When Congress Comes Calling
A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry

Morton Rosenberg
Constitution Project Fellow

The Constitution Project
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MORTON ROSENBERG
CONSTITUTION PROJECT FELLOW
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PREFACE

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. We create coalitions of respected leaders of all political stripes who issue consensus recommendations for policy reforms on a variety of legal and constitutional issues. Our Rule of Law Program focuses particularly on preserving the separation of powers structure established by our Constitution and ensuring that all three branches of our government continue to check and balance each other.

In 2006, the Constitution Project brought together an ideologically diverse group of over forty prominent Americans, who joined together to express their grave concerns “about the risk of permanent and unchecked presidential power, and the accompanying failure of Congress to exercise its responsibility as a separate and independent branch of government.” Since that time, the Constitution Project has urged measures designed to restore and protect our constitutional system of checks and balances by promoting reforms to, among other things, the state secrets privilege, the use of presidential signing statements, and our country’s post-9/11 detention policies.

This handbook on congressional investigations and the respective roles and powers of Congress, the executive branch, and the courts is a continuation of these efforts. We are pleased to have been able to partner in creating this handbook with Morton Rosenberg, who served for over 35 years as a researcher and Specialist in American Law at the Congressional Research Service (CRS), and who is one of the country’s leading experts on congressional-executive relations. The Constitution Project sincerely thanks Mr. Rosenberg for his extensive research and drafting work in preparing this handbook. The Constitution Project also thanks our former colleague Becky Monroe and interns Mason Clutter and Neel Lalchandani for their indispensable assistance in finalizing this handbook.

The Constitution Project is also grateful to the Atlantic Philanthropies, Rockefeller Brothers Fund, Wallace Global Fund, Educational Foundation of America, CS Fund, Overbrook Foundation, Lawrence and Lillian Solomon Fund, Community Foundation for the National Capital Region, and Open Society Institute for their generous support for this project.

—Virginia E. Sloan, President, and Sharon Bradford Franklin, Senior Counsel, June 2009

I would like to thank the Constitution Project for making it possible for me to undertake this study, and in particular senior counsel Sharon Bradford Franklin for her tireless efforts to render my legalese into readable and usable expositive prose; to recognize the invaluable contributions to my understanding of this subject that resulted from the decade-long collaboration with my former CRS colleagues T.J. Halstead and Todd B. Tatelman; the perceptive insights of Burt Wides; the indispensable technical assistance provided by Catherine Harris and Nick Mancuso in the preparation of the first draft of this work; and the patience and unstinting support of my wife, Aileen.

—Morton Rosenberg
I. INTRODUCTION: THE CHALLENGES TO EFFECTIVE INVESTIGATIVE OVERSIGHT

The proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust … to expel them, and either expressly or virtually appoint their successors. –John Stuart Mill

Throughout its history, Congress has engaged in oversight of the Executive Branch—the review, monitoring, and supervision of the implementation of public policy. Congress’ right of access to executive branch information is constitutionally based and is critical to the integrity and effectiveness of our scheme of separated but balanced powers. The first several Congresses inaugurated such important oversight techniques as special investigations, reporting requirements, resolutions of inquiry, and use of the appropriations process to review executive activity. The legislature’s capacity and capabilities to check on and check the executive have increased over time. Public laws and congressional rules have measurably enhanced Congress’ implied power under the Constitution to conduct oversight.

This handbook provides practical guidance on the conduct of congressional oversight, and on the scope and limitations of the respective powers of Congress, the Executive Branch, and the courts. It explains the available tools of oversight and when and how Congress may use them. It also outlines the abilities of the Executive Branch and members of the public to resist such inquiries, and of the courts to resolve such interbranch conflicts. Finally, it describes recent executive branch challenges to congressional oversight and suggests ways to address these disputes. In short, this volume is designed to serve as a resource for anyone involved in congressional oversight inquiries.

A. The Purposes and Powers of Congressional Oversight

Congressional oversight of the executive is designed to fulfill a number of important purposes and goals, including to:

- ensure executive compliance with legislative intent;
- improve the efficiency, effectiveness, and economy of governmental operations;
- evaluate program performance;
- prevent executive encroachment on legislative powers and prerogatives;
- investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse, waste, fraud, and dishonesty;
- assess agency or officials’ ability to manage and carry out program objectives;
- assess the need for new federal legislation;
- review and determine federal financial priorities;
- protect individual rights and liberties; and
- inform the public about how its government is performing its public duties.

Legislative oversight is most commonly conducted through congressional budget authorizations, appropriations, confirmations, and investigative processes, and, in rare instances, through impeachment. All legislative oversight serves the purpose of informing Congress so that it may effectively develop legislation, monitor the
I. Introduction: The Challenges to Effective Investigative Oversight

Implementation of public policy, and disclose to the public how its government is performing. Oversight conducted through authorization, appropriations, or confirmation exercises tends to be more routine, whereas congressional investigations are often adversarial, confrontational, and sometimes high profile.

Beyond the traditional purposes of oversight, the inquisitorial process also sustains and vindicates Congress’ role in our constitutional scheme of separated powers and checks and balances. There is a rich history of congressional investigations from the one examining the failed St. Clair expedition in 1792 through those assessing the Teapot Dome scandal, Watergate, Iran-Contra, Whitewater, and most recently, the removal and replacement of U.S. Attorneys. These investigations have established, in law and practice, the nature and scope of the tools upon which Congress may rely to maintain its role in our constitutional scheme.

Congress’ right of access to executive branch information has been recognized by innumerable Supreme Court and lower federal court decisions. These precedents establish a broad and encompassing power in the Congress to engage in oversight investigations that reach all sources of information that enable it to carry out its legislative functions.

Committees have been granted a formidable array of tools to ensure access. Committees can:

- issue subpoenas;
- grant immunity to force testimony of witnesses invoking their Fifth Amendment privilege against self-incrimination;
- provide for staff deposition authority;
- establish rules for the conduct of hearings with less protection for witness rights than is provided in court proceedings; and
- hold recalcitrant witnesses in contempt of Congress and subject them to criminal prosecution.

B. The Power of Congress Over Executive Branch Agencies

The Constitution is silent about the administrative bureaucracy and its operation. There is scant mention of departments and agencies. It is apparent that Congress has the power to create agencies and offices and can select the manner of appointment of officials, but the Constitution says nothing on such issues as the removal of officers or who controls the decision making of the agencies, the President or Congress.

In historical practice, Congress creates, locates, and abolishes agencies and offices. Congress also sets qualifications for officeholders, as well as the terms of their tenure and compensation, and other incidents of office. In short, Congress can tailor offices of government in virtually any way it wants. Congress is also the sole source of agency powers, functions, and funding. In so doing, it defines the missions of agencies and provides the authorities of the agencies to carry out those missions. Most often, the powers are given to agency heads not to the President.

In historical practice, the President normally has authority to appoint and remove and to supervise and coordinate the actions of executive branch officers. As a practical matter, the President has the power, in most instances, to direct how they will carry out their missions. This derives from Article II’s investiture in the President of all the “Executive Powers” and the duty to “Take Care” that the laws be faithfully executed. In addition, several Supreme Court decisions forbid Congress from appointing executive branch officers or removing them, or from granting the power to administer laws to legislative branch officers.

It is also clear from Supreme Court precedent, however, that Congress may limit the ability of the President to remove executive officials at his or her pleasure, and may require that the President have substantial cause for such removal. The Court has also held that the “Take Care” Clause does not provide the President with the
power to decide how or whether or which laws should be carried out, but creates an obligation to ensure that executive branch officers carry them out as Congress has ordered.3

C. Barriers to Effective Oversight

In short, with these powers and legal precedents, shouldn’t Congress win most of its disputes with the Executive Branch over access to information? Absolutely. Does it? Mostly, but “it depends” is the honest answer. On what? On how badly Congress wants to protect its institutional interests, and on how skilled and determined the committees are in utilizing the powers, rules, and tools available to them.

Experience has shown that in order to engage in successful oversight, committees must establish their credibility with the executive departments and agencies they oversee early, often, consistently, and in a manner that evokes respect, if not fear. A request to an agency for information, documents, or briefings from either a committee chair or staff should be immediately respected by the agency. Agency staff should automatically understand that if the request is not answered and there is no legitimate explanation, Congress will follow up with more formal, uncomfortably public processes.

But effective oversight is a hard task even in the best of times, and recent years have not been the best of times for relations between the legislative and executive branches. In recent years, the Executive Branch has advocated a broad view of expansive presidential power under the rubric of “the unitary executive” theory. This has included an expanded notion of the bounds of presidential executive privilege and efforts to block any assertions of legislative powers. The pendulum swung even further toward presidential power due to the acquiescence of the Congress itself and its failure to assert its own powers.

There are numerous recent examples of overbroad assertions of executive power, only some of which were challenged by Congress, including:

- Routine refusals to provide jurisdictional committees with access to information to which they were legally entitled and that involved neither national security or even “sensitive matters;”
- The refusal to provide witnesses from the Executive Office of the President (EOP) who were involved in operational matters to testify before Congress;
- Challenging (successfully) in court information demands of the Government Accountability Office (GAO);
- Issuing an executive order that limited public and congressional access to the papers of past presidents under the Presidential Records Act by giving an effective veto power to former Chief Executives;
- Issuing an executive order significantly expanding the Office of Management and Budget’s power over agency rulemaking;
- Claiming (unsuccessfully) executive privilege to prevent the disclosure of evidence regarding a 30-year pattern of corruption in the FBI’s Boston Regional Office;
- The issuance of over 150 presidential signing statements that challenged numerous legislative provisions that required access to and reporting of non-security related information to Congress on the grounds that these provisions unconstitutionally interfered with the President’s authority to direct the heads of executive departments to supervise, control, and correct employees’ communications with the Congress;
- The withholding of documents pertinent to the confirmation proceedings for several presidential nominees; and
- The withholding of information with respect to the EOP’s role in the preparation for and response to Hurricane Katrina.

Effective oversight has also been hampered by several congressional practices. These have included the congressional establishment of term limits on committee chairs and the failure to stem a high turnover rate of key investigative staff. Further, congressional leaders have failed to assert their powers in several key instances.
For example, the House and Senate leadership blocked the Comptroller General from appealing a district court decision that prevented an inquiry into the activities of an energy policy task force established by then-President Bush and headed by then-Vice President Cheney. The court’s ruling raised serious questions about GAO’s ability to provide important oversight support for Congress. These actions and inactions have undermined the institutional continuity, integrity, and memory so essential for effective oversight.

As this handbook goes to press, the opening months of the 111th Congress have provided mixed signals. There have been some steps toward restoring Congress’ oversight role. On the first day of the new session, the House repealed its term limit requirement for chairs of committees and subcommittees. In March, the House reached a settlement with representatives of the Obama and former Bush administrations in the *Miers* case, in which, as discussed in Chapter II below, the House Judiciary Committee successfully challenged then-President Bush’s assertion that his claim of executive privilege provided absolute immunity for White House aides and shielded them from responding to congressional subpoenas. Following the change of administration, the Executive Branch agreed to abandon its appeal of the district court ruling, permit the subpoenaed witnesses to testify within specified parameters, produce most documents, and allow the lower court’s opinion to stand.

However, on the executive power side of the balance, later in March, President Obama issued his first presidential signing statement. In the statement, he identified provisions of a spending bill he was signing into law that he claimed interfered with his constitutional prerogatives in foreign affairs and as Commander-in-Chief, and with his power to control all executive communications with Congress, its committees, and individual members. Although President Obama did not say he would refuse to enforce the law, presidential signing statements can infringe upon the separation of powers. If a President signs a particular bill into law, but then issues a signing statement declaring an intention not to enforce a particular provision in it, and that provision is in fact not enforced by the empowered official, the President is effectively vetoing the law without affording Congress the opportunity to override the veto, as the Constitution requires. This also interferes with Congress’ ability to legislate and oversee executive branch actions.

**D. How to Conduct Effective Oversight**

How is effective oversight accomplished? This handbook is designed to describe the tools of oversight and the applicable legal doctrines. But, first, it is important to set forth a few broad principles:

*Oversight Should Be a Leadership Priority:* The leadership of the House and Senate must send the message to committee chairs that oversight, and in particular operational oversight, is to be a priority, and that oversight decisions, strategies, and enforcement will be fully supported, no matter who is in the White House. Even—or especially—when the president is of the same party as the one in control of Congress, it is critical to our system of checks and balances that Congress conduct effective oversight. Every standing committee should be encouraged to establish a subcommittee on investigations. Committee chairs should take care in selecting competent, dedicated, and experienced staff who will be familiar with the rules and the oversight powers available to Congress.

*Develop Good Working Relationships with the Executive Branch:* Staff should be encouraged to develop effective, ongoing, informal relations with key agency personnel. Committees should create and keep open lines of communication with agency personnel no matter how much they disagree with or distrust them. Informal, regular contact with key staff can be vital. It is useful to encourage a sense in the agency that it is better to give the committee a “heads up” about a problem before the committee reads about it in the *Washington Post* or the *New York Times*. The development of interbranch relationships founded on mutual respect, if not actual trust, is necessary, though difficult and time consuming.

*Prepare, Prepare, Prepare, and Pay Attention to Details:* The first rule of successful oversight is that there must be intensive preparation. Rarely should an inquiry begin with a subpoena for documents or testimony at a hearing. Formal compulsory process should be the product of urgent need after a sufficient period of fact gathering and fact checking. If the purpose of a document subpoena is to preserve material from possible
destruction, that goal can be legally accomplished by a letter from the chair. The letter should announce the initiation of an inquiry pursuant to the committee’s authority, describe its purpose and scope, and request documents in categories that are relevant to the inquiry. Such a letter should be sufficient to provide the notice necessary to invoke the federal criminal law prohibition of obstruction of a congressional proceeding.

Staff must pay attention to details. Every letter, every phone call, every meeting, and every hearing should have some well-defined purpose. Asking oneself: “How am I furthering understanding or resolution of the matter before the committee?” should be the question at every step of an ongoing investigation. An oversight inquiry should be viewed as a “staged process.” That is, it should be understood that you are going from one level of persuasion or pressure to the next to find out the “who, what, when, where, and why” of a situation.

Cooperate During the Investigation Whenever Possible: Normally, a subpoena should not be served out of the blue. Rather, it should follow only after the parties have reached an impasse. Even at impasse, if the votes for a subpoena are available, a quite effective tactic is to grant the chair authority to issue the subpoena for a definite period, or even indefinitely. Past experience has shown that the threat of a subpoena is often sufficient to spur reconsideration of previously adamant refusals (or to demonstrate that the committee was not just bluffing). This most often leads to further negotiation and accommodation.

Similarly, an investigative hearing should not be held unless there is a compelling horror story, a smoking gun to reveal, or an important point to make publicly. When hearings are held, the committee should clearly and explicitly advise all witnesses of the subjects to be discussed and of what materials they should bring with them. Failure to be precise invites the response, “Gee, I didn’t anticipate that. We’ll get back to you with the answer in writing soon.” After a hearing concludes, there must be prompt follow-up or the advantage of the hearing is quickly lost.

If it is at all possible, investigative staff should involve the minority in the process. Bipartisan support for an oversight proceeding can greatly enhance the chances of its success. Members and staff can be sure the agency or the private sector subjects of the investigation will contact supporters in Congress, especially if the White House is controlled by a different party than the one in control of Congress. Holding periodic staff meetings with other members and staff of the committee to inform them about the nature of and reason for the investigation can help in more easily garnering support for future enforcement efforts.

Rely Upon, Use, and Protect Information Sources and Outlets: Whistleblowers are often the most useful committee informants. They must be protected. The word will get out if a committee leaves them hanging or makes them targets for retaliation, and these invaluable sources of information will then dry up. Staff should become familiar with federal and state whistleblower protection laws, so they can properly advise and protect these witnesses. It can also be helpful for the chair to send a firm letter to an agency head making clear that retaliation will not be tolerated if evidence of such action appears.

The media can be useful in bringing pressure on agencies or private sector targets of the investigation, and in garnering public support for the inquiry. Media coverage of an investigation can also assist in attracting whistleblowers to come forward.

Provide Proper Training for Staff and Rely on Existing Expertise: Finally, committees must address the problem of staff expertise. Learning on the job may be the only alternative in light of high rates of staff turnover on Capitol Hill. Teaming an experienced investigator with a less experienced colleague can provide fresh ideas and be helpful to both staff members. Periodic “brainstorming” sessions among the investigative staff can enhance the sharing of experience. The Congressional Research Service (CRS) provides periodic oversight workshops that have provided valuable introductions. CRS analysts can provide useful support at all stages of an investigation with respect to legal advice, hearing procedure, and background information on policy and programmatic issues. The Government Accountability Office can provide investigative backup as well as program evaluations. Offices of Inspectors General can be enlisted to probe questionable agency activities.
But perhaps the most valuable resource can be the study of past investigations. There are several valuable studies of past inquiries, and the CRS issued a report in 2008 on investigations of the Justice Department that contains detailed descriptions of 18 important probes since 1920. Reading the published hearing transcripts and reports on such investigations can provide valuable insight on strategy, and the reports often contain copies of the correspondence between the committees and the subject agencies and organizations that show the parries and thrusts as the proceeding develops.

As the title of this handbook suggests, it is designed to be an introduction to the legislative investigatory process. It is intended to shed some light on this aspect of the arcane, sometimes impenetrable, and often seemingly bizarre “Law of Congress” that can confound the most sophisticated legal practitioners representing government and private clients before an inquiring committee, and which may even elude the members and staff of committees conducting such inquiries. The law of congressional investigation consists of a complex combination of constitutional rulings and principles, statutory provisions, Byzantine internal rules adopted by the House and Senate and individual committees, informal practices, and folkways. Although there is no black letter guide for the uninitiated, we hope that this handbook will provide a first step in that direction.

Chapter II presents an overview of Congress’ authority to conduct oversight. It includes a discussion of the extent and limits of the obligation of the executive agencies and the White House, and private parties, to provide access to needed information. The essential rules and tools of oversight are detailed, followed by a description of the scope and limits of enforcement of the investigative power, and the alternatives of the appropriations, confirmation, and impeachment powers.

Chapter III discusses the preparation for and conduct of investigative hearings. It includes a discussion of the significant rules governing such proceedings, including the rights of witnesses, the roles of the committee chairpersons and counsel for witnesses, and the effect of sine die adjournment at the end of a legislative session on the conduct of ongoing investigations.

Chapter IV examines the constitutional testimonial privileges of witnesses. It focuses first on the particular problem of investigating the Office of the President and the nature and scope of presidential claims of executive privilege, and then reviews the protections afforded witnesses under the First, Fourth, and Fifth Amendments.

Chapter V contains a similar examination of the availability of common law testimonial privileges, such as the attorney-client, work-product, and deliberative process privileges, before congressional committees.

Chapter VI deals with issues that commonly arise in investigations of executive agencies. Utilizing the well-documented history of investigations of the Department of Justice since 1920, it examines questions about accessing information in open and closed civil and criminal proceedings and explores the availability of particular officers and employees of agencies for interviews and testimony, the accessibility of grand jury materials, and the effect on congressional access to information of statutory prohibitions on public disclosure of proprietary, trade secret, privacy, and other “sensitive” matters.

Chapter VII delineates the rights of minority party and individual members in the investigatory process.

Chapter VIII concludes with considerations of methods to make the investigative process more effective and facilitate accommodations between the political branches.

Throughout all of these chapters, the discussion includes the standards established and guidance provided by the courts. Finally, appendices provide an example of a comprehensive subpoena and identify the governmental and non-governmental institutional support resources available for legislative oversight.
II. THE POWERS AND TOOLS AVAILABLE TO CONGRESS FOR CONDUCTING INVESTIGATIVE OVERSIGHT

A. Congress’ Power to Investigate

1. The Breadth of the Investigatory Power

Congress possesses broad and encompassing powers to engage in oversight and conduct investigations reaching all sources of information necessary to carry out its legislative functions. 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 production of information needed to discharge their legislative functions. This applies whether the information is sought from executive agencies, private persons, or organizations. Within certain constraints, the information so obtained may be made public.

These powers have been recognized in numerous Supreme Court cases, and the broad legislative authority to seek information and enforce demands was unequivocally established in two Supreme Court rulings arising out of the 1920s Teapot Dome scandal. In *McGrain v. Daugherty*, which considered a Senate investigation of the Department of Justice, the Supreme Court described the power of inquiry, with the accompanying process to enforce it, as “an essential and appropriate auxiliary to the legislative function.” The Court explained:

> 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.

The Court also pointed out that the target of the Senate investigation, the Department of Justice, like all other executive departments and agencies, is a creation of Congress and subject to its plenary legislative and oversight authority. Congress has clear authority to investigate whether and how agencies are carrying out their missions.

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States*, a different witness at the congressional hearings refused to provide answers and was prosecuted for contempt of Congress. Based upon a separate lawsuit between the government and the Mammoth Oil Company, the witness had 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.” The Supreme Court upheld the witness’ conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness’ contention that the pending lawsuits provided an excuse for withholding information.

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress’ investigative authority. For example, in *Eastland v. U.S. Servicemen’s Fund*, the Court explained that “[t]he scope of [Congress’] power of inquiry … is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” In addition, the Court, in *Watkins v. United States*, stated that the broad power of inquiry “encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.” Congress’ investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department.
The most recent and forceful reiteration of Congress’ broad right-of-access to information, and the means to enforce that right, appears in *House Committee on the Judiciary v. Miers*. In that ruling, the district court upheld the right of a House committee to subpoena former presidential aides. The court rejected a presidential assertion that a claim of executive privilege bestowed an absolute immunity on any present or former presidential aide from ever appearing before the committee in response to the subpoena. The court also rejected the Executive’s claims that the case could not be contested in the courts, finding it had jurisdiction and that the Committee had both standing, or a right to sue, and an implied cause of action because Congress possesses “the power of inquiry” under Article I. It concluded, “In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.” In the spring of 2009, the parties settled this case before the appeal was heard. The settlement provided that the subpoenaed officials would testify, certain documents would be disclosed, the government’s appeal would be withdrawn, and the district court’s opinion would be allowed to stand.

2. The Limits of the Investigatory Power

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” and cannot be used to expose for the sake of exposure alone. In the Court’s words: “There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress … [n]or is the Congress a law enforcement or trial agency …. [A]n inquiry … must be related to, and in furtherance of, a legitimate task of the Congress.” Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by the full House or Senate. But once having established its jurisdiction and authority, and the pertinence of the matter under inquiry to its area of authority, a committee’s investigatory purview is substantial and wide-ranging.

B. Congress’ Ability to Obtain Documents and Witness Testimony

1. The Subpoena Power

A critical tool for congressional investigations is the subpoena power because “[e]xperience 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.” 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.

a. The Power to Issue a Subpoena

**Issuance:** To validly issue a subpoena, committees or subcommittees must be delegated this authority and follow the rules established by each house and the individual committees, as outlined below:

- **Standing committees and subcommittees:** Senate Rule XXVI(1) and House Rule XI.2(m)(1) presently empower all standing committees and subcommittees to require the attendance and testimony of witnesses and the production of documents.

- **Special or select committees:** These committees must receive specifically delegated subpoena authority by Senate or House resolution.

- **Rules of standing committees:** 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 chair alone, with or without the concurrence of the ranking minority member. One committee requires a quorum of six members, at least two of whom are members of the minority party, to authorize the issuance of a subpoena.
**Vetting subpoenas:** House Rule II.2(d)(1) requires that House committees may only issue subpoenas under the seal of the Clerk of the House. In practice, every subpoena issued by a committee is reviewed by the House General Counsel for substance and form. There is no equivalent rule in the Senate, but the Senate Legal Counsel performs a subpoena vetting function informally.

**Service:** In practice, 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 non-citizens in the United States. Securing compliance of people living in foreign countries presents more complex problems.

**Challenges:** A witness seeking to challenge the legal sufficiency of a subpoena has only limited remedies to raise objections. The Supreme Court has ruled that courts may not block a congressional subpoena, holding that the Speech or Debate Clause of the Constitution provides “an absolute bar to judicial interference” with such compulsory process. As a consequence, a witness’ sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise the objections as a defense in a contempt prosecution.

Challenges to the legal sufficiency of subpoenas must overcome formidable judicial obstacles. The standard for 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 Congress.

**b. The Permissible Scope of a Subpoena**

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. Therefore, the enabling rule or resolution that gives the committee life or particular direction is the charter that defines the grant and the limitations of the committee’s power. In deciding whether a subpoena’s scope is permissible, the Supreme Court looks first to the words of the resolution itself, and then, if necessary, to the usual sources of legislative history, including floor statements, reports, and past committee practice.

Subpoenaed persons often attack subpoenas as overbroad or nothing more than a “fishing expedition.” However, the courts have not limited a congressional inquiry to an initial stated scope, understanding that historically, such investigations evolve, and, akin to grand jury probes, must be allowed to develop in order to be effective. In *Eastland v. United States Servicemen’s Fund,* the Supreme Court recognized that a congressional investigation may lead “up some ‘blind alleys’ and into non-productive enterprises. To be a valid legislative inquiry there need be no predicable end result.”

**Permitting the scope of inquiry to evolve:** The scope of an inquiry is permitted to evolve as the investigation proceeds. In *Senate Select Committee on Ethics v. Packwood,* the court rejected a claim that a subpoena for a senator’s personal diaries was overbroad, holding that the committee’s investigation was not limited in its investigatory scope to its original demand “even though the diaries might prove compromising … in respects the Committee has not yet foreseen.” The court noted the long judicial acceptance of the breadth of congressional subpoenas and the analogy of a legislative inquiry to a grand jury:

In determining the proper scope of a legislative subpoena, this Court may only inquire as to whether the documents sought by the subpoena are “not plainly incompetent or irrelevant to any lawful purpose [of the subcommittee] in the discharge of [its] duties.” *McPhaul v. United States,* 364 U.S. 374, 381, 81 S.Ct. 138, 143, 5 L. Ed. 2d 36 (1960) (quoting *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509, 63 S. Ct. 339, 343, 87 L. Ed. 424 (1943)) …. Senator Packwood’s principal apprehension appears to be that somewhere within the diaries will be found evidence of other conduct presently not within anyone’s contemplation (other than perhaps his own) that the Ethics Committee will deem to be senatorial misbehavior. Yet where, as here, an investigative subpoena is challenged on relevancy grounds, the Supreme Court has stated that the subpoena is to be enforced “unless the district court determines that there is no reasonable possibility that
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The category of materials the Government seeks will produce information relevant to the general subject of the … investigation.” United States v. R. Enterprises, Inc., 498 U.S. 292, 301, 111 S. Ct. 722, 727, 12 L. Ed. 795 (1997) ….

At this stage of its proceedings, the Ethics Committee is performing the office of a legislative branch equivalent of a grand jury, in furtherance of an express constitutional grant of authority to Congress to keep its own house in order …. “The function of the grand jury is to inquire about all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred.” R. Enterprises, Inc., 498 U.S. at 297, 111 S. Ct. at 726.

c. The Necessary Legislative Purpose for a Subpoena

Although a subpoena must be issued for a 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. In In re Chapman,36 the Court upheld a resolution authorizing an inquiry into charges of corruption against certain senators, despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated: “it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.”37

The subpoena may simply include an open-ended statement that it seeks information that may provide a basis for whatever legislation Congress deems appropriate. For example, in the Senate investigation into the Tea Pot Dome affair in the 1920s, the original authorizing resolution made no mention of a legislative purpose. A subsequent resolution regarding a recalcitrant witness declared that his testimony was sought for the purpose of obtaining “information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.” The Court found that the investigation was presumptively ordered for a legitimate object. It wrote: “An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable.”38

It can be helpful to include in the statement of purpose a reference to “specific problems which in the past have been, or in the future could be, the subjects of appropriate legislation.”39 In the past, the types of legislative activity which have justified exercising the power to investigate have included: the primary functions of legislating and appropriating;40 the function of deciding whether or not legislation is appropriate;41 oversight of the administration of the laws by the Executive Branch;42 and the essential congressional function of informing itself in matters of national concern.43

d. The Pertinency of the Subpoena to the Investigation

The congressional contempt statute, 2 U.S.C. § 192, provides that a committee’s questions or subpoena requests must be “pertinent to the subject under inquiry.” However, the standard is very broad, and permits a wide range of questions relevant to an investigation. In deciding whether a subpoena is pertinent, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.44

Comparison to rules of evidence in court proceedings: Because of the breadth of congressional investigations, the courts have long recognized that pertinency in the legislative context is broader than that of relevance under the law of evidence applicable in court. “A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress …. 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.”45

The standard: The Supreme Court has warned that a witness “acts at his peril” in deciding not to respond to a committee’s questions or subpoena demands on grounds of pertinency. However, to help them decide whether to comply with a subpoena, witnesses are entitled to receive a description of the investigation’s scope “with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element

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of a criminal offense." The subject matter of an investigation may be shown through a variety of sources: (1) the declaration of the question under inquiry found in the authorizing rule or resolution of the committee or subcommittees, (2) the introductory remarks of the committee chair or other members, (3) the response of the chair to the witness’ pertinency objection, (4) the question itself, or (5) the “nature of the proceedings.”

The Supreme Court has distinguished cases in which the pertinency standard is met from those in which it is not. For example, an inquiry is not pertinent where “the question under inquiry had not been disclosed in any illuminating matter; and the questions asked … were not only amorphous on their face, but in some instances clearly foreign to the alleged subject matter of the investigation,” whereas an inquiry is pertinent when “[t]he subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education” and the scope of the particular hearing “had been announced as ‘in the main communism in education and the experiences and background in the party by Frances X. T. Crowley.’”

2. Staff Deposition Authority

a. Express Authorization of Deposition Authority is Necessary

At present, neither house of Congress has standing rules that expressly authorize staff depositions. On a number of occasions, such specific authority has been granted pursuant to Senate and House resolutions. Staff cannot conduct depositions unless the committee conducting an investigation explicitly grants this authority. When granting this authority, 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.

b. The Utility of Staff Depositions

Committees normally rely on informal staff interviews to gather information in preparation for investigative hearings. However, with more frequency in recent years, congressional committees have authorized and utilized staff-conducted depositions as a tool. Staff depositions afford a number of significant advantages for committees engaged in complex investigations:

- Staff depositions may assist committees in obtaining sworn testimony quickly and confidentially without the necessity of members devoting time to lengthy hearings that 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 in 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 prepare a committee for the questioning of witnesses at a hearing or provide a screening process that can obviate the need to call some witnesses.
- The deposition process also allows questioning of witnesses outside of Washington D.C., thereby avoiding the inconvenience of conducting field hearings requiring the presence of members of Congress.
- Moreover, Congress has enhanced the efficacy of the staff deposition process by re-establishing the applicability of 18 U.S.C. § 1001 to its proceedings. This statute makes false statements made during congressional proceedings, including depositions, subject to criminal prosecution.

There are also certain disadvantages to relying upon staff depositions. Unrestrained staff may be tempted to engage in tangential inquiries. Also, depositions present a “cold record” of a witness’ testimony and may not be as useful for members as in-person presentations.
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3. Congressional Grants of Immunity

a. A Committee May Override a Witness’ Claim of Self-Incrimination Privilege

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 ….” This privilege against self-incrimination is available to witnesses in congressional investigations. However, a witness’ Fifth Amendment privilege can be restricted if the government chooses to grant immunity. When a witness asserts his or her constitutional privilege, the committee may obtain a court order that compels the witness to testify and grants immunity against the use of this testimony, and information derived from it, in a subsequent criminal prosecution. The witness may still be prosecuted on the basis of other evidence.

Immunity provides the witness with the constitutional equivalent of his or her Fifth Amendment privilege. 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.” Such grants may be desirable when a committee is convinced that the witness will describe new or vital facts that would otherwise be unavailable or 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).

b. How a Committee Grants Immunity

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

At least ten days prior to applying to the court, Congress must notify the Attorney General of its intent to seek the order, and issuance of the order will be delayed by the court for as much as 20 additional days at the request of the Attorney General. Notice to the Attorney General is required so that he or she can identify any information in Justice Department files that would provide an independent basis for prosecuting the witness and place that information under seal. The Attorney General does not have a right to veto a committee’s application for immunity.

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. However, the court does have power to determine whether the testimony and information sought is within the jurisdiction of the particular committee and relevant to the committee’s inquiry.

c. Scope of the Immunity Granted

After an immunity order has been issued by the court and communicated to the witness by the chair, the witness can no longer decline to testify on the basis of the Fifth Amendment 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.”

The immunity that is granted is “use” immunity, not “transactional” immunity. That is, neither the immunized testimony that the witness gives to the committee, nor information derived from that testimony, may be used against him or her in a subsequent criminal prosecution, except a prosecution for false testimony or for contempt charges. However, the witness may be convicted of the underlying crime (the “transaction”) on the basis of evidence independently obtained by the prosecution and sealed before the congressional testimony,
and/or on the basis of information obtained after the witness’ congressional appearance but which was not derived, either directly or indirectly, from congressional testimony.

d. Impact of Immunity Grants on Future Prosecutions

In determining whether to grant immunity to a witness, a committee must consider the trade-offs involved. The committee must weigh its need for the testimony in order to perform its legislative, oversight, and informing functions against the possibility that the witness’ immunized congressional testimony could jeopardize a successful criminal prosecution against the witness. 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. In high profile cases, this burden may be extremely difficult to meet. In these instances, Congress must carefully evaluate whether the public interest is better served by a prompt congressional hearing to uncover the truth or by a criminal prosecution.

The Iran-Contra controversy during President Reagan’s administration provides a clear illustration of this choice. Congress conducted an investigation of allegations that the Reagan administration had sold military equipment to Iran and then used the proceeds to fund the Contras, anti-communist rebels in Nicaragua. High-level administration officials, including Lt. Colonel Oliver North and National Security Advisor John Poindexter, were granted use immunity and compelled to testify before Congress. The hearings were televised and highly publicized. Simultaneously, an Independent Counsel was assigned to investigate and conduct prosecutions as warranted. Although both North and Poindexter were convicted on various counts of conspiracy and obstruction of justice, these convictions were reversed on appeal due to concerns that prosecutors had relied inappropriately on immunized testimony to Congress.

Indeed, the appellate court decisions in 1990 reversing the convictions of Lt. Colonel Oliver North and John Poindexter appeared to make the prosecutorial burden substantially more difficult, if not insurmountable, in high-profile cases. The Independent Counsel and his staff made extraordinary efforts to avoid being exposed to any of North’s or Poindexter’s immunized congressional testimony, and they submitted sealed packets of evidence to the district court to show that the material was obtained independently of any immunized testimony to Congress. Nonetheless, the appeals court remanded both cases to the trial court for a further determination of whether the prosecution had directly or indirectly used immunized testimony. Upon remand in both cases, the Independent Counsel determined that he could not meet the strict standards set by the appeals court and moved to dismiss the prosecutions.

While the North and Poindexter rulings in no way diminish Congress’ authority to immunize testimony, they do alter the calculus as to whether to seek such immunity. 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. 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 publicize the truth. The role of Congress as overseer, informer, and legislator arguably warrants this sacrifice. The question becomes more difficult when there is not a sense of national crisis, or where the object is 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.

e. Frequency of Issuance of Immunity Grants

It does not appear that as a consequence of the North and Poindexter rulings, congressional committees have been any more reluctant to issue immunity grants. Since the enactment of the statute in 1970, congressional committees have obtained approximately 350 immunity orders. Of these, about 70% (247) were obtained in connection with four investigations: the 1978 investigation into the assassinations of President Kennedy and Martin Luther King (165), the investigation of Watergate by the Senate Watergate Committee (28), the investigations by the House and Senate Iran-Contra Committees (28), and the 1989 investigation by the Special Committee on Investigations of the Senate Select Committee of Indian Affairs (26). Since the Iran-Contra
rulings in 1990, House Committees have obtained 32 immunity orders, and Senate committees have obtained 20, most recently in the House Judiciary Committee’s 2008 hearings on the forced resignations of nine U.S. Attorneys.

4. Special Investigatory Powers Authorized in Extraordinary Inquiries

Special panels of inquiry established since Watergate have been granted investigative authorities not ordinarily available to standing committees. Staff deposition authority is given in almost all such instances. Depending on the particular circumstance of the inquiry, special panels have also been vested with authority to gain access to tax information, seek international assistance in information gathering abroad, and participate in judicial proceedings. For example, both the House and Senate committees jointly investigating the Iran-Contra matter had the full panoply of special powers because of the international scope of the inquiry. Similarly, the House committee investigating the propriety of undercover activities of the FBI and other Justice Department components known as ABSCAM was provided all the powers except tax access.

C. Enforcement of the Investigation Power

1. Courts Have Recognized the Need for Effective Enforcement Mechanisms

While the threat or actual issuance of a subpoena normally provides sufficient leverage to ensure compliance, it is through the contempt power, or its threat, that Congress may act with ultimate force. The contempt power may be used in response to actions that obstruct the legislative process in order to command compliance with the subpoena and punish the person violating the order. The Supreme Court early on 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.”

There are three different kinds of contempt proceedings. 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 also has a limited third option, enforcement by means of a statutory civil contempt procedure. Similarly, a district court has recently recognized the authority of the House of Representatives to authorize civil enforcement by a standing committee by passage of a House resolution.

2. The Inherent Contempt Power

a. The Source, Nature, and Objectives of Inherent Contempt

Congress’ inherent contempt power is not specifically granted by the Constitution, but is considered necessary for Congress to investigate and legislate effectively. The validity of the inherent contempt power was upheld in the early Supreme Court decision in Anderson v. Dunn and reiterated in McGrain v. Daugherty. Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried in the House or Senate chamber, and then can be imprisoned upon conviction. 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 until he or she agrees to comply. In the House, however, this period may not extend beyond the end of a session of the Congress.

b. Rights of a Person Cited for Contempt

When a witness is cited for contempt under the inherent contempt process, the witness may obtain prompt judicial review through a petition for a writ of habeas corpus. The writ of habeas corpus is a right recognized in the Constitution, and it provides a means for anyone imprisoned to challenge the legal basis for the detention.

In a habeas proceeding for a contempt case, the issues decided by the court might be limited to (a) whether the House or Senate acted in a manner within its jurisdiction, and (b) whether the contempt proceedings
complied with minimum due process standards.\textsuperscript{74} While Congress would not have to afford a person cited for contempt the whole panoply of procedural rights available to a defendant in criminal proceedings, it would have to grant notice and an opportunity to be heard.\textsuperscript{75} Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure (e.g., pertinency of the question asked to the committee’s investigation) might be mandated by the Due Process Clause.

c. Fines as an Alternative to Imprisonment for Inherent Contempt

Although most of the court decisions reviewing use of the inherent contempt power have involved incarceration, Congress may be able to impose monetary fines as an alternative to imprisonment. Such a fine would potentially have the advantage of avoiding a court proceeding through a \textit{habeas corpus} petition, since the person held in contempt would never be jailed or detained. Drawing on the analogous inherent authority that courts possess to impose fines for contemptuous behavior,\textsuperscript{76} it appears that Congress, in its exercise of a similar inherent function, may be able to impose fines rather than incarceration.

d. Inherent Contempt Does Not Require Judicial Enforcement Assistance

Unlike criminal and civil contempt proceedings, Congress’ inherent contempt power may be used without the cooperation or assistance of either the executive or judicial branches. The House or Senate can, on its own, conduct summary proceedings and cite the offender for contempt. Further, although the person cited can seek judicial review by means of a petition for a writ of \textit{habeas corpus}, the scope of such review may be relatively limited\textsuperscript{77} compared to the plenary review accorded by the courts in cases of conviction under the criminal contempt statute.

e. The Perceived Limitations of the Inherent Contempt Mechanism

There are also certain limitations on the inherent contempt process. Although the person cited can be incarcerated until he or she agrees to comply with the subpoena, imprisonment may not extend beyond the end of the current session of Congress.\textsuperscript{78} Moreover, inherent contempt has been described as “unseemly,” cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial in the House or Senate chamber.\textsuperscript{79} Because of these drawbacks, the inherent contempt process has not been used by either body since 1935.\textsuperscript{80} Proceedings under the inherent contempt power might be facilitated, however, if the initial fact-finding and examination of witnesses were to be held before a special committee—which could be directed to submit findings and recommendations to the full body—with only the final decision as to guilt being made by the full House or Senate.\textsuperscript{81} As suggested above, the penalty for conviction could be limited to fines, with no incarceration. With such modifications, the process might be a more attractive option for members of Congress to pursue.

3. Statutory Criminal Contempt

a. The Origin and Nature of the Criminal Contempt Statute

Congress long ago recognized the problem raised by its inability to punish a person cited for contempt beyond the adjournment of a congressional session. In 1857, Congress enacted a statutory criminal contempt procedure as an alternative to the inherent contempt procedure that, with minor amendments, is codified today at 2 U.S.C. §§ 192 and 194. 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 $100,000 and imprisonment for up to one year. A contempt citation must be approved by the subcommittee (if that was where the contempt initially occurred), the full committee, and then by the full House or Senate (or by the presiding officer if Congress is not in session). The statute provides that after a contempt citation has been certified by the President of the 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.”
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b. Congressional Use of Criminal Contempt Against Executive Officials

The criminal contempt procedure was rarely used until the twentieth century, but since 1935 it has been essentially the exclusive vehicle for punishment of contemptuous conduct. Prior to Watergate, no executive branch official had ever been the target of a criminal contempt proceeding. Between 1975 and 1998, however, ten cabinet-level or senior executive officials were cited for contempt for failure to produce subpoenaed documents by a subcommittee, a full committee, or a house of Congress. In each instance the contempt citation led to substantial or full compliance with the document demands before it was necessary to initiate criminal proceedings.

Although such citations have led to compliance without need for an actual criminal prosecution, the Executive Branch has not always agreed that compliance is required. For example, in 1982, the Justice Department filed a lawsuit to block enforcement following the House's vote of contempt of EPA Administrator Anne Gorsuch Burford. The Department filed suit seeking to prevent referral of the contempt citation to the U.S. Attorney for grand jury action, on the grounds that the House action unconstitutionally imposed an “unwarranted burden on executive privilege” and “interferes with the executive's ability to carry out the laws.” A district court dismissed the suit as premature because settlement opportunities had not been exhausted and noted that resolution of the privilege claims could only occur during a criminal trial for contempt. The Department of Justice (DOJ) did not appeal the ruling, opting instead to resume negotiations, which resulted in full disclosure of the documents to the Congress. Throughout the litigation, the U.S. Attorney refused to present the contempt citation to a grand jury. Subsequent DOJ Office of Legal Counsel opinions reiterated the executive’s opposition to use of the contempt process against executive branch officials.

c. The Uncertainty Whether Executive Officials Are Subject to Inherent or Criminal Contempt Proceedings

It is not clear what action is required by the U.S. Attorney to comply with Section 194’s statement that it is the “duty” of the U.S. Attorney to enforce contempt of Congress citations. As a result, it is not certain how useful criminal contempt proceedings may be against executive branch officials. During investigations in the 110th Congress of incumbent and former White House aides to appear in response to testimonial and document subpoenas, the Bush administration relied upon Justice Department opinions in refusing to permit witnesses to testify. Similarly, the Attorney General ordered the U.S. Attorney for the District of Columbia not to submit contempt of Congress citations against these witnesses for grand jury consideration. That action forced the House of Representatives to take the historic action of seeking civil enforcement of the subpoenas, a subject to which we now turn.

4. Civil Contempt

a. In the Senate

i. The Origins, Purposes, and Procedures of the Senate Civil Contempt Statute

As an alternative to both the inherent contempt power of each house of Congress and the criminal contempt statute, in 1978 Congress enacted a civil contempt procedure, which is applicable only to the Senate. The statute authorizes the Senate to file a lawsuit in the U.S. District Court for the District of Columbia to enforce subpoenas issued by the Senate or a committee or subcommittee. This includes authority to seek a “declaratory judgment” confirming the validity of a subpoena and an order requiring compliance when a witness has refused or threatened to refuse to comply. Generally, such a suit will be brought by the Senate Legal Counsel on behalf of the Senate or a Senate committee or subcommittee. The statute does not apply in the case of a subpoena to officers or employees of the Executive Branch acting in their official capacities.

Pursuant to the statute, the Senate may “ask a court to directly order compliance with [a] subpoena or order, or they may merely seek a declaration concerning the validity of [the] subpoena or order. By first seeking a declaration, [the Senate would give] the party an opportunity to comply before actually [being] ordered to do so by a court.” It is solely within the discretion of the Senate whether to use such a two-step enforcement process.
This statute gives the Senate the option of a civil action to enforce a subpoena, but does not eliminate its ability to rely on the inherent contempt power or institute criminal contempt proceedings as described above. 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 objecting witness. Unlike criminal contempt, in a civil context, sanctions such as imprisonment and/or a fine can be imposed until the subpoenaed party agrees to comply. This creates an incentive for compliance to end the punishment. Since the statute’s enactment in 1979, the Senate has authorized the Office of Senate Legal Counsel to seek civil enforcement of a subpoena for documents or testimony at least six times, the last in 1995.

ii. The Benefits of a Civil Contempt Mechanism

The civil contempt process is generally faster than a criminal proceeding, where a court may more closely scrutinize congressional procedures and give greater weight to the defendant’s constitutional rights. The civil contempt procedure also provides an element of flexibility, allowing the subpoenaed party to raise possible constitutional and other defenses (e.g., the privilege against self-incrimination, lack of compliance with congressional procedures, or an inability to comply with the subpoena) without risking a criminal prosecution.

iii. The Senate Civil Contempt Mechanism Cannot be Used Against Executive Branch Officials

Civil contempt, however, has limitations. Most notable is that the statute granting jurisdiction to the courts to hear such cases is, by its terms, inapplicable in the case of a subpoena issued to officers or employees of the federal government acting in their official capacities. A report from the House Judiciary Committee in 1988 stated that the exclusion was to apply only in cases in which the President had directed the recipient of the subpoena not to comply with its terms. Therefore, the procedure may only be used in investigations of private companies and individuals, and Senate members, officials, and employees subject to internal inquiries.

b. In the House of Representatives

i. Past House Resolutions Authorizing Special Committee Actions

While the House of Representatives cannot pursue actions under the Senate’s civil contempt statute just discussed, as an alternative, the House has frequently created special investigatory panels. There are numerous examples of the House, by resolution, providing special investigatory committees with authority not ordinarily available to its standing committees. These extra powers have included staff deposition authority, the authority to obtain tax information, and the authority to seek international assistance in information-gathering efforts abroad. In addition, at least six special panels have been specifically granted the power to seek judicial orders and participate in judicial proceedings.

Before the 110th Congress, the House of Representatives never directly sought civil enforcement of a subpoena in federal court by filing its own lawsuit, but had only sought to participate in cases brought by others. There were several situations in which the House by resolution authorized intervention by counsel representing a House committee into litigation involving congressional committees. The House’s authority to file such lawsuits has been recognized by the Justice Department. Several opinions of DOJ’s Office of Legal Counsel argued that civil enforcement proceedings were a proper means to resolve interbranch information access disputes, rather than inherent or statutory criminal contempt proceedings.

ii. Approval of House Resolution Authorizing Court Enforcement of a Committee Subpoena

In the 110th Congress, the House of Representatives directly sought enforcement of a subpoena in federal court authorized solely by resolution of the House. This action came in connection with the investigation during President George W. Bush’s administration of the firings of nine U.S. Attorneys. When former Bush administration officials Harriet Miers and Joshua Bolten refused to appear and testify before Congress on the matter, the House passed a resolution authorizing a lawsuit to enforce the subpoenas.

More specifically, the litigation involved President Bush’s claim of executive privilege, and his assertion that this claim bestowed absolute immunity on the aides, which protected them from even responding to the
subpoenas. The House passed two resolutions. The first one directed the Speaker to certify the contempt of the House Judiciary Committee to the U.S. Attorney for presentation to a grand jury. Since the House anticipated that the U.S. Attorney would refuse, the second resolution authorized the Chair of the Judiciary Committee to initiate civil proceedings in federal court to seek a declaratory judgment affirming the duty of the subpoenaed individuals to comply with the subpoenas, and court orders requiring compliance. Attorney General Mukasey directed the U.S. Attorney not to present the citation, and the suit was filed.

In 2008, the federal district court hearing this subpoena enforcement case, *House Committee on the Judiciary v. Miers*, ruled that the House subpoenas must be enforced. Under the district court decision, a one-House authorization in such subpoena enforcement cases is sufficient to provide the necessary jurisdiction and standing. Although the case was settled in March 2009, after the change in administration and before the appeal was heard, the settlement provided that the district court decision rejecting both the Executive's broad privilege claims and its assertions that the case could not be heard by the court would stand as precedent.

The district court's lengthy opinion principally dealt with the Executive's claims that the suit should be dismissed because the committee: (1) lacked standing or a right to sue, (2) had not stated a cause of action authorizing the suit, and (3) inappropriately involved the court in a dispute between the political branches that should be resolved by negotiation and accommodation by the parties. The court rejected the Executive's first two claims, finding that Article I of the Constitution, which provides that Congress possesses "the power of inquiry," was sufficient to provide a basis for the suit—both standing and an implied cause of action. The court observed that the Supreme Court had consistently recognized that the power carries with it the "'process to enforce it,'" which is "an essential and appropriate auxiliary to the legislative function" and that "issuance of a subpoena pursuant to an authorized investigation is … an indispensable ingredient of lawmaking."

The trial court also rejected the suggestion that the court dismiss the suit so as to avoid involvement in a political dispute between the branches. The court noted that since the initial Watergate rulings, many courts had considered subpoena disputes raising privilege and immunity questions in both civil and criminal contexts, and often only judicial intervention could prevent "a stalemate that could result in a paralysis of government." The court particularly relied on the lesson of the House's authorization to a subcommittee chair to intervene in an earlier landmark appeals court ruling in commenting: "Two parties cannot negotiate in good faith when one side asserts legal privileges but insists that they cannot be tested in court in the traditional manner. That is true whether the negotiating parties are private firms or the political branches of the federal government."

5. 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 just described 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. The House experience with its current civil contempt suit has not been as expeditious as anticipated. Inherent contempt is described as "unseemly" in such situations and cumbersome as well. And if the criminal contempt route is taken, a committee faces the prospect that the U.S. Attorney may decline to prosecute. The U.S. Attorney may rely on the doctrine of prosecutorial discretion to refuse to present the contempt citation or sign a grand jury indictment if one is handed up, or, alternatively, he or she may be directed by the President not to file the citation on the basis of a claim of executive privilege.

There are, however, various alternatives to the three modes of contempt in the case of an executive branch official:

- the appropriations for the agency or department involved can be cut off or reduced when requested information is not supplied;
- a hold can be placed by a senator on agency nominees until the information is released;
the inherent contempt process can be streamlined by having the fact-finding and recommendation stage of
the proceeding performed by a committee before the trial on the floor, and by limiting the penalty for con-
viction to fines through the exercise of each house's internal rulemaking power;

- a law might be passed modeled after the now expired Independent Counsel Act that requires a special court
to appoint an independent advocate to prosecute contempt of Congress cases when a U.S. Attorney refuses,
or is directed not to present a proper citation to a grand jury; and

- in an exceptional case, the official might be impeached.

6. Perjury, False Statements, and Obstruction Prosecutions
   a. Testimony Under Oath

A witness under oath before a congressional committee who willfully gives false testimony is subject to pros-
cecution for perjury under Section 1621 of Title 18 of the U.S. Code. The false statement must be “willfully”
made before a “competent tribunal” and involve a “material matter.” For a legislative committee to count as a
competent tribunal for perjury purposes a quorum must be present. The quorum problem has been amelio-
rated 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 and one member for Senate committees. 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 be permitted for statements made only in the pres-
ence of committee staff unless the committee has deposition authority and has taken formal action to allow
prosecution.

b. Unsworn Statements

Most statements made before Congress, at both the investigatory and hearing phases of oversight, are un-
sworn. The practice of swearing in all witnesses at hearings is infrequent. However, prosecutions may be
brought to punish congressional witnesses for giving willfully false testimony not under oath. Under 18 U.S.C.
§ 1001, false statements by a person in “any investigation or review, conducted pursuant to the authority of
any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the
House and Senate” are punishable by a fine of up to $250,000 or imprisonment for not more than five years,
or both.

c. Obstruction of a Congressional Proceeding

Section 1505 of title 18 makes it a crime for a person to “corruptly” or through the use of “any threatening let-
ter or communication influence, obstruct, or impede, or endeavor to obstruct or impede” the “due and proper
exercise of the power of inquiry under which any inquiry or investigation is being held by either House, or
any committee of either House or any joint Committee of the Congress ....” The statute makes it a criminal
matter for any obstruction or impeding conduct in relation to a committee inquiry of the House or Senate.
Conviction can result in imprisonment for up to five years or a fine.
III. THE PROCESS OF CONDUCTING INVESTIGATIVE OVERSIGHT PROCEEDINGS

A. The Nature of an Investigative Hearing

A congressional investigative hearing is part of the political process. It is not a judicial fact-finding proceeding reaching for the truth; nor is it an administrative agency’s attempt to create a record. It is a proceeding often driven by political considerations. If a proposed investigation is within the scope of a committee’s assigned jurisdiction, the manner of conducting the inquiry is subject to the discretion of the chair. All committees must adopt rules for the conduct of investigatory hearings, which must be followed to the letter.

The rules governing investigative hearings demonstrate that they are very different from court proceedings. For example, in congressional hearings:

- A witness is entitled to consult with an attorney, but counsel’s overall role is circumscribed.
- Familiar courtroom rules of evidence do not apply. Thus, no foundation need be laid for a question, and hearsay testimony may be used.
- Witnesses have no right to cross-examine other witnesses or view the materials relied upon to develop committee questions.
- Counsel cannot make objections except in the most egregious circumstances and are subject to a chairperson’s plenary power to control the conduct and integrity of a hearing, which can include the expulsion of counsel.

B. Jurisdiction and Authority

If a person does not comply with a committee’s investigative demands, the committee may hold the person in contempt. However, a contempt conviction will not be upheld if the committee’s investigation has not been clearly authorized by the full House or Senate. Both the investigation itself, and the specific questions posed, must be within the scope of the committee’s jurisdiction. A committee cannot issue a subpoena for a subject outside the scope of its jurisdiction.

The required authorization from the full House or Senate may take the form of a statute, a resolution, or a standing rule of the House or Senate. In the case of a subcommittee investigation, the subject matter must fall within the scope of authority granted by the full committee. Investigations may be conducted, and subpoenas issued, pursuant to a committee’s legislative or oversight jurisdiction.

In construing the scope of a committee’s authorizing rule or resolution, the Supreme Court has adopted a mode of analysis that resembles the analysis the Court uses in determining the meaning of a statute: it looks first to the words of the resolution, and then, if necessary, to the usual sources of legislative history, including floor statements, reports, and past committee practice. It appears that the clear articulation of committee jurisdiction in both the House and Senate rules, combined with the express authorization of special committees by resolution, has effectively eliminated the lack of jurisdiction defense in contempt proceedings.
C. Initiation of an Investigation

1. Committees and Chairpersons Have Broad Authority to Commence Proceedings

House and Senate rules have vested broad powers in committees and their chairs to conduct oversight and investigative proceedings. House Rule X.2(b)(1) directs that “Each standing committee … shall review and study on a continuing basis, the application, administration, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that Committee … in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of Congress and whether such programs should be continued, curtailed, or eliminated.” House Rule XI.1(b) provides that “Each Committee is authorized at any time to conduct such investigations and studies as it may consider necessary and appropriate in the exercise of its responsibilities under Rule X.”

The various House committees and subcommittees have their own rules, procedures, and practices. Different committees’ inquiries may follow their own individual paths. Committees decide among themselves, by precedent or newly devised procedures, how to conduct any particular inquiry.

Requiring Votes, Concurrence, or Consultation Before an Investigation: A committee can adopt rules requiring committee votes before initiating major inquiries, as the House Un-American Activities Committee (HUAC) did in the 1960s, and the House Permanent Select Committee on Intelligence (HPSCI) has done in recent years. If such a rule is adopted, “it must be strictly observed.” Both committees had special reasons for adopting such a rule—HUAC’s stemming from the controversial nature of its investigations, and HPSCI’s because of the sensitivity of its inquiries. But the vast majority of committees have not adopted such rules.

More common are committee rules that require either concurrence or consultation with the ranking minority member before the chairperson initiates a formal investigation. House standing committees are also authorized to establish task forces, special subcommittees, or subunits to assist in carrying out their oversight functions.

But even with such special rules, committee chairs may commence informal, preparatory inquiries through inquiry letters, scheduling of hearings, or staff studies and interviews without committee votes or minority party participation. In accordance with the responsibility to engage in continuous oversight, chairs of committees and subcommittees have traditionally initiated preliminary reviews and studies (i.e., “preliminary investigations” to be undertaken by the chair and subject to the ultimate control and direction of the committee). Courts have recognized the legal significance and propriety of such preliminary inquiries.

2. Preliminary Inquiries Can Be Protective of Important Evidence

In certain circumstances, a chairperson’s preliminary inquiry can be essential to minimizing the possibility of the destruction of documents before formal investigations begin. In this regard, the courts have held that the legal obligation to surrender documents requested by the committee chair arises at the time of the official request. The courts have construed 18 U.S.C. § 1505, a statute proscribing the obstruction of congressional proceedings, to cover obstructive acts in anticipation of a subpoena.

For example, in United States v. Mitchell, the appeals court upheld a conviction for obstructing an investigation by the House Committee on Small Business. The court said of the obstruction statute that “[t]o give §1505 the protective force it was intended, corrupt endeavors to influence congressional investigations must be proscribed even when they occur prior to formal committee authorization.” The appeals court clearly approved the notion that a chairperson can initiate a proper committee investigation without official committee sanction and identified two classic indications of this: the writing of an official letter and the handling of the investigation by a committee staffer (the “chief investigator of the Small Business Committee”).
D. Rules Applicable to Hearings

1. Committees Must Adopt and Publish Their Rules of Procedure

House Rule XI.2(a) and Senate Rule XXVI(2) require that committees adopt written rules of procedure and publish them in the Congressional Record. Once properly issued, such rules are judicially recognized by courts and must be strictly observed. The failure to publish has resulted in the invalidation of a perjury prosecution. The House and many individual Senate committees require that all witnesses be given a copy of a committee’s rules.

2. Advance Notice of Hearings Must Be Published

House and Senate rules require committees to provide at least one week’s public notice for the holding of a hearing. In addition to the date, time, and location of the hearing, there must be a description of the subject matter. Individual committee rules provide a separate minimum notice for witnesses. Non-governmental witnesses in the House must include a curriculum vitae in their written statements. They must also include a disclosure of the amount and source (by agency program) of each federal grant or contract received in the current and preceding two fiscal years by the witness or the entity represented by the witness.

3. Quorum Requirements for Certain Investigative Actions

As noted in Chapter II, both the House and the Senate have adopted rules permitting a reduced quorum for taking testimony and receiving evidence. House hearings may be conducted if at least two members are present; most Senate committees permit hearings with only one member in attendance. Some committees 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.

Reduced quorum requirement rules do not apply, however, to authorizations for the issuance of subpoenas. For subpoenas, Senate rules require a one-third quorum, while the House requires a quorum of a majority of the members, unless a committee delegates authority for subpoena issuance to its chairperson.

4. Closed Sessions

Senate and House rules limit the authority of their committees to meet in closed session. A House rule provides that testimony “shall” be held in closed session only if a majority of a committee or subcommittee determines that public testimony “may tend to defame, degrade, or incriminate any person.” Testimony taken in closed session is normally releasable only by a majority vote of the committee. Similarly, confidential material received in a closed session requires a majority vote for release. However, confidential material not obtained in closed sessions is not so protected.

5. Audio and Visual Coverage of Open Hearings

House and Senate hearings open to the public are required to allow audio and visual coverage subject to implementing rules. Neither house permits a subpoenaed witness the right to demand that television, radio, or still photographic coverage cease during his or her testimony.

E. Conduct of Hearings

1. Opening Procedures

The chair usually makes an opening statement to define the subject matter of the hearing and establish the pertinence of questions asked to the witnesses. Not all committees swear in their witnesses; a few committees require that all witnesses be sworn. Most committees leave the swearing of witnesses to the discretion of
the chair. If a committee wishes the potential sanction of perjury to apply, it should, in accordance with the statute, administer an oath and swear its witnesses. It should be noted that false statements not under oath are also subject to criminal sanctions.

2. Rights of Witnesses and the Role of Counsel

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

The right of a witness to be accompanied by counsel is recognized by House and Senate rules. The House rule limits the role of counsel as solely “for the purpose of advising them concerning their constitutional rights.” Some committees have adopted rules specifically prohibiting counsel from “coaching” witnesses during their testimony. Oral arguments and counsel objections to member questions and chair rulings can be deemed out of bounds. Many Senate committees have adopted more lenient rules in allowing counsel advice with respect to the witness’ “legal rights.” Both houses have rules that authorize chairs to maintain the decorum and integrity of a hearing, and a few committees have adopted rules that allow chairs to exclude counsel for improper conduct or for apparent conflicts of interest that would preclude the candid, unintimidated testimony of the witness. 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.

There is no right of cross-examination of adverse witnesses or to discovery of materials utilized by a committee as the basis for questions. Witnesses are entitled to a range of constitutional protections, but can be limited in the use of privileges traditionally recognized in court proceedings. Indeed, the Supreme Court has commented that “only infrequently have witnesses … [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding.”

3. Effect on Investigative Proceedings of a Final Adjournment of a House at the End of a Legislative Session

House and Senate rules allow for the continuation of investigative proceedings when each house votes to end a legislative session and reconvene on a specified date in the next session. This is commonly called sine die adjournment. Committees are authorized to continue or initiate investigations, hold hearings, and issue and enforce subpoenas during the sine die recess. Also, committees, under the criminal contempt statute, can recommend a resolution to the Speaker of the House or President of the Senate who may certify a contempt of Congress citation to the U.S. Attorney for presentation to a grand jury.

The period of recess may be for days, weeks, or even months, so authorization to continue all legislative functions other than lawmaking is necessary to maintain continuity and efficiency. When the next session of Congress is the first session of a new Congress, House committees must take additional actions to continue investigations; investigations must be reauthorized and subpoenas reissued. Since the Senate is a continuing body, its committee investigations may continue into the next session of a new Congress. As a measure of precaution, some Senate committees certify a “continuing interest” in the investigation and for any subpoenas that had been issued.
IV. CONSTITUTIONAL TESTIMONIAL PRIVILEGES OF WITNESSES

Congress’ broad investigatory powers are constrained both by the structural limitations imposed by our constitutional system of separated and balanced powers and by the individual rights guaranteed by the Bill of Rights. Thus, both the President and individuals called as witnesses can assert various privileges, which enable them to resist or limit the scope of congressional inquiries. These privileges, however, are also limited.

The Supreme Court has recognized a constitutionally based privilege of the President to protect the confidentiality of documents or other information that reflects presidential decision making and deliberations. This executive privilege, however, is qualified. Congress and other appropriate investigative entities may overcome the privilege by a sufficient showing of need and the inability to obtain the information elsewhere. Moreover, neither the Constitution nor the courts have provided a special exemption for national security or foreign affairs information. With regard to individual rights, the Supreme Court has recognized that individuals subject to congressional inquiries are protected by the First, Fourth, and Fifth Amendments, though in many important respects those rights may be qualified or denied by Congress’ constitutionally rooted investigatory authority.

A. Executive Privilege

Executive privilege is a doctrine that enables the President to withhold certain information from disclosure to the public or even Congress. The doctrine is based upon constitutional principles of separation of powers, and is designed to enable the President to receive candid advice from advisers, as well as to safeguard information whose disclosure might threaten national security.

1. The Presidential Communication Privilege: A Summary of the State of the Law

The presidential communications privilege is a subcategory of executive privilege that protects the core communications of advisers closest to the President. There is a great deal of confusion about the actual scope of the presidential communications privilege. Various opinions and pronouncements from the Justice Department’s Office of Legal Counsel and the White House Counsel’s Office have described a very broad scope and reach of the presidential privilege. However, recent court opinions have reflected a much narrower understanding of the privilege, and no judicial ruling on the merits has upheld a claim of presidential privilege since the Supreme Court’s 1974 ruling in United States v. Nixon, which recognized the qualified privileged but denied its efficacy in that case. In practice, many claims of executive privilege have been withdrawn in the face of adamant congressional resistance.

The current state of the law of presidential privilege, described more fully below, may be briefly summarized as follows:

- The constitutionally based presidential communications privilege is presumptively valid when asserted.
- There is no requirement that the President have seen nor even been aware of the documents over which he or she claims privilege.
- The communication(s) in question must relate to a “quintessential and non-delegable presidential power” that requires direct presidential decision making. The privilege is limited to the core constitutional powers of the President, such as the power to appoint and remove, the Commander-in-Chief power, the sole authority to receive ambassadors and other public ministers, and the pardon power.
The privilege does not cover matters handled within the broader executive branch beyond the Executive Office of the President. Thus, it does not cover decision making on implementation of laws that delegate policymaking authority to the heads of departments and agencies or which allow presidential delegations of authority.

The subject communication must be authored or “solicited and received” by the President or a close White House adviser. The adviser must be in “operational proximity” to the President, which effectively limits coverage of the privilege to the administrative boundaries of the Executive Office of the President and the White House.

The privilege remains a qualified privilege that may be overcome by a showing that the information sought “likely contains important evidence” and is unavailable elsewhere to an appropriate investigatory authority. The President may not prevent such a showing of need by granting absolute immunity to witnesses who would otherwise provide the information necessary to show that “important” evidence exists.

2. Evolution of the Law of Executive Privilege and Helpful Guidance from the Cases

Presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in executive-congressional relations since at least 1792. In that year, President Washington discussed with his cabinet how to respond to a congressional inquiry into the military debacle that befell General St. Clair’s expedition. Few such interbranch disputes over access to information have reached the courts. The vast majority of such disputes are usually resolved through political negotiation. In fact, it was not until the Watergate-related lawsuits in the 1970s seeking access to President Nixon’s tapes that the existence of a presidential confidentiality privilege was recognized by a court. It then became judicially established as necessary to protect the President’s status in our constitutional scheme of separated powers.

To understand the law of executive privilege, it is helpful to examine the court opinions in cases examining these issues. Of the ten court decisions involving claims of executive privilege, four have involved disputes between Congress and the Executive; two of these resulted in decisions that resolved the dispute “on the merits” of the case. Two of the other six cases also provide helpful guidance. One considered legislation granting custody of President Nixon’s presidential records to the Administrator of the General Services Administration. The most recent appellate court ruling examined a private group’s right of access under the Freedom of Information Act to pardon documents in the custody of the Justice Department, and in rejecting the privilege claim, further clarified the law in this area.

a. Nixon and Post-Watergate Rulings

The Nixon and post-Watergate cases established the broad contours of the presidential communications privilege. Under those precedents, the privilege, which is constitutionally rooted, could be invoked by the President when asked to produce documents or other materials or information that reflect presidential decision making and deliberations that the President believes should remain confidential. If the President does so, the materials become presumptively protected from disclosure. The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need. Finally, while reviewing courts have expressed reluctance to balance executive privilege claims against a congressional demand for information, they have acknowledged they will do so if the political branches have tried in good faith but failed to reach an accommodation.

b. Issues Unresolved by Nixon and the Post-Watergate Cases

However, until the U.S. Court of Appeals for the D.C. Circuit’s 1997 ruling in In re Sealed Case (Espy) and its 2004 decision in Judicial Watch v. Department of Justice, these judicial decisions had left important gaps in the law of presidential privilege. The significant issues left open included:

Does the President have to have actually seen or been familiar with the disputed matter?
Does the presidential privilege encompass documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the Executive Branch?

Does the privilege encompass all communications with respect to which the President may be interested or is it confined to actual presidential decision making and, if so, is it limited to any particular type of presidential decision making?

Precisely what demonstration of need must be shown to justify release of materials that qualify for the privilege?

The unanimous panel in Espy, and the subsequent reaffirmation of these principles by the D.C. Circuit in Judicial Watch, authoritatively addressed each of these issues. Most recently, the district court decision in House Committee on the Judiciary v. Miers clarified that the privilege does not provide absolute immunity to resist congressional inquiries. These decisions clarified the limits of the privilege and drastically altered the legal playing field in resolving such disputes.

c. The Narrowing of the Privilege Through Court Decisions in Espy, Judicial Watch, and Miers

i. Espy

The Espy case arose out of an Office of Independent Counsel (OIC) investigation of former Agriculture Secretary Mike Espy. When allegations of improprieties by Espy surfaced in March 1994, President Clinton ordered the White House Counsel’s Office to investigate, and that office prepared a report for the President, which was publicly released in October 1994. The President never saw any of the underlying or supporting documents to the report.

Separately, a special panel of the D.C. Circuit, at the request of the Attorney General, appointed an Independent Counsel and a grand jury issued a subpoena for all documents that were accumulated or used in preparation of the White House Counsel’s report. In response, the President withheld 84 documents, claiming both the executive and deliberative process privileges for all documents. In ruling on the Independent Counsel’s motion to compel, the district court upheld the privilege claims and quashed the subpoena. In its written opinion the court did not discuss the documents in any detail and provided no analysis of the grand jury’s need for the documents. The appeals court panel unanimously reversed and ordered that the documents be produced.

The Presidential Communications Privilege Is Constitutionally Based, But Qualified, and May Be Overcome by a Substantial Showing of Need and Unavailability

At the outset, the D.C. Circuit’s opinion carefully distinguishes between the “presidential communications privilege” and the “deliberative process privilege.” Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decision making. But the deliberative process privilege (discussed in detail in Chapter V below) applies to executive branch officials generally and is not constitutionally based. It, therefore, can be overcome with a lesser showing of need and “disappears altogether when there is any reason to believe government misconduct [has] occurred.”

On the other hand, the court explained, the presidential communications “privilege is rooted in constitutional separation of powers principles and the President’s unique constitutional role” and applies only to “direct decision making by the President.” The privilege may be overcome only by a substantial showing that “the subpoenaed materials likely contain[] important evidence” and that “the evidence is not available with due diligence elsewhere.” The presidential communications privilege applies to all documents in their entirety and covers final and post-decisional materials as well as pre-deliberative ones.
The presidential communications privilege must cover communications made or received by presidential advisers in the course of preparing advice for the President, even if those communications are not made directly to the President. The court rested its conclusion on “the President’s dependence on presidential advisers” and “the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources.” Thus, the privilege applies “both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser’s staff.”

However, the privilege does not extend beyond close presidential advisers to reach communications with heads of agencies or their staffs. The court emphasized that:

Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers ….

The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decision-making by the President.

The presidential communications privilege is limited to “direct decision-making by the President,” and decisions regarding “quintessential and non-delegable Presidential power.” The Espy case itself concerned the President’s Article II appointment and removal power, which was the question upon which he sought advice. The court’s opinion distinguishes this specific appointment and removal power from general “presidential powers and responsibilities” that “can be exercised or performed without the President’s direct involvement, pursuant to a presidential delegation of power or statutory framework.”

Based on the presidential powers actually enumerated in Article II of the Constitution, the category of “quintessential and non-delegable” powers would also include such powers as the Commander-in-Chief power, the sole authority to receive ambassadors and other public ministers, the power to negotiate treaties, and the power to grant pardons and reprieves. On the other hand, the privilege would not cover decision making based upon powers granted to the President by a statute or to decisions required by law to be made by agency heads.

Thus, communications regarding such matters as rulemaking, environmental policy, consumer protection, workplace safety, securities regulation, and labor relations, among others, would not be covered. Of course, the President’s role in supervising and coordinating decision making in the Executive Branch remains unimpeached. But the President’s communications in furtherance of such activities would not be protected from disclosure by this constitutional privilege.

**ii. Judicial Watch**

These limits in the scope of the presidential communications privilege were further clarified in the D.C. Circuit’s 2004 decision in *Judicial Watch, Inc. v. Department of Justice*. *Judicial Watch* involved requests for documents concerning pardon applications and grants reviewed by the Justice Department for President Clinton. The President withheld approximately 4,300 documents on the grounds that they were protected
by the presidential communications and deliberative process privileges. The district court held that because the materials sought had been produced for the sole purpose of advising the President on a “quintessential and non-delegable Presidential power”—namely the exercise of the President’s constitutional pardon authority—they were protected from disclosure.\footnote{164} However, the appeals court reversed on the ground that the review did not involve the President or close White House advisers.

\textit{Agency Documents Not Solicited or Received by Close Presidential Advisers Are Not Covered by the President’s Privilege}

In rejecting the claim of presidential communications privilege in \textit{Judicial Watch}, the D.C. Circuit held that “internal agency documents that are not ‘solicited and received’ by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege.”\footnote{165} The court emphasized that the “solicited and received” limitation from the \textit{Espy} case “is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far.”\footnote{166} In rejecting the Government’s argument that the privilege should be applicable to all departmental and agency communications related to the pardon recommendations for the President, the court held that:

Communications never received by the President or his Office are unlikely to ‘be revelatory of his deliberations’ … nor is there reason to fear that the Deputy Attorney General’s candor or the quality of the Deputy’s pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal agency documents.\footnote{167}

The \textit{Judicial Watch} decision makes it clear that cabinet department heads will not be treated as being part of the President’s immediate personal staff or as some unit of the Office of the President.\footnote{168} This requirement of proximity to the President confines the potentially broad scope of the privilege. Thus, for the privilege to apply, not only must the presidential decision at issue involve a non-delegable, core presidential function, but the operating officials must also be sufficiently close to the President and senior White House advisers.\footnote{169}

\textbf{iii. Miers}

The 2008 district court ruling in \textit{House Committee on the Judiciary v. Miers}\footnote{170} sheds further light on the limits of the presidential communications privilege. The case involved subpoenas issued by the House Judiciary Committee to compel testimony by close presidential advisers in an investigation of the removal and replacement of nine U.S. Attorneys. The Bush administration had invoked executive privilege and ordered the advisers not to appear, testify, or provide documents in response to the subpoenas. Although the case was settled in March 2009, after the change in administration and before the appeal was heard, the settlement provided that the district court decision rejecting the Executive’s broad privilege claims would stand as precedent.

As discussed in Chapter II,\footnote{171} the district court rejected the Executive’s attempts to dismiss the case, finding that the House had the right to bring the lawsuit (both “standing” and an “implied cause of action”) based upon Article I of the Constitution granting Congress the “power of inquiry.” The court found that this power carries with it the “process to enforce it,” and that “issuance of a subpoena pursuant to an authorized investigation is … an indispensable ingredient of lawmaking.”\footnote{172}

\textit{A Presidential Claim of Privilege Cannot Provide Absolute Immunity to Congressional Subpoenas}

The Executive Branch argued to the district court that present and past senior advisers to the President are absolutely immune from compelled congressional process. The district court unequivocally rejected this position:

The Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context …. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive’s claim of absolute immunity for senior presidential aides.\footnote{173}
The court pointed out that the effect of a claim of absolute privilege for close advisers would be to enable the President to judge the limits of his or her own qualified privilege: “Permitting the Executive to determine the limits of its own privilege would impermissibly transform the presumptive privilege into an absolute one.”

d. The Essential Elements of the Presidential Communications Privilege

Since the Supreme Court recognized the presidential communications privilege in 1974, no court has since upheld such a claim on the merits. Based upon the court decisions outlined above, the following elements are necessary to support such a claim of privilege:

1. The protected communication must relate to a “quintessential and non-delegable presidential power.” Espy and Judicial Watch involved the appointment and removal and the pardon powers, respectively. Other core presidential powers include the Commander-in-Chief power, the sole authority to receive ambassadors and other public ministers, and the power to negotiate treaties. This category does not include decision making where laws delegate policymaking and administrative implementation authority to the heads of agencies.

2. The communication must be authored or “solicited and received” by a close White House adviser or the President. An adviser must be in “operational proximity” to the President. This effectively means that the scope of the presidential communications privilege extends only to cover the Executive Office of the President and the White House.

3. The presidential communications privilege remains a qualified privilege that may be overcome. The privilege can be overcome by showing that the information sought “likely contains important evidence,” it is sought by an appropriate investigating authority, and it is unavailable elsewhere. The Espy court found an adequate showing of need by the Independent Counsel; and Miers held that privilege does not provide absolute immunity to enable the President to block witnesses from showing that “important” evidence exists.

3. Presidents Are Subject to Compulsory Process: Presidential Appearances Before Judicial Tribunals and Congressional Committees

The President and close advisers are subject to subpoenas and court enforcement of subpoenas. This was demonstrated most recently in the Miers case involving subpoenas by the House Judiciary committee for close presidential advisers to testify. The court in Miers noted, first, that enforcement of a subpoena is “a routine and quintessential judicial task;” second, that the Supreme Court has held that the judiciary is the final arbiter of executive privilege; and third, that court enforcement of compulsory process is deeply rooted in the common law tradition going back to Chief Justice Marshall’s 1807 opinion on United States v. Burr. The Miers court commented that “federal precedent dating back as far as 1807 contemplates that even the Executive is bound to comply with duly issued subpoenas. The Supreme Court emphatically reaffirmed that proposition in United States v. Nixon in 1974.”

Professors Ronald D. Rotunda and John L. Nowak have compiled a list of historical investigations in which sitting or former Presidents have been subpoenaed and involuntarily appeared or produced evidence in judicial forums or before congressional committees. These included Presidents Thomas Jefferson (1807), James Monroe (1818), John Quincy Adams and John Tyler (1846), Richard M. Nixon (1975, 1976, 1982), Gerald R. Ford (1975), Ronald Reagan (1990), and William J. Clinton (1996, 1998). President Harry S. Truman was subpoenaed by the House Un-American Activities Committee in 1953 after he had left office. Truman refused to comply and appeared on national television and radio to rebut the charges made by the Committee. The Committee never sought to enforce the subpoena.

indicates that, between 1973 and 2007, at least 70 senior advisers to the President who were subject to subpoenas have testified before congressional committees.181

B. The President Cannot Unilaterally Determine Congressional Access to National Security or Intelligence-Related Material

1. Asserted Basis for Executive Branch Withholding National Security Information

Past administrations have taken the position that the Executive Branch has exclusive control over Congress’ access to information the Executive considers classified due to national security reasons. Through Justice Department opinions, they have expressed the view that Congress may not, by law, legislative rule, or the exercise of investigative authority, bypass the procedures that the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information. According to the Justice Department’s Office of Legal Counsel (OLC), under the precepts of executive privilege and the unitary executive, requirements for reporting to Congress are “limited by a constitutional restraint—the Executive Branch’s authority to control the disclosure of information when necessary to preserve the Executive’s ability to perform its constitutional responsibilities.”182

Earlier OLC opinions have advised that under the President’s Executive Order governing the classification of information, with respect to any “disseminations that would be made to Congress or its Members … the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President, and who is ultimately responsible, perhaps through intermediaries, to the President.”183 That opinion also emphasized that “the longstanding practice under Executive Order 12356 (and its successor) has been that the ‘need to know’ determination for disclosures of classified information to Congress is made through established discretionary channels at each agency.”184

The NSA Surveillance Program Example: Following public disclosure of the National Security Agency’s controversial Terrorist Surveillance Program (TSP) at the end of 2005, several congressional committees sought to investigate the program. In early 2007, as Congress considered various possible amendments to the Foreign Intelligence Surveillance Act (FISA) designed to legalize the surveillance program, it was disclosed that a judge at the Foreign Intelligence Surveillance Court (FISC) had granted the Justice Department’s request for orders authorizing the collection of information under a new interpretation of FISA. The House Judiciary Committee, which has jurisdiction over the FISC, asked for classified briefings for all members and selected staff with appropriate security clearances with respect to the court’s authorization.

The Justice Department responded that the President had decided that only members of the House and Senate Intelligence Committees would be “read into”185 the TSP program; that those committees had been fully briefed on the FISC’s new orders “consistent with their oversight authority relating to intelligence matters and the National Security Act;” and that those committees had received classified copies of DOJ’s applications. But the chair and ranking member of the House Judiciary Committee would only be permitted to review the documents at the Intelligence Committee’s offices and would not be “read into” the program. Ultimately, Congress passed legislation amending FISA without fully contesting these executive branch assertions.

2. Congress is Entitled to Access to National Security Information

The theory that the President possesses the exclusive prerogative to determine who in Congress is to be informed about national security matters, and when and how the informing process is to take place, challenges established and understood constitutionally based oversight prerogatives of Congress and its jurisdictional committees. Certainly, when oversight extends to matters of national security, access to documents and information may be constrained by constitutionally rooted privileges and prerogatives possessed and asserted by the Executive. But under our constitutional system, a proper committee of jurisdiction is entitled to access to
information, even if it relates to national security or foreign affairs material. The Executive’s privilege claim is still a qualified one subject to rebuttal.

The AT&T Case Example: The balance between Congress and the President was illustrated by one of the few interbranch investigations involving national security matters that have reached the courts. That case arose out of an investigation in the 1970s by the Oversight and Investigations Subcommittee of the House Interstate and Foreign Commerce Committee into allegations of improper domestic intelligence gathering and wiretapping of telephone communications by the FBI. The investigation resulted in a three-way conflict among the subcommittee seeking to enforce its subpoenas, AT&T, and the Justice Department. The appeals court carefully addressed the claims of absolute rights asserted by Congress and the Executive Branch, noting that Supreme Court precedent does “not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers.” However, the court directed the parties to continue negotiating and never decided the case on the merits of the legal dispute, even after the case reached the court for a second time.

Today, the AT&T case stands for the proposition that neither executive claims of control over national security documents nor congressional assertions of access are absolute. Rather, both claims are qualified and are, therefore, subject to judicial review. However, a judicial determination is only available after every attempt to resolve interbranch differences has been exhausted.

As a result, Congress and the Executive Branch share an obligation to negotiate the possible terms and conditions of such disclosures. Unilateral action by either branch is unacceptable. But the congressional obligation to negotiate the terms of access does not extend to instances that would unduly interfere with the effective performance of its constitutional oversight duties. The terms can include the location, manner—written or oral, or in open or closed (executive) session—or timing of the disclosure. A committee or an executive agency may agree to limit access only to staff with appropriate security clearances and under secure office conditions. Indeed, in the past, DOJ has acknowledged that interbranch collaboration is necessary when highly sensitive intelligence information is to be shared with the Congress. As OLC has advised: “Both the Executive branch and Congress have recognized that [disclosure of classified information] must be conducted through the secure channels established by the Branches working in cooperation.”

3. Merely Reporting to the House and Senate Intelligence Committees Does Not Satisfy the Obligation to Inform Other Jurisdictional Committees

The obligation for the Executive Branch to inform Congress on matters relating to national security requires informing all congressional committees with jurisdiction. The Justice Department—as demonstrated by its response to the House Judiciary Committee in the investigation of the NSA surveillance program—has argued that its legal obligation to provide Congress with information extends only to fully informing the House and Senate intelligence committees. However, the House rules do not provide the House Permanent Select Committee on Intelligence (HPSCI) with exclusive jurisdiction either over intelligence or intelligence-related matters.

House Rule X(11)(b)(3)(4), which establishes HPSCI’s jurisdiction, provides:

(3) Nothing in this clause shall be construed as prohibiting or otherwise restricting the authority of any other committee to study and review an intelligence or intelligence-related activity to the extent that such activity directly affects a matter otherwise within the jurisdiction of that committee.

(4) Nothing in this clause shall be construed as amending, limiting, or otherwise changing the authority of a standing committee to obtain full and prompt access to the product of the intelligence and intelligence-related activities of a department or agency of the Government relevant to a matter otherwise within the jurisdiction of that committee.
When the intelligence committees were created in 1977, these clauses were deliberately drafted to ensure that the intelligence committees did not obtain sole jurisdiction over intelligence matters. The standing committees were willing to cede primary jurisdiction over the Central Intelligence Agency (CIA) to the new intelligence committees, but they wanted to retain jurisdiction over intelligence activities within agencies over which they then had jurisdiction.

In short, Congress determines which of its committees has oversight over any particular subject matter, and the President cannot pick and choose between committees with overlapping jurisdictions.

4. Congress May Establish Classification Procedures by Law

Both Congress and the President have power to establish classification procedures. Contrary to recent Justice Department assertions, the President does not possess the sole authority to classify information and “read into” programs only those persons he or she determines to have a “need to know.”

In support of the theory of exclusive executive classification authority, the Justice Department has cited a statement by the Supreme Court that the role as Commander-in-Chief provides the President with the “authority to classify and control access to information bearing on national security and … exists quite apart from any explicit congressional grant.” However, the Supreme Court has also stated that “Congress could certainly [provide] that the Executive Branch adopt new [classification] procedures or it could [establish] its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.”

In practice, Congress has enacted legislation governing classification. For example, in the Atomic Energy Act, it established a separate regime for the protection of nuclear related “restricted data.” Further, Congress has acted on numerous occasions to reinforce the classification schemes established by executive orders. These statutes have criminalized the unauthorized disclosure of classified information, provided civil penalties for violations, and authorized administrative measures designed to deter government contractors and their employees from unauthorized disclosures.

5. Committees May Establish Procedures for Handling Classified and Sensitive Materials

Both the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence have established rules and procedures for handling classified and sensitive material and for dealing with unauthorized disclosures by members and staff. Special investigative panels that anticipate receiving classified materials have adopted similar rules and procedures. Such rules provide safeguards to ensure that sensitive materials will not be disclosed.

C. Fifth Amendment Privilege Against Self-Incrimination

1. The Privilege is Applicable to Congressional Investigations but is Subject to Established Limitations

The Fifth Amendment of the Constitution protects individuals from being compelled to testify against themselves in a criminal case. Although it has never been necessary for the Supreme Court to decide the issue, the Court has suggested that the privilege against self-incrimination applies to witnesses in congressional investigations. The privilege is personal in nature, and may not be invoked on behalf of a corporation, small partnership, labor union, or other “artificial” organization. The privilege protects a witness against being compelled to testify, but generally does not protect against a subpoena for existing documentary evidence. However, where compliance with a subpoena asking for documents would effectively serve as testimony to authenticate the documents produced, the privilege may apply. On the other hand, the Supreme Court has held that a directive to a witness to authorize foreign banks to produce records if they existed is not testimonial in nature and, therefore, not incriminating.
2. No Special Combination of Words is Necessary for Invocation

There is no required verbal formula for invoking the Fifth Amendment privilege. Similarly, there does not appear to be a requirement that the congressional committee inform a witness of his or her Fifth Amendment rights. However, a committee should recognize any reasonable indication, such as the witness saying “the Fifth Amendment,” as a sign that the witness is asserting the privilege. Where a committee is uncertain whether the witness is in fact invoking the privilege against self-incrimination or is claiming some other basis for declining to answer, the committee should direct the witness to specify the nature of the objection.

3. Assertion of Privilege Must be Based on a Reasonable Fear of Self-Incrimination

A committee may question the validity of a witness’ assertion of his or her Fifth Amendment privilege; however, the committee cannot require witnesses to articulate the precise criminal repercussions they may fear. In regard to the assertion of the privilege in judicial proceedings, the Supreme Court has advised that a claim of privilege should be upheld so long as it is:

> 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 …

4. Waiver of the Privilege

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

5. Committees May Grant a Witness Immunity to Obtain Testimony

As discussed in detail in Chapter II, when a witness asserts the privilege against self-incrimination, Congress may choose to grant the witness immunity and compel the witness’ testimony. Specifically, the full House or Senate or the committee conducting the investigation may seek a court order, which (a) directs the witness to testify and (b) grants the witness immunity against the use of this testimony, or other evidence derived from the testimony, in a subsequent criminal prosecution. The immunity that is granted is “use” immunity, not “transactional” immunity. Neither the immunized testimony that the witness gives, nor evidence derived therefrom, may be used against the witness in a subsequent criminal prosecution, except one for perjury or contempt relating to the testimony. However, the witness may be convicted of the crime (the “transaction”) on the basis of other independently obtained evidence.

As set forth in Chapter II, the application for the judicial immunity order must be approved by a majority of the House or Senate or by two-thirds of the full committee seeking the order. The Attorney General must be notified at least ten days prior to the request for the order, and he or she can request a delay of 20 days in issuing the order. Although the order to testify may be issued before the witness’ appearance, it does not become legally effective until the witness has been asked the question, invoked the privilege, and been presented with the court order. The role of the court in issuing the order has been held to be ministerial and, thus, if the procedural requirements under the immunity statute have been met, the court may not refuse to issue the order or impose conditions on the grant of immunity.
D. First Amendment

1. The First Amendment is Applicable to Congressional Investigations

The First Amendment protects the freedoms of speech, press, assembly, religion, and petitioning the government. The amendment prohibits government conduct that unduly “chills” the exercise of these rights or inhibits the operation of a free press. The Supreme Court has held that the First Amendment restricts Congress in conducting investigations. In *Barenblatt v. United States*, the Court held that “[w]here First Amendment rights are asserted [by a witness] 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.” Thus, unlike the Fifth Amendment privilege against self-incrimination, the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.

2. The Degree of Protection Afforded by the First Amendment is Uncertain

First Amendment issues often arise when members of the press seek to protect the confidentiality of their sources and cite freedom of the press in response to congressional inquiries. The Court has held that in balancing the personal privacy interests against the congressional need for information, “[t]he critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness.” To protect the First Amendment rights of witnesses, 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.

The Supreme Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction. However, the Court has narrowly construed the scope of a committee’s authority so as to avoid reaching First Amendment issues. In addition, the Court has ruled in favor of a witness who invoked his First Amendment rights in response to questioning by a state legislative committee.

3. Committees Often Tread Lightly When First Amendment Rights are Implicated

When First Amendment rights and access to press sources are at issue, members of Congress are often careful not to press their inquiries as vigorously. A good example was the 1976 investigation by the House Committee on Standards of Official Conduct (House Ethics Committee) of the unauthorized publication of the draft final report of the House Select Committee on Intelligence. The leaked draft report described the results of the Select Committee’s year-long inquiry into the organization, operations, and oversight of the CIA and other components of the intelligence community. The report contained classified information not cleared for public release, as required by the Select Committee’s charter, including a discussion of CIA covert activities. The Ethics Committee subpoenaed four news media representatives, including Daniel Schorr. The committee concluded that Mr. Schorr had obtained a copy of the Select Committee’s report from an undisclosed person on the Select Committee and then made it available for publication. Although the Ethics Committee found that “Mr Schorr’s role in publishing the report was a defiant act in disregard of the expressed will of the House of Representatives to preclude publication of highly classified national security information,” and found “his actions in causing publication of the report to be reprehensible,” it declined to cite him for contempt for his refusal to disclose his source. The desire to avoid a clash over First Amendment rights apparently was a major factor in the committee’s decision on the contempt matter.

In another First Amendment dispute, the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce investigated allegations that deceptive editing practices were employed in the production of the television news documentary program *The Selling of the Pentagon*. In the course of its investigation, the committee subpoenaed Frank Stanton, the president of CBS, directing him to deliver to the subcommittee the “outtakes” relating to the program. When Stanton declined to provide the subpoenaed materials, the subcommittee unanimously voted a contempt citation, and the full committee recommended to the House that Stanton be held in contempt. After extensive debate, the House failed to adopt the committee report, voting instead to recommit the matter to the committee. During the debate, several members
expressed concern that approval of the contempt citation would have a “chilling effect” on the press and would unconstitutionally involve the government in the regulation of the press. 232

A final example comes from the 1991 confirmation hearings on Justice Clarence Thomas’ nomination to serve on the Supreme Court. A confidential affidavit given to the Senate Judiciary Committee by Professor Anita Hill, which alleged sexual harassment by the nominee, was leaked to National Public Radio reporter Nina Totenberg. The allegations raised a political storm that made the hearings highly contentious. After Justice Thomas was confirmed by a close vote, the Senate passed a resolution directing the Senate Committee on Rules and Administration to appoint an independent counsel to investigate the source of the leak.233 Counsel subpoenaed Totenberg but she refused to comply, claiming a reporter's privilege under the First Amendment. Counsel recommended that the Senate Committee hold her in contempt of Congress. The Chair and Ranking Minority Member, who had authority under the Senate resolution to rule on privilege claims, denied the request. The Chair stated that holding her in contempt “could have a chilling effect on the media” and “could close a door where more doors need opening.” The Ranking Member said “[t]here is no legal precedent dealing with the apparent conflict between the freedom of the press guaranteed in the First Amendment and Congress’ inherent constitutional power to compel testimony and documents in the pursuit of an investigation.”234

Not only do these examples demonstrate congressional reluctance to uncover the media’s sources, but such incidents also have been cited as evidence of the need for congressional recognition of a constitutionally based reporter’s privilege. Some scholars have argued that “the theoretical bases for a reporter’s privilege in this area are unsound” but that “even if the bases for such a privilege are valid, they are outweighed by the government’s interest in a congressional investigation.”235

E. Fourth Amendment

1. The Fourth Amendment Applies to Congress

Several opinions of the Supreme Court suggest that the Fourth Amendment’s prohibition against unreasonable searches and seizures applies to congressional committees; however, there has not been an opinion directly addressing the issue.236 The Fourth Amendment protects a congressional witness against a subpoena that is unreasonably broad or burdensome.237 Therefore, there must be a legitimate legislative or oversight-related basis for the issuance of a congressional subpoena.238

2. The Courts Have Given Congress Wide Latitude in This Area

The Supreme Court has outlined the standard to be used in judging the reasonableness of a congressional subpoena:

‘[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry’ … ‘[T]he description contained in the subpoena was sufficient to enable [the petitioner] to know what particular documents were required and to select them accordingly.’239

3. The Burden is on the Witness to Inform a Committee of Objections to a Subpoena

If a witness has a legal objection to a subpoena duxes tecum (one seeking documents) or is, for some reason, unable to comply with a demand for documents, the witness must give the grounds for the objection upon the return of the subpoena. The Supreme Court has stated:

If petitioner was in doubt as to what records were required by the subpoena, or found it unduly burdensome, or found it to call for records unrelated to the inquiry, he could and should have so advised the Subcommittee, where the defect, if any, ‘could easily have been remedied’240
Where a witness is unable to produce documents, the witness will not be held in contempt “unless he is responsible for their unavailability … or is impeding justice by not explaining what happened to them.”

4. Applicability of the Fourth Amendment’s Exclusionary Rule is Uncertain

In judicial proceedings, if evidence has been obtained in violation of a criminal defendant's Fourth Amendment rights, the exclusionary rule prohibits the prosecution from introducing that evidence at trial. The application of the exclusionary rule to congressional committee investigations depends on the precise facts of the situation. Documents that 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. In the absence of a Supreme Court ruling, it remains unclear whether a congressional subpoena that was issued on the basis of documents obtained through an unlawful seizure by another investigating body (such as a state prosecutor) is valid. If the exclusionary rule applies, it would bar reliance on the unlawfully obtained evidence, and also on the subpoena itself.

F. Sixth Amendment

The Sixth Amendment right of a criminal defendant to cross-examine witnesses and call witnesses on his or her behalf has been held inapplicable to a congressional hearing.
V. COMMON LAW PRIVILEGES AVAILABLE IN COURT DO NOT SHIELD WITNESSES FROM TESTIFYING BEFORE CONGRESS

A. Overview

In court proceedings, there are a variety of “testimonial privileges” recognized by our legal system that enable witnesses to refuse to testify on certain subjects or about conversations with particular people. The most common of these is the attorney-client privilege, which protects conversations between lawyer and client as secret, and thus allows people to seek legal advice in confidence. In congressional proceedings, a committee may determine, on a case-by-case basis, whether to accept common law testimonial privileges. It can deny a witness’ request to invoke privilege when the committee concludes it needs the information sought to accomplish its legislative functions. In practice, however, congressional committees have followed the courts’ guidance in assessing the validity of a common law privilege claim.

Examples of common law testimonial privileges include the attorney-client, work-product, and deliberative process privileges. The application of each of these doctrines in congressional hearings is discussed below.

B. The Attorney-Client Privilege and Work-Product Doctrine

1. Defining the Attorney-Client Privilege and the Work-Product Doctrine

As noted above, the attorney-client privilege enables people to seek confidential legal advice by protecting the secrecy of conversations between attorney and client. To prove that the attorney-client privilege should apply, the person claiming the privilege must establish: (1) a communication, (2) made in confidence, (3) to an attorney, (4) by a client, and (5) for the purpose of seeking or obtaining legal advice. The party asserting attorney-client privilege has the burden of conclusively proving each element, and courts strongly disfavor blanket assertions of the privilege as “unacceptable.” In addition, the mere fact that an individual communicates with an attorney does not make the communication privileged.

Courts have 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 to secure legal services. The privilege, therefore, does not apply to legal advice given by an attorney acting outside the scope of his or her role as attorney. The courts, when determining the underlying purpose of a communication, will take into account the difference between outside counsel retained with limited responsibilities to a corporate client and in-house counsel who have duties to provide both business and legal advice. Courts have also invited privilege logs as an acceptable means of establishing a valid claim of privilege, but such logs must be sufficiently detailed and specific in their description to prove each element of the claimed privilege.

The work-product doctrine is a related concept that protects the confidentiality of certain documents created by an attorney as part of his or her representation of a client. The doctrine was recognized by the Supreme Court in 1947 and codified as Rule 26(b)(3) of the Federal Rules of Civil Procedure, and grants limited immunity to an attorney’s work product from requests for disclosure. The Rule allows for qualified immunity from civil discovery when the materials are: 1) “documents or tangible things,” 2) “prepared in anticipation of litigation or trial,” and 3) “by or for another party or for that other party’s representative.” To overcome the privilege, the party seeking the materials must show a substantial need and an inability to obtain the substantial equivalent without undue hardship.
On its face, the definition would not apply to Congress, which is not a court or administrative tribunal, or to a congressional investigative hearing, which does not afford witnesses the same discovery rights afforded during litigation in court. No court has held that the work-product doctrine applies to a legislative hearing, and pertinent federal court rulings support the proposition that it does not apply.

2. Legal Basis for Denying Attorney-Client and Work-Product Privilege Claims

Other than private persons, entities that often invoke claims of common law privilege include departments and agencies, the White House, and private organizations. However, their assertion of privilege does not necessarily provide a shield from congressional inquiry.

The legal basis for Congress’ right to refuse to recognize assertions of attorney-client privilege comes from its inherent constitutional authority to investigate and the constitutional authority of each House to determine the rules of its proceedings. Although the Supreme Court has not definitively ruled on the issue, a number of factors support the conclusion that committees possess the power to compel witness testimony.

The factors indicating that Congress can overrule claims of attorney-client privilege include: (1) the strong constitutional underpinnings of the legislative investigatory power, (2) long-standing congressional (and British parliamentary) practice, and (3) recent appellate court rulings rejecting such claims by executive branch officials subject to grand jury investigations. The attorney-client privilege is not a constitutionally based privilege; rather, it is a judge-made exception to the general evidentiary principle of full disclosure in the context of court proceedings.

3. How Congress Has Traditionally Weighed the Attorney-Client Privilege

In practice, all committees that have denied claims of privilege have considered numerous factors before doing so. In favor of disclosure, committees consider (1) legislative need, (2) public policy, and (3) the ever-present statutory duty to oversee the application, administration, and execution of all laws within Congress’ jurisdiction. They balance these considerations against any possible injury to the witness. Committees also consider whether a court would have recognized the claim in the judicial forum, and invite the submission of privilege logs to support the validity and weight of the claims.

In the absence of a definitive court ruling, the Legal Ethics Committee of the District of Columbia Bar issued an advisory opinion in February 1999. It directly addressed the limits of an attorney’s ethical duty of confidentiality to a client when the attorney is faced with a congressional subpoena for documents that would reveal client confidences. The opinion urges attorneys to press every appropriate objection to the subpoena until no further avenues of appeal are available, and even suggests that clients might be advised to retain other counsel to file a separate lawsuit to prevent compliance with the subpoena. But it does allow the attorney to relent and comply with the subpoena at the earliest point when he or she is in danger of being held in criminal contempt of Congress.

According to the D.C. Bar’s ethics committee, an attorney acting under the D.C. Code of Professional Conduct facing a congressional subpoena that would reveal client confidences or secrets must:

seek to quash or limit the subpoena on all available legitimate grounds to protect confidential documents and client secrets. If, thereafter, the Congressional subcommittee overrules these objections, orders production of the documents and threatens to hold the lawyer in contempt absent compliance with the subpoena, then, in the absence of a judicial order forbidding the production, the lawyer is permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents. A directive of a Congressional subcommittee accompanied by a threat of fines and imprisonment pursuant to federal criminal law satisfies the standard of “required by law” as that phrase is used in D.C. Rule of Professional Conduct 1.6(d)(2)(A).
The opinion represents the first and thus far the only bar in the nation to directly and definitively address this question. Its publication aroused a good deal of debate. However, there is no evidence that congressional committees have been more aggressive in attempting to overrule privilege claims since the issuance of the opinion. Rather, Congress has been sparing in its attempts to challenge claims of attorney-client privilege.

C. Claims of Deliberative Process Privilege and Presidential Communications Privilege

1. Definition and Purpose of the Deliberative Process Privilege

The deliberative process privilege permits government agencies to withhold documents and testimony relating to policy formulation from the courts. The privilege was designed to enable executive branch officials to seek a full and frank discussion of policy options with staff without risk of being held to account for rejected proposals.

Executive branch officials often argue that congressional demands for information regarding an agency’s policy development process would unduly interfere with, and perhaps “chill,” the frank and open internal communications necessary for policymaking. In addition, they may also argue that the privilege protects against premature disclosure of proposed policies before the agency fully considers or adopts them. Agencies may further argue that the privilege prevents the public from confusing matters merely considered or discussed during the deliberative process with those that constitute the grounds for a policy decision. These arguments, however, do not necessarily pertain to Congress in its oversight and legislative roles.

2. Application of the Deliberative Process Privilege to Congressional Investigations

Congress’ oversight process would be severely undermined were the courts or Congress to uniformly accept every agency assertion of the deliberative process privilege to block disclosure of internal deliberations. Such a broad application of the privilege would encourage agencies to disclose only materials that support their positions and withhold those with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering the whole evidence and would become a “show and tell” performance.

Broad application of the deliberative process privilege to congressional investigations would also induce executive branch officials, including attorneys, to claim that oversight would dissuade them from giving frank opinions, or discourage others from seeking such advice. The Supreme Court dismissed that argument in *NLRB v. Sears, Roebuck & Co.* It said:

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

Agencies often claim the privilege to forestall inquiries while they develop substantive rules. However, an agency’s rulemaking process is the prime object of legislative scrutiny; agencies may engage in substantive rulemaking only with an express grant of legislative authority. Moreover, Congress has enacted legislation determining the procedures each agency must follow and retains ultimate control over each agency’s rulemaking process.
Finally, the integrity, even the legitimacy, of an agency’s rulemaking would be damaged more by efforts to avoid oversight inquiries than it would be by the agency officials’ public embarrassment over disclosure of positions taken during the policy development process. The legitimacy and acceptability of the administrative process depends on the public’s perception that the legislature has some sort of ultimate control over the agencies.

3. Congress Treats Deliberative Process Privilege Claims as Discretionary

As with claims of attorney-client privilege and work-product immunity, congressional practice has been to allow committees discretion over acceptance of deliberative process claims. Moreover, a 1997 appellate court decision, discussed below, shows that the deliberative process privilege is easily overcome by an investigatory body’s showing of need for the information. Other court rulings and congressional practices have recognized the overriding necessity of an effective legislative oversight process.

4. The Deliberative Process Privilege is More Easily Overcome by Congress than the Presidential Communications Privilege

As discussed in detail in Chapter IV, the presidential communications privilege is a constitutionally based doctrine that protects communications between the President and his or her immediate advisers in the Office of the President from disclosure. It also extends to communications made by presidential advisers in the course of preparing advice for the President. This doctrine does not cover the entire executive branch, but it applies more directly to relations between the President and his or her closest White House aides.

The 1997 D.C. Circuit’s unanimous ruling in _In re Sealed Case (Espy)_ distinguishes between the “presidential communications privilege” and the “deliberative process privilege” and describes the severe limits of the latter as a shield against congressional investigative demands. The court of appeals held in _Espy_ that the deliberative process privilege is a common law privilege that Congress can more easily overcome than the constitutionally rooted presidential communications privilege. Moreover, in congressional investigations, the deliberative process privilege “disappears altogether when there is any reason to believe government misconduct occurred.” The court’s understanding thus severely limits the extent to which agencies can rely upon the deliberative process privilege to resist congressional investigative demands. A congressional committee merely needs to show that it has jurisdiction and authority, and that the information sought is necessary to its investigation to overcome this privilege. A plausible showing of fraud, waste, abuse, or maladministration would conclusively overcome an assertion of privilege.

On the other hand, the deliberative process privilege covers a broader array of information. Whereas the presidential communications privilege covers only communications between the President and high-ranking White House advisers, the deliberative process privilege applies to executive branch officials generally. But the deliberative process privilege only protects executive branch officials’ communications that are “pre-decisional” and a “direct part of the deliberative process.”

5. Congress Has Greater Ability to Obtain Deliberative Information than Citizens Have Under FOIA

Even before _Espy_, courts and committees consistently countered agency attempts to establish a privilege that thwarted congressional oversight efforts. Agencies often claim that internal communications must be “frank” and “open,” and that communications are a part of a “deliberative process.” This is the standard under the Freedom of Information Act (FOIA), which allows an agency to withhold documents from a citizen requestor. It does not apply to Congress.
Congress has vastly greater powers of investigation than those of citizen FOIA requesters. Moreover, Congress carefully provided that the FOIA exemption section “is not authority to withhold information from Congress.” The D.C. Circuit in Murphy v. Department of the Army explained that FOIA exemptions were no basis for withholding from Congress because “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.”

D. Release of Attorney-Client, Work-Product, or Deliberative Process Material to Congress Does Not Waive Applicable Privileges in Other Forums

Private parties and agencies often assert that yielding to committee demands for material arguably covered by the attorney-client, work-product, or deliberative process privileges will waive those privileges in other forums. Applicable case law, however, is to the contrary. When a congressional committee compels the production of a privileged communication through a properly issued subpoena, it does not prevent the assertion of the privilege elsewhere, as long as it is shown that the compulsion was in fact resisted.
VI. EXECUTIVE BRANCH INVESTIGATIONS: LESSONS FROM DEPARTMENT OF JUSTICE PROBES

Congress’ power of inquiry extends equally to all executive departments, agencies, and establishments. Yet Congress’ experience conducting oversight of the Department of Justice (Department or DOJ) has often been the most contentious, and has presented all of the issues that may arise in disputes between Congress and an executive agency. Therefore, Congress’ experience with the Justice Department provides many useful lessons on how to conduct oversight of agencies.

The history of congressional investigations of DOJ covers a broad scope of congressional inquiries, including committee requests for:
- particular agency witnesses;
- proprietary, trade secret, or other sensitive information;
- documentary evidence of how an agency came to a particular decision; and
- the opinion of an agency’s general counsel with respect to the legality of a course of action taken by the agency.

In response, congressional inquiries into Justice Department operations have been frequently met with claims that such inquiries:
- interfere with the presumptive sensitivity of its principal law enforcement mission;
- intrude upon matters of national security; and
- constitute improper political and constitutional interference with deliberative prosecutorial processes that are discretionary in nature.

As a result, the Justice Department has often refused to supply internal documents or testimony sought by jurisdictional committees.

Since many other agencies have followed DOJ’s examples, the resolution of such past investigative confrontations with DOJ provides useful lessons. These lessons, outlined in detail below, should guide future committees in determining whether to undertake similar probes of DOJ or other executive agencies, as well as inform them about the scope and limits of their investigative prerogatives and the practical problems of such undertakings.

A. Overview of Congressional Investigations of DOJ

A particularly instructive tool is the review of oversight of the Justice Department over the last 85 years by the House Government Reform Committee. This review was presented in the committee’s 2001–2002 investigation of corruption in the FBI’s Boston Regional Office. The compilation provides summaries of 33 congressional investigations, from the Palmer Raids and Teapot Dome scandal in the 1920s to controversies over the past 25 years, including Iran-Contra. The discussion in this handbook also includes the 2008 inquiries into the termination and replacement of U.S. Attorneys.

These various investigations demonstrate that DOJ has consistently been obligated to submit to congressional oversight in investigating allegations of improper administration, misfeasance, and/or malfeasance. This requirement to cooperate in investigations has applied even when there is ongoing or expected litigation. A number of these investigations spawned seminal Supreme Court rulings that today provide the foundation for
the broad congressional power of inquiry. All were contentious and involved Department claims that committee demands for agency documents and testimony were precluded either on the basis of constitutional or common law privilege or policy.

1. Congress’ Power to Obtain Documents and Testimony

To obtain documents and testimony, an inquiring committee need only show that the information sought is:

- within the broad subject matter of the committee’s authorized jurisdiction;
- in aid of a legitimate legislative function; and
- pertinent to the area of concern.

Despite objections by an agency, either house of Congress, or its committees or subcommittees, may obtain and publish information it considers essential for the proper performance of its constitutional functions. There is no court precedent that requires committees to demonstrate a substantial reason to believe wrongdoing occurred before seeking disclosures with respect to the conduct of specific criminal and civil cases, whether open or closed. Indeed, the case law is quite to the contrary.

During the inquiries covered in the House Government Reform Committee’s compilation, committees sought and obtained a wide variety of evidence, including:

- deliberative prosecutorial memoranda;
- FBI investigative reports and summaries of FBI interviews;
- memoranda and correspondence prepared while cases were pending;
- confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrest of subjects;
- documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, which establishes the rules for grand jury secrecy;
- the testimony of line attorneys and other subordinate agency employees regarding the conduct of open and closed cases; and
- detailed testimony about specific instances of the Department’s failure to prosecute cases that allegedly merited prosecution.

Those investigations encompassed virtually every component of DOJ, including its sensitive Public Integrity Section and its Office of Professional Responsibility. They also covered all levels of officials and employees in Main Justice and field offices, from the Attorney General down to subordinate line personnel. Further, they delved into virtually every area of the Department’s operations, including its conduct of domestic intelligence investigations.

There have been only three formal presidential assertions that executive privilege required withholding internal DOJ documents sought by a congressional subpoena. Two of those claims were ultimately abandoned by the President; one was not acted on further by the House committee before the end of the 110th Congress.283 The most recent Supreme Court and appellate court rulings covering the presidential communications privilege and the “Take Care” Clause of the Constitution284 suggest that a claim of executive privilege to protect internal deliberations would be unlikely to succeed.

2. Weighing Pragmatic Considerations When Seeking Disclosures

The consequences of these historic inquiries at times have been profound and far-reaching. They have led directly to important legislation to remedy problems discovered and to the resignations (Harry M. Daugherty, J. Howard McGrath, Alberto R. Gonzales) and convictions (Richard Kleindienst, John Mitchell) of five
attorneys general. Despite the broad extent of their constitutional power to access deliberative processes, committees have generally limited themselves due to prudential considerations. Congressional committees typically weigh legislative need, public policy, and the statutory duty of committees to conduct oversight, against the potential burdens imposed on an agency if deliberative process matter is publicly disclosed. In particular, Congress has considered the sensitive law enforcement concerns and duties of the Justice Department and has, therefore, declined to seek disclosure of the agency’s deliberative processes in the absence of a reasonable belief that government misconduct has occurred. Over time, Congress has been generally faithful to these prudential considerations.

B. The Justice Department’s Responses to Congressional Inquiries

The reasons advanced by the Executive for declining to provide information to Congress about open and closed civil and criminal 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;
- avoiding the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys; and
- preventing interference with the President’s constitutional duty to faithfully execute the laws. 285

Historically, DOJ has continued to assert such objections. For example, in the 2001–2002 House Oversight and Government Reform Committee investigation of the FBI’s misuse of informants, the Department resisted producing internal deliberative prosecutorial documents. In a February 1, 2002, letter to Chairperson Burton, the DOJ Assistant Attorney General for Legislative Affairs explained that: “the public interest in avoiding the polarization of the criminal justice process required greater protection of those documents … This is not an ‘inflexible position,’ but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making.” 286

More recently, during the George W. Bush administration, agencies asserted broader and more strenuous opposition to providing evidence and testimony to Congress through presidential signing statements, executive orders, and opinions of the Department of Justice’s Office of Legal Counsel (OLC). In OLC’s view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information. Thus, the Executive Branch has resisted congressional efforts to seek testimony by lower-level officials or employees without presidential authorization. OLC has declared that “right of disclosure” statutes “unconstitutionally limit the ability of the President and his or her appointees to supervise and control the work of subordinate officers and employees of the Executive Branch.” 289 However, the OLC assertions of these broad notions of presidential prerogatives have not been supported by any authoritative judicial citations.

C. Lessons from Prior Investigations of DOJ

1. Oversight May Proceed Despite Pre-Trial Publicity, Due Process, and Concurrent Investigations Concerns

The Supreme Court has repeatedly reaffirmed the breadth of Congress’ right to investigate the government’s conduct of criminal and civil litigation. Congress must be given access to agency documents, even in situations where the inquiry may result in pre-trial publicity and the exposure of criminal corruption or maladministration of agency officials. The Supreme Court has noted that a committee’s 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 disclosed.” 291 Despite the existence of pending litigation, Congress
may investigate facts that have a bearing on that litigation where the information sought is needed to deter-
mine what, if any, legislation should be enacted to prevent further ills.292

Although several lower court decisions have recognized that congressional hearings may have the result of gen-
erating prejudicial pre-trial publicity, they have not suggested that there are any constitutional or legal limita-
tions on Congress’ right to conduct an investigation while a court case is still proceeding. Instead, the courts
have granted additional time or a change of location for a trial to deal with the publicity problem.293 For ex-
ample, the court in one of the leading cases, \textit{Delaney v. United States}, entertained “no doubt that the commit-
teer acted lawfully, within the constitutional powers of Congress duly delegated to it,” but went on to note that
the Justice Department

must accept the consequence 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.294

Thus, the courts have recognized that the cases pose a choice for the Congress: congressionally generated pub-
licity may result in harming the prosecutorial effort of the Executive; but access to information under secure
conditions can fulfill the congressional power of investigation. Courts have recognized that this remains a
choice that is solely within Congress’ discretion to make irrespective of the consequences. As the Iran-Contra
Independent Counsel observed: “The legislative branch has the power to decide whether it is more important
perhaps 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.”295

2. Probes of Government Strategies, Methods, or Operational Weaknesses Should Not be Limited

Attorney General and OLC opinions have raised concerns that congressional oversight that calls for infor-
mation that reflects the Executive Branch’s strategy or its methods or weaknesses is somehow inappropriate.
However, if this concern were permitted to block congressional inquiries, this would prevent Congress from
performing a major portion of its constitutionally mandated oversight. Congressional inquiries into foreign
affairs and military matters call for information on strategy and assessment of weaknesses in national security
matters; congressional probes into waste, fraud, and inefficiency in domestic operations call for information
on strategy and weaknesses. For Congress to forego such inquiries would be an abandonment of its oversight
duties. The best way to correct either bad law or bad administration is to closely examine the methods and
strategies that led to the mistakes. The many examples of congressional probes recounted in the 2001–2002
House Government hearings demonstrate how important and effective proper congressional oversight can be.

3. Prosecutorial Discretion is Not a Core Presidential Power Justifying a Claim of Executive Privilege

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 lim-
ited. Under this view, matters of prosecutorial discretion are off-limits to congressional inquiry, and access
demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor. However, court
decisions have not upheld this view and have permitted congressional inquiries into prosecutorial decisions.

a. Morrison v. Olsen: Prosecutorial Discretion is Not Central or Unique to the Executive Branch

The Supreme Court has rejected the notion that prosecutorial discretion in criminal matters is an inherent or
core executive function. In \textit{Morrison v. Olsen},296 the Court recognized that while the Executive regularly exer-
cises prosecutorial powers, the exercise of prosecutorial discretion is in no way “central” to the functioning of
the Executive Branch.297 The Court therefore rejected a challenge to a statutory provision exempting the inde-
pendent counsel from at-will presidential removal. The Court held that insulating the independent counsel in
this way did not interfere with the President’s duty to “take care” that the laws be faithfully executed.
The *Morrison* Court reiterated that Congress’ oversight functions of “receiving reports or other information and to oversight of the independent counsel’s activities … [are] functions that have been recognized generally as being incidental to the legislative function of Congress.”298 Arguments that only the Executive Branch has the power to prosecute violations of the law also have been soundly rejected outside the realm of congressional investigations. In *United States ex rel Kelly v. The Boeing Co.*,299 the Ninth Circuit upheld the constitutionality of *qui tam* provisions of the False Claims Act allowing private parties to bring enforcement actions against federal agencies, holding that: “[W]e reject Boeing’s assertion that all prosecutorial power of any kind belongs to the Executive Branch.”300

Prosecution is not a core or exclusive function of the Executive, but oversight is a constitutionally mandated function of Congress; therefore, a claim of executive privilege to protect the ability to prosecute a case would likely fail. Additionally, 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.

Given the legitimacy of congressional oversight of the law enforcement agencies of government, and the need for access to information pursuant to such activities,301 a claim of prosecutorial discretion by itself is unlikely to defeat a congressional need for information. The congressional action itself does not and cannot dictate prosecutorial policy or decisions in particular cases.

b. Recent Court Rulings Further Undermine Presidential Claims of Prosecutorial Prerogatives

Judicial rulings over the past two decades in other contexts have rejected various assertions of presidential privilege that might be raised in attempts to deny congressional access to agency information. The Supreme Court’s ruling in *Morrison v. Olsen* casts significant doubt whether prosecutorial discretion is a core presidential power, a doubt that has been magnified by the appellate court rulings in *Espy*302 and *Judicial Watch*.303 In those later decisions, assertion of the presidential communications privilege was held to be limited to “quintessential and non-delegable presidential power” and confined to communications with advisers in “operational proximity” to the President.

Those decisions indicate that core powers include only decisions that the President alone can make under the Constitution: appointment and removal, pardoning, receiving ambassadors and other public ministers, negotiating treaties, and exercising powers as Commander-in-Chief. As discussed in Chapter IV, *Espy* strongly hinted, and *Judicial Watch* made clear, that the protection of the presidential communications privilege extends only to the boundaries of the White House and the executive office complex and not to the departments and agencies. Even if the actions at an agency related to a core power, unless the subject documents are “solicited and received” by a close White House adviser or the President, they are not covered by the privilege. *Judicial Watch*, which dealt with pardon documents in DOJ that had not been “solicited and received” by a close White House adviser, determined that “the need for the presidential communications privilege becomes more attenuated the further away the advisers are from the President … [which] affects the extent to which the contents of the President’s communications can be inferred from predecisional communications.”304

Of course, these rulings did not involve congressional requests, and they are rulings by the U.S. Court of Appeals for the D.C. Circuit, not decisions by the Supreme Court. However, they provide helpful guidance, especially since the D.C. Circuit is the court most likely to hear and rule on future claims of presidential privilege.305

c. Although Committees Enjoy Significant Investigative Powers, They Carefully Weigh Agency Interests When Seeking Information

The fact that presidential claims of privilege are often unsuccessful does not mean that DOJ policy arguments in particular situations should be immediately dismissed. A review of the historical record of congressional inquiries and experiences with committee investigations of DOJ reveals that committees normally have been restrained by prudential considerations. Members of Congress typically weigh the considerations of legislative
need, public policy, and the statutory oversight duties of congressional committees against the potential burdens and harms that may be imposed on the agency if deliberative process matter is publicly disclosed. If a jurisdictional committee lacks a reasonable belief that the government has engaged in misconduct, a committee generally will give substantial weight to sensitive law enforcement concerns regarding an agency’s internal deliberations. However, the oft-repeated claim that the Department never has allowed congressional access to open or closed litigation files or other “sensitive” internal deliberative process matters is simply not accurate. Under the appropriate circumstances, committees fully and properly have exercised their well-established congressional oversight authority.

4. Neither Agencies Nor Private Parties Can Deny Committee Access to Proprietary, Trade Secret, Privacy, and Other Sensitive Information

a. The Broad Right of Congressional Access and Disclosure

Generally speaking, Congress’ authority and power to obtain information, including but not limited to proprietary or confidential information, is extremely broad. 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 constitutional oversight prerogatives. But where a statutory confidentiality or nondisclosure provision is not made 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. Ambiguities in such statutes as the Trade Secrets Act and the Privacy Act have been resolved in a committee’s favor. The courts have also held that the release of information to a congressional requester is not considered to be disclosure to the general public. Once documents are in congressional control, the courts will presume that committees of Congress will exercise their powers responsibly and with proper regard to the rights of the parties. Moreover, it would appear that courts may not prevent congressional disclosure at least when such disclosure would serve a valid legislative purpose.

b. Release of Proprietary, Trade Secret, or Privacy Information to Congress Does Not Waive Available Privileges in Another Forum

Agencies, and private party submitters of sensitive information to agencies, often claim that acquiescing in a committee demand will waive agency rights under Exemption 5 of the Freedom of Information Act (FOIA) as well as other privileges that they might assert in any subsequent court litigation. Exemption 5 of FOIA covers all the privileges against disclosure that would be provided under court rules governing civil litigation. While agencies have a legitimate interest in preserving these privileges, there should be no fear of waiver. “Waiver is the voluntary relinquishment of a known right or privilege.” It is well established that acquiescence in a valid, official request from a jurisdictional committee to a subject agency does not constitute a waiver of applicable nondisclosure privileges elsewhere.

In Rockwell International Corp. v. U.S. Department of Justice, the court acknowledged that the existence of statutory obligations to comply with congressional information requests is sufficient to demonstrate that compliance was not voluntary. Rockwell dealt with an assertion by the company that the Justice Department had waived the company’s claim of FOIA Exemption 5 protection with respect to internal deliberative documents by giving the documents to a congressional investigating subcommittee at the subcommittee’s request. The appeals court rejected the waiver claim, remarking that since the Justice Department had given “the documents to the Subcommittee only after the Subcommittee expressly agreed not to make them public,” this indicated that “far from intending to waive the attachments’ confidentiality, the Justice Department attempted to preserve it. Under those circumstances, we find no Exemption 5 waiver.”

It is also well established that when the production of privileged communications is compelled, either by a court or a congressional committee, compliance with the order does not waive the applicable privilege in other litigation, as long as it is demonstrated that the compulsion was resisted. Some courts have even refused to find waiver when the client’s production, although not compelled, is pressured by the court.
Two court rulings involving the House Energy and Commerce Committee confirm that turning over documents to a committee does not necessarily waive claims of privilege. However, the rulings also highlight the importance of sufficiently challenging a subpoena to demonstrate that the turnover was, indeed, involuntary. Both cases involved claims in judicial forums that the Energy and Commerce Committee’s receipt and dissemination of documents from tobacco companies waived claims of privilege asserted in those courts. Both courts agreed that there would be no waiver if the document turnover had been involuntary. Both courts found, however, that the companies had failed to sufficiently challenge the chairperson’s subpoenas: “In short, a party must do more than merely object to Congress’ ruling. Instead a party must risk standing in contempt of Congress.”

The Speech or Debate Clause Protects Committee Release of Proprietary, Trade Secret, and Other Sensitive Information

The public release of proprietary, trade secret or other sensitive information, either through inclusion in a hearing record or via the Congressional Record, is protected by the Speech or Debate Clause. Moreover, because such information does not normally include classified material, it is unlikely that release or publication would be deemed to violate the ethics rules of the House. The Speech or Debate Clause of the Constitution protects “purely legislative activities,” including those considered inherent in the legislative process. The protection afforded by the clause covers not only the words spoken during debate but also “[c]ommittee reports, resolutions, and the act of voting are equally covered, as [these] are ‘things generally done in a session of the House by one of its members in relation to the business before it.’” Finally, the clause has been held to encompass such activities integral to the lawmaking process as the circulation of information to other members, as well as participation in committee investigative proceedings and reports.

The Speech or Debate Clause’s protections, however, do not extend to activities only casually or incidentally related to legislative affairs. For example, newsletters, press releases, or the direct distribution of reports containing information or quotes will likely not be shielded, because they are considered “primarily means of informing those outside the legislative forum.” On the other hand, the distribution of such documents to members of a committee and/or their staff, or the inclusion of such information or reports in the public record of hearings or the Congressional Record, are likely to be considered “integral” and, therefore, protected by the Clause. The key consideration is such cases appears to be the act, not the actor.

d. The Privacy Act is Inapplicable to Disclosures to Congress

Agencies often contend that the Privacy Act prevents them from disclosing certain information to Congress in response to an official congressional inquiry. However, a review of the relevant statutory provisions, judicial interpretations, and congressional practice indicates that there is no such barrier.

The Privacy Act safeguards individuals against invasions of personal privacy by requiring government agencies to maintain accurate records and by providing individuals with more control over the gathering, dissemination, and accuracy of government information about themselves. To secure this goal, the Act prohibits an agency from disclosing information in its files to any person or to another agency without the prior written consent of the individual to whom the information pertains. This broad prohibition is subject to 12 exceptions, one of which specifically allows disclosures to Congress and its committees. Section 552a(b)(9) permits disclosure of covered information without the consent of the individual “to either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any joint committee.” A 2000 court of appeals ruling held that this provision “unambiguously permits federal agencies to disclose personal information about an individual without the individual’s consent to a Congressional subcommittee that has jurisdiction over the matter to which the information pertains.”

Similarly, DOJ’s Office of Legal Counsel has agreed that the Section (b)(9) exception applies “where the Senate or House exercises its investigative and oversight authority directly, as is the case with a resolution of inquiry adopted by the Senate or House, each House of Congress exercises its investigative authority through delegations of authority to its committees, which act either through requests by committee chairs, speaking on behalf of the committee, or through some other action by the committee itself.” More recently, a
Department of Justice official agreed that based upon this Privacy Act exception, the Department was permitted to disclose to Congress details from nine U.S. Attorneys’ personnel files in connection with the investigation of the removal of these U.S. Attorneys. The official was testifying before the investigating congressional committee, and he explained in detail the Department’s position that the U.S. Attorneys were removed for purely personnel-related reasons.330

5. 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 grand jury proceedings may not “disclose matters occurring before the grand jury, except as otherwise provided in these rules.”331 The prohibition does not ordinarily extend to witnesses.332 Violations are punishable as contempt of court.333

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.334 As a general rule, however, neither Congress nor the courts have accepted that proposition.

But not all matters presented to a grand jury are covered 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.”335 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.336 However, Rule 6(e) bars congressional access to matters that “reflect exactly what transpired in the grand jury,” such as transcripts of witness testimony.337

The case law indicates that Rule 6(e) would not prevent disclosure to Congress of the following types of documents:

- 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 simply through Department of Justice identification.338

- Immunity letters, draft pleadings, target letters, and draft indictments.339

- Plea agreements as long as particular grand jury matters are not expressly mentioned.340

- 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.341

- 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.342
6. Committees Cannot be Denied Access to Subordinate Agency Personnel

a. Asserted Basis of Agency Refusals

Investigatory committees often reach a point where it becomes vital to interview or call as witnesses subordinate personnel who have unique, hands-on knowledge of events or operational details that are the subject of legislative scrutiny. Agency refusals of requests to provide particular employees typically rest on the grounds that:

- Permitting such an appearance would undermined the agency’s ability to ensure that such agents would be able to exercise the independent judgment essential to the integrity of law enforcement, prosecutorial, or regulatory functions and to public confidence in their decisions.
- It is more appropriate that committees question supervisors or political appointees, which will satisfy a committee’s oversight needs without undermining the independence of line agents and without raising the appearance of political interference in investigational, prosecutorial, or policymaking decisions.

Such claims are made even in the face of subpoenas to the requested agency witnesses, or to a head of the agency to supply the named witnesses. At that point, the identified witness is placed literally between a rock and a hard place: in a test of wills between the committee and the agency. Allowing the designated agency employees to appear but only if accompanied by an agency attorney is a common alternative offered by agencies.

b. A Committee Sets the Terms and Conditions for Agency Witnesses

If the requesting committee has jurisdiction over the agency, and has the authority to initiate and conduct investigations and issue subpoenas, the witness must be allowed to appear. An agency has no authority to determine who from the agency shall or shall not appear before a requesting committee or to set the terms and conditions of such appearances. Indeed, an agency official who blocks the appearance of a witness may be subject to criminal sanctions for obstruction of a congressional proceeding, loss of pay, or a citation for contempt of Congress.

The Example of the Rocky Flats Investigation: Whether a witness access dispute ratchets up to a full-blown interbranch controversy depends on political factors. Illustrative is a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology. The subcommittee investigated the plea bargain settlement of the prosecution of Rockwell International Corporation for environmental crimes committed in its capacity as manager and operating contractor at the Department of Energy’s (DOE) Rocky Flats nuclear weapons facility. The settlement was a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA’s National Enforcement Investigation Centers, and the DOE Inspector General.

The subcommittee was concerned with several issues:

- the small size of the agreed-upon fine relative to the profits made by the contractor and the damage caused by inappropriate activities;
- the lack of personal indictments of either Rockwell or DOE personnel despite a DOJ finding that the crimes were “institutional crimes” that were the result of a culture, substantially encouraged and nurtured by DOE, where environmental compliance was a much lower priority than the production and recovery of plutonium and the manufacture of nuclear “triggers”; and
- the fact that expense reimbursements provided by the government to Rockwell and the contractual arrangements between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.
The subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the U.S. Attorney for the District of Colorado; an assistant U.S. Attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI field agent. It also received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e).347

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

A last-minute agreement forestalled the contempt citation. Under the agreement:

1. DOJ issued a new instruction to all personnel under subpoena to answer all subcommittee questions, including those relating to internal deliberations about the plea bargain. Those instructions applied to all Department witnesses, including FBI personnel, who might be called in the future. Those witnesses were advised to answer all questions fully and truthfully, and were specifically instructed that they were allowed to disclose internal advice, opinions, or recommendations connected to the matter.

2. Transcripts were made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing.

3. Witnesses were required to be interviewed by staff under oath.

4. The subcommittee reserved the right to hold further hearings in the future, at which time it could call other Department witnesses who would be instructed by the Department not to invoke the deliberative process privilege as a reason for refusing to answer subcommittee questions.348

Key to the success of the investigating committee was the support of the chairperson by the ranking minority member throughout the proceeding and the perception that there were sufficient votes on the full committee for a contempt citation. Media attention to the dispute also helped, particularly coverage of grand jury members who complained about not being allowed to hand up indictments of Energy Department and Rockwell officials.

C. A Committee May Reject an Agency-Designated Attorney Appearing With an Agency Witness

Often as an alternative, an agency may offer to allow a subordinate official or employee to be interviewed or to testify if the witness is accompanied by agency counsel. Under certain circumstances, however, this may raise conflict-of-interest problems, particularly where the investigatory hearing involves issues of agency corruption, maladministration, abuse, or waste. In such instances, the agency attorney or other official may have a conflict of interest in representing both the interests of the employee-witness and those of the agency. Moreover, the presence of such an agency official may inhibit the witness from testifying fully. Thus, both pragmatic and legal concerns caution strongly in favor of limiting a witness’ choice of counsel to someone who does not present the potential conflict of interest or pressure on the witness.
To be effective, a committee must be confident that the responses it obtains from officers and employees with respect to the administration of agency programs are candid, objective, and truthful. Committees have no way to ascertain whether a witness’ statement that he or she personally requested to be accompanied by agency personnel is, in fact, based solely on the employee’s personal wishes. Where a potential conflict-of-interest situation appears to arise, a committee should seek to insulate the witness from the presence of agency personnel during a staff interview, deposition, or hearing testimony.

Under House Rule XI.2(k)(4), each committee chair has the express authority to maintain order and decorum in the conduct of hearings and the inherent authority to preserve the integrity of the investigative process. Thus, a determination by a chair that agency-selected counsel for a witness raises a potential conflict of interest, or might chill the candor of the witness’ testimony, may be treated as an obstruction of the investigatory process or a breach of decorum or order of a hearing. This may be remedied by exclusion of the agency counsel or punishment by the contempt process of the House. The witness would not be excused from testifying, but the choice of the witness’ counsel could be circumscribed.

d. An Agency May Direct its Designated Counsel to Solely Represent the Witness

An effective compromise to such situations is for the agency to direct its attorney to represent only the employee-witness’ interests. This solution was employed by the Department of Health and Human Services (HHS) and House Energy and Commerce Committee in the 1990s. The Secretary of HHS authorized a department attorney to represent an employee subpoenaed to testify before the committee, without reporting back to the department. The agreement reflected DOJ regulations authorizing personal representation by a DOJ attorney or private counsel of a government employee subpoenaed to testify about actions occurring during the course of the person’s official duties. The agreement solved the conflict of interest problem and removed the financial burden for subpoenaed government witnesses who no longer needed to pay substantial fees for private legal representation.

e. Congress Has Enacted Witness Protection Laws

Congress has enacted legislation to protect its vital interest in receiving information about the performance of executive agencies, both through permanent statutory provisions and provisions in yearly appropriations laws. These statutes ensure that federal employees have the right to communicate with and provide information to the U.S. Congress, or to a member or committee of Congress, and that this right may not be interfered with or impeded. A current provision, originally enacted as part of the Lloyd-LaFollette Act, states as follows at 5 U.S.C. § 7211:

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

This so-called “anti-gag rule” statute was adopted by Congress in the face of the Taft and Theodore Roosevelt administrations’ attempts to “gag” or restrain employees from speaking or providing information to Congress without the consent of the employees’ heads of Departments. With such “gag rules” in place requiring departmental clearance for employees to speak to Congress or respond to members, Congress was specifically concerned that it would hear only the point of view of cabinet officials and not the views of the rank-and-file experts in the Departments. The anti-gag rule law has no enforcement mechanism.

But the provisions and the underlying policy of the “anti-gag rule” statute have been reaffirmed, strengthened, and clearly reasserted in recent appropriations laws. Repeatedly, Congress has expressly provided that no funds appropriated in any act of Congress may be spent to pay the salary of one who prohibits or prevents an employee of an executive agency from providing information to the Congress, or to any member or committee of Congress, when such information concerns relevant official matters. Similarly, current appropriations provisions also provide that no funds may be spent to enforce any agency nondisclosure policy, or any nondisclosure agreement with an officer or employee, without expressly providing an exemption for information provided to the Congress. In support, these provisions specifically cite the anti-gag rule law and other whistleblower...
VI. Executive Branch Investigations: Lessons from Department of Justice Probes

protection provisions. In discussing the latter provision when it was first added to appropriations laws in 1987, the House Conference Report stated clearly that the effect of the law was to reduce the potential that an overbroad nondisclosure agreement or agency nondisclosure policy might produce a “chilling effect on the first amendment rights of government employees, including their ability to communicate directly with members of Congress.”

Congress has also passed other provisions of law, such as the “Whistleblower Protection Act of 1988,” to assure the free and unfettered passage of information from executive agency employees to, among others, the Congress, to assure the fair and honest administration of the laws of the nation. The Senate Report on the legislation noted that in large bureaucracies it is not difficult to conceal evidence of waste or mismanagement “provided that no one summons the courage to disclose the truth.” The Whistleblower Act expressly protects employees from reprisals for the disclosure of certain information regarding waste, fraud, or abuse in federal programs. Although the Act limits the right to disclose publicly certain confidential or secret information relating to national security or defense, it expressly allows the disclosure to the Congress of any and all such information: “This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.”

While the Whistleblower Act is generally used as a defense to personnel actions taken against covered employees for making protected disclosures, it clearly demonstrates Congress’ continued policy of preserving open communications to the Congress from federal employees. Similarly, the Military Whistleblower Protection Act of 1989 provides that “No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General” and prohibits any retaliatory personnel action against a member of the armed forces for making or preparing a communication to a member of Congress.

Finally, the provisions of 18 U.S.C. § 1505 provide a criminal penalty for one who “corruptly,” or through the use of “any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede,” 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 ….” This statute makes it a criminal violation for anyone to use such threatening means to obstruct or impede a committee inquiry, or other such inquiry of the House or Senate.
VII. THE RIGHTS AND ROLE OF THE MINORITY PARTY AND INDIVIDUAL MEMBERS IN THE INVESTIGATORY PROCESS

A. Overview

In general, congressional powers of oversight only apply when the House, the Senate, or an appropriate committee acts, and the powers cannot be exercised by individual members of Congress. Each house defines the scope of the role its members play in the investigatory process. The House is a majoritarian institution that has maintained rules that strictly limit the ability of individual members to effectively engage in investigative actions. Senate rules reflect a more accommodative stance toward individual members that allows them more leeway to engage in oversight actions.

Over the years, members have unsuccessfully attempted to rely on lawsuits to obtain documents from agencies. Supported by such court rulings, the Justice Department has established, as a matter of executive branch policy, that requests for agency documents by individual members of Congress—other than the chairs of committees and subcommittees—must be treated no differently than those made by private individuals seeking information under the Freedom of Information Act (FOIA).

B. The Limited Rights of Individual Members of the House

The role of members of the minority party in the investigatory process in the House of Representatives is governed by the rules of the House and its committees. While minority members in the House are specifically accorded some rights, no ranking minority members or individual members can start official committee investigations, hold hearings, issue subpoenas, or attend informal briefings or interviews held prior to the institution of a formal investigation. House rules and practice provide a procedure for individual members to file “resolutions of inquiry,” the passage of which expresses an official, non-binding request of the full House for particular information from the President or the head of a department. Individual members may also 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, to exercise the authority of a committee in the context of oversight.

C. Long-Standing Executive Branch Policy Treats Member Information Inquiries as FOIA Requests from Non-Governmental Persons

Supported by the court rulings referenced above, the Department of Justice, in 1984, issued guidelines in which it declared as policy for all agencies that “it is now stated unequivocally, as a matter of Department of Justice FOIA policy,” that a distinction is to be made “between requests made by a House of Congress as a whole (including through its committee structure), on one hand, and requests from individual Members of Congress on the other. Even when a FOIA request is made by a Member clearly acting in a completely official capacity, such a request does not properly trigger the special access rule of [5 U.S.C. § 553(d)] unless it is made by a committee or subcommittee chairman, or otherwise under the authority of a committee or subcommittee.”
The Section 553(d) special-access rule referred to above requires agencies to submit information to Congress even if the terms of a FOIA exemption would otherwise apply and permit the agency to withhold that information. The Justice Department policy statement narrows this special-access rule to apply only to official requests by a congressional committee or its chair, and not to require disclosure when an individual member of Congress is acting outside the committee process. All agencies since then have issued rules relegating individual member requests for information to the status of private citizen requests under FOIA. An agency denial of a member’s request for information may be challenged in court, but this process could take years to resolve.

**D. Members Have Not Succeeded in Persuading Courts to Recognize Individual Investigative Prerogatives**

Individual members and groups of members have unsuccessfully attempted to file lawsuits in order to obtain information denied to them by agencies. These suits have been dismissed as non-justiciable, as they are viewed as attempts to involve the courts in political disputes that members have lost with their colleagues. In addition, courts have found that members of Congress lack standing or a right to sue when the “injury” they have suffered is an “institutional injury” based on their role as legislators, rather than a personal injury.

1. **Lee v. Kelley**

In *Lee v. Kelley*, the court dismissed a lawsuit filed by Senator Jesse Helms to unseal FBI tapes and transcripts concerning Martin Luther King Jr. The court concluded that Senator Helms’ action was an effort to enlist the court in his dispute with fellow legislators. The district court ruled that “[I]t was 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.” The appeals court affirmed on the ground that Senator Helms lacked a right to sue, or standing, because he had not asserted any interest protected by the Constitution, and that his complaint was actually with his fellow senators.

2. **Leach v. Resolution Trust Corporation**

In 1994, a federal district court dismissed the attempt of the then-ranking minority member of the House Banking (now Financial Services) Committee to compel disclosure of documents from two agencies under the Freedom of Information Act and the Administrative Procedure Act. The court held that the case was one “in which a congressional plaintiff’s dispute is primarily with his or her fellow legislators.”

That court also suggested that the possibility that a “collegial remedy” for the minority exists already, referencing 5 U.S.C. § 2954, under which small groups of members of the House Government Reform (now Oversight and Government Reform) and Senate Governmental Affairs Committees (now Homeland Security and Government Affairs) can request information from executive agencies without formal committee action. However, as discussed below, the scope of this provision is uncertain and a recent district court opinion casts doubt on its enforceability by a court.

3. **Requests for Information Under Section 2954**

Section 2954, codified at 5 U.S.C. § 2954, provides for document requests to agencies by a small group of members of Congress. The provision only covers requests from members of the House Oversight and Government Reform Committee or the Senate Homeland Security and Government Affairs Committee because the language is derived from Section 2 of the Act of May 29, 1928, which originally referred to the current committees’ predecessors: the House and Senate Committees on Expenditures in the Executive Departments.
The limited purpose for this legislation was to enable individual members of Congress to seek information from agencies without need for an official congressional inquiry. However, the provision lacks an explicit enforcement mechanism. If an agency refuses to comply, existing contempt processes would not apply, and it is unlikely that the members of Congress could pursue a civil suit to compel production.

Further, the provision applies only to the named committees; thus members of all other committees would still face the problem cited in the *Leach* case: courts would likely view the dispute as a political one between members of Congress. Finally, even members of the named committees still would have to persuade a court that it has jurisdiction to hear the suit, and that committee members have standing, or a right, to sue within the narrow parameters set by the Supreme Court. As outlined further below, two judicial tests appear to have significantly undermined any potential utility of Section 2954 for individual members of the covered committees.

4. *Waxman v. Evans*

The first attempt to secure court enforcement of a document demand under Section 2954 was brought in a federal district court in 2001 by 16 members of the House Government Reform Committee seeking census data. The congressional plaintiffs argued that the plain language of Section 2954 unambiguously directs agencies to comply with information requests. They also claimed that reliance on legislative history supported their position. In addition, the plaintiffs argued that they were entitled to judicial relief because the agency had refused to provide access to information that was specifically granted to them by law.

The district court ordered the release of the requested census data on the basis of the “plain language” argument. The government thereafter moved for reconsideration, raising for the first time the questions whether plaintiffs, as individual legislators, lacked standing or a right to sue because they were claiming “institutional injuries,” and whether the plaintiffs had a right of action under Section 2954. The court declined to reconsider its opinion and address these new arguments. The decision was later vacated on other grounds on appeal to the Ninth Circuit.

5. *Waxman v. Thompson*

A second attempt to enforce a Section 2954 document demand in the same district court was decisively rejected. *Waxman v. Thompson* was a suit by 19 members of the House Government Reform Committee to compel release of a Department of Health and Human Services (HHS) document. In addition to asserting a right of access under Section 2954, the congressional plaintiffs alleged a violation of 5 U.S.C. § 7211, which provides that “[t]he right of employees … to furnish information to either House of Congress, or to a committee or member thereof, may not be interfered with or denied.” The executive branch opposed the claims, raising the issues of standing or a right to sue, jurisdiction of the court to enforce the statutes, and the doctrine of “equitable discretion.”

On July 24, 2006, the district court, applying the guiding principles established by the Supreme Court, ruled that the congressional plaintiffs did not have standing to sue. Accepting that it was bound by that Supreme Court precedent, the district court concluded that when the Secretary refused to produce the documents requested pursuant to Section 2954, plaintiffs did not suffer a personal injury. Rather, Congress, on whose behalf the plaintiffs acted, suffered an institutional injury; namely, that its ability to assess the merits of the bill in question was impeded or impaired.

Quoting the Supreme Court, the district court noted that the plaintiffs were “not … singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies,” and cannot “claim that they have been deprived of something to which they are reasonably entitled,” since the alleged injury “runs (in a sense) with the Member’s seat, a seat which the Member holds (it might be quite arguably be said) as trustees of his constituents, not as prerogatives of personal power.” A violation of Section 2954, the court concluded, therefore raises no personal or particularized injury to the plaintiffs, but at most, creates a type of institutional injury, which necessarily damages all members of Congress and both houses of Congress equally.
The court also noted that no jurisdictional committee had issued either an official request for the documents or a subpoena, nor did the legislative history of the provision imply intent to delegate authority to the requisite number of members of the covered committees to seek to enforce its provisions judicially. The House plaintiffs did not appeal the district court’s ruling. Based on this decision, it is now highly unlikely that any future lawsuit to enforce a document request under Section 2954 would succeed.

E. House Resolutions of Inquiry

Under the rules and precedents of the House, a “resolution of inquiry” allows the House to request information from the President or direct the head of a department to provide such information. According to the leading procedural guidebook, Deschler’s Precedents, it is a “simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch. The practice is nearly as old as the Republic, and is based on principles of comity between the executive and legislative branches rather than on any specific provision of the Constitution that a Federal court may be called on to enforce.” Such resolutions, therefore, are not enforceable through the compulsory processes available to the House. However, they have been useful at times in eliciting the information or providing a springboard for more formal House actions.

A resolution of inquiry is thus a type of expedited procedure for seeking information. Requesting members of Congress do not need to seek a “rule” or permission from the Rules Committee before proceeding to the floor for House consideration, and therefore, the process is not subject to the delays usually facing most legislative actions. A resolution of inquiry may be introduced by one or more members of the House. Once introduced, it is considered “privileged.” Clause 7 of House Rule XIII provides that if the committee to which it is referred does not act on the resolution within 14 legislative days, the resolution may then be considered on the House floor despite the lack of committee action. If the committee does seek to act within the 14-day period, it may vote on the resolution of inquiry without amendment; report it with amendments; or report it favorably, adversely or without recommendation.

In actual practice, the committee usually asks the Executive to comment upon the information request during the 14-day period. Frequently, the Executive’s response will provide enough information to satisfy the purpose of the resolution of inquiry, or the response will convince the committee not to proceed based upon the sensitivity of the information sought or because of competing executive investigations. Thus, an adverse report by a committee may not actually indicate opposition.

On several occasions, resolutions of inquiry have successfully revealed important information or have spurred more formal committee inquiries. Such instances have included revelations of military operations in Vietnam, information about the 1995 Mexico rescue package, and Iraq’s 2002 declaration to the United Nations on its weapons of mass destruction. Not all such attempts have been successful, however. For example, attempts during the 109th Congress to use resolutions of inquiry to seek information from the President, the Attorney General, and the Secretary of Defense regarding the Terrorist Surveillance Program resulted in apparently partisan votes to reject the resolutions.

Despite the absence of enforcement mechanisms, members may turn to resolutions of inquiry for a variety of reasons. They may not be well-positioned within a jurisdictional committee to seek information through normal investigatory processes; or, they may find that such resolutions provide a useful way to draw public attention to an issue and instigate formal investigations.

The Senate has never established comparable formal procedures for the consideration and passage of resolutions of inquiry.
F. Rights of Members of the Senate

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 afforded to their House counterparts. Senate rules emphasize the rights and prerogatives of individual senators and, therefore, minority groups of senators.381

The most important of these rules are those that effectively allow unlimited debate on a bill or amendment unless an extraordinary majority votes to invoke “cloture.”382 Unless or until there are 60 votes in favor of ending debate through cloture, 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 is present. Similarly, the Senate Environment and Public Works Committee has adopted a quorum rule that requires the presence of at least two minority party members for a vote on the issuance of a subpoena.

Even beyond the 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. These include the processes dealing with floor recognition, committee referrals, and the amending process,383 and by committee rules.384
VIII. CONCLUDING OBSERVATIONS: THE CONSTITUTION AND OVERSIGHT OF THE ADMINISTRATIVE BUREAUCRACY

President Woodrow Wilson, describing the role of Congress in 1885, insisted that: “Quite as important as legislation is vigilant oversight of administration.” Wilson further noted the importance of oversight in promoting government transparency, and cited the importance of “the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in the broad daylight of discussion.”

Wilson went on to insist: “It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. … The informing functions of Congress should be preferred even to its legislative function.”

This handbook has attempted to introduce the reader to the complexities of the legislative investigatory process and the rules, tools, and folkways by which it operates. An effective investigative mechanism assures not only that Congress will be able to fully inform itself and the public how well or badly government is performing its public duties, but serves as well to maintain and vindicate Congress’ co-equal role in our constitutional scheme. The threat of an overreaching, unrestrained executive is an ever-present, built-in reality of our separated but balanced plan of government. Vigilance through continuous and aggressive oversight is indispensable. The failure to meet executive challenges to Congress’ core prerogatives is an abdication of its constitutional responsibility.

Congressional investigations can, have, and should serve the public interest. Throughout our nation’s history, congressional investigations have led to major reforms that have benefited taxpayers, improved public health, safety, and the environment, and safeguarded individual liberties from governmental abuse. The benchmark probes of the last six decades have included:

- the 1940s Truman Committee investigation that disclosed waste and abuse in the national defense program, which spurred subsequent procurement reforms;
- the investigation of the drug industry led by Senator Estes Kefauver in the 1960s, which led to enactment of major amendments to the Food, Drug, and Cosmetic Act by imposing new safeguards over the manufacture, testing, inspection, certification, and withdrawal of drugs;
- House and Senate investigations during the 1960s and 1970s concerning the environment, which led to enactment of the Clean Air Act, Clean Water Act, and various hazardous waste laws;
- the exposure by the Church Committee in the 1970s of decades of inappropriate domestic and foreign intelligence activities by the CIA and the FBI, which produced reforms in congressional oversight over the intelligence community and the enactment of such landmark legislation as the Foreign Intelligence Surveillance Act and the establishment of the Foreign Intelligence Surveillance Court;
- in the 1980s, investigations of the generic drug and blood industries by Representative John Dingell’s Oversight and Investigations Subcommittee, which led to major reforms in those industries; and
- in 2002, following the exposure of the Enron and Worldcom accounting scandals and the revelation by the Senate and House Banking Committee investigations of serious weaknesses in industry self-regulatory reporting requirements for certain publicly held companies, Congress enacted the Sarbanes–Oxley Act of 2002, which established an independent board to oversee the audit of public companies subject to the securities laws.
Those investigations and many others came at a price that included the investment in time, resources, and energy of committee chairs and staff, which could have been expended on more politically beneficial legislative activities. Often, high-profile inquiries have inspired personal attacks on committee chairs and staff as well as on the committees themselves. The Senate’s investigation of the Teapot Dome scandal in the 1920s, now revered by many as the modern era’s model of a responsible exercise of Congress’ investigative powers for its exposure of government corruption and self-dealing, was reviled by the press and academics at the time. Leading New York newspapers called the Senate investigators “scandalmongers,” “assassins of character,” and “mudgunners.” The eminent evidence scholar Dean John H. Wigmore wrote of the “sensational daubach of investigation—poking into the garbage cans and dragging the sewers of political intrigue.”

During the House Oversight and Investigations Subcommittee’s 1992–94 investigation of mismanagement in the Environmental Crimes Section (ECS) of the Department of Justice, the subcommittee, its Chair John Dingell, and its staff came under relentless criticism from the media, public interest organizations, a former Attorney General, the American Bar Association, and the Justice Department. Editorials personally attacked “General Dingell” and the subcommittee staff, describing them as “interrogators,” “Dingell’s wolves,” and “Torquemadas-in-training.” The former Attorney General questioned the constitutionality of the Subcommittee’s demands for the testimony of subordinate employees and the probes into open and closed cases, and criticized the Department for ultimately allowing the interviews and producing the documents. The Criminal Justice Section of the ABA recommended to its House of Delegates that it adopt a report that proposed severely restricting congressional oversight of prosecutorial agencies and encouraged the Executive Branch to resist demands for testimony and documents. Nonetheless, the investigation was ultimately highly successful. The inquiry uncovered severe strains in the relationship between the U.S. Attorneys’ Offices and the ECS, which had been exacerbated by a three-year campaign by DOJ Headquarters to centralize its control over environmental prosecutions in Washington, D.C. Ultimately, the Attorney General ordered the return of prosecutorial discretion to the local U.S. Attorneys’ offices and reversed efforts toward centralized control.

As has been emphasized throughout this handbook, investigative oversight is very hard, sometimes dirty, and often unrewarding in the ways that are today so important for a legislator’s political survival. It is, however, critical. Congress’ recent quiescence in the face of very serious challenges to its core constitutional prerogatives is dangerous, and the prospect of its continuance is disquieting. The longer Congress stands silent on the sidelines, the more difficult it becomes to reclaim its powers. The legislative prerogatives are, of course, retrievable but only with great effort. Not only must Congress revive the respect for the powers of the institution, but the infrastructure of oversight also has to be rebuilt, starting with enforcement of the subpoena power.

As described in this handbook, the now-settled three options for enforcing subpoenas are all difficult and problematic. Criminal contempt has worked in the past, probably because the executive official who has been the target has been unwilling to be subjected to a criminal prosecution in order to make a constitutional point for the President. From a congressional standpoint, however, it is time-consuming and resource draining, even if there is eventual capitulation, and the likelihood of success in court is high. Consideration might be given to establishment of a mechanism based on the model of the now-expired Independent Counsel Act. This would allow the appointment of a special advocate by a panel of the U.S. Court of Appeals for the District of Columbia Circuit to prosecute contempt-of-Congress whenever the Executive blocks a U.S. Attorney from presenting a citation to a grand jury. During the Teapot Dome investigation, the independent counsel successfully brought several such contempt prosecutions on behalf of the Senate.

Second, the historic inherent contempt power risks creating a political spectacle since it involves the arrest and detention of the accused, a trial on the floor of the House or Senate chamber, and possible incarceration if the person is found guilty. It also may involve a lawsuit in court, since the initial arrest and detention are typically quickly challenged in court through a habeas corpus petition. As a result, Congress has tended to avoid using this power. But Congress may wish to consider this tool more seriously because it does provide the means to obtain the desired testimony or documents quickly. Congress could establish, by internal House rules, procedures and practices that avoid “unseemly” initial detentions and ultimate incarcerations and provide an expeditious due process proceeding.
For example, instead of holding a trial in the House or Senate chamber, a special committee could conduct evidentiary proceedings at which the person cited or his or her attorney could appear and present witnesses and arguments. The special committee would then report its findings and recommendations to the floor. The person cited for contempt could again appear in person prior to the vote to acquit or convict. In addition, House and Senate rules could provide that upon conviction, the sole penalty that could be imposed would be a fine. In such a process, the entire matter would be carried out within Congress. Without detention or incarceration, habeas is unavailable, and thus there would be no separate court proceedings. Under such revised procedures, inherent contempt might then be viewed as a politically palatable, “congressionally friendly,” fair, and expeditious enforcement mechanism that would make recalcitrant executive officials think twice before resisting.

Finally, civil contempt is not as speedy as advertised, as the now-settled 2008 litigation over the House Judiciary committee subpoenas to White House aides Harriet Miers and Joshua Bolten has demonstrated. In the past, the Justice Department has suggested that subpoena disputes be resolved in court because this would allow the Department to defend an official in a potentially executive-friendly judicial forum. Generally, congressional committees in the past, whether led by Democrats or Republicans, have consistently avoided DOJ offers for resolution through a lawsuit.394 Interestingly, when utilized by the House to enforce subpoenas against Miers and Bolten in 2008, DOJ challenged the suit on a variety of “justiciability” grounds but lost each of its claims that the lawsuit was improper. Ultimately, the lawsuit proved to be the only way for Congress to challenge the President’s claim of absolute immunity from congressional subpoenas for close presidential aides.

Shoring up congressional enforcement mechanisms would help in making executive agencies and the White House more amenable to settling such disputes short of reliance on lengthy lawsuits with potentially uncertain outcomes. In most cases, it is the political process that is best able to forge compromises that address the needs of both political branches of government.

The shape and contours of the legislative oversight process are dictated or directly influenced by our constitutional scheme of separated powers and checks and balances. That scheme envisions and establishes a perpetual struggle for policy control between Congress and the Executive. The framers of the Constitution had a basic distrust of government as a result of their colonial, early state, and Articles of Confederation experiences. Indeed, the issue of honesty and integrity in government, and the prevention of public corruption, has been important since the formation of our government in the 18th century. This distrust motivated the structure of the Federal Government in the Constitution; that is, separating powers among three branches of government to avoid concentrations and abuses of power and facilitate “checks and balances” among the branches.

In practice, the powers of the two political branches are too incomplete for one to gain total control of the departments and agencies of the executive branch. Legislative oversight is the mechanism that attempts to assure the Congress’ will is carried out and that executive power does not overwhelm congressional prerogatives. A more complete and accurate picture, then, is not that of congressional dominance, or executive recalcitrance, but of a dynamic process of continuous sparring, confrontations, negotiations, and ultimate accommodation. Occasionally, there are monumental clashes. It is in those instances that congressional power has been refined and defined.

Our constitutional system of checks and balances is designed to ensure that powers are divided among the branches of government no matter who controls the White House or the Congress. Thus, these issues of interbranch conflict and cooperation will arise and they should be resolved without regard to which political party is in control. In recent years, we have faced a lengthy period of legislative passivity in the face of serious executive challenges. As a result, there remains in Congress a palpable sense of loss of institutional regard, loyalty, and self-respect. It is evident that the availability of formidable investigative powers alone is insufficient without an accompanying oversight process that is continuous, consistent, and aggressive, that is conducted by experienced staff, and is overseen by chairpersons with no limits on tenure. Institutional memory must be maintained, and the sense of integrity and the need for preservation of institutional prerogatives must be nurtured and sustained. The Executive Branch and Congress must seek to work together as co-equal branches of government, and Congress must exercise its oversight function even when its leadership comes from the same political party as the President.
APPENDIX A: ILLUSTRATIVE SUBPOENA

This appendix includes an actual subpoena, annotated to demonstrate its key components.

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A This is a subpoena to an organization for documents issued after a lengthy period of preliminary investigation. It is sufficient to direct it to the "custodian of documents" rather than to a named official who actually may not be responsible for the organization's documents and thereby avoid a time delaying claim that the wrong person was served. In the past, document subpoenas to the White House have been primarily so directed and the custodian has been variously the White House Chief of Staff, the White House Counsel, or the head of the EOP office that is the target.

B House Rule XI 2 (m)(3)(B) allows a committee to designate a place of return of a document subpoena other than at a meeting or hearing. The Rule was clarified in 1999 to prevent subpoenaed parties from demanding return only at a hearing or meeting of committee.

C House Rule II(2)(d)(i) requires the Clerk of the House to attest to and seal all House subpoenas. In practice, the House General Counsel reviews for form and substance. The Senate Legal Counsel has no formal role in the review and issuance of subpoenas, but is available for similar review and assistance in the preparation.
A. General Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You are also required to produce documents that you have a legal right to obtain, documents that you have a right to copy or have access to, and documents that you have placed in the temporary possession, custody, or control of any third party. No records, documents, data, or information called for by this request shall be destroyed, modified, removed, or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization, or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read to also include them under that alternative identification.

3. Each document produced shall be produced in a form that renders the document susceptible of copying.

4. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this subpoena was served. Also identify to which paragraph from the subpoena that such documents are responsive.

5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same document.

6. If any of the subpoenaed information is available in machine-readable form (such as punch cards, paper or magnetic tapes, drums, disks, or core storage), state the form in which it is available and provide sufficient detail to allow the information to be copied to a readable format. If the information requested is stored in a computer, indicate whether you have an existing program that will print the records in a readable form.

7. If the subpoena cannot be complied with in full, it shall be complied with to the extent possible, which shall include an explanation of why full compliance is not possible.

8. In the event that a document is withheld on the basis of privilege, provide the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.

9. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject, and recipients) and explain the circumstances by which the document ceased to be in your possession or control.

10. If a date set forth in this subpoena referring to a communication, meeting, or other event is inaccurate, but the actual date is known to you or is otherwise apparent from the context of the request, you should produce all documents that would be responsive as if the date were correct.

11. Other than subpoena questions directed at the activities of specified entities or persons, to the extent that information contained in documents sought by this subpoena may require production of donor lists, or information otherwise enabling the recreation of donor lists, such identifying information may be redacted.

12. The time period covered by this subpoena is included in the attached Schedule A.

13. This request is continuing in nature. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon location or discovery subsequent thereto.

14. All documents shall be Bates-stamped sequentially and produced sequentially.

15. Two sets of documents shall be delivered, one set for the Majority Staff and one set for the Minority Staff. When documents are produced to the Subcommittee, production sets shall be delivered to the Majority Staff in Room B346 Rayburn House Office Building and the Minority Staff in Room 2101 Rayburn House Office Building.

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These are very detailed response instructions designed to anticipate common objections or difficulties in responding in a timely manner.
B. General Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (E-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, telegrams, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disc, or videotape. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The term “White House” refers to the Executive Office of the President and all of its units including, without limitation, the Office of Administration, the White House Office, the Office of the Vice President, the Office of Science and Technology Policy, the Office of Management and Budget, the U.S. Trade Representative, the Office of Public Liaison, the Office of Correspondence, the Office of the Deputy Chief of Staff for Policy and Political Affairs, the Office of the Deputy Chief of Staff for White House Operations, the Domestic Policy Council, the Office of Federal Procurement Policy, the Office of Intergovernmental Affairs, the Office of Legislative Affairs, Media Affairs, the National Economic Council, the Office of Policy Development, the Office of Political Affairs, the Office of Presidential Personnel, the Office of the Press Secretary, the Office of Scheduling and Advance, the Council of Economic Advisors, the Council on Environmental Quality, the Executive Residence, the President’s Foreign Intelligence Advisory Board, the National Security Council, the Office of National Drug Control, and the Office of Policy Development.

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* The definitions of “document” and “communication” reflect past experience with responses that sought to avoid supplying material arguably not precisely within generally accepted understanding of the terms.

* Grammatical rules are not to interfere with the breadth of the subpoena.
Appendix A: Illustrative Subpoena

C. SCHEDULE A

March 10, 1998

Custodian of Documents
International Brotherhood of Teamsters
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

1. All organizational charts and personnel rosters for the International Brotherhood of Teamsters (“Teamsters” or “IBT”), including the DRIVE PAC, in effect during calendar years 1991 through 1997.

2. All IBT operating, finance, and administrative manuals in effect during calendar years 1991 through 1997, including, but not limited to those that set forth (1) operating policies, practices, and procedures; (2) internal financial practices and reporting requirements; and (3) authorization, approval, and review responsibilities.

3. All annual audit reports of the IBT for the years 1991 through 1996 performed by the auditing firm of Grant Thornton.

4. All IBT annual reports to its membership and the public for years 1991 through 1997, including copies of IBT annual audited financial statements certified to by independent public accountants.

5. All books and records showing receipts and expenditures, assets and liabilities, profits and losses, and all other records used for recording the financial affairs of the IBT including, journals (or other books of original entry) and ledgers including cash receipts journals, cash disbursements journals, revenue journals, general journals, subledgers, and workpapers reflecting accounting entries.


7. All minutes of the General Board, Executive Board, Executive Council, and all Standing Committees, including any internal ethics committees formed to investigate misconduct and corruption, and all handouts and reports prepared and produced at each Committee meeting.

8. All documents referring to or relating to, or containing information about, any contribution, donation, expenditure, outlay, in-kind assistance, loan, or grant (from DRIVE, DRIVE E&L fund, or IBT general treasury) to any of the following entities/organizations:
   a. Citizen Action
   b. Campaign for a Responsible Congress
   c. Project Vote
   d. National Council of Senior Citizens
   e. Vote Now ’96
   f. AFL-CIO
   g. AFSCME
   h. Democratic National Committee
   i. Democratic Senatorial Campaign Committee (“DSCC”)
   j. Democratic Congressional Campaign Committee (“DCCC”)
   k. State Democratic Parties

All document subpoenas should attempt to identify the material sought with some degree of specificity by subject, categories, or relation to named persons. Number 5 is quite broad but may be confined by the chair’s statement with respect to the nature and scope of the inquiry. It is a demand that is open to negotiation.
1. Clinton-Gore ’96

m. SEIU

9. All documents referring or relating to, or containing information about any of the following individuals/entities:
   a. Teamsters for a Corruption Free Union
   b. Teamsters for a Democratic Union
   c. Concerned Teamsters 2000
   d. Martin Davis
   e. Michael Ansara
   f. Jere Nash
   g. Share Group
   h. November Group
   i. Terrence McAuliffe
   j. Charles Blitz
   k. New Party
   l. James P. Hoffa Campaign
   m. Delancy Printing
   n. Axis Enterprises
   o. Barbara Arnold
   p. Peter McGourty
   q. Charles McDonald
   r. Theodore Kheel

10. All documents referring or relating to, or containing information on about, communications between the Teamsters and the White House regarding any of the following issues:
   a. United Parcel Service Strike
   b. Diamond Walnut Company Strike
   c. Pony Express Company organizing efforts
   d. Davis Bacon Act
   e. NAFTA Border Crossings
   f. Ron Carey reelection campaign
   g. IBT support to 1996 federal election campaigns

11. All documents referring or relating to, or containing information about, communications between the Teamsters and the Federal Election Commission.

12. All documents referring or relating to, or containing information about, communications between the Teamsters and the Democratic National Committee, DSCC, or DCCC.

13. All documents referring or relating to, or containing information about, communications between the Teamsters and the Clinton-Gore ’96 Campaign Committee.
14. All documents referring or relating to, or containing information about, policies and procedures in effect during 1996 regarding the approval of expenditures from the IBT general treasury, DRIVE E&L fund, and DRIVE PAC.

15. All documents referring or relating to, or containing information about the retention by the IBT of the law firm Covington & Burling and/or Charles Ruff.

16. All documents referring or relating to, or containing information about work for the IBT performed by the firm Palladino & Sutherland and/or Jack Palladino.

17. All documents referring or relating to, or containing information about work for the IBT performed by Ace Investigations and/or Guerrieri, Edmund, and James.

18. All documents referring or relating to, or containing information about IBT involvement in the 1995-1996 Oregon Senate race (Ron Wyden vs. Gordon Smith).

19. All documents referring or relating to, or containing information about, Ron Carey’s campaign for reelection as general president of the Teamsters.

20. All documents referring or relating to, or containing information about organization, planning, and operation of the 1996 IBT Convention.

21. All documents referring or relating to, or containing information about the following:
   a. Trish Hoppey
   b. John Latz
   c. any individual with the last name of “Golovner”
   d. Convention Management Group

22. All documents referring or relating to, or containing information about the Household Finance Corporation.

23. All documents referring or relating to, or containing information about, any “affinity credit card” program or other credit card program sponsored by or participated in by the IBT.

24. A list of all bank accounts held by the International Brotherhood of Teamsters including the name of the bank, account number, and bank address.

25. All documents referring or relating to, or containing information about, payments made by the IBT to any official or employee of the Independent Review Board.

26. Unless otherwise indicated, the time period covered by this subpoena is between January 1991 and December 1997.
APPENDIX B: INSTITUTIONAL SUPPORT RESOURCES FOR LEGISLATIVE OVERSIGHT

Congress and its committees do not have sufficient resources or personnel to adequately pursue its oversight responsibilities alone. Thus, it must rely extensively on legislative, administrative, and non-governmental entities to provide it with timely, objective, and nonpartisan assistance in reviewing program performance. They include: the Government Accountability Office (GAO); the Offices of Inspectors General (IGs); the Congressional Research Service (CRS); the Offices of Chief Financial Officers (CFOs); the House General Counsel; the Senate Legal Counsel; non-governmental organizations (NGOs); and the media.

A. Government Accountability Office

The Government Accountability Office (GAO) was established in 1921 as an independent auditor of government agencies for the Congress. Over the years, Congress has expanded GAO’s audit authority, added new responsibilities and duties, and strengthened GAO’s ability to perform independently of the Executive Branch. GAO is under the direction and control of the Comptroller General of the United States, who is appointed by the President from a list of candidates provided by the Congress and serves for a 15-year term. He or she is removable only by the passage of a joint resolution of removal by the Congress.

The key oversight support functions performed by the GAO are as follows:

1. Program Evaluator: At the request of congressional committees and members, GAO evaluates whether programs are achieving their desired results, whether there are better ways to accomplish their statutory prescribed missions, whether government programs are being carried out in compliance with applicable laws and regulations, and whether data furnished to Congress on programs are accurate.

2. Audits: GAO determines whether funds are being spent legally and whether the agency’s manner of accounting for them is acceptable.

3. Investigations: GAO conducts special investigations of alleged violations of criminal or civil law through its Office of Special Investigations. Cases involve such matters as conflict of interest of federal officials, questions of ethics of federal officials, and procurement and contract fraud. Completed investigations are usually reported in writing.

4. Legal Services: GAO provides opinions and comments on proposed bills, adjudicates claims for and against the government, and resolves bid protests on government contracts. In addition, GAO occasionally assigns staff to work directly for congressional committees. In such cases, the staff assigned represent the committee and not GAO. GAO protocols give priority to requests from the House and Senate majority and minority leadership, and the chairs and ranking minority members of committees and subcommittees.

B. Offices of Inspectors General

Offices of Inspectors General (IGs) have been established in over 60 government agencies as permanent, nonpartisan independent offices to combat waste, fraud, and abuse in government. They have three principal responsibilities that assist in congressional oversight. Inspectors General:

1. conduct and supervise audits and investigations relating to the programs and operations of the particular establishment;
2. provide leadership and coordination and recommend policies for activities designed to promote the economy, efficiency, and effectiveness of agency programs and operations, and prevent fraud, waste, and abuse; and
3. provide a means, through strict reporting requirements, to keep the agency head and Congress fully and currently informed about problems and deficiencies relating to the administration of agency programs and operations, and the necessity for and progress of corrective action. These reporting requirements include: (1) reporting suspected violations of federal criminal laws directly to the Justice Department; (2) reporting semiannually to the agency head who must forward the IG report with comments to Congress within 30 days; and (3) to report “particularly serious or flagrant problems” immediately to the agency head, who must submit the IG report (with comments) to Congress within seven days.

In addition to these reports, IGs are required to keep Congress “otherwise” informed. This has included such communications as testifying before committees, meeting with legislators and staff, and responding to congressional requests for information and reports. IGs, moreover, may agree to conduct reviews requested by members of Congress.

Inspectors General have considerable independence and powers. They can hire their own staff and issue subpoenas. They have their own separate appropriations, which cannot be dipped into by the agency of which they are a part. If the President or the agency head tries to remove them, the President or agency head has to provide specific written reasons to Congress for the action. Although IGs report to agency heads and serve under their general supervision, they cannot be prevented by the agency head from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation, unless a statute specifically so authorizes.

C. Congressional Research Service

The Congressional Research Service (CRS) has a diverse professional staff of around 700 people. It has a broad mission to provide Congress with nonpartisan, confidential, timely, and objective information. Organized into several research divisions (American Law and Domestic Social Policy, for instance), CRS functions in some respects as Congress’ own “think tank.” Its reports and studies on the issues before Congress are at least as sophisticated as those produced in the Executive Branch or in universities.

In addition, CRS provides personal briefings to members and staff, conducts issue and procedural workshops and seminars, prepares customized memoranda and reports to lawmakers, and often consults and advises committee staffs in the preparation for and conduct of oversight proceedings.
D. Offices of Chief Financial Officers

The Chief Financial Officers Act of 1990\(^K\) and the Government Management Reform Act of 1994\(^L\) were designed to improve financial management throughout the federal government and provide additional sources of information, data, and materials that can aid congressional oversight endeavors by creating a new top management position, a Chief Financial Officer (CFO) in the 24 largest government agencies. The CFOs for the 14 cabinet-level agencies and for the National Aeronautic Space Administration and the Environmental Protection Agency are presidential appointees.

The CFOs are required to prepare full financial statements covering all the activities of the individual departments and agencies, which are audited by GAO annually. The CFOs also conduct audits of major subdivisions of these agencies. The GAO and CFO audits are disclosed to the public just the way the Securities and Exchange Commission discloses the annual statements of regulated companies, by publication on their websites. The result is a very public score card as to whether these departments and agencies are accurately accounting for the care of public funds. This score card provides a wealth of information for congressional committees as to how well and effectively agencies are administering their programs. In 1996, the first year all 24 agencies were audited, only six were able to receive clean GAO audit opinions. By 2002, 21 of the 24 received clean audit opinions.

E. Senate Legal Counsel

The Office of Senate Legal Counsel was created by Title VII of the Ethics in Government Act of 1978\(^M\) “to serve the institution of Congress rather than the partisan interests of one party or another.”\(^N\) 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 chair and ranking minority member of the Committees on the Judiciary and on Rules and Administration.

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. As discussed in detail in Chapter II, the Senate Legal Counsel may represent a committee in seeking an immunity order from a U.S. district court if so authorized by the committee. It may also represent a committee or subcommittee in a civil action to enforce a subpoena if authorized by a Senate resolution. There have been six such authorizations since the passage of the act. Civil actions may not be brought against executive branch officers or employees of the federal government acting in their official capacities.

The Ethics Act details a number of advisory functions of the Office of Senate Legal Counsel. Principal among these are the responsibility of advising members, committees, and officers of the Senate with respect to subpoenas, 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.

\(^K\) P.L. 101-576.
\(^L\) P.L. 103-356.
\(^N\) S. Rept. 95-170, 95th Cong., 2nd sess. 84 (1978).
The act also provides that the counsel shall perform such other duties consistent with the nonpartisan purposes and limitations of Title VII as the Senate may direct. Thus, in 1980, the office was used in the investigation examining President Carter’s brother Billy’s connection to Libya. The office worked under the direction of the chair and vice-chair of the subcommittee charged with the conduct of that investigation. Members of the office have also undertaken special assignments such as the Senate’s investigation of “Abscam” and other undercover activities, the impeachment proceedings of Judge Harry Claiborne, Judge Walter L. Nixon, Jr., and Judge Alcee L. Hastings, Jr., and the confirmation hearings of Supreme Court Justice Clarence E. Thomas. The office was called upon to assist in the Senate’s conduct of the impeachment trial of President Clinton.

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 in civil enforcement proceedings, it has welcomed the opportunity to review proposed subpoenas for form and substance prior to their issuance by committees.

F. House General Counsel

The House Office of General Counsel has evolved since the mid-1970s, from its original role as a legal adviser to the Clerk of the House on matters within its jurisdiction, to serving as counsel for the House as an institution. At the beginning of the 103rd Congress, it was made a separate House office, reporting directly to the Speaker, and charged with the responsibility “of providing legal assistance and representation to the House.” This office plays a similar role to the Senate Legal Counsel with respect to oversight assistance to committees and protection of institutional prerogatives, but there are some differences.

The General Counsel, Deputy General Counsel, and other attorneys of the House Office of General Counsel are appointed by the Speaker and serve at his or her pleasure. The office “function[s] pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group,” which consists of the Speaker, the Majority Leader, Majority Whip, Minority Leader, and Minority Whip. The office has statutory authority to appear before state or federal courts in the course of performing its functions (see 2 U.S.C. § 130f). The office may file friend-of-the-court briefs on behalf of the Speaker and the Bipartisan Legal Advisory Group in litigation involving the institutional interests of the House. Where authorized by statute or resolution, the office may represent the House itself or a committee in judicial proceedings. The office also represents House officers in litigation affecting the institutional interests and prerogatives of the House. Finally, the office defends 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 VIII).

Unlike Senate committees, House committees may only issue subpoenas under the seal of the Clerk of the House. In practice, committees often work closely with the Office of General Counsel in drafting subpoenas, and every subpoena issued by a committee is reviewed by the office for substance and form. Committees frequently seek the advice and assistance of the Office of General Counsel in dealing with various asserted constitutional, statutory, and common-law privileges in responding to executive agencies and officials that resist congressional oversight and navigating the statutory process for obtaining a contempt citation with respect to a recalcitrant witness.

Further, the Office of General Counsel represents the interests of House committees in judicial proceedings in a variety of circumstances. The office represents committees in federal court on applications for immunity orders pursuant to 18 U.S.C. § 6005; files briefs as friend of the court in cases affecting House committee investigations; defends against attempts to obtain direct or indirect judicial interference with congressional subpoenas or other investigatory activity; represents committees seeking to prevent compelled disclosure of non-public information relating to their investigatory or other legislative activities; and appears in court on behalf of committees seeking judicial assistance in obtaining access to documents or information, such as documents that are under seal or materials which may be protected by Rule 6(e) of the Federal Rules of Criminal Procedure.

Like the Senate Legal Counsel's office, the House General Counsel's office also devotes a large portion of its time to providing informal advice to individual members and committees.

G. Non-Governmental Organizations (NGOs)

There has been a dramatic rise in recent years in the formation of non-government organizations (NGOs) that have taken increasingly active roles in exposing improper government activities as well as attempting to influence government policy. They include broad-based membership organizations, which may be organized around very expansive themes of "good government." Such groups include Center for Responsive Politics, Citizens Against Waste, Common Cause, Congress Watch, the Constitution Project, the Government Accountability Project, Judicial Watch, OMB Watch, and the Project on Government Oversight (POGO), among many others. These groups are often significant players in shaping and influencing public opinion through the media, and in Congress by way of testimony in hearings in which they are often able to present very professional and competent studies, reports, and statistical analyses.

The "good government" groups have also had a significant impact on the political culture and the standard of what we should expect and tolerate from our government and its officials, not only through the media and lobbying in Congress, but also through legal and administrative action. One early example will illustrate. In 1968, the House of Representatives took the historic step of establishing as a standing committee, a committee on ethics, called the House Committee on Standards of Official Conduct. This committee would propose rules on conduct, giving advice to members and staff, and would initiate disciplinary hearings against sitting members for misconduct. It was not until 1976, however, and only upon the initiation and persistence of an NGO, Common Cause, that the House Committee on Standards began its first investigation and disciplinary hearing against a sitting member of Congress. A petition and complaint was filed on behalf of Common Cause by 44 members of the House of Representatives.

H. The Role of Press and Media Coverage

The intensity of press and media coverage of governmental operations has increased over the last three decades, and has been particularly heightened by the advent of internet communications. Many people in Washington, including commentators and others in the media, now talk about the "new rules" of media coverage of public officials, while many public officials believe that we are facing not so much "new rules," but rather "no rules." There is now very little about a public official that is considered "off limits" to the media. Since two then-young reporters from the Washington Post (Woodward and Bernstein) made their names uncovering the "Watergate" burglary and cover-up, scores and scores of eager reporters and Woodward and Bernstein "wannabes" are looking for the next Watergate, and rushing stories of "scandal" and "corruption" to the press, the electronic media, and increasingly onto the internet. The Watergate exposures spawned an era of "investigative journalism" characterized by the dedication of press resources to careful, long-term inquiries.
While such traditional press inquiries are still engaged in frequently, the internet has sped up the news cycle significantly. No longer is the media dominated by a late evening deadline for a morning newspaper, nor even getting a story for the 6:00 P.M. or 11:00 P.M. television news cycle. Rather, the internet has made for hourly news cycles, which often force reporters and commentators into hurried stories with less corroboration and background to beat the competition to a “breaking” story of scandal or corruption. For all its faults and criticisms directed its way, however, an independent and vigorous free press remains a crucial vanguard against corruption in government. Transparency, openness, and disclosure in government is of little value if information cannot be communicated to the general populace through a source totally independent from the government. Indeed, much of what we call regulation in the context of ethics is really only disclosure and not necessarily a limit on certain conduct. Today, an aggressive, free, and independent press and media remain an essential resource in uncovering and publicizing corruption and maladministration, and an indispensable asset for investigating committees to assist them in becoming aware of governmental failures or in engendering necessary public support for legislative action by publicizing the results of committee probes.
APPENDIX C: SELECTED READINGS ON INVESTIGATIVE OVERSIGHT

Brand, Stanley M. Battle Among the Branches: The Two Hundred Year War, 65 N.C. L. Rev. 901 (1987).
Bush, Joel D. Congressional-Executive Access Disputes: Legal Standards and Political Settlements, 9 J.L. & Pol. 719 (Summer 1993).


ENDNOTES

1 J.S. Mill, Considerations on Representative Government, 42 (1879).

2 The Constitution in Art. I, sec. 8, cl. 18, provides for Congress “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.” Art. II, sec. 2, cl. 2 provides that the Senate shall advise and consent with regard to all superior officers of the United States “which shall be established by law, but the Congress may by law vest appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”

3 See, e.g., Kendall v. United States ex rel. Stokes, 37 U.S. (3 Pet.) 524, 610 (1838) (holding that where a valid duty is imposed on an executive official by Congress, “the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President”); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (holding that the President does not have the inherent power to take possession of private property in order to keep labor disputes from stopping steel production); Amerson, Inc. v. U.S. Army Corps of Engineers, 610 F. Supp. 750, 751 (D.N.J. 1986), aff’d, 809 F.2d 979 (3d Cir. 1986) (holding that a presidential direction to agencies not to comply with an enacted provision of law “illegally violates the express instruction of the Constitution that the President shall ‘take care that the laws are faithfully executed’”); Lear Siegler, Inc. v. Lehman, 842 F.2d 1012, 1124 (9th Cir. 1988) (holding that once the President puts his signature to a law it “becomes part of the law of the land and the President must take care that it be faithfully executed” and has no authority to “employ a so-called ‘line item veto’ and excise or sever provisions of a bill with which he disagrees”); NTEU v. Nixon, 492 F.2d 87, 604 (D.C. Cir. 1974) (holding that the “Take care” Clause does not permit the President to refrain from executing duly enacted laws).

4 See Walker v. Cheney, 236 F. Supp. 2d 1 (D.D.C. 2002). See also Bruce Montgomery, Congressional Oversight: Vice President Richard B. Cheney’s Executive Triumph, 120 Pol. Science Qtrly. 88 (2005–06) (recounting the events leading to the litigation and the congressional refusal to support the appeal) and T.J. Halstead, The Law: Walker v. Cheney: Legal Insulation of the Vice President From GAO Investigations, 33 Presidential Studies Quarterly 635 (2003) (discussing the ramifications of the ruling and the questions raised as to GAO’s continued efficacy in support of congressional oversight).


6 See, e.g., House Committee Project on Rules, “Congressional Oversight: A ‘How-To’ Series of Workshops” (June 26, July 12 and 26, 1999) (Committee Print) (Sponsored by the Speaker and Chair of the House Rules Committee and organized and conducted by CRS).


10 Id. at 174–75.

11 “[T]he subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is considered that the inquiry was calculated to elicit. This becomes manifest when it is considered that the inquiry was calculated to elicit. This becomes manifest when it is considered that the inquiry was calculated to elicit. This becomes manifest when it is considered that the inquiry was calculated to elicit.

12 273 U.S. at 175.

13 Id. at 290.

14 The Court found that 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 law laws.” Id. at 291. The Court further explained that although Congress cannot compel disclosure of evidence “for the purpose of aiding the prosecution of pending suits,” if Congress sought the information “in aid of its own constitutional power,” that power “is not abridged because the information sought to be elicited may also be of use in such suits.” Id.


17 The investigative power, the Court stated, “comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.” Id. Accordingly, the Court now clearly recognizes “the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiency in agencies of the Government.” Id. at 200 n. 33; see also Morrison v. Olson, 487 U.S. 645, 694 (1988) (noting that Congress’ role under the Independent Counsel Act of “receiving reports or other information and oversight of the independent counsel’s activities ... [are] functions that we have recognized generally as being incidental to the legislative function of Congress”) (citing McGrain v. Daugherty, 273 U.S. 135 (1927)).


19 Id. at 84. Obstruction of congressional access to information, the court held, is an injury to its core constitutional prerogative to inform itself, an injury that it declared is redressible by the Judiciary.

20 105 U.S. 109, 111 (1881).


24 273 U.S. at 175.

18 U.S.C. § 6005(c).

The Justice Department may waive the notice requirement.


166 U.S. 661 (1897).

The House Oversight and Government Reform Committee and the Senate Homeland Security and Governmental Affairs Committee have authorized deposition authority. Nineteen special investigating committees have had deposition authority. Deposition authority may also be granted for a particular investigation being conducted by a committee. See, e.g., H. Res. 1, sec. 4 (f)(2), 115 Cong. Rec. H 9, (daily ed. Jan. 6, 2009) (authorizing the House Judiciary Committee to conduct staff depositions in its investigation of the firings of U.S. Attorneys). (http://thomas.loc.gov/cgi-bin/query/F?c111:1:./temp/~c11171xcAd:e32015:).


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Id. at 446.


The Justice Department may waive the notice requirement. Application of Senate Permanent Subcommittee on Investigations, 655 F.2d at 1236.

18 U.S.C. § 6005(c).


Application of U.S. Senate Select Committee, 361 F. Supp. at 1278–79.


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

Kastigar v. United States, 406 U.S. at 460.


Anderson v. Dunn, 19 U.S. 204 (1821).
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95 McGrain v. Daugherty, 273 U.S. at 161.


97 Jernyn v. MacCaffrey, 294 U.S. 125, 147 (1935); see also Kilborn v. Thompson, 103 U.S. 168, 196 (1880); Ex Parte Nagunt, 1 Hay & Haz. 287, 18 F.Cas. 47 (C.C.D.C. 1848).


99 See, e.g., United States v. United Mine Workers, 330 U.S. 528 (1947) (upholding a $700,000 fine against a labor union as punishment for disobedience of a preliminary injunction preventing it from continuing a worker strike and approving the imposition of a $21.8 million fine if the union did not end the strike within five days).

100 See Jernyn v. MacCaffrey, 243 U.S. at 152.


103 Deschler's Precedents of the U.S. House of Representatives, ch. 15 § 17, 139 n.7 (1977) (hereinafter Deschler's Precedents); see also note 92 at 798–800.

104 The conference report accompanying the legislation, which established the procedure, explained that the relevant House committees had not yet considered the proposal for judicial enforcement of House subpoenas. H. Rept. 95-1756, 95th Cong., 2d Sess., 80 (1978).

105 The Justice Department's articulation of its position that the use of the inherent and statutory contempt mechanisms against executive branch officials is unconstitutional appears in Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege, 8 Op. OLC 101 (1984), and Response to Congressional Requests for Information Made Under the Independent Counsel Act, 10 Op. OLC 68 (1986). They were utilized by the White House Counsel to supply the sole legal basis for directing sitting and former presidential aides to claim absolute immunity from being obligated to respond to congressional subpoenas in the U.S. Attorney's removal investigation. See Memorandum for the Counsel to the President, Fred F. Fielding, from Stephen G. Bradbury, Principal Deputy Attorney General, Office of Legal Counsel, Immunity of Former Counsel to the President from Compelled Congressional Testimony, July 10, 2007.


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113 Although the Senate or the committee may be represented by any attorney designated by the Senate, in most cases such an action will be brought by the Senate Legal Counsel after an authorizing resolution has been adopted by the Senate. 2 U.S.C. § 1665(d) (2000). A resolution directing the Senate Legal Counsel to bring an action to enforce a committee or subcommittee subpoena must be reported by a majority of the members voting, a majority being present, of the full committee. The report filed by the committee must contain a statement of (a) the procedure employed in issuing the subpoena; (b) any privileges or objections raised by the recipient of the subpoena; (c) the extent to which the party has already complied with the subpoena; and (d) the comparative effectiveness of the criminal and civil statutory contempt procedures and a trial at the bar of the Senate. 2 U.S.C. § 1665(c) (2000).


116 Id. at 90.

117 For a more detailed analysis of the civil contempt procedure and a comparison with the options available to the Senate when faced with a contempt, see S.Rept. No. 95-170, 95th Cong., 1st Sess., 16–21, 40–41, 88–97; see also Hearings Before the Senate Committee on Governmental Affairs on S. 395, 95th Cong., 1st Sess. 93–62, 69 et seq. (1977) (hereinafter Civil Contempt Hearing) (statement of Senator Abourezk and attachments); 123 Cong. Rec. 20,916–21,010 (June 27, 1977).

118 Not only do the inherent and criminal contempt procedures remain available as an alternative to the civil contempt mechanism, but the legislative history indicates that the civil and criminal statutes could both be employed in the same case. "Once a committee investigation has terminated, a criminal contempt of Congress citation under 2 U.S.C. § 192 might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem." S.Rept. No. 95-170, 95th Cong., 1st Sess., 95 (citations omitted); see also Civil Contempt Hearing, supra note 92 at 798–800.

119 The act specifies that "an action, contempt proceeding, or sanction … shall not abate upon adjournment sine die by the Senate at the end of a Congress if the Senate or the committee or subcommittee … certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment." 28 U.S.C. § 1345(b) (2000). In the first case brought under the new procedure, the witness unsuccessfully

95 S. Rept. No. 95-170, 95th Cong., 1st Sess., 93.

96 28 U.S.C. § 1365(a) (2000). The statutory exception was explained in the Senate’s Report as follows:

This jurisdictional statute applies to a subpoena directed to any natural person or entity acting under color of state or local authority. By the specific terms of the jurisdictional statute, it does not apply to a subpoena directed to an officer or employee of the Federal Government acting within his official capacity. In the last Congress there was pending in the Committee on Government Operations legislation directly addressing the problems associated with obtaining information from the executive branch. (See S. 2170, “The Congressional Right to Information Act”). This exception in the statute 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.


98 See CRS Oversight Manual supra note 67.

99 Id.


101 The OLC opinions conceded such disputes created federal question jurisdiction under 28 U.S.C. § 1331. See OLC Opinions supra at note 84.


104 See United States v. AT&T, 551 F.2d 384, 392 (D.C. Cir. 1976) (rejecting the Executive’s claim that its assertion of privilege with respect to national security information being sought by a congressional committee was absolute and could not be adjudicated by a court).

105 Micro, 58 F. Supp. 2d at 99. For an in-depth discussion of the implications and importance of the court’s justiciability rulings, see CRS Contempt Report, supra note 69.


107 House Rule XI(2)(h)(2).

108 Senate Rule XXVI(7)(a)(2) allows its committees to set a quorum requirement at less than the normal one-third for taking sworn testimony. Almost all Senate committees have set the quorum requirement at one member.


110 See United States v. Rumely, 345 U.S. 41 (1953); see also United States v. Patterson, 206 F.2d 433 (D.C. Cir. 1953).


112 Resolutions are generally used to establish select or special committees and to delineate their authority and jurisdiction. See Deschler’s Precedents, supra note 80, ch. 17, § 6; see also, e.g., S. Res. 23, 100th Cong. (Iran-Contra); S. Res. 495, 96th Cong. (Billy Carter/Libya); H. Res. 12, 100th Cong. (Iran-Contra).

113 This mode is the most common today. Both the House and the Senate authorize standing committees to initiate investigations within their jurisdiction, and permit such committees and their subcommittees to issue subpoenas. See House Rules Manual, H.R. Doc. No. 108-241, 108th Cong. 2d Sess., Rule XI , cl. 1 (b) and cl. 2 (m) (2005); Senate Manual, S. Doc. No. 98-1, 98th Cong., 2d Sess., Rule XXVI, cl. 1 (1984).

114 Gojack v. United States, 384 U.S. 702, 706 (1966). The case involved a rule of the former House Committee on Un-American Activities, which stated that “no major investigations shall be initiated without the approval of a majority of the Committee.” The court reversed the contempt conviction in Gojack because the subcommittee’s investigation, which resulted in the contempt citation, had not been approved by the committee as its rules required.

115 A leading study of Senate committee jurisdiction noted that “oversight jurisdiction necessarily flows from specific legislative enactments, but it also emanates from broader and more vaguely defined jurisdiction which committees may exercise in particular subject matter areas.” First Staff Report to the Temporary Select Committee to Study the Senate Committee System, 94th Cong., 2d Sess., 104 (1976); see also United States v. Kamin, 548 F. Supp. 791, 801 (D. Mass. 1986) (providing a judicial application of oversight jurisdiction in the investigatory context).

116 See discussion, supra, at Chapter II.B.1.d.

117 See House Permanent Select Committee on Intelligence, Rule 9.


119 Senate rules are comparable. See Senate Standing Rule XXVI, secs. 1 and 8(a).

120 See, e.g., Senate Banking Committee, Rule 2 (concurrence); House Committee on Resources, Rule 7 (consultation).


122 See, e.g., Ashland Oil v. FTC, 348 F.2d 977, 977–81 (D.C. Cir. 1965).


124 877 F.2d at 301.


126 United States v. Reinecke, 624 F.2d 435 (D.C. Cir. 1975) (failure to publish committee rule setting one senator as a quorum for taking hearing testimony held a sufficient ground to reverse a perjury conviction).


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

129 Senate Rule XXVI(7)(a)(1); House Rule XI(2)(m)(3).

130 House Rule XI(2)(K)(3).

131 Many Senate committees have adopted a similar rule.
In contrast, the deliberative process privilege does not protect documents that simply state or explain a decision the government has already made or censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt.”

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

See, e.g., Senate Aging Committee Rule V. 8; Senate Permanent Subcommittee on Investigations, Rule 7.


See discussion in Chapter IV (Constitutional Privileges) and Chapter V (Common Law Privileges).


House Rule XI(2)(m)(1); Standing Senate Rule XXVI (1).


Senate Select Committee, 498 F.2d 725; Miers, 558 F. Supp. 2d 53.


Judicial Watch, 365 F.3d 1108.

Id. at 720 (D.C. Cir. 1997).

365 F.3d 1108 (D.C. Cir. 2004).


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

Id. at 745, 752. See also id. at 753 (“...these communications nonetheless are intimately connected to his presidential decision-making”). The Espy court’s standard is consistent with the showing required by United States v. Nixon, though somewhat more specific. It is inconsistent with the standard enunciated by Senate Select Committee v. Nixon, decided several months before United States v. Nixon. There the appeals panel held that the committee, which sought five tape recordings of presidential conversations relating to the Watergate break in, had not met its burden of showing that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee’s function.” 498 F.2d at 730–31. It reasoned that since the House impeachment committee already had the tapes, “the Select Committee’s immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative.” Id. at 732. The court did not feel that the materials were “critical to the performance of [its] legislative functions” and that “no specific legislative decision ... cannot responsibly be made without access to the materials ...”. Id. at 733. The court’s statement that the Watergate Committee’s need for the tapes was “merely cumulative” has since been utilized by the Executive as the basis for arguing that Congress’ need for executive information is less compelling when a committee’s function is oversight rather than when it is considering legislative proposals. See CRS Report RL31590, Presidential Executive Privilege: History, Law, Practice and Recent Developments, by Morton Rosenberg. The appeals court makes it clear, however, that its ruling is limited to the unique nature of the case’s factual and historic context: the committee was solely an investigative and reporting body with no legislative or impeachment authority, transcripts of the tapes had been publicly released, and the House impeachment committee already had copies of the tapes. The court concluded that “the need demonstrated by the Select Committee in the particular circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to permit a judicial judgment that the President is required to comply with the committee’s subpoena.” In re Sealed Case (Espy), 121 F.3d at 733.

In re Sealed Case (Espy), 121 F.3d at 754. See also id. at 757.

In contrast, the deliberative process privilege does not protect documents that simply state or explain a decision the government has already made or material that is purely factual, unless the material is inextricably intertwined with the deliberative portions of the materials so that disclosure would effectively reveal the deliberations. In re Sealed Case (Espy), 121 F.3d at 737.

154 Id. at 745.

155 Id. at 732.

156 Id.

157 Id.

158 Id. (footnote omitted).

159 Id. at 732.

160 Id. at 752–53. The reference the court uses to illustrate the latter category is the President’s Article II duty “to take care that the laws are faithfully executed,” a constitutional direction that the courts have consistently held not to be a source of presidential power but rather an obligation on the President to see to it that the will of Congress is carried out by the executive bureaucracy. See, e.g., Kendall v. United States ex rel. Stokes, 37 U.S. 524, 612–13 (1838); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); National Treasury Employees Union v. Nixon, 492 F.2d 87, 604 (D.C. Cir. 1974).

161 365 F.3d 1108 (D.C. Cir. 2004). The panel split 2-1, with Judge Rogers writing for the majority and Judge Randolph dissenting.
Relying on both Eastland v. U.S. Servicemen’s Fund and United States v. Nixon, the court concluded that while generally congressional subpoena power cannot be interfered with by the courts, the “Eastland immunity is not absolute in the context of a conflicting constitutional interest by a coordinate branch of the government.” United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976).

Id. at 392.


See The Senate Select Committee on Intelligence, 104d Cong., Report on the Legislative Oversight of Intelligence Activities: The U.S. Experience, 4-19 (Comm. Print, 1994). Senate Standing Order 79.13, secs. (c) and (d) contains the same language denying the jurisdictional exclusivity of the Senate Select Committee on Intelligence.

Department of the Navy v. Egan, 484 U.S. 518, 527 (1988). Egan involved a question of statutory construction: whether the denial of a security clearance to a naval employee was subject to review by the Merit Systems Protection Board. It was not a dispute between Congress and the Executive over access to intelligence information. DOJ has relied upon it as the only case in support of its presidential exclusivity contention. Its use has been critiqued by the majority opinion in the very decision Jefferson was protesting and this Court has subsequently reaffirmed that holding.

Jefferson. The Chief Justice explained that “the obligation [to comply with a subpoena] is general; and it would seem that no person could claim exemption from [it].” Id. at 34. “The guard” that protects the President “from vexatious and unnecessary subpoenas,” in Chief Justice Marshall’s view, “is … the conduct of the court after these subpoenas have issued; not any circumstance which is to precede them being issued.” Id. Any claim that compliance with a subpoena would jeopardize national security or privileged presidential information “will have its due consideration on the return of the subpoena,” Marshall noted. Id. at 37.

Miers, 538 F. Supp. 2d at 72. See also Clinton v. Jones, 520 U.S. 681, 695 n. 23 (1997) (“[T]he prerogative [President] Jefferson claimed in Burr was denied him by the Chief Justice in the very decision Jefferson was protesting and this Court has subsequently reaffirmed that holding”).


Id. at 949–51.

Id. at 941–44.


See letter from Jack L. Goldman, III, Assistant Attorney General, OLC, to the Honorable Alex M. Azar II, General Counsel, Department of Health and Human Services (May 21, 2004).


Id.

The phrase “read into” appears to generally refer to the selective granting of access to the most sensitive information. In these situations, it is determined that a person with the appropriate security clearance has a “need to know” and has gone through proper procedures and has signed the related paperwork for access to such material. Not everyone with such clearance may be “read into” specific programs; rather, there may be a finite number of people within the larger world of those with appropriate clearance who are “read into” a given program.

Relaying on both Eastland v. U.S. Servicemen’s Fund and United States v. Nixon, the court concluded that while generally congressional subpoena power cannot be interfered with by the courts, the “Eastland immunity is not absolute in the context of a conflicting constitutional interest by a coordinate branch of the government.” United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976).

Id. at 392.

Endnotes
However, the Justice Department may waive the notice requirement. 18 U.S.C. § 6005(a) (2000).

Although there is no case law on point, it seems unlikely that any claim of privilege by said Daniel Schorr or Aaron Latham to refuse to answer questions put to them by counsel of the [Ethics Committee] in a public session on September 15, 1976, under said subpoenas would be recognized as a valid claim of constitutionally-protected speech, press or association and petition rights.


201 See United States v. White, 323 U.S. 694 (1944).

202 Bellis, 417 U.S. at 90; see also Rogers v. United States, 340 U.S. 367 (1951) (Communist Party).


206 Despite the absence of any court case on point, it seems unlikely that Miranda warnings are required. That requirement flows from judicial concern as to the validity of confessions evoked in an environment of a police station, isolated from public scrutiny, with the possible threat of physical and prosecutorial jeopardy; an environment clearly distinguishable from a congressional context. See Miranda v. Arizona, 384 U.S. 436 (1966).


208 Emspak v. United States, 349 U.S. 190 (1955); see also Leading Cases, infra note 223 at 63.


212 The constitutionality of granting a witness only use immunity rather than transactional immunity was upheld in Kastigar v. United States, 406 U.S. 444 (1972).


214 However, the Justice Department may waive the notice requirement. Application of the Senate Permanent Subcommittee on Investigations, 655 F.2d 1232, 1236 (D.C. Cir. 1981), cert. denied, 454 U.S. 1084 (1981).

215 Id. at 1237.

216 See In re McElroth, 248 F.2d 612 (D.C. Cir. 1957) (en banc).

217 Application of the U.S. Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973). In dicta, however, the court referred to the legislative history of the statutory procedure, which suggests that although a court lacks power to review the advisability of granting immunity, a court may 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. See id. at 1278–79.


220 Id.

221 Watkins, 344 U.S. at 198. A balancing test was also used in Branzburg v. Hayes, which involved the issue of the claimed privilege of newsmen not to respond to demands of a grand jury for information. See 408 U.S. 665 (1972). 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; see also Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (applying the compelling interest test in a legislative investigation).

222 See, e.g., 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); see also 4 Deschler’s Precedents of the U.S. House of Representatives, ch. 11, § 10, n. 15 and accompanying text.

223 Leading Cases on Congressional Investigative Power, 42 (Comm. Print 1976) (hereinafter Leading Cases); James Hamilton, The Power to Probe: A Study of Congressional Investigations, 234 (1977). Although it was not in the criminal contempt context, one court of appeals has upheld a witness’ First Amendment claim. In Stammer v. Mills, the Seventh Circuit Court of Appeals 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. See 417 F.2d at 745. However, in Eastland v. U.S. Servicemen’s Fund, the Supreme Court 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. 421 U.S. 491 (1975); see also United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).


225 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.


227 Id. at 38–40, 42–43. In addition to releasing Schorr and the three other media persons from their obligations under the Ethics Committee’s subpoenas, it passed a motion stating that “in taking such action … the committee makes no finding and establishes no precedent regarding the validity of any claim of privilege by said Daniel Schorr or Aaron Latham to refuse to answer questions put to them by counsel of the [Ethics Committee] in public session on September 15, 1976, under said subpoenas ….” Id. at 39.

228 Id. at 47–48 (additional views of Representatives Spence, Teague, Hutchinson, and Flynn).
The courts have recognized that the dual responsibilities of in-house counsel may overlap significantly and the purpose of various communications "Acting as a lawyer encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give

The decision of the three-judge panel in the civil case was vacated. On rehearing by the full District of Columbia Circuit, five judges were of the

A congressional subpoena may not be used in a mere "fishing expedition." [88]

The outtakes were portions of the CBS film clips that were not actually broadcast. The subcommittee wanted to compare the outtakes with the tape

Endnotes

230 The outtakes were portions of the CBS film clips that were not actually broadcast. The subcommittee wanted to compare the outtakes with the tape of the broadcast to determine if improper editing techniques had been used.

231 H. Rept. 92-349, 92d Cong., 1st Sess. (1971). The legal argument of CBS was based in part on the claim that Congress could not constitutionally legislate on the subject of editing techniques and, therefore, the subcommittee lacked a valid legislative purpose for the investigation. Id. at 9.


233 Id. at 24731–32.


239 A congressional subpoena may not be used in a mere "fishing expedition." [88]

240 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 the [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. 317 (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.

241 McPhaul, 364 U.S. at 382.

242 Id. (quoting United States v. Bryan, 393 U.S. 323, 331 (1959)).

243 Id. at 378.


245 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 the [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. 317 (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.

246 The decision of the three-judge panel in the civil case was vacated. 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 not 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. See McAdams v. McSurely, 438 U.S. 189 (1978). Jury verdicts were eventually returned against the Senate defendants, but were reversed in part on appeal. See 773 F.2d 88 (D.C. Cir. 1984), cert. denied, 475 U.S. 1005 (1986).


251 United States v. White, 970 F.2d 328, 334 (7th Cir. 1992) ("A blanket claim of privilege that does not specify what information is protected will not suffice.").


253 In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) (rejecting applicability of common interest doctrine to communications at a meeting with White House Counsel's Office attorneys and private attorneys for the First Lady).

254 "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." Zenith Radio Corp. v. Radio Corp. Of America, 121 F. Supp. 792, 794 (D. Del. 1954) (emphasis added).

255 The courts have recognized that the dual responsibilities of in-house counsel may overlap significantly and the purpose of various communications with others may begin to blur. Thus, courts have closely scrutinized communications to and from in-house counsel and held that they may be sheltered by the attorney-client privilege "only upon a clear showing that [in-house counsel] gave [advice] in a professional legal capacity." 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. Colson v. United States, 306 F.2d 635, 636, 638 (2d Cir. 1963); United States v. Teller, 235 F.2d 441 (2d Cir. 1956); J.P. Foley & Co., Inc. v. Vanderbilt, 65 F.R.D. 523, 526–27 (S.D.N.Y. 1974). Indeed, proper invocation of the privilege may be predicated on revealing facts tending to establish the existence of an attorney-client relation. See, e.g., In re John Doe, Esq., 603 F. Supp. 1164, 1167
Under D.C. Rule of Professional Conduct 1.6(e)(2)(A), a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. A direct suit to block a committee from enforcing a subpoena was foreclosed by the Supreme Court's decision in Opinion No. 288, “Compliance With Subpoena from Congressional Committee to Produce Lawyers’ Files Containing Client Confidences or that the subcommittee agreed to the proposal. Proceedings Against Franklin L. Haney), H. Comm. On Commerce, 105th Cong., 2nd sess. 48–50 (1998). The firm continued its refusal to comply With United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a congressional subpoena to provide telephone records that might compromise national security matters). United States v. Fort, 363 U.S. 420, 445 (1960) (“[O]nly infrequently have witnesses [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding”); United States v. Fort, 443 F.2d 670 (1970) (rejecting contention that the constitutional right to cross-examine witnesses applied to congressional investigations); In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997) (deliberative process privilege is a common law privilege which, when claimed by executive officials, is easily overcome, and “disappears” altogether upon the reasonable belief by an investigating body that government misconduct has occurred). See, e.g., “Contempt of Congress Against Franklin L. Haney,” H. Rept. 105-792, 105th Cong., 2nd sess. 11–16 (1998); “Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, U.S. Code, Sections 192 and 194),” H. Rept. 104-598, 104th Cong., 2nd sess. 50–54 (1996); “Refusal of William H. Kennedy, III, To Produce Notes Subpoenaed By The Special Committee to Investigate Whitewater Development Corporation and Related Matters,” S. Rept. 104-191, 104th Cong., 1st sess. 9–19 (1995); “Proceedings Against Ralph Bernstein and Joseph Bernstein,” H. Rept. 99-462, 99th Cong. 2nd sess. 13, 14 (1986); Hearings, “International Uranium Control,” Before the Subcommittee on Oversight and Proceedings Against Ralph Bernstein and Joseph Bernstein,” H. Rept. 104-598, 104th Cong., 2nd sess. 50–54 (1996); “Refusal of William H. Kennedy, III, To Produce Notes Subpoenaed By The Special Committee to Investigate Whitewater Development Corporation and Related Matters,” S. Rept. 104-191, 104th Cong., 1st sess. 9–19 (1995); “Proceedings Against Ralph Bernstein and Joseph Bernstein,” H. Rept. 99-462, 99th Cong. 2nd sess. 13, 14 (1986); Hearings, “International Uranium Control,” Before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st sess. 60, 123 (1977). The Supreme Court has recognized that “only infrequently have witnesses […] in congressional hearings” been afforded the procedural rights normally associated with an adjudicative proceeding.” Hannah v. License, 363 U.S. 420, 445 (1960); See also United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971) (rejecting the contention that the constitutional right to cross-examine witnesses applied to a congressional investigation); In the Matter of President Life and Accident Co., E.D. Tenn., S.D., Civ-1-90-219, June 13, 1990 (per Edgar, J.) (noting that the court’s earlier ruling on an attorney-client privilege claim was “not of constitutional dimensions, and is certainly not binding on the Congress of the United States”). Opinion No. 288, “Compliance With Subpoena from Congressional Committee to Produce Lawyers’ Files Containing Client Confidences or Secrets,” Legal Ethics Committee, District of Columbia Bar, February 16, 1999. The occasion for the ruling arose because of an investigation of a subcommittee of the House Commerce Committee into the circumstances surrounding the planned relocation of the Federal Communications Commission to the Portals office complex. See H. Rept. 105-792, supra note 260, at 1–6, 7–8, 15–16. During the course of the inquiry, the subcommittee sought certain documents from the Portals’ developer, Mr. Franklin L. Haney. Mr. Haney’s refusal to comply resulted in subpoenas to those documents to him and the law firm representing him during the relocation efforts, Haney and the law firm asserted attorney-client privilege in their continued refusal to comply. The law firm sought an opinion from the D.C.’s Bar Ethics Committee as to its obligations in the face of the subpoena and a possible contempt citation, but the Bar Committee notified the firm that the question was novel and that no advice could be given until the matter was considered in a plenary session of the committee. See “Meeting on Portals Investigation (Authorization of Subpoenas: Receipt of Subpoenaed Documents and Consideration of Objections; and Contempt of Congressional Proceedings Against Franklin L. Haney),” H. Comm. On Commerce, 105th Cong., 2nd sess. 48–50 (1998). The firm continued its refusal to comply until the subcommittee cited it for contempt, at which time the firm proposed to turn over the documents if the contempt citation was withdrawn. The subcommittee agreed to the proposal. Id. at 101–05. A direct suit to block a committee from enforcing a subpoena was foreclosed by the Supreme Court’s decision in Eastland v. U.S. Servicemen Fund, 421 U.S. 491, 101 S.Ct. (1993), and that ruling does not appear to foreclose an action against a “third party,” such as the client’s attorney, to test the validity of the subpoena or the power of a committee to refuse to recognize the privilege. See, e.g., United States v. AT&T, 667 F.2d 121 (D.C. Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a congressional subpoena to provide telephone records that might compromise national security matters). Under D.C. Rule of Professional Conduct 1.6(d)(2)(A), a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. rules or when “required by law or court order.”
These reasons were most famously articulated by then Attorney General Robert Jackson in 1941, who stated that all would “seriously prejudice law enforcement.”

The “Take Care” Clause of the Constitution states that the President “shall take Care that the Laws be faithfully executed.” U.S. Constitution, Article II, Section 3.

Congress may intervene in an agency rulemaking proceeding at any point. It is not limited to withdrawing an agency’s authority or negating a particular rule by law after the fact. Where agency rulemaking is akin to the legislative process, the courts have held that “the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall.” Sierra Club v. Castle, 657 F.2d 298, 400–401 (D. C. Cir. 1981). It is, therefore, “entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking. . . . Administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources.” Id. at 409–10. See also Assoc. of National Advertisers, Inc. v. FTC, 657 F.2d 1151 (D.C. Cir.1979), cert. denied, 447 U.S. 921 (1980).


Endnotes

324 See Letter dated May 21, 2004 to Hon. Alex M. Azar, II, General Counsel, Department of Health and Human Services from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Department of Justice (accessible at http://www.usdoj.gov/olc/crsmemoresponsese.htm).

325 This broad view of presidential privilege was repeated in Attorney General Mukasey’s request to the President that he claim executive privilege with respect to a House Committee subpoena for DOJ documents in an investigation by a DOJ Special Counsel into the revelation of a CIA agent’s identity. See Letter to the President from Attorney General Mukasey, dated July 15, 2008.

326 See discussion of case law in Chapters I.B.–I.C. and I.A.


329 See, e.g., Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); United States v. Mitchell, 372 F. Supp. 1259, 1265 (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. §8 (1982).

330 199 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 for the pending indictment might have to be delayed.” 199 F.2d at 114–15. 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 Hutchison v. United States, 369 U.S. 599, 617 (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).


333 Id. at 691–92.

334 Id. at 658, 694 (citing McGrain v. Daugherty, 273 U.S. 135 (1927)).

335 9 F.3d 743 (9th Cir. 1993).

336 Id. at 731 (emphasis in original). See also Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) (holding that qui tam relators meet Article III standing requirements).

337 The recent district court ruling in House Committee on the Judiciary v. Miers, in rejecting a claim of lack of standing of the House Judiciary Committee to challenge an Executive assertion of absolute immunity from compulsory congressional process, reiterated that prior Supreme Court rulings in McGrain v. Daugherty, Eastland v. U.S. Servicemen’s Fund, and Barenblatt v. United States, among others, had firmly established that Congress’ power and authority to seek and compel information from Executive agencies in criminal and civil enforcement contexts is constitutionally based. In denying the claim by the Executive that a jurisdictional committee charged with oversight of the Justice Department could not permissibly employ its investigatory resources to determine the reasons for the forced resignations and replacement of nine U.S. Attorneys, the court stated that “Given its ‘unique ability to address improper partisan influence in the prosecutorial process … [n]o other institution will fill the vacuum if Congress is unable to investigate and respond to this evil.’ … With the legitimacy of its investigation established, there is no need to belabor the argument concerning informational standing—non-compliance with a duly issued subpoena is a quintessential informational injury … Thus, the Committee did file this suit to vindicate both its right to the information that is the subject of the subpoena and its institutional prerogative to compel compliance with its subpoenas. A harm to either interest satisfies the injury-in-fact standing requirement.” 538 F. Supp. 2d at 78. The court also remarked: “The exercise of Congress’s investigative ‘power,’ which the Executive concedes that Congress has, creates rights. For instance, by utilizing its power to issue subpoenas and proceed with an investigation via compulsory process, Congress creates a legal right to the responsive information that those subpoenas will yield. To hold that Congress’s ability to enforce its subpoenas in federal court turns on whether its investigatory function and accompanying authority to utilize subpoenas are properly labeled as ‘powers’ or ‘rights’ would elevate form over substance. The Court declines to do so.” Id. at 91. (Emphasis in original).

338 121 F.3d 279.

339 365 F.3d 1108.

340 Id. at 1123.

341 It may be noted that the recent district court ruling in House Committee on the Judiciary v. Miers, however, did involve a direct confrontation between a congressional committee and the Executive over demands for testimony and documents from present and past senior advisers to the President, and that the court’s opinion approvingly cited the Espy ruling five times with respect to doctrinal trends and interpretations concerning the presidential communications privilege. See Miers, 538 F. Supp. 2d at 73, 74 n. 15, 103 n. 35, and 105 n. 37. Arguably, these references reinforce the notion that Espy is the controlling law in the District of Columbia Circuit with respect to the applicability of the privilege and its nature and scope.

342 Proprietary information is commonly understood to encompass both trade secrets and confidential business information.

343 See, e.g., 1 U.S.C. § 112(b) 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 on committees “specifically authorized by a resolution of the House or Senate”; 10 U.S.C. § 1982, 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 national security”; and under 50 U.S.C. § 403j(b), the Congress’ ability to obtain information about the CIA, particularly with regard to expenditures, is very limited.


310 See, e.g., Owens-Corning Fiberglas Corp., 626 F.2d at 970; see also Exxon Corp., 389 F.2d at 889; Ashland Oil, 548 F.2d at 979; Moon v. CIA, 514 F. Supp. 836, 840–41 (S.D.N.Y. 1981).
311 See, e.g., Owens-Corning Fiberglas Corp., 626 F.2d at 974; see also Exxon Corp., 389 F.2d at 889; Ashland Oil, 548 F.2d at 979; Moon v. CIA, 514 F. Supp. at 849–51.
312 See Doe v. McMillen, 412 U.S. 306 (1973); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491; see also Owens-Corning Fiberglas Corp., 626 F.2d at 970.
314 Murphy v. Dept. of the Army, 613 F.2d 151, 1155–59 (D.C. Cir. 1979); Florida House of Representatives v. U.S. Dept. of Commerce, 961 F.2d 941, 946 (11th Cir. 1992). See also FTC v. Owens-Corning Fiberglas Co., 626 F.2d 966, 970 (D.C. Cir. 1980); Ashland Oil v. FTC, 548 F.2d 977, 979, 980–81 (D.C. Cir. 1976) (Release of confidential information to a congressional requester is not deemed to be disclosure of public documents and the legal obligation to disclosure surrendered requested documents arises from the official request).
315 235 F.3d 598 (D.C. Cir. 2001).
316 Id. at 604.
317 See, e.g., United States v. de la Jara, 973 F.2d 746, 749–50 (9th Cir. 1992) (“In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered,” citing Transamerica Computer, 573 F.2d 646, 652 (9th Cir. 1978)); United States v. Zolin, 809 F.2d 1441, 1455 (9th Cir. 1987), aff'd in part, vacated in part, 491 U.S. 554 (1989) (“When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts ‘reasonably designed’ to protect and preserve the privilege. See Transamerica Computer, 57 F.2d at 610.”); Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1417, 1427 n. 14 (3d Cir. 1991) (“We consider Westinghouse's disclosure to the DOJ to be voluntary even though it was prompted by a grand jury subpoena. Although Westinghouse originally moved to quash the subpoena, it later withdrew the motion and produced the documents pursuant to the confidentiality agreement. Had Westinghouse continued to object to the subpoena and produced the documents only after being ordered to do so, we could not consider its disclosure of those documents to be voluntary.”) (emphasis added); John v. Bank of Boulder (Un re Melco Business Machines Co.), 167 B.R. 631 (D. Colo. 1994) (“Production of documents under a grand jury subpoena does not automatically vitiates the attorney-client privilege, much less in an unrelated civil proceeding brought by a non-government entity. This is especially true in a case such as this, where the record demonstrates that the Bank has consistently sought to protect its privilege.”).
318 Transamerica Computer Corp. v. IBM, 573 F.2d 646, 651 (9th Cir. 1978). Similarly, another court found that a client's voluntary production of privileged documents did not effect a waiver because it was done at the encouragement of the presiding judge. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1145, 1160 (S.D.C. 1974) (finding no waiver “where the voluntary waiver of some communications was made upon the suggestion of the court during the course of the in camera proceeding.”). Moreover, a number of federal appeals and district courts similarly have held that disclosures to congressional committees do not waive claims of privilege elsewhere. See Florida House of Representatives v. Dept. of Commerce, 961 F.2d 941, 946 (11th Cir. 1992); Murphy v. Department of the Army, 613 F.2d 1151, 1155 (D.C. Cir. 1979); In re Sunrise Securities Litigation, 109 B.R. 678 (D.C. E.D. Pa. 1990); In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel, 1987 U.S. Dist. Lexis 10912 (N.D. III. E.D. 1987).
320 U.S. Const. Art. I, § 6, cl. (providing that “for any Speech or Debate in either House, [Members] shall not be questioned in any other place”).
324 See Walker v. Jones, 753 F.2d 927, 929 (holding that activities integral to the legislative process may not be examined, but peripheral activities not closely connected to the business of legislating do not get protection under the clause).
327 See 5 U.S.C. § 552a(b).
328 Derive v. United States, 202 F.3d 547, 551 (2d Cir. 2000).
329 Letter to David A. Aufenhausen, Esq., General Counsel, Department of the Treasury, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, dated December 1, 2000.
331 Fed. R. Crim. Pro. 6 (e)(2).
333 Fed. R. Crim. Pro. 6(e)(2).
On appeal to the Ninth Circuit, the case was argued together with a separate Freedom of Information Act suit for the same census data brought by In re Harristburg Grand Jury 83-2, 618 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).


In re Beef Industry Antitrust Litigation, 757 F.2d 1380, 1382–86 (10th Cir. 1985).


2 U.S.C. §§ 191, 194, or if no subpoena has been issued, under each House’s inherent contempt power.


Rocky Flats Hearings, supra note 346 at 1–3, 82–86, 143–51.

United States v. Mitchell, 877 F.2d 194 (4th Cir. 1989); United States v. Poinderexter, 725 F. Supp. 13 (D.D.C. 1989) (a committee inquiry, however, need not be formally authorized, and may be a preliminary inquiry).

Whenever a hearing is conducted on any measure or matter, the minority may, upon written request of a majority of the minority members to the chair before the completion of the hearing, call witnesses selected by the minority to testify during at least one day of the hearing (House Rule XI.2(j)(1)). Minority members are authorized to vote to issue subpoenas (unless the committee vests subpoena issuance authority in the chair alone) and to vote to enforce subpoenas. Minority members are allowed to participate in actions requiring quorums and to go into closed sessions, and minority members may file supplemental, minority, or additional views for inclusion in the committee report (House Rule XI.2(j)(1)).

Ashland Oil v. FTC, 548 F.2d 977, 979–80 (D.C. Cir. 1976), affirming 499 F. Supp. 297 (D.C. Cir. 1980). See also Exxon v. Federal Trade Commission, 898 F.2d 982, 952–93 (D.C. Cir. 1988) (acknowledging that the “principle is important that disclosure of information can only be compelled by authorization of Congress, its committees or subcommittees, not solely by individual members . . .”).

In re Beef Industry Antitrust Litigation, 898 F.2d 786, 791 (5th Cir. 1989) (refusing to permit two congressmen from intervening in private litigation because they “failed to obtain a House Resolution or any other similar authority before they sought to intervene in the beef industry case”).

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order on January 9, 2003, striking its reversal of the district court’s ruling, but leaving in effect its order to vacate and dismiss, thereby leaving open the door for another round of litigation. \textit{Waxman v. Evans}, No. 02-55823 (9th Cir. Dec. 6, 2002).


375 At least seven members of the House Oversight and Government Reform Committee or five members of the Senate Homeland Security and Governmental Affairs Committee must make an information request.

376 The ruling in \textit{Miers}, 558 F. Supp. 2d 53, appears to make it clear that, while a refusal by an agency to comply with a subpoena by a jurisdictional committee for information provides a cognizable institutional injury as a constitutionally based implied cause of action, it requires not only the issuance of compulsory process by a committee but also authorization by the full House to seek civil enforcement of the demand. Section 2934 suits lack these necessary constitutional components.


378 Deschler’s Precedents of the House of Representatives, ch. 24, sec. 8.

379 See Fisher, supra note 191, at 150–59, recounting successful utilization of such resolutions.


382 Senate Rules XIX and XXII.

383 See Schneider, supra note 381, at 8–11.

384 For example, Senate Environment and Public Works Committee Rule 2(a) requires a quorum of six members, with at least two minority members, to vote for the issuance of a subpoena. During the 110th Congress, this requirement stymied investigations of the Environmental Protection Agency.

385 W. Wilson, Congressional Government, 195 (1885).

386 Id. at 227.

387 Id. at 303.


389 Damaging Disarray, supra note 9.

390 Damaging Disarray, supra note 9 at 41–56.

391 This move toward centralization came at the same time that control over nearly every other area of criminal prosecution was being decentralized. These conflicts were found to have affected field morale and undermined the effectiveness of enforcement efforts. By the time the probe ended, the investigation had spurred important changes in DOJ’s environmental criminal enforcement program. In addition to ordering a return of prosecutorial discretion to the U.S. Attorney’s Offices, the Department also established an entirely new management team to head ECS. Damaging Disarray, supra note 9 at 4–14, 64.

392 Rep. Brad Miller introduced such legislation in the 111th Congress. See H.R. 277, 111th Cong., 1st Sess. (2009). It would provide for appointment of an independent counsel by the Chief Judge of the U.S. District Court for the district in which the certification was made if the Attorney General or the U.S. Attorney refuses to prosecute or if no indictment has been returned within 30 days after the date of receipt of a House or Senate certification of a contempt citation.

393 See Grabow, supra note 388, at 29–30.

394 The Justice Department on numerous occasions has suggested during contentious inquiries that raised possible executive privilege issues over subpoenaed documents or witnesses, that such disputes be resolved by civil enforcement proceedings in federal court. Until \textit{Miers} such importunings were uniformly rejected. \textit{See}, for example, H. Rept. No. 104-198, 104th Cong., 2d Sess. 65 (1996) (additional views of Hon. William F. Clinger, Jr.) (stating that “I am astonished at hearing this recommendation by a Democratic President when the contemnor is a Democrat after knowing that the concept of a civil remedy has been so resoundingly rejected by previous Democrat Congresses when the contemnor was a Republican.”). Such suggestions may traced back to the 1984 and 1986 Office of Legal Counsel opinions. See 8 Op. Off. Legal Counsel 101, 139 note 40 (1984) (stating that “[t]he use of a criminal contempt [against an executive official] is especially inappropriate … because Congress has a clearly available alternative of civil enforcement proceedings’’); 10 Op. Off. Legal Counsel 68, 87–89 (1986) (suggesting that “the courts may be willing to entertain a civil suit brought by the House to avoid any question about the possible applicability of the criminal contempt provisions [2 U.S.C.] secs. 192, 194.”).
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The Constitution Project
1200 18th Street, NW Suite 1000
Washington, DC 20036

(202) 580-6920 (tel)
(202) 580-6929 (fax)

info@constitutionproject.org
www.constitutionproject.org