



5. The Breadth of Congress's Authority to Access Information in Our Scheme of Separated Powers

Overview

Congress's 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, the president, subordinate officials, 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 the president's constitutionally based privilege to protect the confidentiality of documents or other information that reflects presidential decision-making and deliberations. This presidential 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 protecting the confidentiality of national security or foreign affairs information. But self-imposed congressional constraints on information access in these sensitive areas have raised serious institutional and practical concerns as to the current effectiveness of oversight of executive actions in these areas.

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 by Congress's 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 it is designed to enable the president to receive candid advice from advisers, as well as to safeguard information the disclosure of which 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 privilege 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 must have seen or 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 executive officials, 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 regarding the 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.¹ Few such inter-branch disputes over access to information have reached the courts. The vast majority of such disputes are usually resolved through political negotiation.² 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.³ It then became judicially established as necessary to protect the president's status in our constitutional scheme of separated powers.

a. Nixon and Post-Watergate Rulings

The *Nixon* and post-Watergate cases⁴ established the broad contours of the presidential communications privilege. Under those precedents, the president can invoke the privilege, which is constitutionally rooted, 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

1. See Archibald Cox, *Executive Privilege*, 122 U. OF PA. L. REV. 1383, 1395–1405 (1979). See generally, Mark J. Rozell, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWERS, SECRECY, AND ACCOUNTABILITY (2nd Edition, Revised 2002); Mark J. Rozell, *Executive Privilege and Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069 (1999).

2. See Neil Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing*, 48 ADM. L. REV. 109 (1996).

3. *United States v. Nixon*, 418 U.S. 683 (1974).

4. There have been eleven court decisions involving claims of presidential executive privilege. *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983); *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998); *Judicial Watch v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004); *Loving v. Department of Defense*, 550 F.3d 32 (D.C. Cir. 2008); *House Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). Four have involved disputes between Congress and the executive (*Senate Select Committee, U.S. v. House of Representatives, AT&T and Miers*), two of which resulted in substantive rulings that resolved the disputes “on the merits” (*Select Committee and Miers*).

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.

Nixon and related post-Watergate rulings left important gaps in the law of presidential privilege. The significant issues left open included:

- Does the president need 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 the latter, 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 Court of Appeals for the D.C. Circuit has addressed these issues in *In re Sealed Case (Espy)*,⁵ *Judicial Watch v. Department of Justice*,⁶ and *Loving v. Department of Defense*.⁷ A district court decision in *House Committee on the Judiciary v. Miers*⁸ provided further guidance on the scope of the privilege. Taken together, these decisions narrowed and clarified the limits of the privilege and drastically altered the legal playing field in resolving such disputes.

b. 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. That office prepared a report for the president, which was publicly released in October 1994. The president never saw any of the documents underlying or supporting 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.

i. 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 distinguished between the "presidential communications privilege" and the "deliberative process privilege." Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decision-making. But the deliberative process privilege (discussed in detail in Chapter 6) 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."⁹ On the other hand, the court explained, the presidential communications privilege "is rooted in constitutional separation

5. 121 F.3d 729 (D.C. Cir. 1997).

6. 365 F.3d 1108 (D.C. Cir. 2004).

7. 550 F.3d 32 (D.C. Cir. 2008).

8. 558 F. Supp. 2d 53 (D.D.C. 2008).

9. 121 F.3d at 745-46. *See also id.* at 737-38 ("[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.'").

of powers principles and the President's unique constitutional role" and applies only to "direct decision-making by the President."¹⁰ 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."¹¹ The presidential communications privilege applies to all documents in their entirety¹² and covers final and post-decisional materials as well as pre-deliberative ones.¹³

ii. The President Need Not Have Seen or Known of the Documents in Question, but They Must Have Been Received by a Close Adviser; Agency Head Review is Not Sufficient.

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."¹⁴ 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."¹⁵

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

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 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.¹⁶

iii. The Privilege Applies Only to the "Quintessential and Non-Delegable" Powers of the President

The presidential communications privilege is limited to "direct decision-making by the President" and decisions regarding

10. *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*, a court of appeals case decided several months before *United States v. Nixon*. There the 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" because "no specific legislative decision" can "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's need for executive information is less compelling when a committee's function is oversight rather than when it is considering legislative proposals. *See* TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 3 n. 20 (2012). The appeals court made it clear, however, that its ruling was limited to the unique nature of the case's factual and historical 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." The Supreme Court has never made a distinction between Congress's right to executive branch information to use in support of its oversight function versus its responsibility to enact, amend, and repeal laws. *Id.* at 2-5.

11. *In re Sealed Case (Espy)*, 121 F.3d at 754, 757.

12. 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.

13. *Id.* at 745.

14. *Id.* at 752.

15. *Id.*

16. *Id.* (footnote omitted).

“quintessential and non-delegable Presidential power.”¹⁷ 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.”¹⁸

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 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 would not be covered. Of course, the president’s role in supervising and coordinating decision-making in the executive branch remains unimpeded. But the president’s communications in furtherance of such activities would not be protected from disclosure by this constitutional privilege.

c. 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*.¹⁹ *Judicial Watch* involved requests for documents concerning pardon applications and grants reviewed by the Justice Department for President Clinton.²⁰ 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.²¹ However, the appeals court reversed on the grounds that the review did not involve the president or close White House advisers.

i. 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 *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.”²² The court emphasized that the “solicited and received” limitation from the *Espy* case “is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far.”²³ 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:

17. *Id.* at 752.

18. *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 587, 604 (D.C. Cir. 1974).

19. 365 F.3d 1108 (D.C. Cir. 2004). The panel split 2-1, with Judge Rogers writing for the majority and Judge Randolph dissenting.

20. The president has delegated the formal process of review and recommendation of his pardon authority to the attorney general, who, in turn, has delegated it to the deputy attorney general. The deputy attorney general oversees the work of the Office of the Pardon Attorney.

21. *Judicial Watch*, 365 F.3d at 1109–12.

22. *Id.* at 1112, 1114, 1123.

23. *Id.* at 1114–15.

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.²⁴

The *Judicial Watch* decision makes it clear that cabinet department heads will not be treated as part of the president's immediate personal staff or as some unit of the Executive Office of the President.²⁵ 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.²⁶

d. Loving

In *Loving v. Department of Defense*, the D.C. Circuit affirmed the distinction between the deliberative process privilege and the presidential communications privilege that had been carefully delineated in *Espy* and *Judicial Watch*.²⁷ Loving had been court-martialed, convicted of murder, and sentenced to death. By law, the president must approve all such death sentences. Loving filed a FOIA request seeking disclosure of documents including a Defense Department memorandum containing recommendations to the president about his case and sentence. The *Loving* court held that the presidential communications privilege applies only where documents or communications "directly involve the President" or were "solicited and received" by White House advisers.²⁸ After noting the two distinct versions of the privilege,²⁹ the appeals court determined that the documents in question fell "squarely within the presidential communications privilege because they 'directly involve' the President."³⁰ The court also clarified that communications that "directly involve" the president need not actually be "solicited and received" by him or her. The mere fact that the documents were viewed by the president was sufficient to bring them within the ambit of the privilege.³¹

e. Miers

The 2008 district court ruling in *House Committee on the Judiciary v. Miers*³² 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 3,³³ the district court rejected the executive's attempts to dismiss the case, finding that the House had the right to bring the lawsuit (the committee had 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."³⁴

24. *Id.* at 1117.

25. *Id.* at 1121–22.

26. *Id.* at 1118–24. In *Judicial Watch*, the deliberative process privilege was also found insufficient and the appeals court ordered the disclosure of the 4,300 withheld documents.

27. 550 F.3d 32 (D.C. Cir. 2008).

28. *Id.* at 37.

29. *Id.* ("[T]wo executive privileges [] are relevant here: the presidential communications privilege and the deliberative process privilege.")

30. *Id.* at 39.

31. *Id.* at 40.

32. 558 F. Supp. 2d 53 (D.D.C. 2008).

33. See discussion *supra* Ch. III.

34. *Miers*, 558 F. Supp. 2d at 75, 77 (citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), and *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975)).

i. A Presidential Claim of Privilege Cannot Provide Absolute Immunity to Congressional Subpoenas

The executive 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 advisers 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 advisers do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.³⁵

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."³⁶

3. The Essential Elements of the Presidential Communications Privilege

Based upon the court decisions outlined above, the following elements are necessary to support a claim of presidential communications privilege:

- *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.
- *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.
- *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," is sought by an appropriate investigating authority, and 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.

4. Presidents are Subject to Compulsory Process: Presidential Appearances Before Judicial Tribunals and Congressional Committees

The president and his 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 in *United States v. Burr*.³⁷ 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

35. 558 F. Supp. 2d at 99.

36. *Id.* at 103.

37. 25 F. Case 30 (C.C. Va. 1803). The question before the court in *Burr* was the enforceability of Burr's subpoena for documents against President 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.

reaffirmed that proposition in *United States v. Nixon* in 1974.³⁸

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.³⁹ 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 went on national television and radio to rebut the charges made by the committee. The committee never sought to enforce the subpoena.⁴⁰

Seven sitting or former presidents have made voluntary appearances in judicial forums and before congressional committees: Presidents Abraham Lincoln (1862), Ulysses S. Grant (1875), Theodore Roosevelt (1911, 1912), Richard M. Nixon (1980), Gerald R. Ford (1975, 1988), Jimmy E. Carter (1977, 1979, 1981), and William J. Clinton (1995).⁴¹ In December 2008, then President-elect Barack Obama voluntarily appeared for an interview with a U.S. attorney conducting a grand jury investigation of the Illinois governor's alleged attempt to "sell" the appointment to fill Obama's vacated Senate seat.⁴² A Congressional Research Service report indicates that between 1973 and 2007, at least 70 senior advisers to the president who were subject to subpoenas have testified before congressional committees.⁴³

B. Presidential Claims of Constitutional Authority to Limit Congressional Access to National Security-Related Material

1. Congress's Constitutionally Based Oversight and Investigative Prerogatives Apply in Full Measure to Executive Action Regarding National Security, Intelligence, and Foreign Affairs

Under the Constitution, Congress is entitled to seek and obtain any information from any executive branch entity that it deems necessary to carry out its core responsibilities: to make laws, appropriate funds, and engage in oversight of the executive's implementation of those laws and appropriations. This authority and duty encompasses all matters related to the areas of national security, intelligence, and foreign affairs activities.⁴⁴ Presidents have asserted a unilateral presidential authority to withhold information with respect to these areas, but no court has recognized such an authority.⁴⁵ The doctrine of presidential executive privilege is qualified and has been narrowly construed when applied to intelligence concerns raised by Congress.

38. *Miers*, 558 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").

39. See RONALD D. ROTUNDA AND JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE*, (4th ed. 2007).

40. *Id.* at 949–51.

41. *Id.* at 941–44.

42. See Peter Baker, *Obama Follows Tradition Testifying for Prosecutors*, N.Y. TIMES, December 25, 2008 at A1.

43. HAROLD C. RELYEA & TODD B. TATELMAN, CONG. RESEARCH SERV., RL31351, *PRESIDENTIAL ADVISER' TESTIMONY BEFORE CONGRESSIONAL COMMITTEES: AN OVERVIEW* (2007), <http://www.fas.org/sgp/crs/misc/RL31351.pdf>.

44. See generally, Vicki Divoll, *The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information From the Executive*, 34 HARV. J. OF LAW & PUB. POL'Y 493 (2011). See also Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1061–63 (2008); FREDERICK A.O. SCHWARZ AND AZIZ Z. HUG, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 167–186 (2008). The executive's contrary stance of exclusive control over congressional access to national security and foreign affairs information is reflected in numerous opinions of the Justice Department's Office of Legal Counsel that are detailed and discussed immediately below in Section B.2. For a critical, pragmatic assessment of Congress's proper role in the oversight of intelligence community activities in light of the Senate Intelligence Committee's investigation of the CIA's detention and "enhanced interrogation" program, written from the point of view of a former director of the CIA Counterterrorism Center, see Robert L. Grenier, *From Truth and Reconciliation to Lies and Obfuscation: The Senate RDI Report*, HUFFINGTON POST, August 10, 2014.

45. In *United States v. Nixon*, the court noted in dicta that the president "does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 706. But as discussed throughout this chapter, the courts have also recognized Congress's considerable responsibility and authority regarding national security and foreign affairs.

The Supreme Court has limited exercises of presidential war powers.⁴⁶ Recently, the court emphatically rejected the long-bruited executive notion that the president is the “sole organ of the nation in its external relations”⁴⁷ with “exclusive authority to conduct diplomatic relations along with ‘the bulk of foreign-affairs powers.’”⁴⁸ The court has made it clear that the “Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs is at issue”⁴⁹ and that it does not question the substantial powers of Congress over foreign affairs in general.⁵⁰ The court stated: “[W] hether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.” As a matter of historical practice, congressional committees have investigated secret executive matters since the birth of the Republic.⁵¹ When oversight extends to matters of national security, access to documents and testimony may be constrained, under certain narrow circumstances, by constitutionally rooted prerogatives possessed and asserted by the president. But the executive’s privilege claim is still a qualified one subject to rebuttal.

a. The AT&T Case

The nature of the balancing effort between Congress and the president was illustrated by one of the few inter-branch investigations involving national security matters to have reached the courts. That case arose out of an inquiry in the 1970s by a House subcommittee into allegations that the FBI used AT&T’s resources to conduct improper domestic intelligence-gathering and wiretapping. The investigation resulted in a three-way conflict between the subcommittee, the Justice Department, and AT&T, with the subcommittee seeking to subpoena evidence from AT&T and the Justice Department seeking to forestall AT&T’s compliance. The appeals court carefully addressed and rejected the claims of absolute rights asserted by Congress and the executive branch,⁵² 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.”⁵³ As a consequence, 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 a second time.⁵⁴ Ultimately, the branches negotiated a settlement, and the case was dismissed.

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 available only after every attempt to resolve inter-branch 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.

46. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that the government may not detain a United States citizen captured as an enemy combatant indefinitely for purposes of interrogation without giving him or her an opportunity to offer evidence that he or she was not an enemy combatant); *Rasul v. Bush*, 542 U.S. 466 (2004) (rejecting government argument that foreign prisoners being held at Guantanamo Bay, Cuba, were outside of federal court jurisdiction and entitled to *habeas corpus* considerations); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), 126 S. Ct. 2749, 2759, 2800 (2006) (holding “that the military commission convened [at the President’s direction at Guantanamo Bay, Cuba] to try Hamdan lacks power to proceed because its structure and procedures violate [the Uniform Code of Military Justice].” Justice Kennedy noted that “the President has acted in a field with a history of congressional participation and regulation.”).

47. *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 135 S. Ct. 2076, 2089-90 (2015) (rejecting the *dicta* in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936)).

48. 135 S. Ct. at 2089.

49. *Id.* at 2090.

50. *Id.* at 2096.

51. See TODD GARVEY AND ALISSA M. DOLAN, CONG. RESEARCH SERV., R42811, CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920-2012 (2012) (detailing 20 sensitive congressional investigations of DOJ) (periodically updated); PAUL C. LIGHT, GOVERNMENT BY INVESTIGATION: CONGRESS, PRESIDENTS, AND THE SEARCH FOR ANSWERS, 1945-2012 (2013) (analyzing 112 investigations since 1945); ROGER A. BRUNS, DANIEL L. HOSTETTER, AND RAYMOND W. SMOCK, EDS., CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY (rev. ed. 2011) (describing 29 investigations from 1792 to 2006); FRANK J. SMIST, CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY (2d ed. 1994).

52. Relying on both *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975) and *United States v. Nixon*, 418 U.S. 683 (1973), 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).

53. *Id.* at 392.

54. *United States v. AT&T*, 567 F.2d 121, 128 (D.C. Cir. 1977).

2. The Executive Branch's Claims of Legal Authority to Withhold National Security Information from Congress

Past and present administrations have taken the position that the executive branch has exclusive control over Congress's access to information the executive considers classified for national security reasons. Through a series of opinions of the Justice Department's Office of Legal Counsel (OLC), 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.

A 1969 opinion co-authored by OLC and the State Department Legal Advisor stated that "the President has the power to withhold from the Senate information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."⁵⁵ A 1989 OLC opinion acknowledged that "[t]here is no decided case on the constitutional authority of the President to assert an absolute privilege for state secrets against a coordinate branch of government."⁵⁶ It argued, though, that dicta in related cases and the "powers and responsibilities conferred on the Executive by the Constitution" supported an absolute privilege. Moreover, OLC stated that "[t]he Executive has long asserted the right to an absolute privilege. The Congress has long acquiesced in that assertion." But the *AT&T* case demonstrates that Congress has not always acquiesced and is not required to do so.

A 1996 OLC memo advised the CIA General Counsel that federal employees did not have a legal right to reveal classified information to members of Congress without authorization from their superiors, and any statute that conferred such a right would be unconstitutional. OLC continued 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."⁵⁷ 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."⁵⁸

In a 2003 opinion, OLC wrote that "if the President finds that the information is sufficiently sensitive, that disclosure [to Congress] could harm the national security, the President's constitutional responsibilities require a construction of the relevant reporting statutes under which disclosure is not required."⁵⁹ Failure to comply with a reporting statute, unlike an invocation of privilege in response to a subpoena, would not necessarily be apparent to members of Congress.⁶⁰

In 2004, OLC reaffirmed its view that the executive branch could forbid employees from disclosing certain information to Congress. According to the 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."⁶¹ OLC opinions are themselves routinely withheld from Congress on grounds of national security, claims of privilege or

55. Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, OLC (December 8, 1969).

56. Memorandum from J. Michael Luttig, Principal Associate Deputy Attorney General, OLC, to C. Boyden Gray, Counsel to the President (December 21, 1989), https://www.justice.gov/sites/default/files/olc/pages/attachments/2014/12/30/1989-12-21_-_pdaag_luttig_-_cong_access_to_pres_communications_ocr.pdf.

57. Memorandum from Christopher H. Schroeder, Acting Assistant Attorney General, OLC, to General Counsel, CIA (November 26, 1996), <https://www.justice.gov/sites/default/files/olc/opinions/1996/11/31/op-olc-v020-p0402.pdf>.

58. *Id.*

59. Memorandum from John C. Yoo, Deputy Assistant Attorney General, OLC, to Alberto Gonzales, White House Counsel, January 27, 2003, <https://fas.org/irp/agency/doj/olc/nsi.pdf>. The 2003 memo references a still-secret November 1, 2002 OLC memo from Yoo to Gonzales regarding "Congressional Notification for Certain Special Operations." *Id.*

60. *But see* 50 U.S.C. § 3107 (National Security Act provision requiring the head of each element of the intelligence community to annually certify its full compliance with the Act's reporting provisions and provide an explanation for any departure from the Act's requirements).

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

both. After 9/11, OLC issued classified legal opinions that provided the purported legal basis for the secret presidential orders setting in motion the National Security Agency's (NSA) warrantless communications surveillance and the Central Intelligence Agency's rendition and torture programs, among others. These opinions, as well as similar opinions on the legal basis for the U.S.'s targeted killing program, were withheld from Congress for years.

3. Congressional Notification Requirements and Procedures

Congress has the constitutional authority to structure, empower, fund, and, where necessary, constrain the operations of the intelligence community, and to require the disclosure of information respecting its activities to allow assessment and evaluation of their efficacy. But Congress has accepted limitations on its own access to information. In practice, often only a limited number of intelligence committee members and congressional leadership officials receive sensitive information, and often in a manner that can result in ineffective institutional action or none at all.⁶²

a. The National Security Act of 1947

The National Security Act of 1947, as amended and codified starting at 50 U.S.C. §3001, provides the statutory framework for the U.S. intelligence community. Section 3092 of that law requires the intelligence agencies to “keep the congressional intelligence committees fully and currently informed of all intelligence activities other than a covert action ... carried out for or on behalf of, any department, agency or entity of the United States Government.”⁶³ It also requires that the intelligence community

furnish the congressional intelligence committees any information or material concerning intelligence activities (including the legal basis under which the intelligence activity is being or was conducted), other than covert actions, which is within their custody or control, and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.⁶⁴

Section 3092 states, however, that these requirements apply only “to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.”⁶⁵

Section 3093 requires all covert actions to be authorized by a written presidential finding and provides for congressional notification regarding covert actions in language that largely duplicates Section 3092's requirements for other intelligence activities. Section 3093(c) specifies that presidential findings “shall be reported in writing to the congressional intelligence committees as soon as possible” after presidential approval and “before the initiation of the covert action authorized by the finding.”⁶⁶ But it also explicitly authorizes the president to limit notification of covert actions to eight members of Congress if he or she “determines that it is essential to limit access the finding to meet extraordinary circumstances affecting vital interests of the United States.”⁶⁷ In those cases,

the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.⁶⁸

62. MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., R40691, SENSITIVE COVERT ACTION NOTIFICATIONS: OPTIONS FOR CONGRESS (2013); MARSHALL CUTIS ERWIN, CONG. RESEARCH SERV., R40698, “GANG OF FOUR” CONGRESSIONAL INTELLIGENCE NOTIFICATIONS (2013).

63. 50 U.S.C. § 3092.

64. *Id.*

65. *Id.*

66. 50 U.S.C. § 3093.

67. *Id.*

68. *Id.*

This group is known as the “Gang of Eight.” In cases where congressional notification is delayed or limited to the “Gang of Eight,” the statute requires the president to provide a written statement of the reasons for limiting access and to provide the finding to the full committee in 180 days or explain his failure to do so. Section 3093(d) requires the president to notify the intelligence committees of “any significant change in a previously approved covert action, or any significant undertaking pursuant to a previously approved finding” in the same manner as a new covert action finding.⁶⁹ Finally, Section 3094 states that appropriations for covert actions and intelligence activities are contingent on compliance with the statute’s requirements for written findings and notifications to the intelligence committees.⁷⁰

b. “Gang of Four” and “Gang of Eight” Notification in Practice

The amendments to the National Security Act providing for advance notice of covert actions to the “Gang of Eight” were passed in 1980, in response to President Jimmy Carter’s failure to give advance notice of an abortive covert effort to rescue U.S. hostages held in Iran. Before 1980, the executive branch provided notice of covert actions and other particularly sensitive intelligence activities to the “Gang of Four,” the chair and ranking members of the House and Senate intelligence committees. The use of the Gang of Four notification procedure predates the establishment of the congressional intelligence committees and has no basis in statute or in the internal rules of either committee.⁷¹ According to the Congressional Research Service, however, the procedure “has been generally accepted by the leadership of the intelligence committee” and continues for certain intelligence activities (as opposed to covert actions).⁷²

Notifications before 1980 were oral. No notes could be taken, and limited or no expert staff or legal counsel could be present. There could be no communication respecting the notification with committee members, and any objections had to be voiced privately to the president. But in the president’s discretion, not all sensitive operations were so reported.⁷³ These limitations are still commonly applied to both Gang of Eight and Gang of Four notifications today.

There are intelligence operations so sensitive that secrecy is essential, and Congress’s willingness to limit notification is understandable, particularly for a short period. But the risks of disclosure to the full intelligence committee should not be overstated. There is a limited number of congressional intelligence committee members and staff—particularly when compared with the over 1.2 million executive branch employees and contractors with top secret clearance—and they are subject to strict security rules (discussed further below).

Moreover, by acquiescing to Gang of Eight and Gang of Four notice, Congress has allowed itself to be backed into a situation in which it can be said to have known about what turned out to be controversial or even unlawful actions, but in a way in which it could not do anything in a timely, effective way. As described by the former chief counsel for the Church Committee, Frederick A.O. Schwarz:

Technically, gang members are *notified* of something. But in reality, they are not *informed*. When matters covered by a secret, oral briefing become public...the informal nature of the gang process and human nature inevitably lead to conflicting accounts about what was actually revealed.⁷⁴

This was dramatically evidenced by the use of Gang of Four and Gang of Eight notification regarding the NSA’s warrantless wiretapping program, the CIA “black site” detention centers, and the DOJ’s Office of Legal Counsel’s authorization of “enhanced interrogation” of suspected terrorists. After both programs and the congressional briefings became public, intelligence officials, White House officials, and members of Congress who were present gave dramatically

69. *Id.*

70. 50 U.S.C. § 3094.

71. Before 1974, the intelligence community generally provided “Gang of Four” notice to the chair and ranking member of the armed services subcommittees on intelligence. See LOCH JOHNSON, NATIONAL SECURITY INTELLIGENCE 165 (2012).

72. MARSHALL CUTIS ERWIN, CONG. RESEARCH SERV., R40698, “GANG OF FOUR” CONGRESSIONAL INTELLIGENCE NOTIFICATIONS (2013).

73. *Id.* See also Vicki Divoll, *The “Full Access Doctrine”: Congress’s Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J. L. & PUB. POL’Y 493, 535-36 (2011).

74. FREDERICK A.O. SCHWARZ, DEMOCRACY IN THE DARK: THE SEDUCTION OF GOVERNMENT SECRECY 192 (The New Press, 2015).

contradictory accounts of what was revealed and of how legislators reacted.⁷⁵

Gang of Four and Gang of Eight members who had concerns about the programs considered themselves bound by the intelligence community's restrictions on the briefings and had no effective response. Jane Harman, former ranking member of the House Permanent Select Committee on Intelligence (HPSCI), wrote a classified letter to the general counsel of the CIA in February 2003 expressing some reservations about the CIA's "enhanced interrogation program."⁷⁶ She received only a cursory reply⁷⁷ but did not attempt to raise the issue with the full committee. Harman later told the Washington Post, "When you serve on [the] intelligence committee you sign a second oath—one of secrecy. I was briefed, but the information was closely held to just the Gang of Four. I was not free to disclose anything."⁷⁸

Senate Select Committee on Intelligence (SSCI) Vice Chair Jay Rockefeller sent a handwritten, classified letter to Vice President Cheney in July 2003 regarding a briefing Cheney, the NSA director, and the CIA director had delivered on the NSA's terrorist surveillance program. Rockefeller's letter said: "Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received." He noted that he was placing a copy in the SSCI safe in addition to sending a copy to Cheney.⁷⁹ Cheney later derided the note as a "CYA."⁸⁰

Harman and SSCI Vice Chair Jay Rockefeller also wrote a letter to Vice President Cheney regarding the CIA detainee program on March 11, 2005, and Rockefeller formally sought to begin a full committee investigation into the program at the same time. These efforts were also rebuffed. The full intelligence committees were not briefed on the program until hours before it was publicly disclosed. Even then, staff attendance was limited to the minority and majority staff directors.⁸¹

c. Committee Security Procedures

Both the SSCI and the HPSCI⁸² 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.⁸³ Such rules provide safeguards to ensure that sensitive materials will not be disclosed. Thus the House and Senate intelligence committees conduct their business in a "Secure Compartmentalized Information Facility" (SCIF). The classified materials the executive entrusts to Congress are kept in vaults within the SCIF, and professional security staff monitors them. Any member of Congress who wishes to read classified material must do so in a committee SCIF under the supervision of security personnel.⁸⁴

Members of Congress, like the president and federal judges, are considered exempt from the general security clearance investigation process by virtue of their position and protected from criminal prosecution for disclosure of classified information in official congressional proceedings. Nonetheless, committee rules and chamber rules forbid disclosure of

75. See Constitution Project, *Report of the Task Force on Detainee Treatment* 340 (2013), <http://detaineeataskforce.org/pdf/Full-Report.pdf>.

76. Letter from Rep. Jane Harman to Scott Muller, CIA General Counsel (February 10, 2003), <http://www.cfr.org/terrorism-and-the-law/representative-jane-harmans-letter-cia-general-counsel-muller/p1516>.

77. Letter from CIA General Counsel Scott Muller to Rep. Jane Harman (February 28, 2003), <http://www.cfr.org/terrorism-and-the-law/representative-jane-harmans-letter-cia-general-counsel-muller/p1516>.

78. Joby Warrick and Dan Eggen, *Hill Briefed on Waterboarding in 2002*, WASH. POST, December 9, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/08/AR2007120801664.html>.

79. Letter from Senator John D. Rockefeller to Vice President Dick Cheney (July 17, 2003), <http://www.fas.org/irp/news/2005/12/rock121905.pdf>. See also Charles Babington and Dafna Linzer, *Senator Sounded Alarm in '03*, WASH. POST, December 19, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121901641.html>.

80. Television Interview of Vice President Dick Cheney by Bob Schieffer, *Face The Nation* (January 4, 2009), <https://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090104.html>.

81. S. Rep. No. 113-288, *Report of the Senate Select Committee on Intelligence of the Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* at 441, 446-47 (2014).

82. See Senate Standing Order 79.13 and House Rule X (11)(e), (f), and (g)(4)(5).

83. See, e.g., Rule 7 of the Senate Select Committee on Secret Military Assistance to Iran, reprinted in Senate Document 105-16 at 77-86, 105th Cong. 1st Sess. (1988).

84. See Divoll, *supra* note 73, at 505.

classified information. Members can be formally investigated and sanctioned by their chambers' ethics committees for unauthorized disclosures.⁸⁵ They can also be penalized by House and Senate leadership by loss of their committee seats.

Congressional staff members who handle classified information in the performance of their duties are subject to the same clearance process as officials of the executive branch. HPSCI and SSCI staff are also subject to additional nondisclosure requirements imposed by committee rules, which strictly forbid disclosure of classified information and also limit disclosure of unclassified material discussed at closed hearings.⁸⁶

d. The Intelligence Committees' Jurisdiction Is Not Exclusive

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 HPSCI with exclusive jurisdiction over either 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.

Senate Resolution 400 contains a similar procedure. 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 CIA to the new intelligence committees, but they wanted to retain jurisdiction over intelligence activities within agencies over which they then had jurisdiction.⁸⁷

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. But in practice, the executive has often attempted to do so.

e. 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.

85. See Rules 12, 13, and 14 of the House Permanent Select Committee on Intelligence, <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/hpscirules114th.pdf>; Rules 9 and 10 of the Senate Select Committee on Intelligence, <http://www.intelligence.senate.gov/about/rules-procedure>.

86. *Id.*

87. See S. Select Comm. on Intelligence, 103d Cong., Report on the Legislative Oversight of Intelligence Activities: The U.S. Experience, 4-19 (Comm. Print, 1994). Senate Standing Order 79.13, secs. 3(c) and (d) contains the same language denying the jurisdictional exclusivity of the Senate Select Committee on Intelligence.

The Justice Department responded that the president had decided that only members of the House and Senate Intelligence Committees would be “read into”⁸⁸ 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 only the chair and ranking member of the House Judiciary Committee would be permitted to review the documents at the Intelligence Committee’s offices and would not be “read into” the program. The chairman and ranking member refused to accede to the limited document access. Ultimately, Congress passed legislation amending FISA without fully contesting these executive branch assertions.

4. Congress’s Role in Classification and Declassification

a. Congress May Establish Classification Standards and Procedures by Law, but Has Imposed Few Restraints on Executive Secrecy

Both Congress and the president have power to establish classification procedures. Contrary to 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 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 of 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.”⁸⁹ But the Supreme Court stated in the same decision that courts “have been reluctant to intrude upon the authority of the Executive in military and national security affairs *unless Congress specifically has provided otherwise*,” strongly implying that the president’s authority is not exclusive.⁹⁰ The Supreme Court has also stated in another case 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.”⁹¹

In practice, Congress has enacted legislation governing classification, but it has generally sought to enhance rather than restrict executive secrecy. For example, in the Atomic Energy Act, it established a separate regime for the protection of nuclear-related “restricted data.”⁹²

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.⁹³

88. The phrase “read into” generally refers 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.

89. *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 critically assessed in LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE*, 241–43, (2004). Fisher notes that the oft-quoted language of the *Egan* opinion was qualified by the Court when it later stated that courts “traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs *unless Congress specifically has provided otherwise*.” 489 U.S. at 530 (emphasis added).

90. *Id.* at 530 (emphasis added). See also LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE*, 241–43 (2004); David J. Barron and Martin S. Lederman and David Barron, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1084, n. 595 (2008).

91. *EPA v. Mink*, 410 U.S. 73, 83 (1973).

92. See 42 U.S.C. §§ 2011 et seq. (2000). In addition, Congress has enacted the Investor Security Act, which authorizes the commissioner of patents to keep secret patents on inventions that the government has an ownership interest in and where widespread knowledge of such invention would, in the opinion of the interested agency, harm national security. 35 U.S.C. §§ 181 et seq., (2000).

93. JENNIFER ELSEA, CONG. RESEARCH SERV., RL33502, *PROTECTION OF NATIONAL SECURITY INFORMATION* (2006) (detailing congressional efforts to criminalize unauthorized disclosures of classified information and provide for civil deterrents), <https://fas.org/sgp/crs/secretcy/RL33502.pdf>; JENNIFER ELSEA, CONG. RESEARCH SERV., RS21900, *THE PROTECTION OF CLASSIFIED INFORMATION* (2013) (providing an overview of the relationship between executive and legislative authority over national security information and a summary of current laws and regulations that form the legal framework for protecting classified information), <https://fas.org/sgp/crs/secretcy/RS21900.pdf>.

b. Procedures for Publication of Classified Material

SSCI) and HPSCI have procedures for publishing classified information when they consider doing so to be in the public interest. But despite substantial disputes between Congress and the executive branch regarding classification, the procedure has never been used.⁹⁴

The official process for congressional publication of classified information is set forth in Section 8 of Senate Resolution 400 and in House Rule X(11)(g).⁹⁵ The House and Senate procedures are very similar, but not precisely identical. For the purposes of simplicity, the following discussion focuses on the Senate procedure.

At the outset, the Senate intelligence committee must make a determination, by a formal vote, “that the public would be served by such a disclosure.” If a committee is seeking public interest disclosure of classified material, it must formally notify the president of its vote to release the information. Section 8(b) of Senate Resolution 400 requires SSCI, prior to providing formal notice to the president, to notify and consult with the Senate majority and minority leaders regarding the vote to disclose classified information. The purpose of this step is presumably to afford the Senate leadership an opportunity to resolve the situation before formal notice to the president is given.

Once the vote is taken and the president is notified, a five-day clock starts ticking. After five days have expired, SSCI may publicly disclose the information that was the subject of the vote, unless the president properly objects during this period. To do so, he must, “personally” and “in writing,” notify SSCI of his objection to disclosure, provide his reasons therefor, and certify “that the threat to the national interest of the United States posed by such disclosure is of such gravity that it outweighs any public interest in the disclosure.” If the president does object within five days, the question of disclosure may be referred to the Senate for consideration. Such referral may be made by SSCI itself, acting upon a majority vote, or by the majority and minority leaders, acting jointly. There is no requirement that the matter be referred to the Senate, nor any time period within which the referral must be made.

If the matter is referred to the Senate, however, strict time limits apply. Under Section 8(b)(5), the Senate must go into closed session to consider the disclosure issue one hour after it convenes on the fourth day following the referral. The Senate must conclude its consideration of the matter by the end of the ninth day following the referral. At that time, “the Senate shall immediately vote on the disposition of such matter in open session, without debate, and without divulging the information with respect to which the vote is being taken.” In voting to dispose of the matter, the Senate can choose to approve or disapprove the public release of some or all of the information in question, or it can choose to send all or any portion of the matter back to SSCI for final determination.

The Senate Resolution 400 process and the equivalent House process would impose substantial burdens on the intelligence committees, the president, and the full Senate or House. It obviously was not meant to be a first resort. But the procedure has sufficient intermediate stages to increase the pressure for accommodation. It requires the president to take personal responsibility for a decision to maintain the secrecy of documents over the intelligence committee’s objections, and to provide an explanation for that decision.

Nonetheless, neither intelligence committee has chosen to invoke the provision—even during a recent high-profile confrontation between SSCI, the intelligence community, and the White House over the classification of the executive summary of the committee’s study of the CIA detention and interrogation program.

c. Declassification of the Executive Summary of the Senate “Torture Report”

In December 2012, SSCI adopted by a 9-6 vote a 6,300-page study of the CIA’s detention and interrogation program (commonly known as the “torture report”). In April 2014, SSCI voted 11-3 to submit the study’s findings, conclusions, and

94. Because of the intelligence committees’ secrecy regarding their own hearings and meetings, it is not possible to confirm whether the committee has ever attempted to call a vote to begin the process. It is clear that there has never been a referral to the full Senate.

95. S. Res. 400, 94th Cong., 2d Sess. (1976), <http://www.intelligence.senate.gov/about/rules-procedure>; H.R. R. X(11)(g), <http://clerk.house.gov/legislative/house-rules.pdf> (H.R. R. X(11)(g) of the House Rules begins on page 15).

executive summary to the executive branch for declassification.

The declassification vote occurred only weeks after then SSCI Chairman Dianne Feinstein delivered a speech on the Senate floor accusing the CIA of improperly interfering with the committee's investigation. Senator Feinstein accused the CIA of unlawfully searching intelligence committee staffers' computers and filing an unfounded "crimes report" against Senate staff with the Department of Justice.⁹⁶ (A subsequent investigation by the CIA inspector general's office confirmed these allegations.⁹⁷ The CIA's search and criminal referral are discussed in more detail in Chapter 10.) Despite the tensions between the committee and the agency, SSCI did not attempt to trigger the Senate Resolution 400 process, either in April or in the months that followed.

Senator Feinstein asked the White House to lead the declassification effort, but according to former Senator Carl Levin, "[t]he White House declined to lead the declassification effort, and instead gave the declassification review to the very agency, the CIA, that the Senate committee was investigating."⁹⁸ On August 1, the CIA delivered its proposed redactions of the report to the committee.

Chairman Feinstein responded that the redactions were unacceptable, because they "eliminate[d] or obscure[d] key facts that support[ed] the report's findings and conclusions."⁹⁹ But she did not attempt to trigger Senate Resolution 400, or threaten to do so. It is not clear whether a majority of the committee would have voted to begin the process, and in any case the Senate had departed for its August recess. Instead, the committee began a series of negotiations with the CIA and the White House regarding the redactions, which continued until December 2014.

The lead investigator for the Senate report, Daniel Jones, later described the negotiations to a reporter.¹⁰⁰ Jones said that White House Chief of Staff Denis McDonough personally oversaw the process, which included a paragraph-by-paragraph review of the executive summary. According to the news report, "Jones cannot recall a single issue on which McDonough or his team backed the Senate, and only when the agency would agree to relent would McDonough concur."¹⁰¹ The negotiations were eventually cut short by the Democrats' loss in the midterm elections and Feinstein's impending loss of the SSCI chairmanship to an opponent of the report's release.

Despite these obstacles, SSCI did eventually succeed in negotiating release of many crucial details about the CIA program that the agency had originally blacked out. But other important details remained obscure. The committee's full, classified report has remained locked in a few executive branch safes, despite repeated requests from Senator Feinstein for the executive branch to review the full report and use it to guard against future abuses by the intelligence community. Invoking Senate Resolution 400 would not have eliminated the need for negotiation, but it might have strengthened the committee's bargaining position.

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 made it clear

96. Transcript available at <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>.

97. CIA Office of the Inspector General, *Report of Investigation: Agency Access to the SSCI Shared Drive on RDINet*, July 18, 2014, <https://www.cia.gov/library/reports/Redacted-July-2014-CIA-Office-of-Inspector-General-Report.pdf>.

98. Spencer Ackerman, "A Constitutional Crisis": *The CIA Turns on the Senate*, THE GUARDIAN, September 10, 2016, <https://www.theguardian.com/us-news/2016/sep/10/cia-senate-investigation-constitutional-crisis-daniel-jones>.

99. Senator Dianne Feinstein, Feinstein Statement on Redactions in Detention Interrogation Study, August 5, 2014, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=d574da86-1171-4bd9-b87f-707e96fa088d>.

100. Ackerman, *Supra* note 98.

101. *Id.*

that the privilege against self-incrimination applies to witnesses in congressional investigations.¹⁰² The privilege is personal in nature¹⁰³ and may not be invoked on behalf of a corporation,¹⁰⁴ small partnership,¹⁰⁵ labor union,¹⁰⁶ or other “artificial” organization.¹⁰⁷ The privilege protects a witness against being compelled to testify, but it generally does not protect against a subpoena for existing documentary evidence.¹⁰⁸ However, where compliance with a subpoena asking for documents would effectively serve as testimony to authenticate the documents produced, the privilege may apply.¹⁰⁹ 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.¹¹⁰

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.¹¹¹ 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.¹¹² 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.¹¹³

3. Grounds for the Assertion of the Privilege

Witnesses may invoke the Fifth Amendment privilege during a congressional investigation with regard to testimony or documents that are (1) testimonial—that is, it “relate[s] to a factual assertion;”¹¹⁴ (2) self-incriminating, in that its disclosure would tend to show guilt or furnish a “link in the chain of evidence” needed to prosecute;¹¹⁵ and (3) compelled—that is, not voluntarily given. Oral testimony given pursuant to a subpoena and in response to questioning almost always would be testimonial and compelled. The remaining, critical inquiry, then, is whether the responsive testimony would be “incriminating.” The Supreme Court has taken the broad view of what constitutes incriminating testimony, holding that the privilege protects any statement “that the witness reasonably believes could be used in criminal prosecution or could lead to other evidence that might be so used.”¹¹⁶ Even a witness who denies wrongdoing can refuse to answer questions on the grounds that he or she might be “ensnared by ambiguous circumstances.”¹¹⁷

102. *See* *Watkins v. United States*, 354 U.S. 178 (1957); *See also* *Quinn v. United States*, 349 U.S. 155, 162 (1955).

103. *See* *McPhaul v. United States*, 364 U.S. 372 (1960); *see also* McCORMICK, EVIDENCE § 120 (Cleary ed. 1984) [hereinafter McCORMICK].

104. *See* *Hale v. Henkel*, 201 U.S. 43 (1906).

105. *See* *Bellis v. United States*, 417 U.S. 85 (1974).

106. *See* *United States v. White*, 322 U.S. 694 (1944).

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

108. *See* *Fisher v. United States*, 425 U.S. 391, 409 (1976); *Andresen v. Maryland*, 427 U.S. 463 (1976). The cases concerned business records, and there may be some protection available in the case of a subpoena for personal papers. *See* McCORMICK, *supra* note 103 at §§ 126, 127.

109. *See* *United States v. Doe*, 465 U.S. 605 (1984); *Fisher*, 425 U.S. at 391; *see also* *Curcio v. United States*, 354 U.S. 118 (1957); McCORMICK, *supra* note 103, at § 126.

110. *See* *Doe v. United States*, 487 U.S. 201 (1988).

111. Although there is no case law 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).

112. *Quinn*, 349 U.S. at 155.

113. *Emspak v. United States*, 349 U.S. 190 (1955).

114. *Doe*, 487 U.S. at 210.

115. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

116. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

117. *Ohio v. Reims*, 532 U.S. 17 (2001).

4. The Necessary Elements for a Contempt Citation

In 1955 the Supreme Court announced, in a trilogy of rulings, that in order to establish a proper legal foundation for a contempt prosecution, a jurisdictional committee must disallow a witness's constitutional privilege and clearly apprise the witness that an answer is demanded. In *Quinn v. United States* and *Empsak v. United States*, the court held that a witness cannot be forced to guess whether or not a committee has accepted his or her objection. If the witness is not able to determine "with a reasonable degree of certainty that the committee demanded his answer despite his objection," and thus is not presented with a "clear-cut choice between compliance and non-compliance, between answering the question and risking the prosecution for contempt," no prosecution for contempt may lie.¹¹⁸

Similarly, in *Bart v. United States*,¹¹⁹ the court found that at no time did the committee overrule the petitioner's claim of self-incrimination or lack of pertinence, nor was he indirectly informed of the committee's position through a specific direction to answer. A committee member's suggestion that the chairman advise the witness of the possibility of contempt was rejected. The court concluded that the consistent failure to advise the witness of the committee's position as to his objections left him to speculate about this risk of possible prosecution for contempt and did not give him the clear choice between standing with his objection and compliance with a committee ruling. Citing *Quinn v. United States*, the Court held that this defect in laying the necessary constitutional foundation for a contempt citation required reversal of the petitioner's conviction.

5. Waiver of the Privilege

The privilege against self-incrimination may be waived by failure 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;¹²⁰ and where witnesses do not offer substantive testimony, and instead merely make general denials or summary assertions, federal courts have been unwilling to infer a waiver of the Fifth Amendment privilege.¹²¹ At times, though, a waiver dispute can engender an acrimonious compounding of complex legal, constitutional, ethical, and political issues. This was the case with the House Oversight and Government Reform Committee's investigation of allegations that the Internal Revenue Service (IRS) for a number of years had been engaging in the targeting of conservative groups seeking tax-exempt status by using tougher-than-normal applicant scrutiny.¹²² It presents an illuminating examination of legislative committee coercive investigatory tactics and processes and the potential pitfalls for all parties.

a. The Contempt of Congress Citation of Lois Lerner

In May 2013, the U.S. Treasury Inspector General (IG) for Tax Administration issued a report finding that the Internal Revenue Service's Division of Exempt Organizations used inappropriate criteria to identify conservative organizations applying for tax-exempt status and then targeted them in a manner distinct from and more intrusive than other applicants. The practice had been ongoing since 2010. During this period Lois Lerner was the director of the division. Following issuance of the IG's report, the House Committee on Oversight and Government Reform commenced an investigation and subpoenaed Lerner. Her attorney wrote Chairman Issa, advising him that Lerner would be invoking the Fifth Amendment and requesting that she be excused, "since the only purpose of having her appear would be to embarrass or burden her." The chairman refused, asserting that her appearance was required "because of the possibility that she will

118. *Quinn*, 349 U.S. at 177; *Empsak*, 349 U.S. at 202.

119. *Bart v. United States*, 349 U.S. 219 (1955).

120. *See Empsak*, 349 U.S. at 190 (1955); *see also* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Rogers v. United States*, 340 U.S. 367, 371 (1951).

121. *See, e.g., Isaacs v. United States*, 256 F.2d 654, 656-57, 660-61 (8th Cir. 1958) (witness before grand jury who repeatedly stated that he had committed no crime did not waive his Fifth Amendment privilege); *Ballantyne v. United States*, 237 F.2d 657, 665 (5th Cir. 1956) (concluding that "the United States Attorney could not, by thus skillfully securing from appellant a general claim of innocence, preclude him from thereafter relying upon his constitutional privilege when confronted with specific withdrawals"); *United States v. Hoag*, 142 F. Supp. 667, 669 (D.D.C. 1956) (witness who generally denied being a spy or a saboteur before a congressional committee did not waive the Fifth Amendment privilege). *See also, McCarthy v. Arndstein*, 262 U.S. 355, 359 (1923).

122. *See* H. R. REP. NO. 113-415, 113th Cong., 2d Sess. (2014), of the Committee on Oversight and Government Reform, recommending holding Lois Lerner in contempt of Congress [hereinafter *Lerner Contempt Report*]. The report also includes a section on minority views that presents rebuttal arguments of the minority members and 31 opinions of non-congressional legal professionals. *See Id.* at 337-436.

waive or choose not to assert the privilege as to at least certain questions of interest to the Committee; the possibility that the Committee will immunize her testimony...and the possibility that the Committee will agree to hear her testimony in executive session.”¹²³

When Lerner appeared before the committee, she took the oath and then presented an opening statement in which she described her professional background, her knowledge of the inspector general's report and an ensuing FBI investigation, and her authentication of written responses to questions put to her by the inspector general's office. She also said: “I have done nothing wrong. I have not broken any laws. I have not violated any IRS rules and regulations, and I have not provided false information to this or any other congressional committee.”¹²⁴

Lerner then invoked the privilege and refused to answer any further questions. The chairman and Rep. Gowdy, a former federal prosecutor, commented that they believed her opening statement may have waived her Fifth Amendment rights. At the close of the session Lerner was excused by the chairman “subject to a recall; I am looking into the possibility of recalling her and insisting that she answer questions in light of a waiver.”¹²⁵ At a public committee meeting convened a month later, after receiving a legal opinion from Lerner's attorney on the waiver issue, as well as other informal legal advice, the committee voted 22-17 for a resolution that it had “determine[d] that the voluntary statement offered by Ms. Lerner constituted a waiver of her Fifth Amendment privilege against self-incrimination.” Still subject to the subpoena, Lerner was recalled to testify. Before questioning her, the chairman stated that “[a]t a business meeting on June 28, 2013, the committee approved a resolution rejecting Ms. Lerner's claim of Fifth Amendment privilege based on her waiver...If Ms. Lerner continues to refuse to answer questions from our members while she is under subpoena, the committee may proceed to consider whether she should be held in contempt.”¹²⁶ During subsequent questioning she refused to acknowledge the waiver and continued to refuse to answer based on her constitutional privilege. The chairman never specifically rejected or warned her of the consequence of each refusal to answer, as is seemingly required by Supreme Court rulings.

Lerner was voted in contempt of Congress on May 7, 2014,¹²⁷ and the citation was sent by the speaker to the United States attorney for the District of Columbia for presentation to a grand jury. On March 31, 2015, the United States attorney advised the speaker that it had concluded that Lerner had not waived her Fifth Amendment protections in her opening statement “because she made only general claims of innocence. Thus, the Fifth Amendment to the Constitution would provide Ms. Lerner with an absolute defense should she be prosecuted under Section 192 for her refusal to testify.”¹²⁸ The U.S. attorney did find, however, that the committee did properly give the notices required by the Supreme Court's 1995 trilogy. But, disturbingly, the opinion concluded that DOJ practice and precedent accorded U.S. attorneys the absolute constitutional discretion to determine whether or not to decline a contempt prosecution of a federal officer, even if the chief executive has not or cannot assert his or her presidential communications privilege.¹²⁹

123. *Lerner Contempt Report*, *supra* note 122 at 9. The chairman's response was carefully couched to avoid D.C. Legal Ethics Opinion 31 (1977), as modified by Opinion 358 (January 2011), which makes it a violation of the D.C. Rules of Professional Responsibility for a congressional staff attorney to require a witness to appear before a congressional committee when the committee has been informed that the witness will invoke his or her Fifth Amendment privilege and where the summons serves no substantial purpose “other than to embarrass, delay, or burden” the witness. For a critique of the congressional practice of compelling a witness to assert the privilege at a public hearing after advising a committee beforehand of that intention, see Daniel Cubelo Zeidman, *Note, To Call or Not to Call: Compelling Witnesses to Appear Before Congress*, 42 *FORDHAM URB. L. J.* 569, 606 (2014) (asserting that “Opinion 358 is at odds with other relevant opinions because it effectively allows a member of Congress to compel any witness to appear before a committee so long as the sole purpose of compelling the witness is not to pillory him or her...Opinion 358 provides that one legitimate reason for compelling a witness is to determine whether the witness will actually assert his or her right. This determination will always allow a committee to force a witness to appear before a committee because the only way to definitively prove that a witness will invoke the right against self-incrimination is by forcing the witness to do so publically.”).

124. *Id.* at 9-10.

125. *Id.* at 10-11.

126. Emphasis supplied. The resolution only declared a waiver. *See, id.* at 11-12.

127. H. R. Res. 574, 113th Cong. (2014).

128. Letter from Ronald C. Machen, Jr. United States Attorney, District of Columbia, to the Honorable John A. Boehner, Speaker, U.S. House of Representatives, March 31, 2015.

129. *See generally*, Jason Kornfeld, *Waiver of the Privilege Against Self-Incrimination in Congressional Investigations: What Congress, Witnesses and Lawyers Can Learn From the IRS Scandal*, 50 *NYU J. OF LEGIS. & PUB. POLICY QUORUM* 48 (2015) (suggesting lawyers should be more careful in what to allow clients to testify to in analogous situations; that Congress should not subpoena witnesses who will certainly claim privilege; and if they do, witnesses should be advised that any opening statement will be deemed a waiver by a committee).

6. Congress May Grant a Witness Immunity to Obtain Testimony

As discussed in detail in Chapter 3, when a witness asserts the privilege against self-incrimination, Congress may choose to grant the witness immunity and compel the witness's 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.¹³⁰ 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.¹³¹

As set forth in Chapter 3, 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.¹³² 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.¹³³ Although the order to testify may be issued before the witness's appearance,¹³⁴ it does not become legally effective until the witness has been asked the question, invoked the privilege, and been presented with the court order.¹³⁵ 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.¹³⁶ In *Barenblatt v. United States*,¹³⁷ 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.¹³⁸

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 personal privacy interests against the congressional need for information, "[t]he critical element is the existence of, and the weight to be ascribed

130. 18 U.S.C. §§ 6002, 6005 (2000). See discussion in Chapter 3.B.3.b (How a Committee Grants Immunity).

131. *Kastigar v. United States*, 406 U.S. 441 (1972) (upholding the constitutionality of granting a witness only use immunity rather than transactional immunity).

132. 18 U.S.C. § 6005(a) (2000).

133. 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).

134. *Id.* at 1257.

135. See *In re McElrath*, 248 F.2d 612 (D.C. Cir. 1957) (en banc).

136. See *Watkins v. United States*, 354 U.S. 178, 197 (1957).

137. 360 U.S. 109, 126 (1959).

138. *Id.*

to, the interest of the Congress in demanding disclosures from an unwilling witness.¹³⁹ 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.¹⁴⁰

The Supreme court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.¹⁴¹ However, the court has narrowly construed the scope of a committee's authority so as to avoid reaching First Amendment issues.¹⁴² 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.¹⁴³

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 is 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 yearlong 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.¹⁴⁴ 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 it further 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.¹⁴⁵ The desire to avoid a clash over First Amendment rights apparently was a major factor in the committee's decision on the contempt matter.¹⁴⁶

139. *Watkins*, 354 U.S. at 198. A balancing test was also used in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which involved the issue of the claimed privilege of newsmen not to respond to demands of a grand jury for information. In its 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).

140. See, e.g., *Barenblatt*, 360 U.S. at 109; *Watkins*, 354 U.S. at 178; *United States v. Rumely*, 345 U.S. 41 (1953); see also 4 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, ch. 15, § 10, n. 15 and accompanying text.

141. LEADING CASES ON CONGRESSIONAL INVESTIGATIVE POWER 42 (Comm. Print 1976); 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's First Amendment claim. In *Stamler v. Willis*, the Seventh Circuit Court of Appeals ordered to trial a witness's 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. 415 F.2d 1365 (7th Cir. 1969), cert. denied, 399 U.S. 929 (1970). In other cases for declaratory and injunctive relief brought against committees on First Amendment grounds, relief has been denied, though the courts indicated that relief could be granted if the circumstances were more compelling. See, e.g., *Sanders v. McClellan*, 463 F.2d 894 (D.C. Cir. 1972); *Davis v. Ichord*, 442 F.2d 1207 (D.C. Cir. 1970); *Ansara v. Eastland*, 442 F.2d 751 (D.C. Cir. 1971). However, in *Eastland v. 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).

142. See *Rumely*, 345 U.S. at 41.

143. See *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.

144. INVESTIGATION PURSUANT TO HOUSE RESOLUTION 1042 CONCERNING UNAUTHORIZED PUBLICATION OF REPORT OF SELECT COMMITTEE ON INTELLIGENCE, H. R. REP. NO. 94-1754, 94th Cong. 2d Sess., 6, 19-23 (1976).

145. *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, the committee 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.

146. *Id.* at 47-48 (additional views of Representatives Spence, Teague, Hutchinson, and Flynt).

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.¹⁴⁷ 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.¹⁴⁸ After extensive debate, the House failed to adopt the committee report, voting instead to recommit the matter to the committee.¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹ 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 that “[t]here is no legal precedent dealing with the apparent conflict between the freedom of the press guaranteed in the First Amendment and Congress’s inherent constitutional power to compel testimony and documents in the pursuit of an investigation.”¹⁵²

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.”¹⁵³

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.¹⁵⁴ The Fourth Amendment protects a congressional witness against a subpoena that is unreasonably broad or burdensome.¹⁵⁵

147. 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.

148. H. R. REP. NO. 92349, 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.

149. *See* 117 Cong. Rec. 23922–26, 24603–59, 24720–53 (1971).

150. *Id.* at 24731–32.

151. The final report on the inquiry was due 120 days after appointment of the counsel. *See* S. Res. 202, 102d Cong., 1st Sess. (1991).

152. *See* Report of the Temporary Special Independent Counsel Pursuant to Senate Resolution 202, S. Doc. No. 102-20, 102d Cong., 2d Sess. 6–8, 30 (1992); Editorial, MISGUIDED BUSINESS: SENATE COMMITTEE DECIDES TO QUIT ABUSING REPORTERS, HOUS. CHRON., March 28, 1992, at B10.

153. *See, e.g.,* James J. Mangan, *Contempt for the Fourth Estate: No Reporter’s Privilege Before a Congressional Investigation*, 83 GEO. U. L. REV. 129, 130 (1994).

154. *See* *Watkins*, 354 U.S. at 188; *see also* *McPhaul v. United States*, 364 U.S. 372 (1960).

155. *McPhaul*, 364 U.S. at 372; *see also* *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

Therefore, there must be a legitimate legislative or oversight-related basis for the issuance of a congressional subpoena.¹⁵⁶

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.¹⁵⁷

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 *duces 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.'"¹⁵⁸

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."¹⁵⁹

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.¹⁶⁰ 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

156. A congressional subpoena may not be used in a mere "fishing expedition." *See* *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936) (quoting *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924) (stating that "[i]t is contrary to the first principles of justice to allow a search through all the respondents' records [sic], relevant or irrelevant, in the hope that something will turn up.")). *But see* *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975) (recognizing that an investigation may lead "up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result"); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946) (holding that determining whether a subpoena is overly broad "cannot be reduced to formula; for relevancy and adequacy of excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry").

157. *McPhaul*, 364 U.S. at 382.

158. *Id.* (quoting *United States v. Bryan*, 339 U.S. 323, 333 (1950)).

159. *Id.* at 378.

160. *See* *Nelson v. United States*, 208 F.2d 505 (D.C. Cir.), *cert. denied*, 346 U.S. 827 (1953).

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.¹⁶¹

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.¹⁶²

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in Part II:

Alissa M. Dolan: *The House Committee on Government Reform Investigation of the FBI's Use of Confidential Informants*

161. 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 June 1973, 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 denied the motion of the defendants for summary judgment. While the appeal from the decision of the district court in the civil case was pending before the court of appeals, the Supreme Court held in *Calandra v. United States*, 414 U.S. 338 (1974), that a grand jury is not precluded by the Fourth Amendment’s exclusionary rule from questioning a witness on the basis of evidence that was 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.”

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. 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* 753 F.2d 88 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985).

162. *See United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971); *see also Hannah v. Larche*, 363 U.S. 420 (1960); *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (Sixth Amendment is not a source for attorney-client privilege).