court held that "a witness need not have the skill of a lawyer to invoke the protection of the Self-Incrimination Clause,"[60] and that "no ritualistic formula or talismanic phrase" is required to invoke it.[61] All that is required is that the witness' objection be stated in a manner that the "committee may reasonably be expected to understand as an attempt to invoke the privilege."[62] Thus, a simple reference to "the Fifth Amendment" is sufficient, as would be such formulations as "the First and Fifth Amendments" or "the First Amendment to the Constitution supplemented by the Fifth Amendment."[63] Although certainly not the most advisable method of invoking the privilege, it has also been found sufficient to simply adopt the grounds relied upon by an earlier witness.[64] To the extent there is any

55. H.R. REP. NO. 481, 23d Cong., 1st Sess. (1834), *cited in id.* at 193.
56. On congressional immunity generally, *see supra* Chapter Three, § 3.6.
57. 349 U.S. 155 (1955).
58. 349 U.S. 190 (1955).
59. 349 U.S. 219 (1955).
60. *Quinn*, 349 U.S. at 162.
61. *Emspack*, 349 U.S. at 194.
62. *Id.*
63. *Quinn*, 349 U.S. at 163.
64. *Id.*

doubt about the witness' intent, it is incumbent upon the committee to ask the witness whether he or she is in fact invoking the privilege.[65]

Unlike an accused defendant in a criminal case, who has the right to remain silent and not to take the stand, a witness before a congressional committee cannot refuse to testify altogether; a congressional witness may only invoke the privilege in response to specific questions that might incriminate him. A witness who refuses to take the oath, whether on Fifth Amendment or other grounds, may be prosecuted for contempt.[66] Although the privilege against self-incrimination cannot be asserted in advance of the questions actually being propounded, the memory remains vivid of witnesses being paraded before television cameras in public hearings during the 1950s to plead the Fifth, and committees today will often grant the request of a witness to claim the privilege in executive session.[67] Another unseemly abuse of a witness' constitutional rights is the practice of forcing a witness to assert the privilege repeatedly in response to questions in areas that he or she has indicated will not be answered.

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65. *Id.* at 164.

66. For example, G. Gordon Liddy was cited and prosecuted for criminal contempt of Congress for his refusal, on Fifth and Sixth Amendment grounds, to take the oath to testify before a House subcommittee in 1973. United States v. Liddy, *reprinted in Court Proceedings and Actions of Vital Interest to Congress,* Joint Comm. on Congressional Operations, 93d Cong., 2d Sess. 483 (1974). *Accord* Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948), *cert. denied,* 338 U.S. 883 (1949); United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), *cert. denied,* 333 U.S. 858 (1948); United States v. Hintz, 193 F. Supp. 325 (N.D. Ill. 1961).

67. Interestingly, a 1977 opinion of the District of Columbia Legal Ethical Committee addresses this issue. *See* District of Columbia Legal Ethics Committee, Opinion No. 31 (March 29, 1977). The Ethics Committee ruled upon a complaint that a staff attorney to a congressional committee had acted improperly in summoning a witness to testify before a televised public hearing when the committee had been notified in advance that the witness would invoke his Fifth Amendment privilege. The Ethics Committee, looking to cases holding that it is prosecutorial misconduct to call a witness before a jury when the prosecutor knows he will claim a valid privilege, held the committee counsel's action to be in conflict with a disciplinary rule prohibiting a lawyer from asking a question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness. The Ethics Committee suggested that to the extent the counsel questioned whether the witness would in fact claim the Fifth Amendment privilege, the issue should have been resolved in closed session. Without in any way suggesting that the local bar committee acted properly in seeking to render an opinion on the functioning of the legislative branch, albeit addressed to the acts of a member of the local bar, its conclusion as to the propriety of the conduct complained about certainly cannot be faulted.

The practice clearly serves no legitimate investigative purpose, since if the witness has improperly asserted the Fifth Amendment privilege, the contempt is not multiplied by repeating the objection in response to follow-up questions.[68]

A witness may plead the Fifth Amendment only to those questions which, if answered, would serve as a "link in the chain of evidence" that would tend to incriminate him.[69] The availability of the privilege can be affected as much by the context in which a question is asked as by the nature of the question itself. "To sustain the privilege, it need only be evident from the implications of the question, the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[70] Thus, in one case a witness' refusal to answer a question about his employment record was upheld because the question was asked "in a setting of possible incrimination."[71] Although it is impossible to draw clear lines in this area, the considerations involved in this determination are described in the following passage:

> While it may be that, in certain circumstances, a witness should explain why an answer to an apparently innocent question might tend to incriminate him in order to avoid the conclusion that he was resorting to subterfuge to prevent giving information which he is required to give and to make clear that he did have reasonable apprehension that the answers to such questions would tend to incrminate him there can

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68. United States v. Costello, 198 F.2d 200, 204 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952).

69. This language is from the oft-cited opinion of Chief Justice Marshall, sitting on circuit, in the trial of United States v. Burr, 25 Fed. Cas. 38, 40 (No. 14692e) (C.C.D. Va. 1807). *Accord* Hoffman v. United States, 341 U.S. 479, 486 (1951) (answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime"). A witness may not, however, refuse to answer questions or produce documents on the ground that it "may tend to disgrace him or otherwise render him infamous." 2 U.S.C. § 193.

70. *Hoffman*, 341 U.S. at 486-87.

71. Jackins v. United States, 231 F.2d 405 (9th Cir. 1956). Other witnesses had testified that Jackins and others were at one point employed by the Communist party. Some of those others had been prosecuted under the Smith Act, and thus Jackins had reason to believe that answering questions about his employment record could lead to incrimination and prosecution under this act. *Id.* at 407.

> certainly be no such burden upon a witness when the circumstances are such that reasonable apprehension on his part is evident. Moreover, it is well recognized that, once it has become apparent that the answer to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions upon the ground that such answers would tend to incriminate him. For this reason, certain of the questions, which did indeed on their face seem quite innocent, standing alone, might well require an explanation from the defendant to justify his refusal to answer, would not require more than the claim of privilege when associated with other questions which are clearly incriminatory, or which in the circumstances reasonably gave rise to apprehension of danger to the witness.[72]

These determinations obviously place a witness in a delicate position. As Judge Learned Hand observed:

> Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.[73]

The Fifth Amendment privilege against self-incrimination is personal to the witness and cannot be asserted in order to protect others from punishment.[74] This limitation brings to mind one of the more famous invocations of the privilege in this century, that by the

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72. United States v. Jaffee, 98 F. Supp. 191, 194 (D.D.C. 1951). *See also* United States v. Neff, 615 F.2d 1235, 1239-40 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980).
73. United States v. Weisman, 111 F.2d 260, 262 (2d Cir. 1940).
74. Rogers v. United States, 340 U.S. 367, 371 (1951).

playwright Lillian Hellman made in response to a HUAC subpoena in 1952. In advance of her apearance, Ms. Hellman wrote the committee:

> I am not willing, now or in the future, to bring bad trouble to people who, in my past association with them, were completely innocent of any talk or any action that was disloyal or subversive. I do not like subversion or disloyalty in any form, and if I had ever seen any I would have considered it my duty to have reported it to the proper authorities. But to hurt innocent people whom I knew many years ago in order to save myself is, to me, inhuman and indecent and dishonorable....
>
> I am prepared to waive the privilege against self-incrimination and to tell you anything you wish to know about my views or actions, if your committee will agree to refrain from asking me to name other people. If the committee is unwilling to give me this assurance, I will be forced to plead the privilege of the Fifth Amendment at the hearing.[75]

However eloquent Hellman's words or noble her sentiment, a desire to avoid "bringing trouble" to others alone would quite clearly not constitute an appropriate basis for claiming the privilege.[76]

A related proposition is that because the privilege is personal, it may not be claimed to prevent the disclosure of documents kept by a witness in a representative capacity. The Fifth Amendment does not apply to corporations.[77] Accordingly, although the privilege may in some circumstances protect a witness from having personally to produce records of a sole proprietorship when the act of producing or authenticating the documents may tend to incriminate that witness,[78] it

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75. *Quoted in* T. TAYLOR, *supra* note 53, at 207.

76. This does not mean that Hellman, who had been identified to HUAC as a former member of the Communist Party and publicly accused by the committee of membership in a number of Communist "front" organizations, might not have had other grounds for invoking the privilege. *Id.*

77. Andresen v. Maryland, 427 U.S. 463, 468 n.2 (1976); Bellis v. United States, 417 U.S. 85, 88-89 (1974).

78. United States v. Doe, 465 U.S. 605 (1984).

cannot be used to prevent disclosure of corporate documents held by the witness in a representative capacity.[79]

An interesting Fifth Amendment issue arose during the Iran-Contra inquiry relating to the select committees' efforts to trace the money trail from the sale of arms to Iran. The Senate Iran-Contra committee, without success, sought to obtain judicial enforcement[80] of a committee order requiring Richard Secord to execute a consent directive that would waive foreign bank secrecy laws and permit certain Swiss banks to release to the committee records of any bank accounts upon which Secord was authorized to draw. Secord objected, arguing that forcing him to sign the directive against his will would violate the Fifth Amendment.

The Fifth Amendment privilege against self-incrimination "applies only when the accused is compelled to make a *testimonial* communication that is incriminating."[81] Bank records themselves are clearly not protected by the privilege since they are prepared by a third party and contain no testimonial declarations of the witness.[82] Thus, the issue was whether requiring Secord to sign the directive itself was a testimonial communication. The Senate's lawyers argued it was not, because the directive included a carefully worded disclaimer under which Secord was not required to acknowledge the existence of any foreign bank accounts, but merely to authorize the banks to produce the records if such accounts existed. Although similar consent directives have been upheld by three courts of appeals,[83] Judge Aubrey Robinson of the D.C. district court upheld Secord's claim of privilege, finding that the content of the directive was "not only testimonial, but it is also false as far as Secord is concerned," and that "[b]y signing the directive, Secord would be testifying just as clearly as if he were forced

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79. *Rogers,* 340 U.S. at 371-72. *See also* Braswell v. United States, 56 U.S.L.W. 4681 (U.S. June 22, 1988); McPhaul v. United States, 364 U.S. 372, 380 (1960); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 205 (1946). For a more extensive treatment of the legal issues raised in this area, *see* Alito, *Documents and the Privilege Against Self-Incrimination,* 48 U. PITT. L. REV. 27 (1986).

80. The committee sought judicial enforcement of its order under the civil contempt statute, 28 U.S.C. § 1364, a remedy discussed *supra* in Chapter Three, § 3.4[c].

81. Fisher v. United States, 425 U.S. 391, 408 (1976) (emphasis in original).

82. California Bankers Ass'n v. Schultz, 416 U.S. 21, 55 (1974).

83. United States v. Ghidoni, 732 F.2d 814 (11th Cir.), *cert. denied,* 469 U.S. 932 (1984); United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); In re U.S. Grand Jury Proceedings, Cid, 767 F.2d 1131 (5th Cir. 1985).

to verbally assert his consent."[84] After that ruling, however, the Supreme Court adopted the contrary view, squarely holding that a similar compelled consent directive did not violate the Fifth Amendment.[85]

[3] Committee Action

A congressional committee makes the initial determination of validity of the self-incrimination claim. The committee's determination may be reversed by a court in a contempt proceeding if the committee rejects the claim of privilege and the witness continues to refuse to testify. The courts have required, as a foundation for a contempt prosecution, that the committee disallow the objection and clearly apprise the witness that an answer is demanded. Just as the witness need not resort to any particular form to assert a Fifth Amendment objection, so too no fixed verbal formula need be used by the committee to indicate its disposition of the objection.[86] However, a witness will not be forced to guess whether or not the committee has accepted the objection; if the witness is not able to determine "with a reasonable degree of certainty that the committee demanded his answer despite his objection," and thus is not presented with a "clear-cut choice between compliance and noncompliance," no prosecution for contempt may lie.[87]

[4] Waiver of the Privilege

The privilege against self-incrimination may be waived by a witness in a number of ways: by expressly disclaiming any reliance upon it,[88] failing to assert it,[89] or testifying as to the same matters on which the privilege is later asserted. It has been the latter form of

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84. Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord, No. 87-0090, slip op. at 6 (D.D.C. April 16, 1987).

Because Secord thereafter voluntarily appeared before the Iran-Contra committees and indicated that all Swiss Bank records were under the control of his partner, Albert Hakim, no appeal was taken from this decision. JOINT IRAN-CONTRA REPORT at 687.

85. Doe v. United States, 56 U.S.L.W. 4708 (U.S. June 22, 1988).

86. *Quinn,* 349 U.S. at 170.

87. *Id.* at 166, 167. *Accord* Emspack, 349 U.S. at 202.

88. *Emspack,* 349 U.S. at 195. Though, consistent with the principle that courts must "'indulge every reasonable presumption against waiver of fundamental constitutional rights,'" *id.* at 198 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)), the

"implied waiver" which has been the subject of the most misunderstanding and which may prove most troublesome for a witness invoking the Fifth Amendment.

Just as a witness risks contempt if he or she pleads the Fifth Amendment too early and a court later determines that the committee's questions were not incriminating, under the doctrine of implied waiver the witness also must be wary of pleading the Fifth Amendment too late. In *Rogers v. United States,*[90] the petitioner, Jane Rogers, testified before a grand jury that she had been an officer of the Communist Party of Denver. The Supreme Court upheld her conviction for contempt, holding that she could not invoke the Fifth Amendment to refuse to identify her successor in office. The Court reasoned that Rogers had voluntarily testified about her status as an officer of the Communist Party and, since answering the question about the identity of her successor would not subject her to the danger of further incrimination, she had waived the privilege. In the Court's words, a witness is not permitted "to select any stopping place in the testimony.... Where incriminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details."[91]

Although *Rogers* has not been overruled, and the risk of waiving the Fifth Amendment privilege by answering what at first blush may seem like innocuous questions cannot be ignored, the doctrine of implied waiver is not without limits. As a starting point, though the lines are often far from clear,[92] a witness cannot waive the privilege by answering questions that would not tend to incriminate him.[93] Moreover, the privilege may not be waived by answering questions on the same subject matter in some *other* proceeding. Thus, allegations verified by a witness in an earlier litigation will not waive the privilege.[94] Likewise, answers given by a witness in a Federal Bureau of Investigation interview several years earlier were held not to have the effect of waiving the privilege in a congressional hearing.[95]

Supreme Court has refused to interpret ambiguous statements by a witness as a waiver of the privilege against self-incrimination. *Id.*

89. *Id.*

90. 340 U.S. 367 (1951).

91. *Id.* at 371, 373.

92. *See supra* notes 69-73 and accompanying text.

93. United States v. Costello, 198 F.2d at 202.

94. Poretto v. United States, 196 F.2d 392, 394 (5th Cir. 1952). *See also* In re Neff, 206 F.2d 149 (3d Cir. 1953).

95. Marcello v. United States, 196 F.2d 437 (5th Cir. 1952).

[5] Congressional Immunity

The power of a congressional committee to compel the testimony of witnesses asserting the privilege against self-incrimination by granting immunity for their testimony is addressed in the prior chapter.

[b] The First Amendment

Although encountered less frequently than the privilege against self-incrimination, claims that congressional investigations have improperly infringed upon First Amendment freedoms of association, expression, or belief have also been raised by witnesses. The Supreme Court has held that—although the First Amendment states that Congress shall make "no law" abridging freedom of speech or press or assembly, and an investigation is not a law—a congressional investigation nonetheless is a "part of lawmaking" and subject to the limitations of the First Amendment.[96] Unlike claims of the privilege against self-incrimination under the Fifth Amendment, however, the protections of the First Amendment do not afford a witness the right to be absolutely free of inquiry. Rather, "[w]here First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[97]

The Supreme Court first applied this balancing test in yet another HUAC case, *Barenblatt v. United States*.[98] Lloyd Barenblatt, who had been a graduate student and teaching fellow at the University of Michigan and a philosophy instructor at Vassar College, was subpoenaed to testify before a subcommittee of HUAC. In refusing to answer the subcommittee's questions concerning whether he was a member of the Communist Party and his involvement with various allegedly Communist organizations while at the University of Michigan, Barenblatt expressly disclaimed reliance upon the Fifth Amendment. Instead, he objected to the subcommittee's right to inquire into

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96. Watkins v. United States, 354 U.S. 178, 197 (1957).

97. Barenblatt v. United States, 360 U.S. 109, 126 (1959). *See also Watkins*, 354 U.S. at 198.

98. 360 U.S. 109 (1959).

his "political" and "religious" beliefs or "any other personal and private affairs" or "associational activities."[99]

The Court, Justice Harlan writing for the majority, struck the balance in favor of Congress and upheld Barenblatt's conviction for contempt. "The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose."[100] The Court found that "Congress has wide power to legislate in the field of Communist activity in this Country," a power which rests, "[i]n the last analysis...on the right of self-preservation, 'the ultimate value of any society,'" which was seen as threatened by the "tenets of the Communist party [which] include the ultimate overthrow of the Government of the United States by force and violence...."[101] With respect to the First Amendment interests at issue, the Court rejected Barenblatt's claim that the investigation was in fact directed at controlling what was being taught at American universities rather than, as purported, the extent of Communist infiltration of those universities.[102] While recognizing that "there is no congressional power to expose for the sake of exposure,"[103] the Court stated that "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motions which spurred the exercise of that power," and rejected the contention that the purpose of the investigation was purely to expose Barenblatt.[104] The *Barenblatt* Court thus concluded that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended."[105]

This balancing test has never been struck by the Supreme Court against Congress.[106] However, in a 1963 case involving a probe by an

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99. *Id.* at 114.
100. *Id.* at 127.
101. *Id.* at 127-28.
102. *Id.* 129-30.
103. *Id.* at 133 (quoting *Watkins*, 354 U.S. at 200).
104. *Id.* at 132.
105. *Id.* at 134.
106. In addition to *Barenblatt*, *see* Wilkinson v. United States, 365 U.S. 399 (1961) and Braden v. United States, 365 U.S. 431 (1961), both of which also arose out of HUAC Communist investigations.

investigating committee of the Florida legislature into Communist infiltration of the Florida and Miami branches of the NAACP, the Supreme Court found in favor of the First Amendment claim of the witness. In *Gibson v. Florida Legislative Investigation Committee*,[107] the President of the Miami Branch of the NAACP, Theodore Gibson, refused to produce the branch's membership and contribution lists in response to a committee subpoena. Nevertheless, Gibson voluntarily responded from memory to questions as to whether a number of individuals identified by the Committee as possible Communists were associated with the NAACP.[108] Gibson was convicted of contempt for his failure to produce the subpoenaed records, and challenged his conviction on the ground that requiring their production would interfere with the First Amendment associational rights of members and prospective members of the NAACP.

The Supreme Court, in a decision by Justice Goldberg, reversed Gibson's contempt conviction. The Court described the balancing test to be applied in these terms:

> [I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.[109]

The *Gibson* Court found the case distinguishable from *Barenblatt* on the ground that the issue there had been a witness' own membership in the Communist party itself, while there was no evidence that the NAACP was either a Communist dominated or influenced organization. "Compelling such an organization, engaged in the exercise of First and Fourteenth Amendment rights, to disclose its membership presents, under our cases, a question wholly different from compelling the Communist Party to disclose its own membership."[110]

The differing results in *Barenblatt* and *Gibson* may be more explainable by the changes in the composition of the Court (Justice

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107. 372 U.S. 539 (1963).
108. *Id.* at 542-43.
109. *Id.* at 546.
110. *Id.* at 549.

Goldberg by that time had replaced Justice Frankfurter), and the lessening of public perception of the danger of the "Communist threat" by the time *Gibson* was decided, than by the distinction proffered by Justice Goldberg.[111] Most significantly for a congressional witness, the different results in those two cases illustrate the inherent unpredictability of any balancing test where important constitutional rights are being weighed against each other, and suggest strongly that a witness exercise caution in relying upon the First Amendment to resist compliance with a congressional subpoena.[112]

[c] The Fourth Amendment

The Fourth Amendment's prohibition against unreasonable searches and seizures also applies to congressional investigations.[113] Thus, the Congress in exercising its powers of inquiry, quite clearly may not invade a person's home to obtain evidence in aid of its investigations.[114] However, the more significant issue for a congressional witness involves not such blatant searches and seizures but the application of the Fourth Amendment as a bar to unreasonably broad congressional subpoenas.

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111. *See id.* at 579 (Harlan, J., dissenting) ("I had never supposed that any of our decisions relating to state or federal power to investigate in the field of Communist subversion could possibly be taken as suggesting any difference in the degree of governmental investigation interest as between Communist infiltration *of* organizations and Communist activity *by* organizations.")

112. A consequence of the use of this balancing test has been the unwillingness of courts to enjoin prospective congressional conduct on the ground that any First Amendment claim should first be brought before the committee and, in any event, may be reasserted at the trial or on appeal of a contempt proceeding. *See, e.g.*, Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971); Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972). *But cf.* Stamler v. Willis, 415 F.2d 1365, 1369 (D.C. Cir. 1969), *cert. denied*, 399 U.S. 929 (1970). The result might be different, however, if the witness whose First Amendment rights would be damaged from disclosure was not under subpoena and thus would have no opportunity to assert his rights at the time of the committee's questioning. *See Ansara*, 442 F.2d at 753; *see also* Chapter Three, *supra* note 31.

113. *See Watkins*, 354 U.S. at 188.

114. *See, e.g.*, Dombrowski v. Eastland, 387 U.S. 82 (1967); Gravel v. United States, 408 U.S. 606, 621 (1972); McSurely v. McClellan, 553 F.2d 1277, 1288-89 (D.C. Cir. 1976) (en banc), *cert. denied*, 438 U.S. 189 (1978); Nelson v. United States, 208 F.2d 505, 513 (D.C. Cir. 1953).

The Fourth Amendment precedents in this regard are less than clear-cut. There are a few scattered, early lower-court decisions which refused to enforce overbroad congressional subpoenas. One such decision involved a Senate subpoena requiring Western Union to produce all telegrams sent or received by a law firm for a ten-month period in 1935;[115] another, a Senate subpoena that same year requiring several telegraph companies in the District of Columbia to produce all telegrams transmitted through its office over a seven-month period.[116] The latter case, *Hearst v. Black,*[117] brought by the publisher William Randolph Hearst against Senator (later Justice) Hugo Black, makes an important distinction. Although the telegraph companies had refused to comply with the subpoenas, the committee, with the help of the Federal Communications Commission, obtained copies of the materials sought. The court recognized that " '[i]t is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up,' "[118] and indicated that the subpoenas at issue were so unreasonably broad that a witness would have been justified in not complying. Nevertheless, the Court refused to enjoin the committee from making use of the material now that it was in its possession.[119]

The most significant case addressing the limitations of the Fourth Amendment upon the congressional subpoena power, both because it is a relatively modern case and the sole Supreme Court precedent, is *McPhaul v. United States.*[120] Arthur McPhaul, the Executive Secretary of the Civil Rights Congress, was held in contempt for his failure to comply with a sweeping HUAC subpoena requiring him to produce "all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress. . . ."[121] The Court rejected McPhaul's argument that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth

115. Strawn v. Western Union, 3 U.S.L.W. 646 (Sup. Ct. D.C., March 11, 1936).
116. Hearst v. Black, 87 F.2d 68 (D.C. Cir. 1936).
117. *Id.*
118. *Id.* at 71 (quoting FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924)).
119. *Id.*
120. 364 U.S. 372 (1960).
121. *Id.* at 374.

Amendment, holding that the subpoena was no broader than the scope of the subcommittee's investigation:

> "[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry...." The Subcommittee's inquiry here was a relatively broad one—whether "there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof"—and the permissible scope of materials that could reasonably be sought was necessarily equally broad.[122]

Given the wide scope of inquiry often granted investigatory committees, *McPhaul* indicates that courts will not lightly excuse failures to comply with subpoenas on Fourth Amendment grounds.[123] However, although only dictum, and arising in the setting of a state legislative inquiry, *Gibson v. Florida Legislative Investigation Committee*, suggests at least some limits on the permissible scope of congressional subpoenas:

> The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information. Validation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands.[124]

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122. *Id.* at 382 (citations omitted).

123. In addition, McPhaul suggests that the burden is on a witness who feels a subpoena is unduly burdensome or doubts what documents are demanded to assert the objection to the committee to give it an opportunity to remedy any defect. 364 U.S. at 382.

124. 372 U.S. at 545. *See supra* notes 107-10 and accompanying text. *See also* Bergman v. Senate Special Comm. on Aging, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975) (committee could properly investigate profits earned by private citizens from owning nursing home, but may not conduct general inquiry designed to ascertain private individuals' net worth).

[d] The Sixth Amendment

Unlike an accused defendant in a criminal prosecution, a congressional witness has no rights under the Sixth Amendment,[125] or the due process clause of the Fifth Amendment, to present evidence in his behalf or to confront and cross-examine his accusers.[126] Nevertheless, some, but not all, of these rights, including the right to counsel, have been granted to congressional witnesses by House and Senate rules. These important procedural rules, binding upon congressional committees, are the subject of the next chapter.

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125. However, a distinction must be made between the applicability of the Sixth Amendment directly to congressional proceedings and to criminal proceedings arising from congressional proceedings. For example, in O'Conner v. United States, 240 F.2d 404, 405-05 (D.C. Cir. 1956), the court reversed a contempt conviction on the ground that the question the witness had refused to answer—whether "he was a member of the Communist Conspiracy"—was void for vagueness under the Sixth Amendment. *See also* United States v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954), discussed *supra* in Chapter Three, notes 108-10 and accompanying text.

126. United States v. Fort, 443 F.2d 670, 678-81 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971). The rationale is that a "congressional investigation... is an investigative proceeding and not a criminal proceeding, and in such proceeding Congress is not empowered to adjudicate criminal sanctions on the witness." *Id.* at 679. The D.C. Circuit in *Fort* upheld the contempt conviction of a witness who had refused to answer questions before the Senate Permanent Subcommittee on Investigations because the subcommittee refused his request to cross-examine his accusers. *Id.* at 678. The Court relied upon the 1960 decision of the Supreme Court in Hannah v. Larche, 363 U.S. 420 (1960), which had rejected a challenge to the rules of procedure of the U.S. Civil Rights Commission on the ground that the rules provided individuals no right to confront or cross-examine complaining individuals at Commission fact-finding hearings. The Court found those rights unavailable under the due process clause, relying upon the analogous practice before congressional committees: "In the vast majority of instances, congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses." *Id.* at 445. The Supreme Court stated that even if it were true, as had been alleged, that "the Commission's proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions... [that] would not be the result of any affirmative determinations made by the Commission, and [that] would not affect the legitimacy of the Commission's investigative function." *Id.* at 443.

§ 4.3. COMMON LAW TESTIMONIAL PRIVILEGES

In addition to the constitutionally based privilege against self-incrimination, there are various privileges of common law origin—attorney-client, physician-patient, husband-wife, and clergyman-penitent—that operate to protect confidential communications from compelled disclosure. Of these, the oldest and most commonly asserted by witnesses before the Congress is the attorney-client privilege,[127] the purpose of which is to promote the public interest in the observance of law by encouraging full and frank communications between attorneys and their clients.[128]

This privilege protects confidential communications between clients and their attorneys from compelled disclosure at all stages of judicial proceedings, including discovery and grand jury proceedings.[129] The applicability of the privilege outside of the judicial setting to legislative investigations, however, has not been clearly determined. There have been no judicial decisions directly addressing the issue.[130]

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127. *See* 8 J. WIGMORE, EVIDENCE § 2290 at 543 (J. McNaughton rev. ed. 1961). The elements of the privilege are as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except if the protection be waived.

Id. at § 2292 at 554.

128. Upjohn v. United States, 449 U.S. 383, 389 (1981). Unlike the privilege against self-incrimination, the attorney-client privilege may be claimed by corporations. *Id.* at 390.

129. *See, e.g.*, In re Berkley & Co., 629 F.2d 548, 551-52 (8th Cir. 1980) (privilege applicable to grand jury proceedings).

130. Though, some have read Jurney v. MacCracken, 294 U.S. 125 (1935), as supporting the view that acceptance of the privilege is discretionary with the committee. *See* T. TAYLOR, *supra* note 53, at 237. In *Jurney,* a special Senate committee chaired by Senator Hugo Black had subpoenaed certain papers in the possession of William MacCracken, an attorney representing several of the carriers under investigation by the special committee. MacCracken at first declined to produce many of the subpoenaed documents, asserting that they were privileged communications between himself and his clients. The committee, in the Court's words, "decided that none of the papers in his possession could be withheld under the claim of privilege." 294 U.S. at 146. The asserted privilege was not at issue when the case reached the Supreme Court, however, because MacCracken's clients all had waived the privilege and the disputed documents were made available to the committee prior to

Committees of both houses of Congress have on occasion taken the position that the availability of the privilege in the legislative context is discretionary with the committee.[131] The exercise of such discretion by a committee would be consistent with English parliamentary practice; parliamentary committees of inquiry have not treated the privilege, which is firmly established in English common law, as binding upon them.[132]

This issue again arose in early 1986, when the House cited a New York attorney, Joseph Bernstein, and his brother, Ralph, for contempt of Congress for their refusal, on the ground of the attorney-client privilege, to answer questions of the House Foreign Affairs Subcommittee on Asian and Pacific Affairs concerning their business dealings with former Philippine President Ferdinand Marcos.[133] The report of

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trial, which concerned the removal and destruction of other documents. *Id.* at 144. *See also* Stewart v. Blaine, 8 D.C. (1 MacArth.) 453 (D.C. 1874).

131. The rejection by the Senate in 1934 of William MacCracken's claim of the attorney-client privilege is noted in note 130 *supra*. An even earlier rejection of the attorney-client privilege apparently occurred during the nineteenth century Senate investigation into the financing of the Union Pacific Railroad and the activities of the Credit Mobilier when the railroad's counsel was cited for contempt and jailed in the Capitol for his refusal to testify upon the basis of the attorney-client privilege. *See* T. TAYLOR, *supra* note 53, at 45. More recently, in 1977 and 1983 the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce rejected claims of the attorney-client privilege asserted before it. *See* Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, *Attorney-Client Privilege,* 98th Cong., 1st Sess. 1, 25 (Comm. Print 98-I 1983). With respect to the 1977 rejection, the chairman of the subcommittee explained: "It is my firm conviction that the commonwealth precedents, customs of both the Commons and the House, fully sustain rejecting a claim of attorney-client privilege if it impedes in any manner whatsoever the necessary inquiries of the Congress in determining whether a law of the United States may have been violated or whether that law accords sufficient protection to the American people." *Quoted in id.* at 25. For a recent discussion of these issues, *see* Note, *The Attorney-Client Privilege in Congressional Investigations*, 88 Col. L. Rev. 145 (1988).

132. *See* L. CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES § 983 (2d ed. 1866).

133. 133 CONG. REC. H698 (daily ed. Feb. 27, 1986). Counsel for the Bernsteins, and their consultant, Harvard law professor Alan M. Dershowitz, additionally argued that their clients' refusal to testify was justified by the ethical obligations imposed by Canon 4 and accompanying Disciplinary Rule 4-101 of the American Bar Association's Model Code of Professional Responsibility. This ethical rule, broader in scope than the attorney-client privilege, requires attorneys to preserve client "confidences" and "secrets." The committee rejected this argument on the ground that Rule 4-101 authorizes disclosure of confidential information "when required by law or court order." The committee held that under the criminal contempt

the House Committee and Foreign Affairs, after reviewing several earlier congressional precedents, as well as the English parliamentary practice in this regard, concluded that "Congress has taken a limited view as to the applicability of [the] attorney-client privilege. Congressional committees have entertained, as a matter of discretion, claims of such privilege. However, where in the particular circumstances an investigation determines that the legislative need for the information outweighs the arguments against production, such production has been required."[134]

Nevertheless, although congressional committees (particularly in the House) continue to talk about the attorney-client privilege being only discretionary, in recognition of the important public goals served by the privilege[135] the practice of most committees has been to recognize validly asserted claims of the privilege.[136] In many instances, committees have been able to obtain the information sought, irrespective of this issue, by relying upon the narrower ground that the privilege has been improperly invoked by the witness.

For example, in the 1986 House contempt citation of the Bernstein brothers, because of the objections voiced by a number of members to the position by the Foreign Affairs Committee that the recognition of the attorney-client privilege is discretionary with the House,[137] the House relied principally upon the ground that the witnesses were improperly asserting the privilege to apply to their business and

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statute, 2 U.S.C. § 192, 194, congressional testimony is "required by law" and not voluntary at the point that a committee rejects any claims of privilege and demands a response. 133 CONG. REC. at H670.

134. *Id.* at H669.

135. *See* Upjohn v. United States, 449 U.S. at 393 ("if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected").

136. *See* Senate Committee on Rules and Administration, *Rules of Procedure for Senate Investigating Committees*, S. Rep. No. 2, 84th Cong., 1st Sess. 27 (1955) (footnote omitted) ("With few exceptions [citing *Jurney v. MacCracken, supra*], it has been committee practice to observe testimonial privileges of witnesses with respect to communications between clergyman and parishioner, doctor and patient, lawyer and client, and husband and wife."); J. HAMILTON, THE POWER TO PROBE 244 (1976).

137. *See, e.g.*, 133 CONG. REC. at H670 (additional views of Reps. Berman & Levine) ("We believe that an assertion that [attorney-client] protections do not apply to the Congress would be a truly frightening proposition. If it were to prevail, attorney-client protections could be completely eviscerated, and the values they are designed to serve would be crushed.").

investment advice, an application of the privilege that would also be rejected by a court.[138] Likewise, the Senate Watergate Committee required testimony by Robert Mardian about conversations he had with G. Gordon Liddy and by Herbert Kalmbach about conversations with Bebe Rebozo, after determining that neither Mardian nor Kalmbach were acting within the scope of the attorney-client privilege during those discussions.[139]

More recently, during the Iran-Contra hearings, some of the House committee members expressed the view that the attorney-client privilege is discretionary before Congress. Nevertheless, neither the Senate nor House committees challenged any assertions of the privilege by witnesses appearing at the public hearings, even in a few instances when the applicability of the privilege appeared somewhat questionable. For example, Richard Secord, Albert Hakim, and Oliver North all refused on the basis of the attorney-client privilege to testify about a meeting they held with Secord's attorney, claiming that he was acting as an attorney for all three at the meeting. The Iran-Contra commitees also recognized a rare assertion before Congress of the marital privilege, invoked on behalf of Oliver North's wife, who refused on that basis to testify about various funds created for the benefit of North's family from proceeds from the Iranian arms sales.[140]

A number of established exceptions to the application of the attorney-client privilege exist. The privilege is inapplicable if the client obtained other than legal services from the attorney, for example, business or accounting advice;[141] also, it protects only those communications between attorney and client made in confidence, and is thus inapplicable if a communication is made in the presence of a third party not the agent of either the client or the attorney.[142] Furthermore, the privilege may be expressly or implicitly waived, for example, if the client or his or her attorney with authority testifies or otherwise

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138. *See id.* at H669 and 697. After they were cited for contempt of Congress, the Bernsteins agreed to testify before the House Foreign Affairs committee; their prosecution for contempt was not pursued further.

139. J. HAMILTON, *supra* note 136 at 244.

140. *Joint Iran-Contra Report* at 345.

141. *See* United States v. Davis, 636 F.2d 1028, 1044 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); In re Shapiro, 381 F. Supp. 21, 22 (N.D. Ill. 1974).

142. *See* United States v. Simpson, 475 F.2d 934, 936 (D.C.Cir.) (per curiam), *cert. denied*, 414 U.S. 873 (1973).

discloses the contents of the confidential communication to someone outside the attorney-client relationship.[143] Finally, an important exception to the privilege is that it does not protect communications between client and attorney when the client's purpose is the furtherance of a present, continuing, or future crime or fraud.[144]

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143. *See* Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 25 n.13 (9th Cir. 1981). There is a division of authority as to whether the voluntary release of otherwise protected information on a limited basis to agencies such as the Securities and Exchange Commission and the Internal Revenue Service constitutes a waiver. *Compare* Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.") *with* Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) voluntary surrender of materials to SEC pursuant to an agency subpoena constitutes only a "limited waiver" or privilege). No similar judicial consideration of whether testimony before Congress might constitute waiver of later assertions of the attorney-client privilege exists, though a court in a different context held that executive branch disclosures of information to Congress do not constitute any waiver of the deliberative process privilege under the Freedom of Information Act. Murphy v. Department of the Army, 613 F.2d 1151, 1155-58 (D.C. Cir. 1979).

144. *See* United States v. Horvath, 731 F.2d 557 (8th Cir. 1984); In re Grand Jury Proceedings in Matter of Fine, 641 F.2d 199, 203 (5th Cir. 1981). For a detailed analysis of these exceptions, and the scope of the attorney-client privilege generally, *see* Developments, *Privileged Communications*, 98 Harv. L. Rev. 1450, 1501-29 (1985).

hearings.[19] As the Supreme Court stated in 1933, a congressional "committee determines for itself whether its sessions shall be public or private.... It is all a matter of discretion."[20] However, since the early 1970s, both the Senate and the House have adopted rules limiting the authority of its committees to meet in closed session. Though their effect is similar, these House and Senate "sunshine" rules are not identical, and thus require separate consideration.

Senate Rule 26(5)(b)—which also applies to regular committee business—provides that all hearings "shall be open to the public" unless the committee determines that the testimony to be taken falls within one of six enumerated categories: 1) national security matters, 2) internal staff personnel matters, 3) matters that "will tend to charge an individual with crime or misconduct, or otherwise to expose an individual to public contempt or obloquy or will represent a clearly unwarranted invasion of the privacy of an individual," 4) the identity of informers and other law enforcement matters, 5) trade secrets and other confidential financial or commercial information, and 6) other matters required to be kept confidential by law or regulation.

Under this rule, a committee may go into closed session only if the following three steps are taken: *first,* there must be a motion made and seconded to go into closed session for the sole purpose of determining whether to go into closed session; *second,* a closed session is held to discuss whether any of the six enumerated categories of information require proceedings in closed session; and *third,* a majority of the members of the committee or subcommittee must vote in open session to go into closed session.

The House rules, though similar, distinguish between closed session meetings and hearings. With respect to closed session hearings,[21] House Rule XI(2)(g)(2) provides that all hearings shall be open to the public unless a majority of the committee or subcommittee votes in open session to close the hearing because the testimony would endanger national security or violate a law or House rule.[22] In addition,

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19. The term "executive session" is often used interchangeably with "closed session." Strictly speaking, however, the term executive session does not have that broad meaning; executive sessions are sessions in which the Senate exercises its responsibility to advise and consent to nominations and treaties.

20. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 304-05 (1933).

21. As to the closing of meetings, *see* House Rule XI(2)(g)(1).

22. Under this provision, the committee may also vote to close the hearing for the sole purpose of determining whether the testimony should be received in closed session.

Rule XI(2)(k)(5) provides that testimony "shall" be held in closed session if a majority of a committee or subcommittee determines it "may tend to defame, degrade, or incriminate any person."[23] For example, this provision was recently invoked to close a hearing by the House Ethics Committee looking into allegations of various ethical violations by Congressman Austin Murphy. The Committee Chairman held that expected testimony by Murphy about his permitting the use of congressional resources at his former law firm and his hiring of a "ghost" employee on a subcommittee staff might "tend to defame, degrade and or invoke the privacy of third parties."[24]

Frequently, witnesses called before a congressional committee, fearing that publicity from their testimony will damage their reputation, or for other reasons preferring not to testify in public, will ask to be heard in closed session. Although a witness has a right to have a request to be heard in closed session considered by the committee, and that request cannot be disposed of by a staff member or the chairman on his or her own authority,[25] a witness has no absolute right to refuse to testify at a public hearing.[26]

If the determination is made to hear a witness' testimony in closed session, the transcript of that testimony will be treated as a confidential document. Most committees have adopted rules that permit the release to the public of closed session testimony only upon formal committee action.[27] Under the House rules, and many Senate committee rules, a majority vote of the committee is required to publicly release such

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23. Although this language would appear to give a House committee no discretion to hold a public hearing if it determines that testimony may defame, denigrate, or incriminate any person, a committee retains a measure of discretion, since the committee, not the witness, makes the threshold determination of whether the testimony is derogatory. *See* 4 DRESCHLER'S PRECEDENTS at Ch. 15, § 15.4-15.6; *see also* notes 39-41 and accompanying text *infra*, discussing additional protections accorded to witnesses by Rule XI(2)(k)(5).

24. Washington Post, Nov. 18, 1987, at A23, Col. 1.

25. *See* Yellin v. United States, 374 U.S. 109 (1963), discussed *supra* at notes 6-8 and accompanying text.

26. United States v. Orman, 207 F.2d 148, 159 (3d Cir. 1953). This is also reflected in a statutory provision, 2 U.S.C. § 193, which provides that no congressional witness may refuse to testify on the ground that his testimony "may tend to disgrace him or otherwise render him infamous."

27. Most of these rules apply to confidential materials received by the committee in closed session, such as trade secrets and other proprietary information provided in response to a committee subpoena. *See infra* § 5.5.

testimony.[28] Some committee rules permit such release upon the joint decision of the committee's chairman and ranking minority member.[29]

Some witnesses, on the other hand, may prefer to be heard in open session,[30] perhaps to demonstrate to others that they have not revealed anything or, as may be more common, out of a fear that their testimony might be leaked by the committee in a distorted form.[31] However, just as a witness cannot demand to be heard in closed session, so too a witness cannot refuse to testify in closed session if the committee has considered that request yet determined not to grant it.[32]

§ 5.5. CONFIDENTIAL MATERIALS

Congressional committees regularly obtain access to a wide range of confidential materials—for example, national security and other classifed information from the executive branch, open investigatory files from the Department of Justice, the Securities and Exchange Commission, and other law enforcement agencies, as well as trade secrets and other sensitive proprietary information obtained directly from businesses or other private parties. If, as is common, such materials are provided in closed session, they generally may not be released without a vote by the committee.[33] However, these rules do not

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28. House Rule XI(2)(k)(7) provides that "[n]o evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee." Many House committees repeat this is their own rules. Although no Senate rule addresses the issue, many individual committeess have adopted the same requirement, *e.g.*, Senate Armed Services Rule 10(e); Senate Energy Rule 10; Senate Indian Affairs Rule 9.

29. *E.g.*, Senate Aging Rule 2.4; Senate Banking Rule 3(e).

30. Their objection may be either to testifying in closed session or at a staff deposition.

31. On the problem of leaks in congressional investigations, *see infra* Chapter Nine, § 9.3.

32. *Cf.* United States v. Liddy, Crim. No. 74-117 (D.D.C. 1974), *reprinted in Court Proceedings and Actions of Vital Interest to the Congress,* Joint Comm. on Cong. Operations, 93d Cong., 2d Sess. 483 (1974) (upholding contempt conviction of G. Gordon Liddy, who refused to testify at closed session of House subcommittee).

33. *See* House Rule XI(2)(k)(7) and the examples of Senate committee rules cited *supra* in note 28. Because no Senate rule addresses this issue, individual committee rules must be consulted. A few of these rules permit release of information obtained in closed session without a vote by the full committee upon the joint concurrence of the committee's chairman and ranking minority member.

protect against disclosure of confidential materials obtained other than in closed session.[34] And both the Senate and House rules provide that all committee records are the property of each house and that all members of that house may have access thereto.[35]

If a committee follows its procedures for the release of confidential information and makes a determination to permit the release of such information, a witness will have no absolute right to demand confidentiality, because courts have interpreted Congress' constitutional authority to investigate as including the right to make at least limited public dissemination of the information obtained.[36] Furthermore, if an individual member discloses confidential information on the floor or during committee hearings, while that member may be subject to internal disciplinary action, a private party affected by the disclosure of its sensitive information would most likely be prevented from obtaining legal redress by the operation of the Speech or Debate Clause of the Constitution.[37] Thus, while it may be possible, and advisable, to

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Both the Senate and House rules establish procedures for the receipt of "confidential communications" from the President. *See* House Rule XXIX; Senate Rule XXIX(6). The Senate rules explicitly provide that a senator may be expelled, or an officer of the Senate punished for contempt, for disclosing the "secret or confidential business or proceedings of the Senate." Senate Rule XXIX(5). In addition, special rules have been adopted by both House and Senate committees to protect classified information. *See, e.g.*, House Armed Services Rule 23; House Foreign Affairs Rule 20; House Intelligence Rule 10; Senate Intelligence Rule 9; Senate Foreign Relations Rule 13.

34. An exception is Joint Economic Committee Rule 23, which prohibits the release of any documents obtained by the committee with a request for confidentiality unless the committee votes that the release is essential to the performance of its functions or if the identity of the company or entity providing the information will not be revealed.

35. Senate Rule XXVI(10)(a); House Rule XI(2)(e)(2) (which excepts the records of disciplinary actions taken by the House Committee on Standards of Official Conduct). The House precedents indicate that members do not have unfettered access to such documents. The rule does not entitle members to make copies of the documents and members may not bring committee documents to the well of the House (where they could be read into the *Congressional Record*) without committee authorization. Furthermore, committees may prescribe regulations to govern the access of members to their files, such as requiring examination in the committee offices. H.R. DOC. NO. 99-279, *supra* note 1, at § 706, comment.

36. *See, e.g.*, Doe v. McMillan, 566 F.2d 713, 716-18 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 969 (1978). *Cf.* Senate Rule XXVI(10)(a) ("Each committee is authorized to have printed and bound such testimony and other data presented at hearings held by the committee.").

37. Art I, Sec. 6, cl. 2, discussed *infra* in Chapter Seven, § 7.2.

enter into confidentiality agreements of varying scope with congressional committees in responding to both subpoenas and informal demands for information, in providing documents to Congress there is never a guarantee that the confidentiality of such information will remain safeguarded.[38]

§ 5.6. DEFAMATORY OR DEROGATORY HEARING TESTIMONY

Not infrequently in the course of committee hearings, testimony is offered that a third party considers defamatory or otherwise damaging to his or her reputation. Various rules have been adopted to afford individuals so affected an opportunity to be heard or to otherwise present their story.

House Rule XI(2)(k)(5) provides that "[w]henever it is asserted that the evidence or testimony at an investigation may tend to defame, degrade, or incriminate any person... the committee shall afford such person an opportunity voluntarily to appear as a witness, and dispose of requests from such person to subpoena additional witnesses."[39] While the language of this rule clearly gives committees the discretion whether to grant a request to subpoena additional witnesses, the additional right granted to an impugned person to appear voluntarily as a witness is stated in such a way ("the committee *shall* afford... an opportunity") to suggest an absolute right to be heard. Indeed, at the time the rule was adopted in 1955, as part of a House resolution known as the Code of Fair Procedures, it was commented during its floor consideration that "when a person is named in a committee hearing and his good reputation besmirched, he shall have a prompt opportunity to appear and refute the charges," and that the remedy is "mandatory."[40] Although this provision has rarely been invoked, House committees in practice have been able to retain their discretion over such requests to testify, by reserving the power to make the

38. *See infra* Chapter Nine, § 9.3.

39. A third remedy provided by Rule XI(2)(k)(5)—to have the evidence that will tend to degrade presented in closed session—is discussed *supra* at notes 23-24 and accompanying text.

40. 101 CONG. REC. 3569, 3572-73 (1955), *quoted in* 4 DRESCHLER'S PRECEDENTS at Ch. 15, § 15.1.

threshold determination of whether or not evidence may tend to defame, degrade, or incriminate a person under the rule.[41]

Although no Senate rule applies, similar kinds of protections have been adopted by a number of Senate committees. A few of these rules create a procedure for persons who believe that hearing testimony (or comments at hearings by committees members or staff) has affected their character adversely to request that the committee hear their testimony.[42] All of these rules make clear that the decision in this regard rests solely within the discretion of the committee. A few committees permit impugned individuals to submit in writing questions for the committee to use in questioning witnesses.[43] Again, the decision whether or not to utilize the questions rests with the committee. Somewhat more common are rules permitting an impugned witness to submit a sworn written statement for the hearing record.[44] However, no Senate committees have adopted rules similar to House Rule XI(2)(k)(5), providing a procedure for an impugned person to request that additional witnesses be subpoenaed. That, of course, does not prevent an individual from suggesting names of additional witnesses to a committee. Further, Senate Rule 26(4)(d) sets forth a procedure for the minority members of Senate committees to call witnesses. Depending on the political dynamics of a particular investigation, this might provide a useful vehicle for an individual who feels his or her reputation has been impugned to assure that additional views are presented.

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41. *See id.* at § 15.4 (citing to 1966 ruling on point of order by Speaker McCormack).

42. *See* Senate Aging Rule V.6; Senate Ethics Rule 6(h)(1); Senate Intelligence Rule 8.8; Permanent Subcommittee on Investigations Rule 15. Unless the requirement is waived, the Permanent Subcommittee on Investigations requires an impugned person to make such a request within thirty days of the date the offending statement was made.

43. *See* Senate Aging Rule V.6; Senate Intelligence Rule 8.8; Senate Permanent Subcommittee on Investigations Rule 15.

44. *See* Senate Aging Rule V.6; Senate Energy Rule 11; Senate Ethics Rule 6(h)(2); Senate Indian Affairs Rule 10; Senate Intelligence Rule 8.8; Senate Permanent Subcommittee on Investigations Rule 15. Senate Aging Rule V.6 would suggest that the committee must permit an impugned person to file a statement; the other rules leave the decision with the committee. Senate Permanent Subcommittee on Investigations Rule 15 provides that the Subcommittee may condition the filing of such a written statement upon the individual personally appearing to testify about the matters contained in the statement.

One remedy that is clearly unavailable to an impugned person is to seek to bring a defamation action against the witness who offered the offending testimony. As with a witness in a judicial proceeding, a witness appearing before a congressional committee is absolutely immune from defamation actions or other lawsuits predicated upon the witness' testimony before the committee.[45] This absolute immunity of witnesses testifying before the Congress or state legislatures has been recognized by both federal and state courts.[46]

A recent decision addressing the scope of this immunity is *Yip v. Pagano*,[47] a defamation action arising from testimony before the House Judiciary Subcommittee on Crime in which the defendant, a New Jersey State Police officer, testified that the plaintiff was an international drug smuggler who had laundered nearly $400,000 in two Atlantic City casinos. In holding that the defendant's testimony was absolutely privileged, the court stated that in order to be privileged, "a statement made to a legislative body must be (1) related to the subject matter (2) of legislative proceedings (3) which are either (a) being conducted or (b) being contemplated in good faith, and (4) which are within the jurisdiction of the legislative body conducting them."[48]

This privilege has been interpreted as applying not only to witnesses under subpoena, but to voluntary testimony as well.[49] The privilege has been held to apply to both sworn and unsworn testimony.[50] In addition, the privilege applies to statements not made in response to

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45. This common law privilege is expressed by the RESTATEMENT (SECOND) OF TORTS § 590A (1977) in the following terms: "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding." *See also* Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131 (1910).

In addition, under the Speech or Debate Clause of the Constitution, committee members and staff would also be absolutely immune from any lawsuits based upon their comments at committee hearings. The scope and limitations of this privilege are discussed *infra* in Chapter Seven, § 7.2.

46. *See, e.g.*, Webster v. Sun Co., Inc., 731 F.2d 1 (D.C. Cir. 1984); Bio/Basics Int'l. Corp. v. Ortho Pharmaceutical Corp., 545 F. Supp. 1106 (S.D.N.Y. 1982); Tocco v. Piersante, 69 Mich. App. 616, 245 N.W.2d 356, 362 (1976); Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 112 Cal. Rpt. 609, 614-15 (1974).

47. 606 F. Supp. 1566 (D.N.J. 1985).

48. *Id.* at 1571.

49. *Id.; Webster*, 731 F.2d at 4; *Bio/Basics*, 545 F. Supp. at 1108. *But see* Fiore v. Rogero, 144 So.2d 99, 103 (Fla. App. 1962).

50. *Yip*, 606 F. Supp. at 1571.

specific questions by committee members if the testimony is relevant to the committee's inquiry.[51] This test of relevance is satisfied "[s]o long as the statement has some objective pertinence to the legislative issue it was meant to address."[52]

§ 5.7. BROADCASTING OF HEARINGS

First radio and now television have become an increasingly prevalent presence at congressional hearings. Many of the major congressional investigative hearings of this century, the Watergate and Iran-Contra hearings being obvious recent examples, have received virtual gavel-to-gavel coverage. With the advent of cable televison and networks such as C-Span, even routine hearings may receive television coverage. There can be no doubt that such broadcasting serves a significant role in educating and informing the public. However, it is equally clear that the potential for injuring a witness' reputation is accentuated when his or her testimony is the subject of television coverage.

In recognition of the potential dangers of television coverage of congressional hearings, the House in 1970 adopted specific rules to regulate and control the broadcasting of its hearings.[53] House Rule XI(3)(e) provides that the broadcast of open committee hearings may be permitted by a majority vote of the committee in accordance with written rules adopted by the committee. Some committee rules permit broadcast coverage of its open hearings upon a majority vote of the committee,[54] others permit that determination to be made by the committee or subcommittee chairman.[55] A few committees have adopted rules providing that all of its open hearings may be broadcast unless the committee specifically votes to forbid such coverage.[56]

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51. *Id.* at 1571-72.

52. *Webster,* 731 F.2d at 5. *Accord Yip,* 606 F. Supp. at 1572 (relevance requirement concerns "a general frame of reference and relationship to the subject matter of the action").

53. Rules for the broadcasting of the proceedings of the full House were also adopted, and appear in House Rule I(9).

54. *E.g.,* House Interior Rule 12(e); House Aging Rule 3(h).

55. *E.g.,* House Foreign Affairs Rule 21.

56. *E.g.,* House Energy and Commerce Rule 19.

The most fundamental protection offered to witnesses testifying before House committees is the absolute right to demand that there be no television, radio, or still photograph coverage during their subpoenaed testimony. House Rule XI(3)(F)(2) provides that:

> No witness served with a subpoena by the committee shall be required against his or her will to be photographed at any hearing or to give evidence or testimony while the broadcasting of that hearing, by radio or television, is being conducted. At the request of any such witness who does not wish to be subjected to radio, television, or still photograph coverage, all lenses shall be covered and all microphones used for coverage turned off.

No similar absolute protection is afforded to Senate witnesses.[57] The only Senate Rule on this subject, Rule 26(3)(c), provides that "[w]henever any hearing conducted by any . . . committee or subcommittee is open to the public, that hearing may be broadcast by radio or television, or both, under such rules as the committee or subcommittee may adopt." Like the House rules, Senate committee rules differ on the procedures for allowing broadcast of hearings, some permitting all open hearings to be broadcast in the absence of committee action to the contrary,[58] others requiring committee[59] or the committee chairman's[60] approval for such broadcasting. However, unlike those in the House, few Senate committees provide witnesses with the absolute right to demand that there be no broadcast coverage of their testimony.[61] A few committee rules specifically provide a mechanism for witnesses to request that broadcast coverage be stopped during their testimony,

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57. Because of this difference in the House and Senate rules, in order to permit joint hearings by the House and Senate Select Iran-Contra Committees, the House Committee included no such right in its rules and (since the standing rules or the House normally would supercede any conflicting committee rules), in accordance with its enabling resolution, adopted an unusual rule which provided "that the rules of the House of Representatives *when not inconsistent therewith,* are the rules of the committee. . . ." House Iran-Contra Rule 1.1 (emphasis supplied).

58. *E.g.*, Senate Finance Rule 15(a); Senate Aging Rule II.5.

59. *E.g.*, Senate Ethics Rule 10(a); Senate Energy Rule 12.

60. *E.g.*, Senate Commerce Rule IV.

61. An exception is Senate Finance Rule 15(f), which requires that there be no television or radio coverage upon the request of a witness.

leaving the discretion to grant or reject the request to the committee[62] or its chairman.[63] However, most Senate committee rules are silent on this subject, and thus provide no such right.

The question of what, if any, rights a witness has to refuse to answer questions because of the presence of television or other media in the absence of a specific rule has received only limited judicial treatment. In a 1961 district court case, *United States v. Hintz*,[64] the court stated that it "has no power to impose upon Congress, or coordinate branch of our government, either a proscription against or a prescription for radio, television, movies or photographs." The court nevertheless found that in the context of a contempt proceeding, "where the defense condemns the conditions under which the defendant was commanded to answer," a court may properly examine whatever "the conditions were reasonably conducive to that clarity and accuracy of response of which that defendant would normally have been capable."[65] The court held that it "may not deny legal sufficiency to a contempt of Congress indictment merely because the admitted factual context includes the presence of photographic and aural recording and transmission apparatus."[66] Rather, the burden is on the contemptuous witness to establish that he "was actually deprived of his normal faculties to respond intelligently with clarity and accuracy," that "this deprivation was the reasonable result of conditions caused, or affirmatively allowed to exist, by Congress," and that "such conditions were unreasonable and unwarranted."[67] Such a showing would be

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62. *E.g.*, Senate Ethics Rule 10(b).

63. *E.g.*, Senate Aging Rule II.5(b); Senate Iran-Contra Rule 2.4(b).

64. 193 F. Supp. 325, 331 (N.D. Ill. 1961).

65. *Id.* at 332. However, that court in dictum suggested that in no circumstances could a witness refuse to take an oath or express an affirmation because of the presence of television cameras or other broadcasting apparatus. *Id.* at 335.

66. *Id.* at 335. *See also* United States v. Moran, 194 F.2d 623, 627 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952) (presence of microphones, television cameras, and photographs held not so lacking in decorum to render the committee an incompetent tribunal before which false testimony would not constitute perjury).

67. *Id.* at 334. With respect to the burden of proof, the district court in *Hintz* disapproved of the language in an earlier district court case, United States v. Kleinman, 107 F. Supp. 407, 408 (D.D.C. 1952), that a witness was not guilty of contempt because there were "in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing against the walls.... The concentration of all of these elements seems... necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous."

exceedingly difficult for a witness to establish. Thus, in the absence of a rule giving witnesses protection in this area, a witness' best strategy is to convince the committee in advance not to permit broadcasting, rather than to expect to later convince a court that refusal to answer questions was justified by the existence of such broadcasting.

§ 5.8. CONDUCT OF HEARINGS

[a] Role of the Chairman

If the Chairman of a committee or subcommittee is present, he or she usually presides over the conduct of hearings.[68] In the absence of the Chairman, the ranking majority member present at the hearing presides.[69] Hearings typically begin with an opening statement by the Chairman. As discussed in Chapter Four, a witness may be prosecuted for contempt only if questioned on matters that are pertinent to the subject matter of the investigation; the opening statement is an important means of defining the subject matter of a hearing.[70]

[b] Sworn or Unsworn Testimony

Witnesses may be either sworn or unsworn, depending on whether the committee wishes the sanction of perjury to apply.[71] A few committees (generally those that regularly conduct potentially contentious investigative hearings) have adopted rules that require all witnesses appearing before the committee to be sworn.[72]

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68. *See generally,* United States v. Fort, 443 F.2d 670, 681 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 932 (1971).

69. House Rule XI(2)(d); Senate Rule XXVI(3). Given that many House committees permit hearings with two members present and Senate committees with a single member, and that there may be instances when hearings are conducted with no majority members present, some committees have adopted rules expressly providing that *any* member may preside over a hearing. *See, e.g.,* Senate Aging Rule I.4; Senate Environment Rule 4(a); Senate Finance Rule 3(b).

70. *See supra* Chapter Four, § 4.1[c].

71. *See supra* Chapter Three, § 3.5.

72. *See, e.g.,* Senate Permanent Subcommittee on Investigations Rule 6; Senate Aging Rule V.2; Senate Iran-Contra Rule 5.2; House Iran-Contra Rule 6.2.

Usually, the Chairman administers the oath to the witness. However, by statute any member of a committee may administer the oath.[73] No particular oath is required. A common formulation is, "Do you solemnly swear (or affirm) that the testimony you will give before this committee will be the truth, the whole truth, and nothing but the truth, so help you God?"

[c] Witness' Right to Make a Statement

Witnesses have no right to make an opening statement before being questioned.[74] Nevertheless, committees by rule commonly accord witnesses the right to make a brief opening statement. These rules typically limit the length of such statements to ten or fifteen minutes or "a brief summary,"[75] and require the witness to submit a written copy of his or her statement twenty-four or forty-eight hours in advance of the hearing.[76] Although a committee may decide to waive that requirement, some committees require strict compliance—witness the refusal, on that basis, of the Senate and House Iran-Contra Committees to permit Lt. Col. Oliver North to make an opening statement.[77]

[d] Questioning of Witnesses

Questioning is generally structured so that each member is permitted a fixed period to ask questions, usually for five or ten

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73. 2 U.S.C. § 191. This is often expressly noted in committee rules. *See, e.g.*, House Armed Services Rule 15; Senate Intelligence Rule 8.2; Senate Aging Rule 5.2.

74. Courts have upheld contempt convictions of witnesses who refused to be sworn or to answer questions because of the committee's refusal to permit an opening statement. *E.g.*, Townsend v. United States, 95 F.2d 352, 360 (D.C. Cir.), *cert. denied*, 303 U.S. 604 (1938).

75. *See, e.g.*, Senate Aging Rule 5.3; Senate Foreign Relation Rule 6(b); House Agriculture Rule III(e); House Banking Rule 7(b).

76. *See* the rules cited in footnote 75 *supra*. House Rule XI(2)(k)(8) provides that "[i]n the discretion of the committee, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The committee is the sole judge of the pertinency of testimony and evidence adduced at its hearing."

77. North, however, was permitted to read his statement at a later time in the

minutes,[78] with questioning alternated between majority and minority members present, by order of seniority, until all the members present have exhausted their questions. Although witnesses are most frequently questioned by committee members, committee staff may also ask questions. In order to facilitate more in-depth questioning, a committee may permit its chief counsel or other committee staff to begin the questioning, laying the foundation for follow-up questioning by the members.[79]

[e] Right to Review the Transcript

Most House and Senate committees have adopted rules permitting witnesses to inspect a copy of their testimony given in public session, as well as closed session testimony if authorized by the committee.[80] Many of these rules additionally provide a procedure for a witness to request changes in his testimony. These rules usually provide that witnesses may only make minor grammatical changes and not substantive alterations in their testimony.[81] The decision on whether to permit such changes is usually left to the committee Chairman.[82]

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hearings, after the notice period of the rule had passed. *See supra* Chapter Two, § 2.6[e].

78. *E.g.*, Senate Banking Rule 4(g); Senate Energy Rule 4(c); House Armed Service Rule 16(b); House Energy Rule 4(c).

79. *See supra* Chapter Two, § 2.6 for a discussion of the extensive role given counsel in the questioning of witness during the Iran-Contra hearings.

80. House Rule XI(2)(k)(9) provides that "[a] witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the committee." The rules of Senate committees on this subject generally do not require the committee to provide the witness a *copy* of the transcript of his testimony, though committees will often provide witnesses with a copy in order to avoid forcing a witness to inspect the transcript at the committee offices. *See, e.g.*, Senate Aging Rule V.5; Senate Armed Services Rule 10(g).

81. With respect to more significant, substantive changes, a committee may agree to permit a witness to make a supplemental statement to be published with his or her original testimony. *E.g.*, Joint Economic Rule 10.

82. These rules are consistent with court holdings that witnesses have no absolute right to recant sworn testimony. *See* United States v. Norris, 301 U.S. 564, 573-74 (1937).

§ 5.9. RIGHT TO COUNSEL

[a] Role of Counsel

The right of a witness to be accompanied by counsel while testifying is recognized before both Senate and House committees.[83] House Rule XI(2)(k)(3) recognizes that right, but makes clear that the role of counsel is limited: "Witnesses at investigative hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights."[84] Many Senate committees have adopted similar rules; a typical formulation is Senate Armed Services Rule 10(f), which provides: "Any witness summoned to give testimony or evidence at a public or closed hearing of the committee or subcommittee may be accompanied by counsel of his own choosing who shall be permitted at all times during such hearing to advise such witness of his legal rights."[85] A few committees have adopted rules that specifically prohibit counsel from "coaching" witnesses during their testimony.[86]

[b] Control Over Counsel

Committees retain the authority to control the conduct of counsel appearing before them. The House has adopted a rule expressly dealing

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83. This section deals exclusively with the procedural rules that have been adopted governing the right to counsel in congressional proceedings. The role of an attorney in a congressional investigation is discussed further *infra* in Chapter Nine, § 9.8.

84. The Supreme Court at least implicitly has recognized the validity of such limitations. In Yellin v. United States, 374 U.S. 109, 112-13 (1963), referring to a HUAC rule similar to House Rule XI(2)(k)(3), the Court said that counsel for the witness "would not have been justified in continuing [to speak], since Committee rules permit counsel only to advise a witness, not to engage in oral argument with the Committee."

85. *See also* Banking Rule 4(e); Senate Labor Rule 17(d). A few committees' rules provide a mechanism for a witness who cannot afford an attorney to ask the committee to seek to obtain volunteer counsel. *E.g.*, Senate Aging Rule 5.4(b); Senate Iran-Contra Rule 5.4(b); House Iran-Contra Rule 6.6.

86. *See, e.g.*, Senate Permanent Subcommittee on Investigations Rule 8.

with this issue. House Rule XI(2)(k)(4) provides that "[t]he chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."[87] Similar rules have been adopted by a few Senate committees.[88] In the rare event that a witness' counsel is ejected, that does not excuse the witness from testifying.[89]

87. A committee must strictly follow its rules in this regard. *See* Kinoy v. District of Columbia, 400 F.2d 761, 764 (D.C. Cir. 1968) (reversing disorderly conduct conviction of attorney disrupting HUAC subcommittee proceedings in part because attorney was removed by order of chairman, acting alone in contravention of HUAC rule requiring action by majority of subcommittee present for such action).

88. *E.g.*, Senate Aging Rule V.8; Senate Permanent Subcommittee on Investigations Rule 7.

89. *See* Senate Permanent Subcommittee on Investigations Rule 8.

5 Hearing Procedures

§ 5.1 Significant Protections
§ 5.2 Notice of Hearings
§ 5.3 Quorums for Hearing Testimony
§ 5.4 Open and Closed Sessions
§ 5.5 Confidential Materials
§ 5.6 Defamatory or Derogatory Hearing Testimony
§ 5.7 Broadcasting of Hearings
§ 5.8 Conduct of Hearings
- [a] Role of the Chairman
- [b] Sworn or Unsworn Testimony
- [c] Witness' Right to Make a Statement
- [d] Questioning of Witnesses
- [e] Right to Review the Transcript

§ 5.9 Right to Counsel
- [a] Role of Counsel
- [b] Control over Counsel

§ 5.1. SIGNIFICANT PROTECTIONS

In addition to the constitutional and statutory protections discussed in the previous chapter, less widely understood but equally significant protections are afforded to witnesses by House and Senate rules and precedents.[1] This chapter considers some of the most important of these procedural rules available to a witness appearing before a congressional committee.

Two related principles make these procedural rules so important. *First,* both the Senate and House rules require all committees to adopt written rules of procedure and to publish those rules in the *Congressional Record.*[2] The requirement of publishing committee rules is mandatory. In *United States v. Reinecke,*[3] Howard Reinecke had appeared before a hearing of the Senate Judiciary Committee under a committee rule setting one senator as a quorum for the hearing of testimony. Reinecke challenged his perjury conviction on the ground that this reduced quorum rule had not been published by the committee

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1. Selected Senate and House rules are set forth, *infra,* in Appendices B and C respectively. In addition to the actual Senate and House rules, another important informational source in this area is JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE, ("JEFFERSON'S MANUAL"), *reprinted in* H.R. DOC. NO. 279, 99th Cong., 2d Sess. (1987). Jefferson's Manual was prepared by Thomas Jefferson for his guidance as President of the Senate during his years as Vice President from 1797 to 1801. Ironically, though prepared for use in the Senate, Jefferson's Manual is not part of the formal rules of the Senate, but is a continuing source of parliamentary authority in the House. The House in 1837, in a rule which still exists, *see* House Rule XLII, provided that the rules set forth in Jefferson's Manual should "govern the House in all cases to which they are applicable, and in which they are not inconsistent with the standing rules and orders of the House."

The modern precedents of the House of Representatives are set forth in the multivolume DRESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1974) ("DRESCHLER'S PRECEDENTS"). The precedents of the House from 1908-1936 are contained in the earlier CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1936) ("CANNON'S PRECEDENTS"). A compilation of the early House precedents, from the first Congress through 1907, are found in HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1907) ("HINDS' PRECEDENTS"). No similar comprehensive compilation of Senate precedents exists, though the above works contain scattered references to some Senate precedents.

2. House Rule XI(2); Senate Rule XXVI(2). The House rule requires semiannual publication, the Senate annual.

3. 524 F.2d 435 (D.C. Cir. 1975).

at the time of his testimony. The D.C. Circuit accepted the witness' argument that the rule was invalid because not published. Reversing the perjury conviction, the court emphasized two purposes of such publication—to assure that the public has access to committee rules and to hold members politically accountable for the fairness of their rules.[4]

Second, once a committee has promulgated rules of procedure, it must comply with them. The rules of each house and of committees and subcommittees that affect the rights of witnesses are judicially cognizable and must be "strictly observed."[5] An example of the application of this principal is *Yellin v. United States*,[6] in which the Supreme Court reversed the contempt conviction of a witness who had refused to answer questions posed to him at a public session of the House Committee on Un-American Activities (HUAC) on the ground that the committee had violated its rule on executive sessions. HUAC had adopted a rule that provided that "[i]f a majority of the Committee . . . believes that the interrogation of a witness in a public hearing might . . . unjustly injure his reputation . . . the Committee shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing."[7] Yellin, a suspected Communist, had requested to be heard in closed sesssion, a request that was denied by members of the HUAC staff. The Court stated that "Yellin might not prevail, even if the Committee takes note of the risk of injury to his reputation or his request for an executive session. But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in [its] Rule. . . ."[8]

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4. *Id.* at 438-39.

5. Gojack v. United States, 384 U.S. 702, 708 (1966). Though, as in the administrative setting, courts give considerable weight to a committee's construction of its own rules. *See, e.g.*, Barry v. United States ex rel. Cunningham, 279 U.S. 597, 619 (1929); United States v. Smith, 286 U.S. 6 (1932).

6. 374 U.S. 109 (1963).

7. *Id.* at 784. The modern version of this rule is discussed *infra* at notes 21-23 and accompanying text.

8. 374 U.S. at 121. By the same token, the rules of the House and Senate must also be strictly observed by committees. *See, e.g., In re* Beef Industry Antitrust Litigation, 589 F.2d 786, 790-91 (5th Cir. 1979) (refusing House Committee Chairmen's motion to intervene in private litigation because of failure to obtain House authorization as required by House Rule XI(2)(m)(2)(B)). *See also* Shape of Things to Come, Inc. v. Kane County, 588 F. Supp. 1192, 1193 (N.D. Ill. 1984) (House rules "have the force of law . . . and Congressmen must abide by them.").

By the operation of these two related principles, the procedural rules applicable to committee hearings to which we now turn provide an important source of protection to witnesses called to appear before a congressional hearing.

§ 5.2. NOTICE OF HEARINGS

Both the Senate and House rules require committees to provide at least one week's notice for hearings.[9] These rules, however, permit a committee to call a hearing with less than one week's notice if necessary for "good cause." Besides notice of the date, time, and place, the rules require a description of the subject matter of the hearing. As discussed in Chapter Four, the requirement that a witness be apprised of the subject matter of the hearing has been interpreted by the courts as constitutionally mandated.[10] Some committee rules also provide separately for a minimum period of notice that must be given to witnesses, usually forty-eight hours; exceptions are also usually made in these rules for good cause.[11] The House rules[12] and many individual Senate committees, also require that all witnesses be provided with a copy of the committee's rules.

§ 5.3. QUORUMS FOR HEARING TESTIMONY

A quorum is the minimum number of members who must act together in order to function as a legislative body. Although the normal quorum for conducting business is no less than one-third of the members of the committee or subcommittee, [13] both the Senate and

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9. Senate Rule XXVI(4)(a); House Rule XI(2)(g)(3).

10. *See supra* Chapter Four, § 4.1[c].

11. *See, e.g.*, Senate Aging Rule V.1; House Banking Rule 7(a).

12. House Rule XI(2)(k)(2).

13. Senate Rule XXVI(7)(a)(1); House Rule XI(2)(h)(2). Excluded from the definition of conducting business by both rules is a committee's final reporting of measures to the full House, which requires a majority quorum. In addition to these quorum requirements for committees, established by Senate and House rule, the Constitution, Art. I, sec. 5, cl. 1, provides that a majority of each house constitutes a quorum to do business.

House rules permit a reduced quorum for taking testimony and receiving evidence. The House permits its committees to conduct hearings if at least two members are present; the Senate permits hearings with only one member present.[14] The great majority of committees in both houses have adopted reduced quorums for testimony at those levels. A few committees have a higher quorum for sworn than unsworn testimony.[15]

These reduced quorum requirements, however, apply only to the taking of testimony and *not* to a vote to authorize the issuance of a subpoena for testimony. Under the Senate rules, a quorum of one-third of the committee or subcommittee's membership is required to authorize a subpoena; a majority of the membership is required under the House rules.[16] Committees are not authorized to act if these quorum requirements are not satisfied. Thus, in *Christoffel v. United States*,[17] the Supreme Court reversed a perjury conviction of a witness because less than a quorum of the committee's members were present at the time of the allegedly perjured testimony. It should be noted, however, that the presence of a quorum is not essential to convicting a witness for criminal contempt, since the criminal contempt statute refers to willful failures to testify or produce papers "upon any matter under inquiry before... any committee," and is thus not restricted, as is the perjury statute, to false statements before a "competent tribunal."[18]

§ 5.4. OPEN AND CLOSED SESSIONS

Until relatively recently, congressional committees had absolute discretion in determining whether to hold open or closed session

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14. House Rule XI(2)(h)(1); Senate Rule XXVI(7)(a)(2). The same quorum would be sufficient to rule upon a witness' objections to the validity of a subpoena. *See* Flaxer v. United States, 235 F.2d 821, 824 (D.C. Cir. 1956), *vacated and remanded*, 354 U.S. 929 (1957).

15. *E.g.*, Senate Appropriations Rule II(3) (three member quorum for taking sworn testimony, one member for other testimony).

16. Senate Rule XXVI(7)(a)(1); House Rule XI(2)(m)(2)(A). However, as discussed *supra* in Chapter Three, notes 13-16 and accompanying text, this power may be delegated by the committee to its chairman.

17. 338 U.S. 84 (1949). The offense of perjury is discussed *supra* in Chapter Three, § 3.5.

18. *See* United States v. Bryan, 339 U.S. 323, 329 (1950).

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CRS Report for Congress

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

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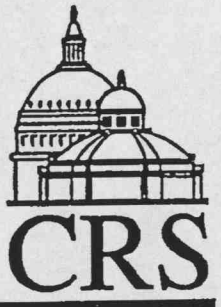

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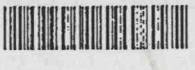

INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY

SUMMARY

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

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

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

I. INTRODUCTION

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

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[1] For a general overview of the oversight process see Congressional Research Service, Congressional Oversight Manual (February 1995).

II. THE LEGAL BASIS FOR OVERSIGHT

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

More particularly, although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the purposes of performing its legitimate functions, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress.[2] 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."[3] 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."[4] The Court went on to emphasize that Congress' investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[5] "[T]he first Congresses", it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"[6] 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."[7] Accordingly, the Court stated, it recognizes

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

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

4 354 U.S. at 187.

5 *Id.*

6 *Id.* at 182.

7 *Id.* at 194-95

"the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[8]

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

The foundation cases establishing Congress' broad power to probe are illustrative and illuminating. They arose out of the Teapot Dome investigations, the 1920's scandal regarding oil company payoffs to officials in the Harding Administration. A major concern of the congressional oversight investigation was the failure of Attorney General Harry M. Daugherty's Justice Department to prosecute the alleged government malefactors. When congressional committees attempting to investigate came up against refusals by subpoenaed witnesses to provide information, the issue went to the Supreme Court and provided it with the opportunity to issue a seminal decision describing the constitutional basis and reach of congressional oversight. In *McGrain v. Daugherty,*[13] the Supreme Court focused specifically on Congress' authority to study "charges of misfeasance and nonfeasance in the Department of Justice." The Court noted with approval that "the subject to be investigated" by the congressional committee "was the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and

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8 *Id.* at 200 n. 33.

9 *Kilbourn v. Thompson,* 103 U.S. 168, 204 (1880).

10 *Watkins v. United States, supra,* 354 U.S. at 187.

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

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

13 273 U.S. 135, 151 (1927).

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

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,*[17] 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."[18] The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits gave an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."[19]

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

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14 *Id.* at 177.

15 *Id.*

16 *Id.*

17 279 U.S. 263 (1929).

18 *Id.*, at 290.

19 *Id.* at 295.

20 *Id.* at 295.

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

III. THE TOOLS OF OVERSIGHT

A. The Subpoena Power

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

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

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21 *McGrain v. Daugherty, supra,* 273 U.S. at 174-75.

22 *Id.* at 158.

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

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

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

26 Senate Rule XXV.

27 House Rule X.

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

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

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

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

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

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

30 U.S. Const., Art. I, sec. 6, cl. 1.

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

32 365 U.S. 399, 408-09 (1961).

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

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

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

B. Staff Depositions

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

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[34] *In re Chapman,* 166 U.S. 661, 669 (1897).

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

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

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

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

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

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

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

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

C. Congressional Grants of Immunity

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

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

[41] See examples cited at note 39, *supra*.

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

[43] See *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955).

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

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

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

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

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[44] See generally *Kastigar v. United States*, 406 U.S. 441 (1972).

[45] *Kastigar v. United States*, 406 U.S. at 446.

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

[47] 18 U.S.C. § 6005(b).

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

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

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

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[49](...continued)

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

[50] 18 U.S.C. § 6005(c).

[51] See H.R. Rept. No. 91-1549, 91st Cong., 2d Sess. 43 (1970).

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

[53] *Application of U.S. Senate Select Committee,* 361 F.Supp. at 1278-79.

[54] 18 U.S.C. § 6002.

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

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

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

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

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56 *Kastigar v. United States, supra,* 406 U.S. at 460.

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

58 951 F.2d 369 (D.C. Cir. 1991).

59 *United States v. North,* 920 F.2d at 942.

60 *Id.* (emphasis in original).

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

immunized testimony" was a forbidden use of the compelled testimony under both the Fifth Amendment and *Kastigar*.[62]

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

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

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

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

63 *Id.* at 872.

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

65 *Id.*

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

IV. ENFORCEMENT OF THE INVESTIGATIVE POWER

A. The Contempt Power

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

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

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

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

[68] *Anderson v. Dunn,* 19 U.S. (6 Wheat) 204 (1821).

also has a third option, enforcement by means of a statutory civil contempt procedure. The three proceedings may be briefly described.[69]

(1) Inherent Contempt

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

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

(2) Statutory Contempt

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

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

70 See, *Groppi v. Leslie*, 404 U.S. 496 (1972).

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

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

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

(3) Civil Contempt

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

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

72 See 2 U.S.C. 288d and 28 U.S.C. 1364.

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

(4) Alternatives to Contempt

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

B. Perjury and False Statements Prosecutions

(1) Testimony Under Oath

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

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

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74 *Christoffel v. United States,* 378 U.S. 89 (1949).

75 House Rule XI (2) (h) (1).

76 Senate Rule XXVI (7) (a) (2).

(2) Unsworn Statements

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

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

V. INVESTIGATING THE EXECUTIVE BRANCH

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

A. Presidential Claims of Executive Privilege

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

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

[78] *United States v. Poindexter, supra*, 951 F.2d at 377-86.

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

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

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

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

[81] 418 U.S. 683 (1974).

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

[83] 418 U.S. at 705, 706. See also *id.* at 708, 711.

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

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

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

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

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85 *Id.* at 707.

86 *Id.* at 713.

87 Id. at 712, n. 19.

88 498 F.2d 725 (D.C. Cir. 1974).

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

90 498 F.2d at 730.

91 *Id* at 732-33.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[102] *Ashland Oil Co., Inc. v. F.T.C.,* 548 F.2d at 980-81.

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

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

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103 5 U.S.C. 552(b)(5).

104 5 U.S.C. 552(d).

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

106 5 U.S.C. 552a (b)(9).

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

108 441 U.S. 281, 301-16 (1979).

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

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

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

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

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109 41 Op. Atty. Gen. 221 (1955).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[118] 199 F.2d at 115.

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

[120] See, *e.g., Pillsbury Co. v. FTC,* 354 F.2d 952 5th Cir. (1968).

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

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

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

Initially, it must be noted that the Supreme Court has rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. Rather, the Court noted in *Morrison v. Olson,* [123] 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.[124] 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.*)[125]

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

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

123 487 U.S. 654 (1988).

124 *Id.* at 691-92.

125 *Id.* at 694.

126 9 F.3d 743 (9th Cir. 1993).

constitutionality of the *qui tam* provisions of the False Claims Act vesting enforcement functions against agencies by private parties.[127]

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

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

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

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

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

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

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

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

D. Access to Grand Jury Materials

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

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

[129] *U.S. v. Nixon,* 418 U.S. 683, 705-706, 711-712 (1974).

[130] *Gulf Oil Corp. v. FPC,* 563 F.2d 588, 610 (3d Cir. 1977).

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

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

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

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131 Fed. R. Crim. Pro. 6 (e) (2).

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

133 Fed. R. Crim. Pro. 6(e) (2).

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

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

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

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

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

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

VI. INVESTIGATIVE OVERSIGHT HEARINGS

A. Jurisdiction and Authority

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

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

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

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

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

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

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

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

B. Rules Applicable to Hearings

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

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

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

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

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

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

148 Senate Rule XXV.

149 House Rule X.

150 House Rule XI(2); Senate Rule XXVI(2).

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

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

153 House Rule XI(2)(k)(2).

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

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

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154 House Rule XI(2)(h)(1).

155 Senate Rule XXVI(7)(a)(2).

156 *Christoffel v. United States*, 338 U.S. 84 (1949).

157 Senate Rule XXVI(7)(a)(2); House Rule XI(2)(h)(1).

158 Senate Rule XXVI(5)(b); House Rule X1(2)(g)(2).

159 House Rule XI(2)(k)(5).

160 House Rule XI(2)(k)(7).

161 *Id.*

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

163 Art. I, sec. 6, cl. 2.

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

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

C. Conducting Hearings

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

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

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

[165] Senate Rule XXVI(3)(c).

[166] See discussion, *supra* at notes 77-78 and accompanying text.

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

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

D. Constitutional and Common Law Testimonial Privileges of Witnesses

(1) Constitutional Privileges

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

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167 2 U.S.C. 191.

168 House Rule XII(2)(k)(3).

169 See, *e.g.*, Senate Permanent Committee on Investigations Rule 8.

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

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

172 2 U.S.C. 191.

(a) Fifth Amendment

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

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

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

174 *Hale v. Henkel*, 201 U.S. 43 (1906).

175 *Bellis v. United States*, 417 U.S. 85 (1974).

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

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

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

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

180 *Emspak v. United States, supra*, 349 U.S. at 194.

181 *Quinn v. United States, supra*, 349 U.S. at 164.

in response to a specific question that might incriminate him. Nor may a witness refuse to take the oath on Fifth Amendment grounds.[182]

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

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

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

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

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

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

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

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

> or prosecution, wider latitude is permitted the witness in refusing to answer other questions.[185]

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

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

(b) First Amendment

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

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

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

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

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

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

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

191 360 U.S. 109, 126 (1959).

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

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

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

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[192] *Id.*

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

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

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

(continued...)

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

(c) Fourth Amendment

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

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

[196] *United States v. Rumely,* 345 U.S. 41 (1953).

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

[198] *Watkins v. United States,* 354 U.S. 178, 188 (1957); *McPhaul v. United States,* 364 U.S. 372 (1960).

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

unreasonably broad or burdensome.[200] The Court has delineated the test be used in judging the reasonableness of a congressional subpoena:

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

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

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

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

201 *McPhaul v. United States*, 364 U.S. at 382.

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

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

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

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

203 *McPhaul v. United States,* 364 U.S. at 378.

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

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

(continued...)

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

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

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

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[205](...continued)

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

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

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

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

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

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

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

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

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207 *See* 2 U.S.C. 190d.

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

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

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

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

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

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

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

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

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

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

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

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

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

216 Bernstein Contempt Report, at 14.

217 *Id.* at 14-15.

218 132 Cong. Rec. at 3061-62.

validity of non-constitutional evidentiary privileges that are asserted before the Congress. [219]

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

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

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

220 *Id.* at 14.

221 *Id.* at 15, 18-19.

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

privilege that might have attached to the document in question when it provided the document to the Department of Justice.[223]

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

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

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

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

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

225 *Id.*

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

227 U.S. Const., Art. I, Sec. 5, cl. 2.

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

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

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

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

229 *Hickman v. Taylor*, 329 U.S. 495, 511 (1974).

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

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

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

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

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

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

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

The courts have heeded Wigmore's admonition.[235]

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

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233 *Fisher v. United States*, 425 U.S. 391 (1976).

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

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

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

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

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

(c) Waiver of the Attorney-Client Privilege

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

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

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

239 613 F.2d 1151, 1155 (D.C. Cir. 1979).

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

241 8 J. Wigmore §2192, at 70.

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

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

244 8 J. Wigmore, §2327, at 632-39.

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

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

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

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

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

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

249 *Id.*

250 8 J. Wigmore, §2327.

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

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

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

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

(continued...)

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

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

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

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

[256] 8 J. Wigmore, Evidence, §2367 at 636 (McNaughton rev. ed. 1961).

[257] *Permian Corp. v. U.S.*, 665 F.2d 1214, 1221-22 (D.C. Cir. 1981).

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

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

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

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

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

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

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

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

264 *Id.*

265 856 F.2d at 623.

(d) Exceptions to the Attorney-Client Privilege

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

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

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

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

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

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

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

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

VII. RIGHTS OF MINORITY PARTY MEMBERS IN THE INVESTIGATORY PROCESS

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

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

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

270 House Rule XI 2(j)(1); House Banking Committee Rule IV. 4.

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

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

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

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

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

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

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

274 99 F.R.D. at 342.

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

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

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

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

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276 5 U.S.C. 552 (1988).

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

278 5 U.S.C. 702, 706 (1988).

279 860 F.Supp. at 871-72.

280 *Id.* at 874-76.

agencies without the need of formal committee action. [281] However, the precise scope and efficacy of this provision is uncertain.

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

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

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

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

[282] 45 Stat. 996.

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

[284] S. Rep. No. 1320, *supra*, at 4.

[285] H.R. Rep. No. 1757, *supra*, at 1.

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

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

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

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

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

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

288 Senate Rule XIX.

289 See Bach, supra note 287 at pp. 8-11.

A. Senate Legal Counsel

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

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

(1) Proceedings to Aid Investigations by Senate Committees

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

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

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

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

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

293 2 U.S.C. 288(a) and (b), 288a.

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

direct the Senate Legal Counsel to represent it or any of its subcommittees in an application for an immunity order.[295]

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

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

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295 2 U.S.C. 288b(d),(e), 288f.

296 2 U.S.C. 1207(f).

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

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

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

300 2 U.S.C. 288d and 28 U.S.C. 1365.

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

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

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

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

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

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

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

303 2 U.S.C. 288g(a)(5) and (6).

304 2 U.S. 288g(c).

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

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

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

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

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

B. House General Counsel

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

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

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

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

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

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

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

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

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

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

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314 See, 132 Cong. Rec. 3036-38 (1986).

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

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

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