

CRS Report for Congress

Congress's Contempt Power: Law, History, Practice, and Procedure

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Summary

Congress's contempt power is the means by which Congress responds to certain acts that in its view obstruct the legislative process. Contempt may be used either to coerce compliance (inherent contempt), punish the contemnor (criminal contempt), and/or to remove the obstruction (civil contempt). Although arguably any action that directly obstructs the effort of Congress to exercise its constitutional powers may constitute a contempt, in the last seventy years the contempt power (primarily through the criminal contempt process) has generally been employed only in instances of refusals of witnesses to appear before committees, to respond to questions, or to produce documents.

This report examines the source of the contempt power, reviews the historical development of the early case law, outlines the statutory and common law basis for Congress's contempt power, and analyzes the procedures associated with each of the three different types of contempt proceedings. In addition, the report discusses limitations both nonconstitutional and constitutionally based on the power. Finally, the report discusses the recent investigation by the House Judiciary Committee that has resulted in votes for criminal contempt of Congress and the filing of a civil lawsuit to enforce congressional subpoenas.

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Introduction

Congress's contempt power is the means by which Congress responds to certain acts that in its view obstruct the legislative process. Contempt may be used either to coerce compliance, punish the contemnor, and/or to remove the obstruction.¹ Although arguably any action that directly obstructs the effort of Congress to exercise its constitutional powers may constitute a contempt,² in the last seventy years the contempt power has generally been employed only in instances of refusals of witnesses to appear before committees, to respond to questions, or to produce documents.³

This report examines the source of the contempt power, reviews the historical development of the early case law, outlines the statutory, common law, and constitutional limitations on the contempt power, and analyzes the procedures associated with each of the three different types of contempt proceedings (inherent contempt, statutory criminal contempt, and statutory civil contempt).⁴

¹ See generally, RONALD L. GOLDFARB, *THE CONTEMPT POWER* (2d ed., Anchor Books 1971).

² Compare *Journey v. MacCracken*, 294 U.S. 125 (destruction of documentary evidence which had been subpoenaed by a committee of Congress can constitute contempt) with *Marshall v. Gordon*, 243 U.S. 521 (1917) (publication by U.S. Attorney of letter critical of Congress could not constitute contempt because it did not directly obstruct the legislative process). The *Journey* decision also upheld the use of the inherent contempt power to punish a past contempt, even where removal of the obstruction to the legislative process was no longer possible. See *Journey*, 294 U.S. at 147-48, 150.

³ However, in two cases, defendants entered pleas of *nolo contendere* to the statutory offense of contempt, a misdemeanor, rather than stand trial for perjury, a felony. *United States v. Helms*, Cr. No. 77-650 (D.D.C. 1977); *United States v. Kleindienst*, Cr. No. 74-256 (D.D.C. 1974); see also *Prosecution of Contempt of Congress*, Hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on H.R. 2684 and H.R. 3456, 98th Cong., 1st Sess., 29 (1983) (prepared statement of Stanley Brand, former Counsel to the Clerk of the House).

⁴ The three types of contempt, and the procedures associated with them, are discussed in more detail below. See *infra* at 12 (inherent contempt), 20 (criminal contempt), & 33 (civil contempt). It is noted that a witness who refuses to testify before a committee, or who provides a committee with false or misleading testimony, can potentially be prosecuted under other criminal provisions, including 18 U.S.C. § 1001 (false statements), 18 U.S.C. § 1621 (perjury), and 18 U.S.C. § 1505 (obstruction of committee proceedings). A detailed discussion of those offenses, however, is beyond the scope of this report. See generally, JAMES HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS*,

(continued...)

Congress's Power to Investigate

The power of Congress to punish for contempt is inextricably related to the power of Congress to investigate.⁵ Generally speaking, Congress's authority to investigate and obtain information, including but not limited to confidential information, is extremely broad. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress.⁶ The broad legislative authority to seek and enforce informational demands was unequivocally established in two Supreme Court rulings arising out of the 1920's Teapot Dome scandal.

In *McGrain v. Daugherty*,⁷ which arose out of the exercise of the Senate's inherent contempt power, the Supreme Court described the power of inquiry, with the accompanying process to enforce it, as "an essential and appropriate auxiliary to the legislative function." The Court explained:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain that which is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry – with enforcing process – was regarded and employed as a necessary and appropriate attribute of the power to legislate – indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.⁸

In *Sinclair v. United States*,⁹ a different witness at the congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be

⁴ (...continued)
78 (1976).

⁵ See generally, Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189 (1967).

⁶ See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 435 (1977); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Barnblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

⁷ 273 U.S. 135, 174-75 (1927).

⁸ *Id.*

⁹ 279 U.S. 263 (1929).

able to give for those courts ... and shall respectfully decline to answer any questions propounded by your committee.”¹⁰ The Supreme Court upheld the witness’s conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness’s contention that the pendency of lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, “operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws.”¹¹ The Court further explained that

[i]t may be conceded that Congress is without authority to compel disclosure for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.¹²

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress’s investigative authority. For example, in *Eastland v. United States Servicemen’s Fund*, the Court explained that “[t]he scope of [Congress’s] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”¹³ In addition, the Court in *Watkins v. United States*, described the breadth of the power of inquiry. According to the Court, Congress’s power “to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”¹⁴ The Court did not limit the power of congressional inquiry to cases of “wrongdoing.” It emphasized, however, that Congress’s investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, the Court stated, “comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.”¹⁵ “[T]he first Congresses,” held “inquiries dealing with suspected corruption or mismanagement by government officials”¹⁶ and subsequently, in a series of decisions, “[t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered.”¹⁷ Accordingly, the Court now clearly recognizes “the power

¹⁰ *Id.* at 290.

¹¹ *Id.* at 295.

¹² *Id.*

¹³ 421 U.S. 491, 504, n. 15 (1975) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1960)).

¹⁴ 354 U.S. 178, 187 (1957).

¹⁵ *Id.*

¹⁶ *Id.* at 182.

¹⁷ *Id.* at 194-95

of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government.”¹⁸

The inherent contempt power is not specified in a statute or constitutional provision, but has been deemed implicit in the Constitution's grant to Congress of all legislative powers. In an inherent contempt proceeding, the offender is tried at the bar of the House or Senate and can be held in custody until such time as the contemnor provides the testimony or documents sought, or until the end of the session. Inherent contempt was most often used as a means of coercion, not punishment. A statutory criminal contempt provision was first enacted by Congress in 1857, in part because of the inadequacies of proceedings under the inherent power. In cases of criminal contempt, the offender is cited by the subcommittee, the committee, and the full House or Senate, with subsequent indictment by a grand jury and prosecution by the U.S. Attorney. Criminal contempt, unlike inherent contempt, is intended as a means of punishing the contemnor for non-compliance rather than to obtain the information sought. A statutory civil contempt procedure, applicable only to the Senate, was enacted in 1978. Under that procedure, a witness, who refuses to testify before a Senate committee or provide documents sought by the committee can, after being served with a court order, be held in contempt of court and incarcerated until he agrees to testify. Moreover, the House and Senate have authorized standing or special committees to seek civil enforcement of subpoenas.¹⁹

Early History of Congressional Contempt

While the contempt power was exercised both by the English Parliament²⁰ and by the American colonial assemblies,²¹ Congress's first assertion of its contempt authority occurred in 1795, shortly after the ratification of the Constitution. At the

¹⁸ *Id.* at 200 n. 33; *see also Morrison v. Olson*, 487 U.S. 654, 694 (1988) (noting that Congress's role under the Independent Counsel Act “of receiving reports or other information and oversight of the independent counsel's activities ... [are] functions we have recognized as being incidental to the legislative function of Congress”) (citing *McGrain v. Daugherty*, 273 U.S. 135 (1927)).

¹⁹ *See, e.g.*, S.Res. 60 & S.Res. 194, 93d Cong., (1973) (Senate Select Committees on Watergate); H.Res. 60, 97th Cong., (1981) (ABSCAM); H.Res. 12, 100th Cong. (1987) (House Iran–Contra); S.Res. 23, 100th Cong. (1987) (Senate Iran–Contra); H.Res. 463, 105th Cong., (1998) (Select Committee on National Security Commercial Concerns); *see also* H.Res. 1420, 94th Cong. 2d Sess. (1976) (authorizing the Chairman of the House Interstate and Foreign Commerce Subcommittee on Oversight and Investigations to intervene in *United States v. American Telephone & Telegraph*, 419 F. Supp. 454 (D.D.C. 1976)); H.Res. 899, 121 CONG. REC. 918-19 (1975) (authorizing the Chairman of the House Interstate and Foreign Commerce Subcommittee on Oversight and Investigations to intervene in *Ashland Oil Inc., v. FTC*, 409 F. Supp. 297, 307 (D.D.C. 1976)).

²⁰ MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT, 141-42 (17th ed. 1964).

²¹ MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES (1971); *see also* CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945-1957 (1959) [hereinafter Beck].

time, three Members of the House of Representatives reported that they had been offered what they interpreted to be a bribe by men named Robert Randall and Charles Whitney.²² The House of Representatives interpreted these allegations as sufficient evidence of an attempt to corrupt its proceedings and reported a resolution ordering their arrest and detention by the Sergeant-at-Arms, pending further action by the House.²³ The matter was then referred to a special Committee on Privileges which reported out a resolution recommending that formal proceedings be instituted against Messrs. Randall and Whitney at the bar of the House.²⁴ In addition, the resolution provided that the accused be questioned by written interrogatories submitted by the Speaker of the House with both the questions and the answers entered into the House minutes.²⁵ The resolution also provided that individual Members could submit written questions to the accused.²⁶

Upon adopting the resolution and after considerable debate, the House determined that the following procedures be adhered to: First, the complaining Members were to submit a written signed information to the accused and for publication in the House Journal. In addition, the accused were to be provided counsel, the right to call witnesses on their behalf, the right to cross-examination of the complaining Members through written questions submitted to the Speaker, and adequate time to prepare a defense.²⁷ A proceeding was held at the bar of the House, and on January 4, 1796, the House, by a vote of 78-17, adopted a resolution finding Mr. Randall guilty of “a contempt to, and a breach of the privileges of, this House by attempting to corrupt the integrity of its Members in the manner laid to his charge.”²⁸ The House ordered Mr. Randall to be brought to the bar, reprimanded by the Speaker, and held in custody until further resolution of the House.²⁹ Mr. Randall was detained until January 13, 1796, when he was discharged by House resolution. Mr. Whitney, on the other hand, was absolved of any wrongdoing as the House determined that his actions were against a “member-elect,” and had taken place “away from the seat of government.”³⁰

²² 2 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 1599 (1907) [hereinafter Hinds’ Precedents]. According to the records, Messrs. Randall and Whitney allegedly offered three Members emoluments and money in exchange for the passage of a law granting Randall and his associates some 18-20 million acres of land bordering Lake Erie. *See id.*

²³ *Id.*

²⁴ *Id.* at § 1600.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at §§ 1601-1602. The proceedings appear to have been delayed from December 30, 1795 to January 4, 1796, at the request of Randall and his counsel. *Id.*

²⁸ *Id.* at § 1603.

²⁹ *Id.*

³⁰ *Id.*

Of additional significance is the fact that the records indicate that almost no question was raised with respect to the power of Congress to punish a non-Member for contempt. According to one commentator, who noted that many of the Members of the early Congress were also members of the Constitutional Convention and, thus, fully aware of the legislative practices of the time, it was “substantially agreed that the grant of the legislative power to Congress carried with it by implication the power to punish for contempt.”³¹

Four years later, the Senate exercised its contempt power against William Duane, who, as editor of the *Aurora* newspaper, was charged with the publication of a libelous article concerning the Senate and one of its committees. Mr. Duane was ordered by Senate resolution to appear before the bar of the Senate and “make any proper defense for his conduct in publishing the aforesaid false, defamatory, scandalous, and malicious assertions and pretended information.”³² At his initial appearance before the Senate, Mr. Duane requested, and was granted, the assistance of counsel and ordered to appear again two days later.³³ Instead of appearing before the Senate as ordered, Mr. Duane submitted a letter indicating he did not believe he could receive a fair trial before the Senate.³⁴ Mr. Duane was subsequently held in contempt of the Senate for his failure to appear, not for his alleged libelous and defamatory publications.³⁵ As a result, he was held in the custody of the Senate for several weeks before the Senate, by resolution, instructed that he be released and tried by the courts.³⁶

The Senate’s contempt of Mr. Duane generated considerably more debate concerning Congress’s contempt authority. A majority of Senators argued that the Senate’s contempt power was an inherent right of legislative bodies, derived not specifically from the Constitution, but rather from “the principle of self-preservation, which results to every public body from necessity and from the nature of the case.”³⁷ Moreover, Senators supportive of this position argued that their reasoning was firmly supported by English and colonial practices, as well as the practice of the state legislatures. Finally, the majority asserted that if Congress did not possess a

³¹ C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PENN. L. REV. 691, 720 (1926).

³² 2 Hinds’ Precedents, *supra* note 22 at § 1604.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* The Senate voted 16-11 to hold Mr. Duane in contempt. *Id.*

³⁶ *Id.* The records indicate that Mr. Duane was held in contempt of the Senate on March 27, 1800, and released by resolution adopted on May 14, 1800, the last day of the session, by a vote of 13-4. *Id.*

³⁷ *Senate Proceedings*, 6th Cong. 1799-1801 86 (March 5, 1800); *see also* Constitution, Jefferson’s Manual, and the Rules of the House of Representatives, H.R. Doc. 108-241, 108th Cong., 2d Sess., §§ 297-299 (2005) [hereinafter Jefferson’s Manual]

contempt power it would be vulnerable to the disruption of its proceedings by outside intruders.³⁸

While the Senate’s exercise of its contempt power was not without precedent, many Senators disputed these claims, arguing that all powers sought to be exercised by Congress must be specifically derived from the Constitution; that because the contempt power is not among the enumerated powers given to Congress, the power is reserved to the states and the people. In addition, the minority argued that Congress, unlike the English Parliament or state legislatures, was intentionally not granted the plenary powers of sovereignty by the Constitution and, thus, could not claim any inherent right to self-preservation.³⁹ As an alternative, the minority proposed that Congress, which has the power to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers”⁴⁰ had sufficient authority to enact a statute that would protect the integrity of its proceedings.⁴¹ Moreover, the minority argued that disruptions of congressional proceedings would continue to be subject to the criminal laws.⁴²

After Mr. Duane’s contempt by the Senate, it appeared that the subject of the Congress’s inherent contempt power was settled. The authority, however, was not used again for another 12 years. In 1812, the House issued a contempt resolution against Mr. Nathaniel Rounsavell, who had refused to answer a select committee’s questions concerning which Representative had given him information regarding secret sessions.⁴³ However, before Mr. Rounsavell was brought before the bar of the House a Member admitted his indiscretion and the matter was not pursued.⁴⁴ Congress’s inherent contempt power was not used again until 1818, where it eventually made its way to the Supreme Court for adjudication.

Anderson v. Dunn. In 1821, the Supreme Court was faced with interpreting the scope of Congress’s contempt power.⁴⁵ The case arose when Representative Louis Williams of North Carolina introduced a letter before the House from a John Anderson, which Representative Williams interpreted as an attempt to bribe him.⁴⁶ Following its 1795 precedent, the House adopted a resolution ordering the Sergeant-at-Arms to arrest Mr. Anderson bring him before the bar of the House. Upon Mr. Anderson’s arrest, however, a debate erupted on the floor of the House as the motion

³⁸ *See id.*

³⁹ *Id.* at § 298

⁴⁰ U.S. CONST. Art. 1, § 8, cl.18.

⁴¹ Jefferson’s Manual, *supra* note 37 at § 298.

⁴² *See id.*

⁴³ *See Beck, supra* note 21 at 192.

⁴⁴ *Id.*

⁴⁵ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

⁴⁶ *See 2 Hinds’ Precedent, supra* note 22 at § 1606. The letter offered Representative Williams \$500 as “part pay for extra trouble” with respect to furthering the claims of Mr. Anderson with respect to the River Raisin. *Id.*

for referral to the Committee on Privileges to adopt procedures was considered. Several Members objected to the House's assertion of an inherent contempt power. They argued, as the minority Senators had in Mr. Duane's contempt, that neither the Constitution nor the general laws afforded the Congress such an inherent power to punish for actions that occurred elsewhere.⁴⁷ Relying on the 1795 precedent and examples from the British Parliament and state legislatures, the Committee was formed and it adopted a resolution requiring Mr. Anderson to be brought before the bar of the House for questioning by the Speaker.⁴⁸ At his appearance, Mr. Anderson, like Mr. Randall and Mr. Whitney before him, was afforded counsel and permitted to present the testimony of eleven witnesses. Ultimately, Mr. Anderson was found in contempt of Congress and was ordered to be reprimanded by the Speaker for the "outrage he committed" and discharged into the custody of the Sergeant-at-Arms.⁴⁹

Mr. Anderson subsequently filed suit against Mr. Thomas Dunn, the Sergeant-at-Arms of the House, alleging assault, battery, and false imprisonment. Mr. Dunn responded by asserting that he was carrying out the lawful orders of the House of Representatives. The Supreme Court heard the case in February of 1821 and concluded that the Congress possessed the inherent authority to punish for contempt and dismissed the charges against Mr. Dunn.⁵⁰ The Court noted that while the Constitution does not explicitly grant either House of Congress the authority to punish for contempt, except in situations involving its own Members, such a power is necessary for Congress to protect itself. The Court asserted that if the House of Representatives did not possess the power of contempt it would "be exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may meditate against it."⁵¹

The Court's decision in *Anderson* does not define the specific actions that would constitute contempt; rather, it adopted a deferential posture, noting that

it is only necessary to observe that there is nothing on the facts of the record from which it can appear on what evidence the warrant was issued and we do not presume that the House of Representatives would have issued it without fully establishing the facts charged on the individual.⁵²

The *Anderson* decision indicates that Congress's contempt power is centered on those actions committed in its presence that obstruct its deliberative proceedings. The Court noted that Congress could supplement this power to punish for contempt

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

⁵¹ *Id.* at 228.

⁵² *Id.* at 234.

committed in its presence by enacting a statute, which would prohibit “all other insults which there is any necessity for providing.”⁵³

The Court in *Anderson* also endorsed the existing parliamentary practice that the contemnor could not be held beyond the end of the legislative session.⁵⁴ According to the Court,

[s]ince the existence of the power that imprisons is indispensable to its continuance, and although the legislative power continues perpetual, the legislative body ceases to exist, on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.⁵⁵

Since *Anderson* was decided there has been an unresolved question as to whether this rule would apply with equal force to a contempt by the Senate, since it is considered a “continuing body.”⁵⁶ The Senate, it appears, has only addressed this issue once, in 1871, regarding the contempt of two recalcitrant witnesses, Z.L. White and H.J. Ramsdell.⁵⁷ During these contempt proceedings, the Senate found itself near the end of a session and the question arose as to whether the Senate’s acquiescence to the *Anderson* rule would provide adequate punishment. After vigorous debate, the Senate instructed the Sergeant-at-Arms to release the prisoners immediately upon the final adjournment of the Congress.⁵⁸ The House, however, has imprisoned a contemnor for a period that extended beyond the adjournment of a Congress. Patrick Wood was sentenced by the House to a three-month term in jail for assaulting Representative Charles H. Porter.⁵⁹ Although there is no doubt that Mr. Woods’s period of incarceration extended beyond the date of adjournment, it was not challenged and, therefore, there is no judicial opinion addressing the issue.

Kilbourn v. Thompson. In 1876, the House established a select committee to investigate the collapse of Jay Cooke & Company, a real estate pool in which the United States had suffered losses as a creditor.⁶⁰ The committee was, by resolution,

⁵³ *Id.* at 228.

⁵⁴ *See 2 Hinds’ Precedent, supra* note 22 at § 1604 (noting that Mr. Duane, who had been held in contempt by the Senate, was released from custody on the last day of the legislative session).

⁵⁵ *Anderson*, 19 U.S. (6 Wheat.) at 231.

⁵⁶ Unlike the House, whose entire membership stands for election every two years, only one-third of the Senate is elected each Congress.

⁵⁷ Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189, 199, n. 31 (1967) [hereinafter Moreland].

⁵⁸ *Id.*

⁵⁹ *See 2 Hinds’ Precedents, supra* note 22 at §§ 1628-629.

⁶⁰ *See 2 Hinds’ Precedents, supra* note 22 at § 1609. It should also be noted that the Speaker also reported Mr. Kilbourn’s contempt to the District Attorney for the District of Columbia pursuant to the 1857 criminal contempt statute. According to records, the District Attorney (continued...)

given the power to subpoena both persons and records pursuant to its investigation. Acting under its authority, the committee issued a *subpoena duces tecum* to one Hallet Kilbourn, the manager of the real estate pool. When Mr. Kilbourn refused to produce certain papers or answer questions before the committee he was arrested and tried under the House's inherent contempt power. The House adjudged Mr. Kilbourn in contempt and ordered him detained by the Sergeant-at-Arms until he purged himself of contempt by releasing the requested documents and answering the committee's questions.⁶¹

Mr. Kilbourn filed a suit against the Speaker, the members of the committee, and the Sergeant-at-Arms for false arrest. The lower court held in favor of the defendant dismissing the suit. Mr. Kilbourn appealed, and the Supreme Court reversed, holding that Congress did not have a general power to punish for contempt.⁶² While the Court appeared to recognize that Congress possessed an inherent contempt power, it declined to follow *Anderson v. Dunn's* expansive view of Congress's authority. Moreover, the Court rejected any reliance on the English and colonial precedents establishing the source and extent of Congress's contempt power. The Court stated that

[w]e are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given

⁶⁰ (...continued)

presented the case to a grand jury and received an indictment for five counts of contempt. The District Attorney requested the Mr. Kilbourn be turned over to his custody for trial. The House, however, after considerable debate, adopted a resolution instructing the Sergeant-at-Arms not to release Mr. Kilbourn. See 4 CONG. REC. 2483-2500, 2513-2532 (Apr. 15-16 1876). Although the Supreme Court later indicated, in the case of *In re Chapman*, 166 U.S. 661, 672 (1897), that the double jeopardy clause of the Constitution would not prohibit a criminal prosecution of a witness for contempt of Congress after he had been tried at the bar of the House under the inherent contempt power, subsequent developments in the interpretation of the double jeopardy clause suggest that this aspect of the *Chapman* decision is no longer good law. See *Grafton v. United States*, 206 U.S. 333 (1907); *Waller v. Florida*, 397 U.S. 387 (1970); *Columbo v. New York*, 405 U.S. 9 (1972). However, it appears that where the sanction imposed pursuant to the inherent contempt power is intended to be purely coercive and not punitive, a subsequent criminal prosecution would be permissible since the double jeopardy clause bars only dual criminal prosecutions. See S.Rept. No. 95-170, 95th Cong., 1st Sess., 89 (1977) (stating that “[o]nce a committee investigation has terminated, a criminal contempt of Congress citation under 2 U.S.C. § 192 might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem.”); see also Hearings Before the Senate Committee on Governmental Affairs on S. 555, 95th Cong., 1st Sess., 798-800 (1977).

⁶¹ See 2 Hinds' Precedents, *supra* note 22 at § 1609.

⁶² *Kilbourn v. Thompson*, 103 U.S. 168, 189-90 (1881).

to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation.⁶³

The Court held that the investigation into the real estate pool was not undertaken by the committee pursuant to one of Congress's constitutional responsibilities, but rather was an attempt to pry into the personal finances of private individuals, a subject that could not conceivably result in the enactment of valid legislation. According to the Court, because Congress was acting beyond its constitutional responsibilities, Mr. Kilbourn was not legally required to answer the questions asked of him. In short, the Court held that

no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.⁶⁴

In addition, the Court indicated that the investigation violated the doctrine of separation of powers because judicial bankruptcy proceedings were pending relating to the collapse of the real estate pool and, therefore, it might be improper for Congress to conduct an investigation that could interfere with the judicial proceedings.⁶⁵ The Court specifically challenged Congress's assertion that there were no other viable remedies available to the government to retrieve the lost funds.⁶⁶ Thus, the Court concluded that

the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority.⁶⁷

Finally, in *dicta*, the Court indicated that the contempt power might be upheld where Congress was acting pursuant to certain specific constitutional prerogatives, such as disciplining its Members, judging their elections, or conducting impeachment proceedings.

Although the precedential value of *Kilbourn* has been significantly limited by subsequent case law, the case continues to be cited for the proposition that the House has no power to probe into private affairs, such as the personal finances of an

⁶³ *Id.* at 189.

⁶⁴ *Id.*

⁶⁵ 273 U.S. 135 (1927).

⁶⁶ *Id.* at 194 (questioning “[h]ow could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cooke & Co.? The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction?”).

⁶⁷ *Id.* at 196.

individual, on which legislation could not be enacted. The doubts raised by *Kilbourn* about the scope of Congress’s contempt power have essentially been removed by later cases sanctioning the use of the power in investigations conducted pursuant to Congress’s authority to discipline its Members,⁶⁸ to judge the elections of its Members,⁶⁹ and, most importantly, to probe the business and conduct of individuals to the extent that the matters are subject to congressional regulation.⁷⁰ For example, in *McGrain v. Daugherty*, which involved a Senate investigation into the claimed failure of the Attorney General to prosecute certain antitrust violations, a subpoena was issued to the brother of the Attorney General, Mallie Daugherty, the president of an Ohio bank. When Daugherty refused to comply, the Senate exercised its inherent contempt power and ordered its Sergeant-at-Arms to take him into custody. The grant of a writ of habeas corpus was appealed to the Supreme Court. The Court’s opinion in the case considered the investigatory and contempt powers of Congress to be implicit in the grant of legislative power.⁷¹ The Court distinguished *Kilbourn*, which was an investigation into purely personal affairs, from the instant case, which was a probe of the operation of the Department of Justice. According to the Court, the subject was plainly “one on which legislation could be had and would be materially aided by information the investigation was calculated to elicit.”⁷² The Court in *McGrain* was willing to presume that the investigation had been undertaken to assist the committee in its legislative efforts.⁷³

Inherent Contempt

Congress’s inherent contempt power is not specifically granted by the Constitution, but is considered necessary to investigate and legislate effectively. The validity of the inherent contempt power was upheld in the early Supreme Court decision in *Anderson v. Dunn* and reiterated in *McGrain v. Daugherty*. Under the inherent contempt power the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned in the Capitol jail. The purpose of the imprisonment or other sanction may be either punitive⁷⁴ or coercive.⁷⁵ Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period (but not, at least by the House, beyond the end

⁶⁸ *In Re Chapman*, 166 U.S. 661 (1897).

⁶⁹ *Barry v. United States ex rel Cunningham*, 279 U.S. 597 (1929).

⁷⁰ *McGrain v. Daugherty*, 273 U.S. 135 (1927).

⁷¹ *Id.*

⁷² *Id.* at 177.

⁷³ *Id.* at 177- 178; *see also ICC v. Brimson*, 154 U.S. 447 (1894). It has been said that *McGrain* “very clearly removed the doubt [that had existed after *Kilbourn v. Thompson*] as to whether Congress could force testimony in aid of legislation.” Moreland, *supra* note 57, at 222. Although *McGrain* and *Sinclair v. United States*, 279 U.S. 263 (1929), involved inquiries into the activities of private individuals, there was a connection to property owned by the United States and, therefore, it could not be said that purely personal affairs were the subjects of the investigations.

⁷⁴ *Jurney v. MacCracken*, 294 U.S. 125, 147 (1935).

⁷⁵ *McGrain v. Daugherty*, 273 U.S. at 161.

of a session of the Congress) until he agrees to comply. One commentator has concluded that the procedure followed by the House in the contempt citation that was at issue in *Anderson v. Dunn* is typical of that employed in the inherent contempt cases.

These traditional methods may be explained by using as an illustration *Anderson v. Dunn*. ... In 1818, a Member of the House of Representatives accused Anderson, a non-Member, of trying to bribe him. ... The House adopted a resolution pursuant to which the Speaker ordered the Sergeant-at-Arms to arrest Anderson and bring him before the bar of the House (to answer the charge). When Anderson appeared, the Speaker informed him why he had been brought before the House and asked if he had any requests for assistance in answering the charge. Anderson stated his requests, and the House granted him counsel, compulsory process for defense witnesses, and a copy, of the accusatory letter. Anderson called his witnesses; the House heard and questioned them and him. It then passed a resolution finding him guilty of contempt and directing the Speaker to reprimand him and then to discharge him from custody. The pattern was thereby established of attachment by the Sergeant-at-Arms; appearance before the bar; provision for specification of charges, identification of the accuser, compulsory process, counsel, and a hearing; determination of guilt; imposition of penalty.⁷⁶

When a witness is cited for contempt under the inherent contempt process, prompt judicial review appears to be available by means of a petition for a writ of habeas corpus.⁷⁷ In such a habeas proceeding, the issues decided by the court might be limited to (a) whether the House or Senate acted in a manner within its jurisdiction,⁷⁸ and (b) whether the contempt proceedings complied with minimum due process standards.⁷⁹ While Congress would not have to afford a contemnor the whole panoply of procedural rights available to a defendant in criminal proceedings, notice and an opportunity to be heard would have to be granted.⁸⁰ Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure (e.g., pertinency of the question asked to the committee's investigation) might be mandated by the due process clause in the case of inherent contempt proceedings.⁸¹

Although many of the inherent contempt precedents have involved incarceration of the contemnor, there may be an argument for the imposition of monetary fines as

⁷⁶ Thomas L. Shriner, Jr., *Legislative Contempt and Due Process: The Groppi Cases*, 46 IND. L. J. 480, 491 (1971) [hereinafter Shriner].

⁷⁷ See *Marshall v. Gordon*, 243 U.S. 521 (1917); see also *United States v. Fort*, 443 F.2d 670, 676 (D.C. Cir. 1970); Theodore Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt*, 31GEO. WASH. L. REV. 399, 400, n.3 (1962) [hereinafter Sky].

⁷⁸ *Jurney v. MacCracken*, 294 U.S. 125, 147 (1935); see also *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880); *Ex Parte Nugent*, 18 F. 471 (D.D.C. 1848).

⁷⁹ *Groppi v. Leslie*, 404 U.S. 496 (1972).

⁸⁰ *Id.*

⁸¹ For a discussion of these statutory limitations on the contempt power see *infra* at notes 279-351 and accompanying text.

an alternative. Such a fine would potentially have the advantage of avoiding a court proceeding on habeas corpus grounds, as the contemnor would never be jailed or detained. Drawing on the analogous authority that courts have to inherently impose fines for contemptuous behavior,⁸² it appears possible to argue that Congress, in its exercise of a similar inherent function could impose fines as opposed to incarceration. Additional support for this argument appears to be contained in *dicta* from the 1821 Supreme Court decision in *Anderson v. Dunn*. The Court questioned the “extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self preservation” and responded with the following:

Analogy, and the nature of the case, furnish the answer – ‘the least possible power adequate to the end proposed;’ which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought *to extend to other inflictions*. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious.⁸³

Finally, in *Kilbourn v. Thompson*, the Court suggested that in certain cases where the Congress had authority to investigate, it may compel testimony in the same manner and by use of the same means as a court of justice in like cases. Specifically, the Court noted that “[w]hether the power of punishment in either House *by fine or imprisonment* goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire”⁸⁴ While the language of these cases and the analogous power possessed by courts seem to suggest the possibility of levying a fine as punishment for contempt of Congress, we are aware of, and could not locate, any precedent for Congress imposing a fine in the contempt or any other context.

In comparison with the other types of contempt proceedings, inherent contempt has the distinction of not requiring the cooperation or assistance of either the executive or judicial branches. The House or Senate can, on its own, conduct summary proceedings and cite the offender for contempt. Furthermore, although the contemnor can seek judicial review by means of a petition for a writ of habeas corpus, the scope of such review may be relatively limited, compared to the plenary review accorded by the courts in cases of conviction under the criminal contempt statute.

There are also certain limitations on the inherent contempt process. Although the contemnor can be incarcerated until he agrees to comply with the subpoena,

⁸² See, e.g., *United States v. United Mine Workers*, 330 U.S. 258 (1947) (upholding a \$700,000 fine against a labor union as punishment for disobedience of a preliminary injunction preventing it from continuing a worker strike and approving the imposition of a \$2.8 million fine if the union did not end the strike within five days).

⁸³ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821) (emphasis added).

⁸⁴ *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881) (emphasis added).

imprisonment may not extend beyond the end of the current session of Congress.⁸⁵ Moreover, inherent contempt has been described as “unseemly,” cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar.⁸⁶ Because of these drawbacks, the inherent contempt process has not been used by either body since 1935.⁸⁷ Proceedings under the inherent contempt power might be facilitated, however, if the initial fact-finding and examination of witnesses were to be held before a special committee – which could be directed to submit findings and recommendations to the full body – with only the final decision as to guilt being made by the full House or Senate. Although generally the proceedings in inherent contempt cases appear to have been conducted at the bar of the House of Congress involved,⁸⁸ in at least a few instances proceedings were conducted initially or primarily before a committee, but with the final decision as to whether to hold the person in contempt being made by the full body.⁸⁹

Inherent Contempt Proceedings By Committees of Congress

As has been indicated, although the majority of the inherent contempts by both the House and the Senate was conducted via trial at the bar of the full body, there is historical evidence to support the notion that this is not the exclusive procedure by which such proceeding can occur. This history, when combined with a 1993 Supreme Court decision addressing the power of Congress to make its own rules for the conduct of impeachment trials,⁹⁰ strongly suggests that the inherent contempt process can be supported and facilitated by the conduct of evidentiary proceedings and the development of recommendations at the committee level.

Actually, the consideration of the use of committees to develop the more intricate details of an inquiry into charges of contempt of Congress date back to the very first inherent contempt proceedings of Messrs. Randall and Whitney in 1795. As discussed above, in these cases the House appointed a Committee on Privileges

⁸⁵ *Watkins v. United States*, 354 U.S. 178, 207, n.45 (1957); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

⁸⁶ See S.Rept. No. 95-170, 95th Cong., 1st Sess., 97 (1977); see also Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 255 n. 71 (1978) [hereinafter Lee].

⁸⁷ 4 DESCHLER’S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, ch. 15, § 17, 139 n.7 (1977) [hereinafter Deschler’s Precedents]; see also Lee, *supra* note 86, at 255.

⁸⁸ See Beck, *supra* note 21, at 4; ENERST J. EBERLING, CONGRESSIONAL INVESTIGATIONS 289 (1928) [hereinafter Eberling].

⁸⁹ For example, in 1865, the House appointed a select committee to inquiry into an alleged breach of privilege committed by Mr. A.P. Field for assaulting a Member of the House. 72 CONG. GLOBE, 38th Cong., 2d Sess., 371 (1865). After taking testimony, the committee recommended, and the House adopted, a resolution directing the Speaker to reprimand Field at the bar of the House. *Id.* at 971, 974.

⁹⁰ See *United States v. Nixon*, 506 U.S. 224 (1992).

to report a mode of procedure. The Committee reported the following resolution, which was adopted by the full House of Representatives:

Resolved, That the said Robert Randall and Charles Whitney be brought to the bar of the House and interrogated by the Speaker touching the information given against them, on written interrogatories, which with the answers thereto shall be entered into the minutes of the House. And that every question proposed by a Member be reduced to writing and a motion made that the same be put by the Speaker. That, after such interrogatories are answered, *if the House deem it necessary to make any further inquiry on the subject, the same be conducted by a committee to be appointed for that purpose.*⁹¹

According to the *Annals of Congress*, the Committee's language sparked a debate concerning the proper procedures to be used, including a discussion regarding whether the use of such a select committee was proper.⁹² At least one Representative "was convinced that the select committee was alone competent to taking and arranging the evidence for the decision of the House."⁹³ While others noted that "the investigation of facts is constantly performed by select committees. ... [The committee's] report is not to be final, it is to be submitted to the House for final decision."⁹⁴ It was recommended that, "the subject should be remanded to a committee, which would save a good deal of time."⁹⁵ Other Members, however, objected to the use of a select committee to hear evidence of this magnitude on the grounds that it would be:

highly improper for the witness to be sworn by a select committee, and that committee to send for the Members and have them sworn and examined in that private way. However troublesome and difficult, the House must meet all the questions and decide them on this floor.⁹⁶

Ultimately, it appears that none of the proceedings in this case was conducted before a select committee. That said, Congress's interpretation of its own powers and prerogatives is significant. It is clear that during the very first exercise of Congress's power of inherent contempt, the House allowed for the possibility that at least some of the proceedings could occur before a committee, rather than at the bar of the House.

This early precedent was finally invoked in 1836, when after the assault of reporter Robert Codd by reporter Henry Wheeler on the House floor, the House committed the examination of a contempt and breach of privilege to a select committee. The House adopted the following resolution empowering the committee to conduct a contempt investigation:

⁹¹ See 2 Hinds' Precedent, *supra* note 22 at § 1599 (emphasis added).

⁹² See 5 ANNALS OF CONG. 188 (1792).

⁹³ See *id.* (statement of Rep. Baldwin).

⁹⁴ *Id.* at 189 (statement of Rep. W. Smith).

⁹⁵ *Id.* at 190 (statement of Rep. W. Smith).

⁹⁶ *Id.* at 188 (statement of Rep. Hillhouse).

Resolved, That a select committee be forthwith appointed, whose duty it shall be forthwith to inquiry into an assault committed within the Hall of the House of Representatives this morning, while this House was in session and for and on account of which two persons are now in custody of the Sergeant-at-Arms; and said committee are to make their report to this House; and that said committee be authorized to administer oaths and to cause the attendance of witnesses.⁹⁷

The Committee's report noted that Mr. Wheeler admitted his offense and included a recommendation that the punishment not be vindictive.⁹⁸ The report also contained three resolutions that were considered by the full House. The first found Mr. Wheeler guilty of contempt and breach of the privileges of the House, and was adopted. The second, which was amended on the floor prior to adoption, excluded Mr. Wheeler from the floor of the House for the remainder of the session. Finally, the third resolution, which called for Mr. Wheeler to be taken into custody for the remainder of the session, was also amended on the floor prior to adoption to simply discharge Mr. Wheeler from custody.⁹⁹

Another example of the use of select committee to hear a contempt trial occurred in 1865, when it was alleged that Mr. A.P. Field assaulted Congressman William Kelley. Similar to the contempt proceedings of Mr. Wheeler, the House adopted the following resolution authorizing a select committee to conduct an examination of the charges:

Be it Resolved, That a select committee of five members be appointed by the Speaker to inquire into the said alleged breach of privilege; that the said committee have power to send for persons and papers, and to examine witnesses; and that the committee report as soon as possible all the facts and circumstances of the affair, and what order, if any, it is proper for this House to take for the vindication of its privilege, and right, and duty of free legislation and judgment.¹⁰⁰

During the debate on the resolution it was observed that proceeding in this manner would avoid a trial by the full House, which, in the words of one Member, "would consume a great amount of the public time which there is a pressing need to apply to the business of the Government, it is better that the course should be adopted which is contemplated by the resolution"¹⁰¹

The select committee, in its report to the full House, noted that it had heard the testimony of several witnesses concerning the incident, including the voluntary

⁹⁷ 2 Hinds' Precedent, *supra* note 22 at § 1630.

⁹⁸ *See id.*; *see also* H.Rept. 792, 24th Cong. 1st Sess., (1836).

⁹⁹ *Id.*; *see also* *Groppi v. Leslie*, 404 U.S. 496, 501 n.4 (1972) (citing the Wheeler committee procedure as an example of procedures followed by Congress in contempt cases).

¹⁰⁰ CONG. GLOBE, 38th Cong., 2nd Sess., 371 (1865).

¹⁰¹ *Id.* (statement of Rep. Thayer).

statement of Mr. Field.¹⁰² Also according to the Committee, Mr. Field was present for each of the witnesses and, in fact, several of them were heard from at his request. Moreover, all of the witnesses were subject to examination or cross-examination by Mr. Field.¹⁰³ At the committee's recommendation, a resolution directing the Speaker to issue a warrant for Mr. Field's arrest by the Sergeant-at-Arms for the purpose of bringing him before the Speaker for a reprimand was adopted.¹⁰⁴ It does not appear that Mr. Field or his counsel was permitted to be present during the House's consideration of the committee's report, nor does it appear that he was afforded an opportunity to address the House prior to his formal reprimand. In fact, during the course of the reprimand, the Speaker expressly referred to Mr. Field having "*been tried before a committee of their members*," and ordered to be reprimanded at the bar of the House by their Presiding Officer,"¹⁰⁵ which may be interpreted as indicating that the committee's proceedings were deemed to be sufficient in the eyes of the House.

Nixon v. United States. Although there is ample historical evidence of the presumed propriety of contempt proceedings before committees of Congress, there has been no judicial ruling directly confirming the Congress's interpretation of its own contempt powers. In 1993, however, the Supreme Court decided *United States v. Nixon*,¹⁰⁶ which, while not a contempt case, involved an analogous delegation of authority by the Senate to a select committee for the purposes of hearing evidence regarding the impeachment of two federal judges. Specifically, the impeached judges challenged the Senate's procedure under Rule XI of the "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials," which provides:

That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, *shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine*, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before the committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having received and taken before the Senate, but nothing herein shall prevent the Senate from sending for

¹⁰² *Id.* at 971.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 972-74.

¹⁰⁵ *Id.* at 991 (emphasis added).

¹⁰⁶ 506 U.S. 224 (1993).

any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.¹⁰⁷

Judge Nixon argued that the use of a select committee to hear the evidence and witness testimony of his impeachment violated the Senate’s constitutional duty to “try” all impeachments. According to Judge Nixon, anything short of a trial before the full Senate was unconstitutional and, therefore, required reversal and a reinstatement of his judicial salary. The Court held the issue to be a non-justiciable political question. Chief Justice Rehnquist, writing for the Court, based this conclusion upon the fact that the impeachment proceedings were textually committed in the Constitution to the Legislative Branch. In addition, the Court found the “lack of finality and the difficulty in fashioning relief counsel[led] against justiciability.”¹⁰⁸ According to the majority, to open “the door of judicial review to the procedures used by the Senate in trying impeachments would ‘expose the political life of the country to months, or perhaps years, of chaos.’”¹⁰⁹ The Court found that the word “try” in the Impeachment Clause did not “provide an identifiable textual limit on the authority which is committed to the Senate.”¹¹⁰ Justice Souter’s concurring opinion noted that “[i]t seems fair to conclude that the [Impeachment] Clause contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to ‘try’ impeachments.”¹¹¹

The Court’s affirmation of the Senate’s procedures with respect to the appointment of select committees for impeachment trials, clearly indicates that the use of committees for contempt proceedings – whether they be standing legislative committees, or select committees created by resolution for a specific purpose – is a permissible exercise of each House’s Article I, section 5 rulemaking power. As such, it would appear that one of the suggested reasons for the apparent abandonment of the use of Congress’s inherent contempt power, namely, that it became to cumbersome and time consuming to try contemptuous behavior on the floor of the body, is no longer compelling. The ability to utilize the committee structure for trials, evidentiary hearings, and other procedural determinations appears to be supported not only by the historical records of previous contempt proceedings, but also by the Court’s decision in *Nixon*.

While the Court in *Nixon* addressed the permissibility of using select committees in impeachment trials, it says nothing about the rights or privileges that would be required to be afforded to the accused. Similarly, in any contempt proceedings before a congressional committee, the question of rights and privileges remains one that has not yet been directly addressed by the courts. According to the Supreme Court in *Groppi v. Leslie*:

¹⁰⁷ *Id.* at 227, n. 1 (emphasis added).

¹⁰⁸ *Id.* at 739.

¹⁰⁹ *Id.* (quoting *United States v. Nixon*, 938 F.2d 239, 246 (D.C. Cir. 1991)).

¹¹⁰ *Id.* at 740.

¹¹¹ *Id.* at 748 (Souter, J., concurring).

[t]he past decisions of this Court strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings. The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him.¹¹²

The Court also suggested that “the length and nature of the [right to be heard] would traditionally be left largely to the legislative body....”¹¹³ This deference to Congress in establishing its own rules and procedures is consistent with the more recent decision in *Nixon*. Thus, it would appear that while there is no definitive answer to the question of what rights the committee hearing a contempt proceeding would be required to afford,¹¹⁴ so long as the minimum protections of notice and opportunity to be heard are provided, the courts, it seems, will not interfere with Congress’s decisions regarding proper procedure.

Congressional precedent would also appear to be a useful guide to the question of what process is due. A review of early exercises of inherent contempt, discussed above, indicates that the following procedures have been established: attachment by the Sergeant-at-Arms; appearance before the bar; provision for specification of charges; identification of the accuser; compulsory process; provision of counsel; a hearing; determination of guilt; and imposition of a penalty. According to one commentator, “[t]his traditional procedure was followed by both houses of Congress until they abandoned it for a more convenient statutory device.”¹¹⁵ Since these procedures appear to be in excess of what the Court instructed was required in *Groppi*, it would seem reasonable to conclude that any inherent contempt proceeding that conforms with these traditions would likely satisfy judicial review.

Statutory Criminal Contempt

Between 1795 and 1857, 14 inherent contempt actions were initiated by the House and Senate, eight of which can be considered successful in that the contemnor was meted out punishment, agreed to testify or produce documents. Such inherent contempt proceedings, however, involved a trial at the bar of the chamber concerned and, therefore, were seen by some as time-consuming, cumbersome, and in some instances ineffective – because punishment could not be extended beyond a House’s

¹¹² See *Groppi v. Leslie*, 404 U.S. 496, 500-01 (1972) (citing *Jurney v. MacCracken*, 294 U.S. 125, 143-144 (1935); *Kilbourn v. Thompson*, 103 U.S. 168, 173-174 (1880); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 209-211 (1821); *Marshall v. Gordon*, 243 U.S. 521, 532 (1917)).

¹¹³ *Id.* at 503.

¹¹⁴ While the Supreme Court in *Groppi* limited its holding to requiring only notice and the opportunity to be heard, the lower court in the same case suggested that the following rights were also necessary: representation by counsel; the ability to compel the attendance of witnesses; an opportunity to confront any accusers; and the right to present a defense to the charges. See *Groppi v. Leslie*, 311 F.Supp. 772, 774 (W.D. Wisc. 1970), *rev’d*, 436 F.2d 326 (7th Cir. 1970), *rev’d*, 404 U.S. 496 (1972).

¹¹⁵ Shriner, *supra* note 76 at 491.

adjournment date.¹¹⁶ In 1857, a statutory criminal contempt procedure was enacted,¹¹⁷ largely as a result of a particular proceeding brought in the House of Representatives that year. The statute provides for judicial trial of the contemnor by a United States Attorney rather than a trial at the bar of the House or Senate. It is clear from the floor debates and the subsequent practice of both Houses that the legislation was intended as an *alternative* to the inherent contempt procedure, not as a substitute for it. A criminal contempt referral was made in the case of John W. Wolcott in 1858, but in the ensuing two decades after its enactment most contempt proceedings continued to be handled at the bar of the House, rather than by the criminal contempt method, apparently because Members felt that they would not be able to obtain the desired information from the witness after the criminal proceedings had been instituted.¹¹⁸ With only minor amendments, those statutory provisions are codified today as 2 U.S.C. §§ 192 and 194, which state:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than [\$100,000] nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.¹¹⁹

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

¹¹⁶ See Eberling, *supra* note 88 at 302-16.

¹¹⁷ Act of Jan. 24, 1857, c. 19 § 3, 11 Stat. 156 (1857) (codified as amended at 2 U.S.C. §§ 192, 194 (2000)). The constitutionality of the statute was upheld by the Supreme Court in 1897. See *In re Chapman*, 166 U.S. 661 (1897).

¹¹⁸ Beck, *supra* note 21 at 191-214. In the appendix to Beck's study, he provides a comprehensive list of persons from 1793-1943 who were held in contempt of Congress, and the circumstances surrounding their cases. A review of Beck's chronology indicates that from 1857-1934 Congress relied on its inherent contempt power almost exclusively, despite the availability of the criminal statute. See *id.* Moreover, Beck's detailed history indicates that in at least 28 instances, witnesses who were either threatened with, or actually charged with, contempt of Congress purged their citations by either testifying or providing documents to the inquiring congressional committees. See *id.*

¹¹⁹ 2 U.S.C. § 192 (2000). As a result of congressional classification of offenses, the penalty for contempt of Congress is a Class A misdemeanor; thus, the \$1,000 maximum fine under § 192 has been increased to \$100,000. See 18 U.S.C. §§ 3559, 3571 (2000).

facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.¹²⁰

The legislative debate over the criminal contempt statute reveals that it was prompted by the obstruction of a House select committee's investigation into allegations of misconduct that had been made against several Members of the House of Representatives. According to reports, the investigation was hindered by the refusal of a newspaper reporter, James W. Simonton, to provide answers to certain questions posed by the committee.¹²¹ The select committee responded by reporting a resolution citing Mr. Simonton for contempt, as well as introducing a bill¹²² that was intended "to more effectually ... enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony."¹²³

It appears that there were no printed House or Senate committee reports on the measure, though it was considered in the House by the select committee and in the Senate by the Judiciary Committee.¹²⁴

According to the legislative debate records and commentators, there was opposition to the bill on several fronts. Some Members proposed an amendment expressly codifying Congress's contempt power for failure to comply with requests for documents or testimony, thereby resurrecting the view that Congress did not possess any inherent power to punish for contempt.¹²⁵ Others argued that Congress's inherent contempt powers rendered the proposed bill unnecessary.¹²⁶ Still other Members opposed the bill on the grounds that it violated the Fourth and Fifth Amendments of the Constitution, because it sanctioned unreasonable searches and seizures, compelled persons to incriminate themselves, and violated the prohibition on persons being punished twice for the same offense (double jeopardy).¹²⁷

In response to arguments that such a statute was unnecessary given Congress's inherent authority to hold individuals in contempt, supporters made clear that the proposed bill was not intended in any way to diminish Congress's inherent contempt authority.¹²⁸ Rather, supporters of the bill saw it as designed to give Congress

¹²⁰ 2 U.S.C. § 194 (2000).

¹²¹ See Eberling, *supra* note 88 at 302-04.

¹²² H.R. 757, 34th Cong., 3d Sess. (1857).

¹²³ 42 CONG. GLOBE, 34th Cong., 3d Sess., 403-04 (1857) (discussing H.R. 757).

¹²⁴ See *id.* at 425-26.

¹²⁵ See Eberling, *supra* note 88 at 309; see also *supra* notes 84-89 and accompanying text.

¹²⁶ *Id.* at 311.

¹²⁷ *Id.* at 309.

¹²⁸ 42 CONG. GLOBE, 34th Cong., 3d Sess., 404 (1857) (statement of Mr. Orr) (providing that "Some gentlemen say that the very fact of presenting this bill is an admission that the House has no power upon this subject, and that it negatives the resolution which we have already adopted, that is, to take [Mr.] Simonton into custody and bring him before the House to answer for his contempt. No such thing. The power of this House I believe is conceded by (continued...)

“additional authority, and to impose additional penalties on a witness who fails to appear before an investigating committee of either House, or who, appearing, fails to answer any question.”¹²⁹ The main concern of proponents seems to have been Congress’s ability to impose adequate punishments for contempts that occur near the end of a session, especially in the House, where the prevailing view was that the Court’s opinion in *Anderson v. Dunn*¹³⁰ prohibited terms of incarceration that extended beyond the adjournment of a session.¹³¹ With respect to the arguments surrounding the Fourth and Fifth Amendments, supporters asserted that the bill provided the protection of the judiciary, via a judicial trial, for the potential contumacious witnesses. Moreover, supporters argued that the bill removed such witnesses “from the passions and excitement of the Hall – where partisans may frequently, in political questions, carry into the measures of punishment their party hostilities.”¹³²

The bill was ultimately passed by both the House¹³³ and the Senate.¹³⁴ According to one commentator, the bill was adopted for three reasons:

[F]irst, to increase the power of either House of Congress to punish for contempt in cases of contumacy of witnesses, ... second, to compel criminating testimony. A third reason, although undoubtedly a minor one, was that the effect of the enactment of this legislation would be to remove the trial of cases of contempt of either House of Congress from their respective bars to the courts, where passion and partisanship would not influence the decision against the prisoner and where he would have a trial by jury and all the other constitutional safeguards of court proceedings.¹³⁵

Under 2 U.S.C. § 192, a person who has been “summoned as a witness” by either House or a committee thereof to testify or to produce documents and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine of up to \$100,000 and imprisonment for up to one year. 2 U.S.C. § 194 establishes the procedure to be followed by the House or Senate if it chooses to refer a recalcitrant witness to the courts for criminal prosecution

¹²⁸ (...continued)
all”)

¹²⁹ Eberling, *supra* note 88 at 306; *see also* 42 CONG. GLOBE, 34th Cong., 3d Sess., 405 (1857) (statement of Mr. Orr).

¹³⁰ *See supra* notes 45-59 and accompanying text.

¹³¹ 42 CONG. GLOBE, 34th Cong., 3d Sess., 404 (1857) (statement of Mr. Orr) (stating “[s]uppose that two days before the adjournment of this Congress there is a gross attempt on the privileges of this House by corrupt means of any description; then the power of this House extends only to those two days. Is that an adequate punishment? Ought we not then, to pass a law which will make the authority of the House respected;”).

¹³² Eberling, *supra* note 88 at 313 (citing 42 CONG. GLOBE, 34th Cong. 3d Sess., 427 (1857) (statement of Mr. Davis).

¹³³ 42 CONG. GLOBE, 34th Cong., 3d Sess., 433 (1857).

¹³⁴ *Id.* at 445.

¹³⁵ Eberling, *supra* note 88 at 316.

rather than try him at the bar of the House or Senate. Under the procedure outlined in section 194,¹³⁶ “the following steps precede judicial proceedings under [the statute]: (1) approval by committee;¹³⁷ (2) calling up and reading the committee report on the floor; (3) either (if Congress is in session) House approval of a resolution authorizing the Speaker to certify the report to the U.S. Attorney for prosecution, or (if Congress is not in session) an independent determination by the Speaker to certify the report;¹³⁸ [and] (4) certification by the Speaker to the appropriate U.S. Attorney for prosecution.¹³⁹

The criminal contempt statute and corresponding procedure are punitive in nature. It is used when the House or Senate wants to punish a recalcitrant witness and, by doing so, to deter others from similar contumacious conduct.¹⁴⁰ The criminal sanction is not coercive because the witness generally will not be able to purge himself by testifying or supplying subpoenaed documents after he has been voted in contempt by the committee and the House or Senate. Consequently, once a witness has been voted in contempt, he lacks an incentive for cooperating with the committee. However, although the courts have rejected arguments that defendants had purged themselves,¹⁴¹ in a few instances the House has certified to the U.S. Attorney that further proceedings concerning contempts were not necessary where compliance with subpoenas occurred after contempt citations had been voted but before referral of the cases to grand juries.¹⁴²

Under the statute, after a contempt has been certified by the President of the Senate or the Speaker, it is the “duty” of the United States Attorney “to bring the

¹³⁶ The language of § 194 does not provide a complete picture of the process. For a more detailed explanation of the workings of the procedure, reference should be made to the actual practice in the House and Senate. See 4 Deschler’s Precedents, *supra* note 87, at §§ 17-22.

¹³⁷ In case of a defiance of a subcommittee subpoena, subcommittee approval of the contempt citation precedes committee action on the matter.

¹³⁸ See *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966).

¹³⁹ 4 Deschler’s Precedents, *supra* note 87, at p. 141. While the quoted description is from the compilation of House precedents, the same procedure is employed in the Senate, but with the President of the Senate performing the functions that are the responsibility of the Speaker in cases of contempt of the House.

¹⁴⁰ See, e.g., S.Rept. No. 95-170, 95th Cong., 1st Sess., 97 (1977).

¹⁴¹ *United States v. Costello*, 198 F.2d 200 (2d Cir. 1952), *cert. denied*, 344 U.S. 874 (1952); *United States v. Brewster*, 154 F. Supp. 126 (D.D.C. 1957), *rev’d on other grounds*, 255 F.2d 899 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 842 (1958). However, the defendant’s sentence may be suspended where he complies with the committee’s demand following his conviction. See *United States v. Tobin*, 195 F. Supp. 588, 617 (D.D.C. 1961).

¹⁴² See 4 Deschler’s Precedents, *supra* note 87, ch. 15, 521 (witness before the House Committee on Un-American Activities voluntarily purged himself of his contempt); see also H.Res. 180, 98th Cong. (resolution stating that prosecution of Anne Gorsuch Burford, Administrator of the Environmental Protection Agency, was not required following implementation of an agreement granting the House access to documents which had been withheld under a claim of executive privilege).

matter before the grand jury for its action.”¹⁴³ It remains unclear whether the “duty” of the U.S. Attorney to present the contempt to the grand jury is mandatory or discretionary. The case law that is most relevant to the question provides conflicting guidance. In *Ex parte Frankfeld*,¹⁴⁴ the District Court for the District of Columbia granted petitions for writs of habeas corpus sought by two witnesses before the House Committee on Un-American Activities. The witnesses were charged with violating 2 U.S.C. § 192, and were being held on a warrant based on the affidavit of a committee staff member.¹⁴⁵ The court ordered the witnesses released since the procedure, described as “mandatory” by the court,¹⁴⁶ had not been followed. The court, in *dicta*, not central to the holding of the case, observed that Congress prescribed that

when a committee such as this was confronted with an obdurate witness, a willful witness, perhaps, the committee would report the fact to the House, if it be a House committee, or to the Senate, if it be a Senate committee, and that the Speaker of the House or the President of the Senate should then certify the facts to the district attorney.

It seems quite apparent that Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate, under such circumstances, but made the certification of facts to the district attorney a mandatory proceeding, and *it left no discretion with the district attorney as to what he should do about it. He is required, under the language of the statute, to submit the facts to the grand jury.*¹⁴⁷

Similarly, in *United States v. United States House of Representatives*,¹⁴⁸ a case that involved the applicability of the section 192 contempt procedure to an executive branch official, the same district court observed, again in *dicta*, that after the contempt citation is delivered to the U.S. Attorney, he “is then required to bring the matter before the grand jury.”¹⁴⁹

Conversely, in *Wilson v. United States*,¹⁵⁰ the United States Court of Appeals for the District of Columbia Circuit concluded, based in part on the legislative history of the contempt statute and congressional practice under the law, that the “duty” of

¹⁴³ 2 U.S.C. § 194 (2000).

¹⁴⁴ 32 F.Supp 915 (D.D.C. 1940).

¹⁴⁵ *Id.* at 916.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ *United States v. United States House of Representatives*, 556 F. Supp. 150, 151 (D.D.C. 1983).

¹⁴⁹ *But see Ansara v. Eastland*, 442 F.2d 751, 754, n.6 (D.C. Cir. 1971) (suggesting that “the Executive Branch ... may decide not to present ... [a contempt citation] to the grand jury...”). The court in *Ansara* did not expressly consider the nature of the prosecutor’s duty under 2 U.S.C. § 194, nor did it provide any basis for its statement to the effect that the prosecutor may exercise discretion in determining whether to seek an indictment.

¹⁵⁰ 369 F.2d 198 (D.C. Cir. 1966).

the Speaker when certifying contempt citations to the United States Attorney during adjournments is a discretionary, not a mandatory, one.¹⁵¹ The court reasoned that despite its mandatory language, the statute had been implemented in a manner that made clear Congress's view that, when it is in session, a committee's contempt resolution can be referred to the U.S. Attorney only after approval by the parent body. When Congress is not in session, review of a committee's contempt citation is provided by the Speaker or President of the Senate, rather than by the full House or Senate.¹⁵² This review of a committee's contempt citation, according to the court, may be inherently discretionary in nature, whereas the prosecutor is simply carrying out Congress's directions in seeking a grand jury indictment.¹⁵³ In *Wilson*, the defendants' convictions were reversed because the Speaker had certified the contempt citations without exercising his discretion.¹⁵⁴ From this holding it may be possible to argue that because the statute uses similar language when discussing the Speaker's "duty" and the "duty" of the U.S. Attorney, that the U.S. Attorney's function is discretionary as well, and not mandatory as other courts have concluded.

Alternatively, despite the similarity in the statutory language, there is an argument that the functions of the Speaker and the President of the Senate are so different in nature under the statutory scheme from those of the U.S. Attorney that to conclude that the function of the prosecutor was intended to be discretionary simply because that is the interpretation given to the function of the presiding officers is contrary to the understanding and intent of the 1857 Congress that drafted the language.¹⁵⁵ Nevertheless, it should be noted that the courts have generally afforded United States Attorneys broad prosecutorial discretion, even where a statute uses mandatory language.¹⁵⁶ Moreover, prosecutorial discretion was the basis of the decision of the U.S. Attorney not to present to the grand jury the contempt citation of Environmental Protection Agency Administration Anne Gorsuch Burford.¹⁵⁷

¹⁵¹ *Id.* at 201-03.

¹⁵² *Id.* at 203-04.

¹⁵³ *See id.*

¹⁵⁴ *Id.* at 205.

¹⁵⁵ *See id.* at 201-02.

¹⁵⁶ *See Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868); *see also United States v. Nixon*, 418 U.S. 683, 694 (1974); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 376 (2d Cir. 1973); *Moses v. Kennedy*, 219 F. Supp. 762, 765 (D.D.C. 1963), *aff 'd sub. nom., Moses v. Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965).

¹⁵⁷ *See Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation that Was Voted by the Full House of Representatives against the Then-Administrator of the Environmental Protection Agency, Anne Gorsuch Burford*, Hearing before the House Committee on Public Works and Transportation, 98th Cong., 1st Sess., 30 (1983) [hereinafter *Burford Contempt Prosecution Hearing*]. The U.S. Attorney also suggested that it would have been inappropriate for him to institute a criminal suit against Burford while a related civil action brought by the Justice Department against the House was pending). *See Letter, from U.S. Attorney Stanley Harris to Speaker Thomas P. O'Neill of Dec. 27, 1982, reprinted in, H.Rept. 98-323, 98th Cong., 1st Sess., 48-49 (1983).* Of course, as a
(continued...)

While upholding the validity of 2 U.S.C. §§ 192 and 194, the courts have recognized that they are criminal provisions and have reversed convictions for contempt where limitations dictated by the language of the statute itself or the Constitution have been exceeded.¹⁵⁸

The Position of the Department of Justice on the Use of Inherent and/or Criminal Contempt of Congress Against the Executive Branch

The Department of Justice (DOJ) has taken the position that Congress cannot, as a matter of statutory or constitutional law, invoke either its inherent contempt authority or the criminal contempt of Congress procedures¹⁵⁹ against an executive branch official acting on instructions by the President to assert executive privilege in response to a congressional subpoena. This view is most fully articulated in two opinions by the DOJ's Office of Legal Counsel (OLC) from the mid-1980s,¹⁶⁰ and has been the basis of several recent claims with respect to pending congressional investigations.¹⁶¹

The position of the DOJ was prompted by the outcome of an investigation by two House committees into the Environmental Protection Agency's (EPA) implementation of provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund). Subpoenas were issued by both committees seeking documents contained in EPA's litigation files.¹⁶² At the

¹⁵⁷ (...continued)

practical matter, even if the United States Attorney is required to refer a contempt under 2 U.S.C. §§ 192, 194 to the grand jury, there is no apparent requirement that the United States Attorney concur in the prosecution of any subsequent indictment. *See* FED. R. CRIM. PRO. 7(c); *see also United States v. Cox*, 342 F.2d 167 (5th Cir. 1965).

¹⁵⁸ *See infra* notes 279-325 and accompanying text.

¹⁵⁹ 2 U.S.C. §§ 192, 194 (2000).

¹⁶⁰ *See Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 U.S. Op. Off. Legal Counsel 101 (1984) [hereinafter Olson Memo]; *see also Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 U.S. Op. Off. Legal Counsel 68 (1986) [hereinafter Cooper Memo].

¹⁶¹ *See, e.g.*, Memorandum for the Counsel to the President, Fred. F. Fielding, from Stephen G. Bradbury, Principal Deputy Attorney General, Office of Legal Counsel, *Immunity of Former Counsel to the President from Compelled Congressional Testimony*, July 10, 2007; Letter to George T. Manning, Counsel for Ms. Harriet Miers, from Fred F. Fielding, Counsel to the President, July 10, 2007 (directing Ms. Miers not to appear before the House Judiciary Committee in response to a subpoena); Letter to House Judiciary Committee Chairman John Conyers, Jr. from George T. Manning, Counsel for Ms. Harriet Miers, July 17, 2007 (explaining legal basis for Ms. Miers's refusal to appear).

¹⁶² *See generally*, Congressional Proceedings Against Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, for Withholding Subpoenaed Documents Relating to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, H.Rept.

(continued...)

direction of President Reagan, EPA Administrator Burford claimed executive privilege over the documents and refused to disclose them to the committees on the grounds that they were “enforcement sensitive.”¹⁶³ A subcommittee and ultimately the full House Committee on Public Works and Transportation, approved a criminal contempt of Congress citation and forwarded it to the full House for its consideration.¹⁶⁴ On December 16, 1982, the full House of Representatives voted, 259-105, to adopt the contempt citation.¹⁶⁵ Before the Speaker of the House could transmit the citation to the United States Attorney for the District of Columbia for presentation to a grand jury, the DOJ filed a lawsuit seeking to enjoin the transmission of the citation and to have the House’s action declared unconstitutional as an intrusion into the President’s authority to withhold such information from the Congress. According to the DOJ, the House’s action imposed an “unwarranted burden on executive privilege” and “interferes with the executive’s ability to carry out the laws.”¹⁶⁶

The District Court for the District of Columbia dismissed the DOJ’s suit on the grounds that judicial intervention in executive-legislative disputes “should be delayed until all possibilities for settlement have been exhausted.”¹⁶⁷ In addition, the court noted that ultimate judicial resolution of the validity of the President’s claim of executive privilege could only occur during the course of the trial for contempt of Congress.¹⁶⁸ The DOJ did not appeal the court’s ruling, opting instead to resume negotiations, which resulted in full disclosure and release of the all the subpoenaed documents to the Congress.¹⁶⁹ Throughout the litigation and subsequent negotiations, however, the U.S. Attorney refused to present the contempt citation to a grand jury for its consideration on the grounds that, notwithstanding the mandatory language of the criminal contempt statute,¹⁷⁰ he had discretion with respect to whether to make the presentation. The issue was never resolved because the ultimate settlement agreement included a withdrawal of the House’s contempt citation.

¹⁶² (...continued)

97-968, 97th Cong. (1982) [hereinafter Gorsuch Contempt Report].

¹⁶³ *Id.* at 42-43.

¹⁶⁴ *Id.* at 57, 70.

¹⁶⁵ 128 CONG. REC. 31,776 (1982).

¹⁶⁶ *See generally, United States v. United States House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

¹⁶⁷ *Id.* at 152.

¹⁶⁸ *Id.* (stating that “[c]onstitutional claims and other objections to congressional investigations may be raised as defenses in a criminal prosecution”).

¹⁶⁹ *See* LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE*, 126-130 (Carolina Academic Press., 2004) [hereinafter Fisher].

¹⁷⁰ 2 U.S.C. § 194 (1982) (stating that “[the Speaker of the House or President of the Senate] shall so certify, ... to the appropriate United States attorney, whose duty it *shall* be to bring the matter before the grand jury for its action.”) (emphasis added).

In its initial 1984 opinion, OLC revisited the statutory, legal, and constitutional issues that were not judicially resolved by the Superfund dispute. The opinion concluded that, as a function of prosecutorial discretion, a U.S. Attorney is not required to refer a contempt citation to a grand jury or otherwise to prosecute an executive branch official who is carrying out the President's direction to assert executive privilege.¹⁷¹ Next, the OLC opinion determined that a review of the legislative history of the 1857 enactment of the criminal contempt statute and its subsequent implementation demonstrates that Congress did not intend the statute to apply to executive officials who carry out a presidential directive to assert executive privilege.¹⁷² Finally, as a matter of constitutional law, the opinion concludes that simply the threat of criminal contempt would unduly chill the President's ability to effectively protect presumptively privileged executive branch deliberations.¹⁷³ According to the OLC opinion:

The President's exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks, even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.¹⁷⁴

The 1984 opinion focuses almost exclusively on the criminal contempt statute, as that was the authority invoked by Congress in the Superfund dispute. In a brief footnote, however, the opinion contains a discussion of Congress's inherent contempt power, summarily concluding that the same rationale that makes the criminal contempt statute inapplicable and unconstitutional as applied to executive branch officials apply to the inherent contempt authority:

We believe that this same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of executive privilege. The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). Therefore, the same reasoning that suggests that the statute could not constitutionally be applied

¹⁷¹ See Olson Memo, *supra* note 160 at 102, 114-15, & 118-28.

¹⁷² *Id.* at 129-134 (stating that "[t]he Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.").

¹⁷³ See *id.* at 102, 135-142.

¹⁷⁴ *Id.* at 102.

against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well.¹⁷⁵

The 1986 OLC opinion reiterates the 1984 reasoning adding the observation that the power had not been used since 1935 (at that time over 50 years), and that “it seems unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an executive branch official who claimed executive privilege.”¹⁷⁶ The 1986 OLC opinion also suggests that then current Supreme Court opinions indicated that it was “more wary of Congress exercising judicial authority” and, therefore, might revisit the question of the continued constitutional validity of the inherent contempt power.¹⁷⁷

Factual, legal, and constitutional aspects of these OLC opinions are open to question and potentially limitations. For example, with respect to the argument that a U.S. Attorney cannot be statutorily required to submit a contempt citation to a grand jury, despite the plain language of the law, such a statement appears to be analogous to a grant of so-called “pocket immunity” by the President to anyone who asserts executive privilege on his behalf.¹⁷⁸ The courts have concluded that the government, or in this case the President, may informally grant immunity from prosecution, which is in the nature of a contract and, therefore, its effect is strongly influenced by contract law principles.¹⁷⁹ Moreover, principles of due process require that the government adhere to the terms of any immunity agreement it makes.¹⁸⁰ It appears that a President has implicitly immunized executive branch officials from violations of congressional enactments at least once – in 1996, during a dispute over the constitutionality of a statute that made it a requirement for all public printing to be done by the Government Printing Office.¹⁸¹ At the time, the DOJ, in an opinion

¹⁷⁵ *Id.* at 140, n. 42 (internal citation omitted).

¹⁷⁶ Cooper Memo, *supra* note 160 at 86.

¹⁷⁷ *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 962-66 (1983); *Buckely v. Valeo*, 424 U.S. 1 (1976); *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Levett*, 328 U.S. 303, 317 (1940)). It is important to note that the 1984 OLC opinion pre-dates the Supreme Court's decisions in *Morrison v. Olson*, 487 U.S. 654 (1988) and *Mistretta v. United States*, 488 U.S. 361 (1989), both of which appear to undercut portions of the OLC's reasoning.

¹⁷⁸ *See, e.g., United States v. Hogan*, 862 F.2d 386, 388 (1st Cir.1988); *United States v. Brown*, 801 F.2d 352, 354 (8th Cir.1986); *United States v. Harvey*, 791 F.2d 294, 300-01 (4th Cir.1986); *United States v. Irvine*, 756 F.2d 708, 710-11 (9th Cir.1985).

¹⁷⁹ *Id.*

¹⁸⁰ *See Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *Santobello v. New York*, 404 U.S. 257, 262 (1971) (“when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled”); *United States v. (Jerry) Harvey*, 869 F.2d 1439, 1443-44 (11th Cir.1989); *Innes v. Dalsheim*, 864 F.2d 974, 978 (2d Cir.1988), *cert. denied*, 493 U.S. 809 (1989); *In re Arnett*, 804 F.2d 1200, 1202-03 (11th Cir.1986).

¹⁸¹ *See* Legislative Branch Appropriations Act of 1993, P.L. 102-392 § 207(a), 106 Stat. 1703, 1719 (1992) (codified at 44 U.S.C. § 501 note); *see also* Legislative Branch Appropriations Act of 1995, P.L. 103-283 § 207(2), 108 Stat. 1423, 1440 (1994) (amending (continued...))

from OLC, argued that the requirement was unconstitutional on its face, directed the executive branch departments not to comply with the statute as passed by Congress, and noted that executive branch officials who are involved in making decisions that violate the statute face little to no litigation risk, including, it appears, no risk of prosecution under the Anti-Deficiency Act,¹⁸² for which the DOJ is solely responsible.¹⁸³ Such a claim of immunization in the contempt context, whether express or implicit, would raise significant constitutional questions. While it is true that the President can immunize persons from criminal prosecution, it does not appear that he has authority to immunize a witness from a congressional inherent contempt proceeding. Arguably, an inherent contempt proceeding takes place wholly outside the criminal code, is not subject to executive execution of the laws and prosecutorial discretion, and thus, appears completely beyond the reach of the executive branch. Furthermore, as previously indicated, inherent contempt, unlike criminal contempt, is not intended to punish, but rather to coerce compliance with a congressional directive.¹⁸⁴ Thus, a finding of inherent contempt against an executive branch official, does not appear to be subject to the President's Pardon power¹⁸⁵ – as an inherent contempt arguably is not an “offense against the United States,” but rather is an offense against a House of Congress. Likewise, it appears that the same arguments would be applicable to a potential civil contempt by Congress.

The assertion that the legislative history of the 1857 statute establishing the criminal contempt process demonstrates that it was not intended to be used against executive branch official is not supported by the historical record. The floor debates leading to the enactment of the statute make it clear that the legislation was intended as an alternative to, not a substitute for, the inherent contempt authority.¹⁸⁶ This understanding has been reflected in numerous Supreme Court opinions upholding the use of the criminal contempt statute.¹⁸⁷ A close review of the floor debate indicates that Representative H. Marshall expressly pointed out that the broad language of the bill “proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people.”¹⁸⁸

Moreover, language from the floor debate indicates that Congress was aware of the effect that this language would have on the ability of persons to claim privileges

¹⁸¹ (...continued)
section 207(a) of the 1993 Act).

¹⁸² See 31 U.S.C. § 1341 (2000).

¹⁸³ See Memorandum for Emily C. Hewitt, General Counsel, GSA, *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, May 31, 1996.

¹⁸⁴ See *supra* at 12-14.

¹⁸⁵ U.S. CONST. Art. II, § 2 (stating that the President “shall have the Power to grant Reprieves and Pardons for Offenses Against the United States.”).

¹⁸⁶ See *supra* at 19-22.

¹⁸⁷ See, e.g., *Journey v. McCracken*, 294 U.S. 125 (1935); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *In re Chapman*, 166 U.S. 661 (1897).

¹⁸⁸ 42 CONG. GLOBE 429 (1857).

before Congress. Specifically, the sponsor of the bill, Representative Orr, was asked about the potential instances in which the proposed legislation might interfere with recognized common law and other governmental privileges, such as the attorney-client privilege,¹⁸⁹ to support an investigation such as one that probed “the propriety of a secret service fund to be used upon the discretion of the executive department,”¹⁹⁰ or to support inquires about “diplomatic matters.”¹⁹¹ Representative Orr responded that the House has and would continue to follow the practice of the British Parliament, which “does not exempt a witness from testifying upon any such ground. He is not excused from testifying there. That is the common law of Parliament.”¹⁹² Later in the same debate, a proposed amendment to expressly recognize the attorney-client privilege in the statute was overwhelmingly defeated.¹⁹³

With respect to the secret service fund, Representative Orr explained “that this House has already exercised the power and authority of forcing a disclosure as to what disposition had been made for the secret-service fund. And it is right and proper that it should be so. Under our Government – under our system of laws – under our Constitution – I should protest against the use of any money by an executive authority, where the House had not the right to know how every dollar had been expended, and for what purpose.”¹⁹⁴ Representative Orr’s reference was to a contentious investigation in 1846, regarding charges that Daniel Webster, while Secretary of State, had improperly disbursed monies from a secret contingency fund used by the President for clandestine foreign operations. The charges led the committee to issue subpoenas to former Presidents John Quincy Adams and John Tyler. President Polk sent the House a list of the amounts in the contingent fund for the relevant period, which was prior to his term, but refused to furnish documentation of the uses that had been made of the expenditures on the grounds that a sitting President should not publically reveal the confidences of his predecessors.¹⁹⁵ President Polk’s refusal to provide the information was mooted by the actions of the two investigatory committees established by the House. Former President Tyler testified¹⁹⁶ and former President Adams filed a deposition¹⁹⁷ detailing the uses of the

¹⁸⁹ *Id.* at 431 (statement of Rep. Dunn) (asking that “if the committee considered, and if they did so consider, what is their judgment in reference to the effect of this bill upon communications by the universal law regarded as privileged, to attorneys and counselors at law? Are they required to divulge things communicated to them in confidence, and for wise and high purposes of public purpose by their clients?”).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* (statement of Rep. Orr).

¹⁹³ *Id.* at 441-43.

¹⁹⁴ *Id.* at 431.

¹⁹⁵ See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, 949 (4th ed. 2007) (citing 16 CONG. GLOBE 698 (April 20, 1846)).

¹⁹⁶ *Id.* (citing H.Rept. 684, 29th Cong., 1st Sess., 8-11 (1846)).

¹⁹⁷ *Id.* (citing H.Rept. 686, 29th Cong., 1st Sess., 22-25 (1846)).

fund during their Administrations. In addition, President Polk's Secretary of State, James Buchanan, was subpoenaed and testified.¹⁹⁸ Ultimately, Mr. Webster was found innocent of any wrongdoing. From these references, it appears that the House was, in 1857, sensitive to and cognizant about its oversight and investigative prerogatives vis-a-vis the executive branch. It therefore appears arguable that in the context of the debate, the contempt statute was not intended to preclude the House's ability to engage in oversight of the executive branch.

Finally, OLC's contention that the criminal contempt statute has only been used once, in the Burford/Superfund dispute, appears to be based on the fact that the contempt of Anne Burford was the only contempt voted on by the full House of Representatives. Significantly, prior to the Superfund dispute, committees and subcommittees of the House of Representatives¹⁹⁹ had voted contempt citations against Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C. B. Morton (1975); Secretary of Health, Education, and Welfare Joseph A. Califano, Jr. (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982), and Attorney General William French Smith (1983). Since the Superfund dispute, contempt citations have been voted against White House Counsel John M. Quinn (1996), Attorney General Janet Reno (1998), and White House Chief of Staff Joshua Bolten (2007).²⁰⁰ In every instance, save for John M. Quinn,²⁰¹ a claim of executive privilege was asserted, and in each instance there was either full or substantial compliance with the demands of the committee that had issued the subpoena.²⁰²

Civil Contempt

Civil Contempt in the Senate. As an alternative to both the inherent contempt power of each House and the criminal contempt statutes,²⁰³ in 1978

¹⁹⁸ *Id.* (citing H.Rept. 686, 29th Cong., 1st Sess., 4-7 (1846)).

¹⁹⁹ We have been unable to locate any record of a vote by a Senate committee or subcommittee of a contempt citation against an executive branch official.

²⁰⁰ In 2007, the House Judiciary Committee also held former White House Counsel Harriet Miers in contempt marking the first time that a former Executive Branch official has ever been so held.

²⁰¹ Mr. Quinn was directed by President Clinton to assert a "protective claim of privilege," which was abandoned and never "formalized" when a floor vote for contempt was scheduled and the documents in question were released.

²⁰² See Fisher, *supra* note 169 at 111-34.

²⁰³ The inadequacies of the inherent and criminal contempt procedures had been recognized by the Congress itself, the courts, and by students of the subject. See, e.g., *Representation of Congress and Congressional Interests In Court*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 94th Cong, 2^d Sess., 556-68 (1976); *United States v. Fort*, 443 F.2d 670, 677-78 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971); *Tobin v. United States*, 306 F.2d 270, 275-76 (D. C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962); Sky, *supra* note 77.

Congress enacted a civil contempt procedure,²⁰⁴ which is applicable only to the Senate.²⁰⁵ The statute gives the U.S. District Court for the District of Columbia jurisdiction over a civil action to enforce, secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order issued by the Senate or a committee or subcommittee. Generally such a suit will be brought by the Senate Legal Counsel, on behalf of the Senate or a Senate committee or subcommittee.²⁰⁶

Pursuant to the statute, the Senate may “ask a court to directly order compliance with [a] subpoena or order, or they may merely seek a declaration concerning the validity of [the] subpoena or order. By first seeking a declaration, [the Senate would give] the party an opportunity to comply before actually [being] ordered to do so by a court.”²⁰⁷ It is solely within the discretion of the Senate whether or not to use such a two-step enforcement process.²⁰⁸

Regardless of whether the Senate seeks the enforcement of, or a declaratory judgment concerning a subpoena, the court will first review the subpoena’s validity.²⁰⁹ If the court finds that the subpoena “does not meet applicable legal standards for enforcement,” it does not have jurisdiction to enjoin the congressional proceeding. Because of the limited scope of the jurisdictional statute and because of Speech or Debate Clause immunity for congressional investigations,²¹⁰ “when the court is petitioned solely to enforce a congressional subpoena, the court’s jurisdiction is limited to the matter Congress brings before it, that is whether or not to aid Congress in enforcing the subpoena.”²¹¹ If the individual still refuses to comply, he

²⁰⁴ Ethics in Government Act of 1978, P.L. 95-521, §§ 703, 705, 92 Stat. 1877-80 (1978) (codified as amended at 2 U.S.C. §§ 288b(b) 288d, and 28 U.S.C. § 1364 (2000)).

²⁰⁵ The conference report accompanying the legislation which established the procedure explained that the relevant House committees had not yet considered the proposal for judicial enforcement of House subpoenas. H.Rept. 95-1756, 95th Cong., 2d Sess., 80 (1978).

²⁰⁶ Although the Senate or the committee may be represented by any attorney designated by the Senate, in most cases such an action will be brought by the Senate Legal Counsel after an authorizing resolution has been adopted by the Senate. 2 U.S.C. § 288b(b) (2000). *See* 28 U.S.C. § 1364(d) (2000). A resolution directing the Senate Legal Counsel to bring an action to enforce a committee or subcommittee subpoena must be reported by a majority of the members voting, a majority being present, of the full committee. The report filed by the committee must contain a statement of (a) the procedure employed in issuing the subpoena; (b) any privileges or objections raised by the recipient of the subpoena; (c) the extent to which the party has already complied with the subpoena; and (d) the comparative effectiveness of the criminal and civil statutory contempt procedures and a trial at the bar of the Senate. 2 U.S.C. § 288(c) (2000).

²⁰⁷ S.Rept. No. 95-170, 95th Cong., 1st Sess., 89 (1977).

²⁰⁸ *Id.* at 90.

²⁰⁹ *Id.* at 4.

²¹⁰ *See* U.S. CONST. Art. 1, § 6, cl. 3.

²¹¹ S.Rept. No. 95-170, 95th Cong., 1st Sess., 94 (1977).

may be tried by the court in summary proceedings for contempt of court,²¹² with sanctions being imposed to coerce their compliance.²¹³

Without affecting the right of the Senate to institute criminal contempt proceedings or to try an individual for contempt at the bar of the Senate,²¹⁴ this procedure gives the Senate the option of a civil action to enforce a subpoena.²¹⁵ Civil contempt might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues than with punishing the contemnor. Unlike criminal contempt, in a civil contempt, sanctions (imprisonment and/or a fine) can be imposed until the subpoenaed party agrees to comply thereby

²¹² As the statute makes clear, a party refusing to obey the court's order will be in contempt of the court, not of Congress itself. 28 U.S.C. § 1364(b) (2000); *see also* S.Rept. No. 95-170, 95th Cong., 1st Sess., 41, 92. It is also worth noting that the Senate has in place a standing order, adopted in 1928, that appears to provide the authority, independent of the civil contempt statute, for a committee to seek a court order to enforce its subpoenas. The standing order states that

Resolved, That hereafter any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate, or other law. Such suit may be brought and prosecuted to final determination irrespective of whether or not the Senate is in session at the time the suit is brought or thereafter. The committee may be represented in the suit either by such attorneys as it may designate or by such officers of the Department of Justice as the Attorney General may designate upon the request of the committee. No expenditures shall be made in connection with any such suit in excess of the amount of funds available to the said committee. As used in this resolution, the term "committee" means any standing or special committee of the Senate, or any duly authorized subcommittee thereof, or the Senate members of any joint committee.

See S. Jour. 572, 70-1, May 28, 1928. It is unclear what effect, if any, the passage of the civil contempt procedure in 1978 has had on this Standing Order. The Standing Order appears to have never been invoked and, therefore, its validity remains an open question.

²¹³ 28 U.S.C. § 1364(b) (2000).

²¹⁴ Not only do the inherent and criminal contempt procedures remain available as an alternative to the civil contempt mechanism, but the legislative history indicates that the civil and criminal statutes could both be employed in the same case. "Once a committee investigation has terminated, a criminal contempt of Congress citation under 2 U.S.C. § 192 might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem." S.Rept. No. 95-170, 95th Cong., 1st Sess., 95 (citations omitted); *see also* Hearings Before the Senate Committee on Governmental Affairs on S. 555, 95th Cong., 1st Sess., 798-800 (1977) [hereinafter Civil Contempt Hearing].

²¹⁵ For a more detailed analysis of the civil contempt procedure and a comparison with the other options available to the Senate when faced with a contempt, *See* S.Rept. No. 95-170, 95th Cong., 1st Sess., 16-21, 40-41, 88-97; *see also* Civil Contempt Hearing, *supra* note 212, at 59-62, 69 *et seq.* (statement of Senator Abourezk and attachments); 123 CONG. REC. 20,956-21,019 (June 27, 1977).

creating an incentive for compliance; namely, the termination of punishment.²¹⁶ Since the statute's enactment in 1979, the Senate has authorized the Office of Senate Legal Counsel to seek civil enforcement of a subpoena for documents or testimony at least 6 times, the last in 1995. None has been against executive branch officials.

The civil contempt process is arguably more expeditious than a criminal proceeding, where a court may more closely scrutinize congressional procedures and give greater weight to the defendant's constitutional rights. The civil contempt procedure also provides an element of flexibility, allowing the subpoenaed party to raise possible constitutional and other defenses (e.g., the privilege against self-incrimination, lack of compliance with congressional procedures, or an inability to comply with the subpoena)²¹⁷ without risking a criminal prosecution.

Civil contempt, however, has limitations. Most notable is that the statute granting jurisdiction to the courts to hear such cases is, by its terms, inapplicable in the case of a subpoena issued to an officer or employee of the federal government acting in their official capacity.²¹⁸ Enacted as part of the Ethics in Government Act of 1978, early drafts of the civil contempt statute did not include an exception for federal government officers and employees acting within the scope of their duties. It appears that the section was drafted primarily in response to the District Court's dismissal, for lack of jurisdiction, of an Ervin Committee's request for a declaratory judgment regarding the lawfulness of its subpoena of President Nixon's tape

²¹⁶ The act specifies that "an action, contempt proceeding, or sanction shall not abate upon adjournment sine die by the Senate at the end of a Congress if the Senate or the committee or subcommittee ... certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment." 28 U.S.C. § 1364(b) (2000). In the first case brought under the new procedure, the witness unsuccessfully argued that the possibility of "indefinite incarceration" violated the due process and equal protection provisions of the Constitution, and allowed for cruel and unusual punishment. *Application of the U.S. Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

²¹⁷ S.Rept. No. 95-170, 95th Cong., 1st Sess., 93.

²¹⁸ 28 U.S.C. § 1364(a) (2000). The statutory exception was explained in the Senate's Report as follows:

This jurisdictional statute applies to a subpoena directed to any natural person or entity acting under color of state or local authority. By the specific terms of the jurisdictional statute, it does not apply to a subpoena directed to an officer or employee of the Federal Government acting within his official capacity. In the last Congress there was pending in the Committee on Government Operations legislation directly addressing the problems associated with obtaining information from the executive branch. (*See* S. 2170, "The Congressional Right to Information Act"). This exception in the statute is not intended to be a congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the federal government. However, if the federal courts do not now have this authority, this statute does not confer it.

recordings.²¹⁹ Thus, one of the purposes of the statute was to expressly confer jurisdiction upon courts to determine the validity of congressional requests for information.

During the course of the debates regarding this legislation, the executive branch strongly opposed conferring jurisdiction upon the federal courts to decide such sensitive issues between Congress and the executive branch. Testifying before a subcommittee of the Senate Committee on Governmental Operations, then-Assistant Attorney General Antonin Scalia argued that weighing the legislature's need for information against the executive's need for confidentiality is "the very type of 'political question' from which ... the courts [should] abstain."²²⁰ In response, Congress amended the proposed legislation excluding from its scope federal officers and employees acting in their official capacity. However, as noted in a report from the House Judiciary Committee in 1988, the exclusion was to apply only in cases in which the President had directed the recipient of the subpoena not to comply with its terms.²²¹

Civil Contempt in the House of Representatives. While the House of Representatives cannot pursue actions under the Senate's civil contempt statute discussed above, there are numerous examples of the House, by resolution, affording special investigatory committees authority not ordinarily available to its standing committees. Such special panels have often been vested with staff deposition authority, and given the particular circumstances, special panels have also been vested with the authority to obtain tax information, as well as the authority to seek international assistance in information gathering efforts abroad.²²² In addition, several special panels have been specifically granted the authority to seek judicial orders and participate in judicial proceedings.²²³

For example, in 1987, the House authorized the creation of a select committee to investigate the covert arms transactions with Iran (Iran-Contra). As part of this resolution, the House provided the following authorization:

(3) The select committee is authorized ... to require by subpoena or otherwise the attendance and testimony of such witnesses ... as it deems necessary, including all intelligence materials however classified, White House materials, ... and to obtain evidence in other appropriate countries with the cooperation of their governments. ... (8) The select committee shall be authorized to respond to any

²¹⁹ See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973).

²²⁰ *Executive Privilege - Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess., 117 (1975).

²²¹ *Clarifying the Investigatory Powers of the United States Congress*, H.Rept. 100-1040, 100th Cong. 2d Sess., 2 (1988).

²²² See *supra* note 19; see also *infra* notes 228-232 and accompanying text.

²²³ *Id.*

judicial or other process, or to make *any applications to court*, upon consultation with the Speaker consistent with [House] rule L.²²⁴

The combination of broad subpoena authority, that expressly encompassed the White House, and the ability to make “any applications to court,” arguably suggests that the House contemplated the possibility that a civil suit seeking enforcement of a subpoena against a White House official was possible. By virtue of the resolution’s language, it appears reasonable to conclude that the House decided to leave the decision in the hands of the select committee, consistent with House Rule L (now House Rule VIII governing subpoenas).²²⁵ It may be noted, then, that while the House select committee did not attempt to seek judicial enforcement of any of its subpoenas, the authorization resolution did not preclude the possibility.

Among the more prominent attempts at utilizing the authority to make applications in court granted by a House of Congress to a select committee occurred during the investigation into the Iran-Contra affair. In 1987, the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition issued an order requiring that former Major Richard V. Secord execute a consent directive authorizing the release of his offshore bank records and accounts to the Committee.²²⁶ When Mr. Secord refused to sign the consent directive, the Committee sought to obtain a court order directing him to comply.²²⁷ While the Committee did not prevail in the Secord litigation, the matter was not disposed of on jurisdictional grounds. Specifically, the district court noted its jurisdiction pursuant to 28 U.S.C. § 1364, as Mr. Secord was a private citizen. Moreover, there is no mention or indication of any challenge to the Committee’s ability to seek such an order. Rather, the case was decided on Fifth Amendment grounds, with the court holding that there was a testimonial aspect to requiring the signing of the consent directive.²²⁸ Thus, the court concluded that the Committee’s order was a violation of Mr. Secord’s Fifth Amendment right against self-incrimination.²²⁹

A review of modern House precedents indicates at least 5 other special or select committees that have been granted, via House resolution, both subpoena authority as well as the ability to seek and participate in judicial actions. These include The

²²⁴ See H.Res. 12, 100th Cong., 1st Sess., §§ 3, 8 (1987) (emphasis added).

²²⁵ This resolution was initially added to the House Rules as Rule L by the 97th Congress. See H.RES. 5, 97th Cong. (1981). The 106th Congress re-codified the rules and this provision became House Rule VIII, which is where it remains today as amended. See H.RES. 5, 106th Cong. (1999).

²²⁶ *Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord*, 664 F.Supp. 562, 563 (D.D.C. 1987).

²²⁷ *Id.*

²²⁸ *Id.* at 564-65.

²²⁹ *Id.* at 566. The ruling was not appealed because of the time strictures imposed on the House and Senate Select Committee’s inquiry. It may be noted that in 1988 the Supreme Court adopted the Senate’s argument in a different case, holding that such a directive is not testimonial in nature. See *Doe v. United States*, 487 U.S. 201 (1988).

October Surprise Investigation;²³⁰ The White House Travel Office Inquiry;²³¹ The House Campaign Finance Investigation;²³² The Select Committee on National Security Commercial Concerns;²³³ and The Teamsters Election Investigation.²³⁴ Again, while there is no record to indicate that any of these committees utilized their authority to participate in judicial proceedings to bring a civil subpoena enforcement action, the resolution language appears to indicate that such a suit was authorized by the full House.

A potential hurdle to a resolution by the House of Representatives authorizing the pursuit of a civil court order is the jurisdiction of the federal courts. Such jurisdiction, specifically federal district court jurisdiction, where a civil action for enforcement of a congressional subpoena would be brought, is derived from both Article III of the Constitution and federal statute. Article III of the Constitution states, in relevant part, that “[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States”²³⁵ The Supreme Court has interpreted the language “arising under” broadly, essentially permitting federal jurisdiction to be found whenever federal law “is a potentially important ingredient of a case.”²³⁶ Conversely, the federal-question jurisdiction statute, first enacted in 1875,²³⁷ while containing almost identical language to Article III, has been interpreted by the Court to be much narrower in scope. As the Court explained in *Verlinden B.V. v. Central Bank of Nigeria*:

Although the language of 1331 parallels that of the “Arising Under” Clause of Art. III, this Court never has held that statutory “arising under” jurisdiction is identical to Art. III “arising under” jurisdiction. Quite the contrary is true. ... [T]he many limitations which have been placed on jurisdiction under 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts ... Art. III “arising under” jurisdiction is broader than federal-question jurisdiction under 1331”²³⁸

The fact that the statutory jurisdiction provided by Congress is narrower than the Constitution’s grant of judicial power may give rise to an argument that the statutory grant of jurisdiction cannot be used by the House should it merely adopt a resolution

²³⁰ See H.Res. 258, 102d Cong., 1st Sess., (1991).

²³¹ See H.Res. 369, 104th Cong., 2d Sess., (1996).

²³² See H.Res. 167, 105th Cong., 1st Sess., (1997).

²³³ See H.Res. 463, 105th Cong., 2d Sess., (1998).

²³⁴ See H.Res. 507, 105th Cong., 2d Sess., (1998).

²³⁵ U.S. CONST., Art. III, § 2, cl. 1.

²³⁶ See ERWIN CHERMERINSKY, FEDERAL JURISDICTION, 264 (3d Ed. 1999) (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

²³⁷ See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000) (stating that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

²³⁸ *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983) (internal quotation marks and citations omitted).

authorizing a subpoena enforcement proceeding to be brought in court. Following this argument to its conclusion might suggest that both Houses of Congress must pass a law, signed by the President, which authorizes a civil enforcement action to be brought in federal district court because a mere one-House resolution will not suffice to provide such jurisdiction.

We have found no court or commentator that has expressly adopted this argument. It therefore remains unclear whether the existing statutory language for jurisdiction can be definitively said to be inadequate. Rather, the limited Supreme Court and other federal court precedent that exists may be read to suggest that the current statutory basis is sufficient to establish jurisdiction for a civil action of the type contemplated here if the representative of the congressional committee is specifically authorized by a House of Congress to act.

In 1928, the Supreme Court decided *Reed v. The County Commissioners of Delaware County, Pennsylvania*,²³⁹ which involved a special committee of the United States Senate charged, by Senate resolution, with investigating the means used to influence the nomination of candidates for the Senate.²⁴⁰ The special committee was authorized to “require by subpoena or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.”²⁴¹ During the course of its investigation into the disputed election of William B. Wilson of Pennsylvania to the Senate, the committee sought to obtain the “boxes, ballots, and other things used in connection with the election.”²⁴² The County Commissioners, who were the legal custodians of said materials, refused to provide them to the committee, thus necessitating the lawsuit. The Supreme Court, after affirming the powers of the Senate to “obtain evidence related to matter committed to it by the Constitution”²⁴³ and having “passed laws calculated to facilitate such investigations,”²⁴⁴ nevertheless held that it was without jurisdiction to decide the case. The Senate had relied on the resolution’s phrase “such other acts as may be necessary” to justify its authority to bring such a suit. According to the Court, however, that phrase “may not be taken to include everything that under any circumstances might be covered by its words.”²⁴⁵ As a result, the Court held that “the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department. Petitioners are not ‘authorized by law to sue.’”²⁴⁶ The Court in *Reed* made no mention of the jurisdictional statute that existed at the time. Rather, the Court appears to have relied on the fact that the Senate did not specifically authorize the committee to sue; therefore, absent particular language granting the power to sue

²³⁹ 277 U.S. 376 (1928).

²⁴⁰ *Id.* at 378 (citing S. Res 195, 69th Cong., 1st Sess. (1926)).

²⁴¹ *Id.* at 378-79.

²⁴² *Id.* at 387.

²⁴³ *Id.* at 388 (citing *McGrain v. Daugherty*, 273 U.S. 135, 160-174 (1927)).

²⁴⁴ *Id.* (citing R.S. §§ 101-104, (codified as amended at 2 U.S.C. §§ 192, 194 (2000))).

²⁴⁵ *Id.* at 389.

²⁴⁶ *Id.*

in court, there can be no basis for judicial jurisdiction over such a suit.²⁴⁷ Read in this manner, *Reed* appears to suggest that had the Senate resolution specifically mentioned the power to sue, the Court may have accepted jurisdiction and decided the case on its merits. Such a reading of *Reed* is supported by a recent district court ruling involving the question of whether Congress authorized judicial enforcement of Member demands for information from executive branch agencies.

In *Waxman v. Thompson*, a 2006 opinion of the District Court for the Central District of California,²⁴⁸ the plaintiffs, all minority members of the House Government Reform Committee, sought a court order pursuant to 5 U.S.C. §§ 2954 and 7211 – often times referred to as the “rule of seven” – granting them access to Department of Health and Human Services records related to the anticipated costs of the Medicare Prescription Drug Implementation and Modernization Act of 2003.²⁴⁹ The court, in dismissing the case for lack of jurisdiction, addressed the argument made by the plaintiffs that 5 U.S.C. § 2954, which requires that “[a]n Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof ... shall submit any information requested of it relating to any matter within the jurisdiction of the committee,”²⁵⁰ implicitly delegated to Members the right to sue to enforce their informational demands.²⁵¹ The court, in rejecting this argument, relied on the Supreme Court’s holding in *Reed v. County Commissioners*.²⁵² Specifically, the court noted that *Reed*’s holding “put Congress on notice that it was necessary to make authorization to sue to enforce investigatory demands explicit if it wished to ensure that such power existed.”²⁵³ According to the court, like the Senate resolution at issue in *Reed*, because § 2954 is silent with respect to civil enforcement it stands to reason that the Congress never intended to provide the Members with the power to seek civil judicial orders to enforce their document demands.

The argument that a mere one-house resolution is not sufficient to provide jurisdiction also derives support from the ruling in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,²⁵⁴ a 1973 decision by the District Court for the District of Columbia. In *Senate Select Committee*, the court held that there was no jurisdictional statute available that authorizes the court to hear and decide the merits of the Committee’s request for a declaratory judgment, mandatory injunction, and writ of mandamus arising from President Nixon’s refusal to produce tape recording and other documents sought by the Committee pursuant to a *subpoena*

²⁴⁷ It appears that the Court’s decision in *Reed* prompted the Senate to adopt its Standing Order. See *supra* note 209.

²⁴⁸ *Waxman v. Thompson*, No. 04-3467, slip op. (C.D. Cal. July 24, 2006).

²⁴⁹ *Id.* at 2.

²⁵⁰ 5 U.S.C. § 2954 (2000) (emphasis added).

²⁵¹ *Waxman v. Thompson*, No. 04-3467, slip op. at 21 (C.D. Cal. July 24, 2006).

²⁵² *Id.* at 21, n. 42.

²⁵³ *Id.*

²⁵⁴ 366 F. Supp. 51 (D.D.C. 1973).

duces tecum.²⁵⁵ In reaching its conclusion, the court addressed several potential bases for jurisdiction: 28 U.S.C. § 1345, United States as a Plaintiff; 28 U.S.C. § 1361, Action to Compel an Officer of the United States to Perform His Duty; 5 U.S.C. §§ 701-706, the Administrative Procedure Act; and, of particular relevance here, 28 U.S.C. § 1331, the federal question jurisdiction statute.²⁵⁶

Focusing on 28 U.S.C. § 1331, the court noted that the statute at the time contained a minimum “amount in controversy” requirement of “\$10,000 exclusive of interest and costs.”²⁵⁷ The court stated that “[t]he satisfaction of a minimum amount-in-controversy is not a technicality; *it is a requirement imposed by Congress which the courts may not dispense with at their pleasure.*”²⁵⁸ Because the Select Committee could not establish a theory under which the amount in controversy requirement was satisfied, the court dismissed the case for lack of subject matter jurisdiction.²⁵⁹

Senate Select Committee may still be cited for the proposition that, absent a specific congressional enactment, Congress may not seek to enforce a subpoena in federal court. It is important to note, however, that not only have subsequent cases held that “[w]here fundamental constitutional rights are involved, this court has been willing to find satisfaction of the jurisdictional amount requirement for federal question jurisdiction,”²⁶⁰ but also that Congress specifically removed the amount in controversy requirement for federal question jurisdiction in 1980.²⁶¹ Given these developments, combined with the reading of *Reed v. County Commissioners* suggested above, it appears possible to argue that a specifically authorized congressional committee may bring a civil action to enforce a subpoena using 28 U.S.C. § 1331 as a basis for federal question jurisdiction. Such an argument has been suggested by the district court in *Waxman v. Thompson*, the “rule-of-seven” case discussed above. According to the court in *Waxman*, the holdings of *Reed*, *Senate Select Committee* and *United States v. AT&T*²⁶² – a case involving the intervention by a House committee chairman into a lawsuit by the Department of Justice, which was attempting to enjoin compliance with a committee subpoena by AT&T – suggest that “legislative branch suits to enforce requests for information from the executive

²⁵⁵ *Id.* at 61.

²⁵⁶ *Id.* at 55-61.

²⁵⁷ 28 U.S.C. § 1331 (1970).

²⁵⁸ *Senate Select Committee*, 366 F. Supp. at 59 (citing *Holt v. Indiana Mfg. Co.*, 176 U.S. 68 (1900); *United States v. Sayward*, 160 U.S. 493 (1895)) (emphasis in original).

²⁵⁹ *Id.* at 61 (stating that “[e]ach of plaintiffs’ assertions ... regarding the amount-in-controversy are legally inadequate, and finding no possible valuation of the matter which satisfies the \$10,000 minimum, the Court cannot assert jurisdiction by virtue of § 1331.”).

²⁶⁰ *United States v. American Telephone & Telegraph Co.*, 551 F.2d 384, 389 (D.C. Cir. 1976) (citing *Committee for GI Rights v. Callaway*, 518 F.2d 466, 472-73 (1975)); *see also Greer v. Spock*, 424 U.S. 828 (1976)

²⁶¹ *See* P.L. 96-486 § 2(a), 94 Stat. 2369 (1980).

²⁶² 567 F.2d 121

branch are justiciable *if authorized by one or both Houses of Congress.*²⁶³ While we have found no instance where a committee of either the House or Senate has attempted to use this argument to enforce a subpoena, it appears to be consistent with both the plain meaning of the statute and a reasonable interpretation of the existing case law.

Although, as indicated, prior to the 110th Congress, there have been no previous attempts by a House of Congress to seek civil enforcement of subpoenas in federal court authorized solely by resolution of a single House,²⁶⁴ there have been situations that appear to be closely analogous. On several occasions the House of Representatives has authorized, via House Resolution, the intervention by counsel representing a House Committee into civil litigation involving congressional subpoenas.

In June of 1976, subpoenas were issued to the American Telephone and Telegraph Company (AT&T) by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. The Subcommittee was seeking copies of “all national security request letters sent to AT&T and its subsidiaries by the FBI as well as records of such taps prior to the time when the practice of sending such letters was initiated.”²⁶⁵ Before AT&T could comply with the request, the Department of Justice (DOJ) and the Subcommittee’s chairman, Representative John Moss, entered into negotiations seeking to reach an alternate agreement which would prevent AT&T from having to turn over all its records.²⁶⁶ When these negotiations broke down, the DOJ sought an injunction in the District Court for the District of Columbia prohibiting AT&T from complying with the Subcommittee’s subpoenas.

The House of Representatives responded to the litigation by authorizing Representative Moss to intervene in the suit on behalf of the Committee on Interstate and Foreign Commerce and the House of Representatives.²⁶⁷ Specifically, the authorization for intervention was accomplished by House Resolution, which provided that Chairman Moss was to represent the Committee and the full House “to secure information relating to the privacy of telephone communications now in the possession of [AT&T] for the use of the Committee and the full House.”²⁶⁸ In addition, the resolution authorized Chairman Moss to hire a special counsel, use not

²⁶³ *Waxman v. Thompson*, No. 04-3467, slip op. at 29 (C.D. Cal. July 24, 2006) (emphasis added).

²⁶⁴ The recent litigation filed during the 110th Congress by the House Judiciary Committee represents the first such attempt at civil enforcement. *See infra* notes 405-416 and accompanying text.

²⁶⁵ *United States v. American Telephone & Telegraph*, 551 F.2d 384, 385 (D.C. Cir. 1976).

²⁶⁶ *Id.* at 386. The precise details of the delicate negotiations between the DOJ and the Subcommittee are explained by the court, *see id.* at 386-88, and, therefore, will not be recounted here.

²⁶⁷ *See* H.Res. 1420, 94th Cong. 2d Sess. (1976); *see also* H.Rept. 94-1422, 94th Cong. 2d Sess. (1976).

²⁶⁸ *Id.*

more than \$50,000 from the contingent fund of the Committee to cover expenses, and to report to the full House on matters related as soon as practicable.²⁶⁹ The resolution was adopted by the House by a vote of 180-108 on August 26, 1976.²⁷⁰

Chairman Moss's intervention into the proceedings was noted by the district court, and does not appear to have been contested by either AT&T or the DOJ.²⁷¹ Chairman Moss remained an intervener pursuant to the House Resolution through the district court proceeding and two appeals to the Court of Appeals for the District of Columbia Circuit until an agreement was reached with respect to the disclosure of the documents sought.

A second intervention authorization, involving litigation between Ashland Oil and the Federal Trade Commission (FTC), also occurred in 1976. This case arose when Ashland Oil sought to enjoin the FTC from transferring its information to the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce at the request of Subcommittee Chairman Moss. When Ashland Oil obtained a temporary restraining order, the subcommittee promptly authorized a subpoena for the documents and Chairman Moss filed a resolution for authorization from the House to allow him to intervene with special counsel in the suit that Ashland Oil had filed seeking to enjoin the FTC from transferring the documents to the subcommittee.²⁷² The district court granted Chairman Moss's motion to intervene and ultimately refused to grant the injunction.²⁷³ The Court of Appeals affirmed on the grounds that "no substantial showing was made that the materials in the possession of the FTC will necessarily be 'made public' if turned over to Congress."²⁷⁴

While *AT&T* and *Ashland Oil* represent affirmative authorizations for intervention by a house of Congress, *In Re Beef Industry Antitrust Litigation*,²⁷⁵ provides an example of what may occur should a house of Congress not provide express authorization to be represented in court. In *In Re Beef*, the chairmen of two subcommittees of the House of Representatives²⁷⁶ sought to intervene in a pending

²⁶⁹ *Id.*

²⁷⁰ See 122 CONG. REC. 27,865-866 (Aug. 26, 1976).

²⁷¹ See *United States v. American Telephone & Telegraph*, 419 F.Supp. 454, 458 (stating that "[t]he effect of any injunction entered by this Court enjoining the release of materials by AT&T to the Subcommittee would have the same effect as if this Court were to quash the Subcommittee's subpoena. In this sense the action is one against the power of the Subcommittee and should be treated as such, assuming that Representative Moss has authority to speak for the Subcommittee.").

²⁷² See generally, *Ashland Oil, Inc. v. FTC*, 548 F.2d 977 (D.C. Cir. 1976); see also H.Res. 899, 94th Cong., 1st Sess. (1975); 121 CONG. REC. 41,707 (1976).

²⁷³ *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 301 (D.D.C. 1976).

²⁷⁴ *Ashland Oil*, 548 F.2d at 979.

²⁷⁵ 589 F.2d 786 (5th Cir. 1979).

²⁷⁶ The Subcommittee on Oversight and Investigations of the Committee on Interstate and
(continued...)

antitrust dispute for the purpose of obtaining access to documents subpoenaed by subcommittees from a party to the litigation. The subpoenaed documents had been obtained through litigation discovery and were thus subject to a standing court protective order. The district court refused to modify its protective order allowing the party to comply with the subpoena.²⁷⁷ The subcommittee chairmen appealed to the United States Court of Appeals for the Fifth Circuit.

On appeal, the Fifth Circuit entertained a motion to dismiss by one of the plaintiffs on the grounds that the chairmen had not obtained authorization from the full House of Representatives before filing their initial motion before the district court. The plaintiffs relied on what was then Rule XI, cl. 2(m)(2)(B) of the Rules of the House of Representatives, which provided that “[c]ompliance with any subpoena [sic] issued by a committee or subcommittee ... may be enforced only as authorized or directed by the House.”²⁷⁸ The committee chairmen responded by arguing that the rule was not applicable as they were not seeking to enforce their subpoenas, but rather were seeking a modification of the district court’s protective order.²⁷⁹ Therefore, according to the chairmen, they did not require authorization from the full House of Representatives to appear in court.²⁸⁰

The Fifth Circuit rejected the chairmen’s arguments, noting specifically that the House Rules “require[] House authorization not only for direct enforcement of a subpoena but also in any instance when a House committee seeks to institute or to intervene in litigation and, of course, to appeal from a court decision, particularly when the purpose is, as here, to obtain the effectuation of a subpoena.”²⁸¹ The court also extensively relied on the *Ashland Oil* precedent noting that similar to this case, the chairman in *Ashland Oil* was not seeking to enforce a subpoena, rather merely attempting to prevent an injunction from being issued.²⁸² The failure of the chairmen to obtain an authorization resolution from the full House in this case necessitated the dismissal of their appeal without any decision on the merits.²⁸³

As neither *AT&T*, *Ashland Oil*, nor *In Re Beef* raised any questions regarding the jurisdiction of the federal courts, it appears possible to argue that all that is legally

²⁷⁶ (...continued)

Foreign Commerce, and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business. *See id.* at 788.

²⁷⁷ *See In re Beef Industry Antitrust Litigation*, 457 F.Supp. 210, 212 (C.D. Tex. 1978) (stating that “the persons whom the Subcommittees have subpoenaed would not have possession of the subpoenaed documents but for the discovery rules of the Federal Courts. Congress by subpoenaing these documents is interfering with the processes of a Federal Court in an individual case.”).

²⁷⁸ *In Re Beef*, 589 F.2d at 789.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 790-91.

²⁸² *Id.* at 790.

²⁸³ *Id.* at 791.

required for committees, the House General Counsel, or a House-retained private counsel to seek civil enforcement of subpoenas or other orders is that authorization be granted by resolution of the full House. Absent such authorization, it appears that the courts will not entertain civil motions of any kind on behalf of Congress or its committees. While some may still argue that a law passed by both Houses and signed by the President conferring jurisdiction is required, it may be plausibly argued that taken together, the combination of *Reed*'s requirement that congressional authorization to sue be by express language, the willingness of federal courts to accept properly authorized interventions, and the fact that the federal question jurisdiction statute no longer contains an amount in controversy requirement, suggest that if an authorization resolution by the House can be obtained there is a likelihood that a reviewing court will find no legal impediment to seeking civil enforcement of subpoenas or other committee orders.²⁸⁴

Non-Constitutional Limitations

Authorization and Jurisdiction. Although the courts have upheld the authority of Congress to investigate and to cite a witness for contempt, they have also established limits, rooted both in the language of the criminal contempt statute and in the Constitution, on the investigatory and contempt powers. Recognizing that 2 U.S.C. § 192 is a criminal statute, the courts have accorded defendants the same safeguards as defendants in other criminal proceedings.²⁸⁵

The criminal contempt statute is applicable to contempts committed by a person “summoned as a witness by *the authority of either House of Congress ...*”²⁸⁶ The statute applies regardless of whether a subpoena has been issued by a committee or by the full House or Senate.²⁸⁷ Although the statute specifically makes the contempt

²⁸⁴ Relatedly, the Department of Justice has, on numerous occasions, including most recently in 1996, suggested that committees of Congress resolve inter-branch disputes involving the enforcement of subpoenas by civil proceeding in federal court. *See, e.g.*, H.Rept. 104-598, 104th Cong., 2d Sess., 63 (1996) (additional views of Hon. William F. Clinger, Jr.) (stating that “I am astonished at hearing this recommendation by a Democrat President when the contemnor is a Democrat after knowing that the concept of a civil remedy has been so resoundingly rejected by previous Democrat Congresses when the contemnor was a Republican.”); 10 Op. Off. Legal Counsel, 68, 87-89 (1986) (suggesting that “the courts may be willing to entertain a civil suit brought by the House to avoid any question about the possible applicability of the criminal contempt provisions of [2 U.S.C.] §§ 192 and 194.”); 8 Op. Off. Legal Counsel, 101, 139, n.40 (1984) (stating that “[t]he use of criminal contempt is especially inappropriate ... because Congress has the clearly available alternative of civil enforcement proceedings.”).

²⁸⁵ *Russell v. United States*, 369 U.S. 749 (1962); *see also Sinclair v. United States*, 279 U.S. 263 (1929). While most of the case law in this section of the report involves decisions under the statutory criminal contempt procedure, many of the holdings would be applicable to exercises of the new civil contempt statute and the inherent contempt power. *See S.Rept. No. 95-170, 95th Cong., 1st Sess., 41, 94.*

²⁸⁶ 2 U.S.C. § 192 (2000) (emphasis added).

²⁸⁷ *McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also Sinclair v. United States*, 279 U.S. 263, 296 (1929).

sanction applicable to a witness who has been “summoned,” the law applies whether the individual is subpoenaed or appears voluntarily and then refuses to testify.²⁸⁸

A contempt conviction will not be upheld if the committee’s investigation has not been clearly authorized by the full House or Senate.²⁸⁹ The investigation, and the questions posed, must be within the scope of the committee’s jurisdiction.²⁹⁰ A committee cannot issue a subpoena for a subject outside the scope of its jurisdiction. Authorization from the parent body may take the form of a statute,²⁹¹ a resolution,²⁹² or a standing rule of the House or Senate.²⁹³ In the case of a subcommittee investigation, the subject matter must fall within the scope of authority granted to the subcommittee by the full committee.²⁹⁴ Investigations may be conducted, and subpoenas issued, pursuant to a committee’s legislative or oversight jurisdiction.²⁹⁵

²⁸⁸ *Sinclair*, 279 U.S. at 296.

²⁸⁹ *United States v. Rumely*, 343 U.S. 41 (1953); *Tobin v. United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962); *United States v. Patterson*, 206 F.2d 433 (D.C. Cir. 1953).

²⁹⁰ *See United States v. Rumely*, 343 U.S. 41 (1953); *see also United States v. Patterson*, 206 F.2d 433 (D.C. Cir. 1953).

²⁹¹ 26 U.S.C. § 8021, 8022 (2000) (Joint Committee on Taxation).

²⁹² Resolutions are generally used to establish select or special committees and to delineate their authority and jurisdiction. *See* 4 Deschler’s Precedents, *supra* note 87, ch. 17, 56; *see also e.g.*, S.Res. 23, 100th Cong. (Iran-Contra); Sen. Res. 495, 96th Cong. (Billy Carter/Libya).

²⁹³ This mode is the most common today. Both the House and the Senate authorize standing committees to make investigations within their jurisdiction, and permit such committees and their subcommittees to issue subpoenas. *See* House Rules Manual, H.R. Doc. No. 108-241, 108th Cong. 2d Sess., Rule XI, cl. 1 (b) and cl. 2 (m) (2005); Senate Manual, S. Doc. No. 98-1, 98th Cong., 2d Sess., Rule XXVI, cl. 1 (1984).

²⁹⁴ *Gojack v. United States*, 384 U.S. 702, 706 (1966). The case involved a rule of the former House Committee on Un-American Activities, which stated that “no major investigations shall be initiated without the approval of a majority of the committee.” The court reversed the contempt conviction in *Gojack* because the subcommittee’s investigation, which resulted in the contempt citation, had not been approved by the committee as its rules required.

Despite the provision of Senate Rule XXVI, cl.1, authorizing subcommittee subpoenas, the rules of at least one committee expressly prohibit subcommittee subpoenas (Committee on Small Business, Rule 3(c)), while another committee requires approval by the full committee of any subcommittee subpoenas (Committee on Labor and Human Resources, Rule 17).

²⁹⁵ A leading study of Senate committee jurisdiction noted that “oversight jurisdiction necessarily flows from specific legislative enactments, but it also emanates from broader and more vaguely defined jurisdiction which committees may exercise in particular subject matter areas.” *First Staff Report to the Temporary Select Committee to Study the Senate Committee System*, 94th Cong., 2d Sess., 104 (1976); *see also United States v. Kamin*, 136 F. Supp. 791, 801 (D. Mass. 1956) (providing a judicial application of oversight jurisdiction in the investigatory context).

In construing the scope of a committee’s authorizing rule or resolution, the Supreme Court has adopted a mode of analysis not unlike that ordinarily followed in determining the meaning of a statute: it looks first to the words of the resolution itself, and then, if necessary, to the usual sources of legislative history, including floor statements, reports, and past committee practice. As explained by the Court in *Barenblatt v. United States*,²⁹⁶ “[j]ust as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions.”²⁹⁷ It appears that the clear articulation of committee jurisdiction in both the House and Senate rules combined with the express authorization of special committees by resolution has effectively eliminated the use of jurisdiction as a defense to contempt proceedings.

Legislative Purpose. A committee’s investigation must have a legislative purpose or be conducted pursuant to some other constitutional power of the Congress, such as the authority of each House to discipline its own Members, judge the returns of the their elections, and to conduct impeachment proceedings.²⁹⁸ Although the early case of *Kilbourn v. Thompson*²⁹⁹ held that the investigation in that case was an improper probe into the private affairs of individuals, the courts today generally will presume that there is a legislative purpose for an investigation, and the House or Senate rule or resolution authorizing the investigation does not have to specifically state the committee’s legislative purpose.³⁰⁰ In *In re Chapman*,³⁰¹ the Court upheld the validity of a resolution authorizing an inquiry into charges of corruption against certain Senators despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated:

The questions were undoubtedly pertinent to the subject matter of the inquiry. The resolutions directed the committee to inquire “whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.” What the Senate might or might not do upon the facts when ascertained, we cannot say nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.

²⁹⁶ 360 U.S. 109, 117 (1959).

²⁹⁷ See *Watkins v. United States*, 354 U.S. 178, 209-215 (1957).

²⁹⁸ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927); see also *In Re Chapman*, 166 U.S. 661 (1897).

²⁹⁹ 103 U.S. 168 (1881).

³⁰⁰ *McGrain v. Daugherty*, 273 U.S. 135 (1927); see also *Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938); LEADING CASES ON CONGRESSIONAL INVESTIGATORY POWER, 7 (Comm. Print 1976) [hereinafter cited as *Leading Cases*]. For a different assessment of recent case law concerning the requirement of a legislative purpose, See Moreland, *supra* note 57, at 232.

³⁰¹ 166 U.S. 661, 669 (1897).

Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.

We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.³⁰²

In *McGrain v. Daugherty*,³⁰³ the original resolution that authorized the Senate investigation into the Teapot Dome Affair made no mention of a legislative purpose. A subsequent resolution for the attachment of a contumacious witness declared that his testimony was sought for the purpose of obtaining “information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.” The Court found that the investigation was ordered for a legitimate object. It wrote:

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. ***

The second resolution—the one directing the witness be attached—declares that this testimony is sought with the purpose of obtaining “information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.” This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of “other action” if deemed “necessary or proper” is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and is rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.³⁰⁴

Moreover, when the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of

³⁰² *In re Chapman*, 166 U.S. at 699.

³⁰³ 273 U.S. 135 (1927).

³⁰⁴ *Id.* at 179-180.

the Congress exceeds its power when it seeks information in such areas.³⁰⁵ In the past, the types of legislative activity which have justified the exercise of the power to investigate have included the primary functions of legislating and appropriating;³⁰⁶ the function of deciding whether or not legislation is appropriate;³⁰⁷ oversight of the administration of the laws by the executive branch;³⁰⁸ and the essential congressional function of informing itself in matters of national concern.³⁰⁹ In addition, Congress's power to investigate such diverse matters as foreign and domestic subversive activities,³¹⁰ labor union corruption,³¹¹ and organizations that violate the civil rights of others³¹² — have all been upheld by the Supreme Court.³¹³

Despite the Court's broad interpretation of legislative purpose, Congress's authority is not unlimited. Courts have held that a committee lacks legislative purpose if it appears to be conducting a legislative trial rather than an investigation to assist in performing its legislative function.³¹⁴ Furthermore, although "there is no congressional power to expose for the sake of exposure,"³¹⁵ "so long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."³¹⁶

Pertinency. Two different issues of pertinency arise in regard to a contempt prosecution.³¹⁷ First, a witness's refusal to answer questions or provide subpoenaed documents will be punished as a contempt only if the questions posed (or documents requested) by the committee are, in the language of the statute, "pertinent to the

³⁰⁵ *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert denied*, 393 U.S. 1024 (1969).

³⁰⁶ *Barenblatt v. United States*, 360 U.S. 109 (1959).

³⁰⁷ *Quinn v. United States*, 349 U.S. 155, 161 (1955).

³⁰⁸ *McGrain*, 273 U.S. at 295.

³⁰⁹ *United States v. Rumely*, 345 U.S. 4, 43-45 (1953); *see also Watkins*, 354 U.S. at 200 n. 3.

³¹⁰ *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McPhaul v. United States*, 364 U.S. 372 (1960).

³¹¹ *Hutcheson v. United States*, 369 U.S. 599 (1962).

³¹² *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

³¹³ For an indication of the likely breadth of Congress's power to investigate, *see supra* note 5-19 and accompanying text.

³¹⁴ *See United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956); *United States v. Cross*, 170 F. Supp. 303 (D.D.C. 1959).

³¹⁵ *Watkins v. United States*, 354 U.S. 178, 200 (1957). However, Chief Justice Warren, writing for the majority, made it clear that he was not referring to the "power of the Congress to inquire into and publicize corruption, mal-administration or inefficiency in agencies of the Government." *Id.*

³¹⁶ *Barenblatt*, 360 U.S. at 132.

³¹⁷ *Deutch v. United States*, 367 U.S. 456, 467-68 (1961).

question under inquiry.”³¹⁸ In determining general questions of the pertinency of inquiries, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.³¹⁹ Given the breadth of congressional investigations, the courts have long recognized that pertinency in the legislative context is broader than in the judicial context, which relies primarily on the law of evidence’s standard of relevance. For example, the D.C. Circuit has stated that

A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. ... A judicial inquiry relates to *a case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad.³²⁰

The second pertinency issue concerns the Fifth Amendment’s Due Process Clause. According to the Supreme Court in *Deutch v. United States*, the pertinency of a “committee’s inquiry must be brought home to the witness at the time the questions are put to him.”³²¹ The Court in *Watkins* stated that

[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.³²²

In addition, according to commentators, a witness is entitled “to understand the specific aspect of the committee’s jurisdiction under its authorizing resolution [or House or Senate rule] to which the question relates.”³²³ Finally, it appears that the committee must specifically rule on a pertinency objection and, if the objection is overruled, inform the witness of that fact before again directing him to answer the question.

The Court has also observed that a witness might resort to several sources in determining the subject matter of an investigation. These include, but are likely not limited to: (a) the House or Senate resolution authorizing the committee inquiry; (b) the committee’s resolution authorizing the subcommittee investigation; (c) the introductory statement of the chairman or other committee Members; (d) the nature

³¹⁸ 2 U.S.C. § 192 (2000); *see also* *Barenblatt*, 360 U.S. at 123; *Watkins*, 354 U.S. at 208

³¹⁹ *Sinclair v. United States*, 279 U.S. 263, 279 (1929); *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 287, 305 (D.D.C. 1976).

³²⁰ *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938), *cert. denied*, 303 U.S. 664 (1938) (internal citation omitted) (emphasis in original).

³²¹ *Deutch*, 367 U.S. at 467-68.

³²² *Watkins*, 354 U.S. at 214-15.

³²³ *See* James Hamilton, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS*, 241 (1977) [hereinafter Hamilton].

of the proceedings; and (e) the chairman's response to a witness's objections on the grounds of lack of pertinency.³²⁴

Willfulness. A conviction for statutory criminal contempt cannot be sustained unless the failure to appear before the committee, to produce documents, or to respond to questions is a willful, intentional act.³²⁵ However, an evil motive does not have to be established.³²⁶ Because of the willfulness requirement, and to satisfy constitutional due process standards, when a witness objects to a question or otherwise refuses to answer, the chairman or presiding member should rule on any objection and, if the objection is overruled, the witness should be clearly directed to answer.³²⁷ It has been observed that "there is no talismanic formula which [a] committee must use in directing [a] witness to answer," but he should be clearly informed "and not left to the risk of guessing upon pain of criminal penalties, whether the grounds for his objection to answering [are] accepted or rejected," and "if they are rejected, he should be given another chance to answer."³²⁸ The procedure to be followed in responding to a witness's objections to questions has been described as follows:

If a witness refuses to answer a question, the committee must ascertain the grounds relied upon by the witness. It must clearly rule on the witness's objection, and if it overrules the witness's objection and requires the witness to answer, it must instruct the witness that his continued refusal to answer will make him liable to prosecution for contempt of Congress. By failing adequately to apprise the witness that an answer is required notwithstanding his objection the element of deliberateness necessary for conviction for contempt under 2 U.S.C. § 192 is lacking, and such a conviction cannot stand.³²⁹

Other Procedural Requirements. A contempt conviction can be reversed on other non-constitutional grounds. The cases make clear that committees must closely follow their own rules and the rules of their parent body in authorizing

³²⁴ *Watkins*, 354 U.S. at 209-14.

³²⁵ *Quinn v. United States*, 349 U.S. 155, 165 (1955); see also *United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1948), cert. denied, 333 U.S. 838 (1948); *Deutch v. United States*, 235 F.2d 853 (D.C. Cir. 1956), rev'd on other grounds, 367 U.S. 456 (1961).

³²⁶ See generally, Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189, 239-42 (1967).

³²⁷ See, e.g., *Deutch v. United States*, 367 U.S. 456 (1961); *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955); *Emspak v. United States*, 349 U.S. 190 (1955); *Bart v. United States*, 349 U.S. 219 (1955); *Braden v. United States*, 272 F.2d 653, 661 (5th Cir. 1959), aff'd, 365 U.S. 961 (1961).

³²⁸ *Quinn v. United States*, 203 F.2d 30, 33 (D.C. Cir. 1952), aff'd, 349 U.S. 155 (1955).

³²⁹ See Leading Cases, *supra* note 297 at 69.

subpoenas³³⁰ and conducting investigations and hearings.³³¹ It appears that a witness can be convicted of criminal contempt,³³² but not of perjury, where a quorum of the committee was not present.³³³

Attorney-Client Privilege. In practice, the exercise of committee discretion whether to accept a claim of attorney-client privilege has turned on a “weighing [of] the legislative need for disclosure against any possible resulting injury.”³³⁴ More particularly, the process of committee resolution of claims of attorney-client privilege has traditionally been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of laws that fall within their jurisdiction,³³⁵ against any possible injury to the witness. In the particular circumstances of any situation, a committee may consider and evaluate the strength of a claimant’s assertion in light of the pertinency of the documents or information sought to the subject of the investigation, the practical unavailability of the documents or information from any other source, the possible unavailability of the privilege to the claimant if it were to be raised in a judicial forum, and the committee’s assessment of the cooperation of the witness in the matter, among other considerations. A valid claim of attorney-client privilege, free of any taint of waiver, exception or other mitigating circumstance, would merit substantial weight. Any serious doubt, however, as to the validity of the asserted claim would diminish its compelling character.³³⁶ Moreover, the conclusion that recognition of non-

³³⁰ *Shelton v. United States*, 327 F.2d 601 (D.C. Cir. 1963); *see also Liveright v. United States*, 347 F.2d 473 (D.C. Cir. 1965).

³³¹ *Yellin v. United States*, 374 U.S. 109 (1963); *Gojack v. United States*, 384 U.S. 702 (1966).

³³² *United States v. Bryan*, 339 U.S. 323 (1950).

³³³ The Court held in *Christoffel v. United States*, 338 U.S. 84 (1949), that a quorum of the committee must be present at the time that the perjurious testimony is given. It is not sufficient that a quorum is present at the start of the hearing. The difference in regard to the quorum requirement between the contempt statute (2 U.S.C. § 192) and the perjury statute (18 U.S.C. § 1621) is the provision in the latter that the statement must have been made before a “competent tribunal,” and a quorum has been considered necessary for the tribunal to be competent. The Court in *Christoffel* recognized the constitutional power of each House to determine the rules of its proceedings and pursuant to this power, the Senate has authorized its committees to adopt rules under which one member of a committee can constitute a quorum for the receipt of sworn testimony. *See* Senate Rule XXVI, cl. 7(a)(2). The House allows committees to adopt rules providing for receipt of testimony by as few as two members. *See* House Rule XI, cl. 2(h).

³³⁴ Hearings, “International Uranium Cartel”, Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Vol. 1, 123 (1977).

³³⁵ *See* 2 U.S.C. 190d (1994).

³³⁶ *See, e.g., Contempt of Congress Against Franklin L. Haney*, H.Rept. 105-792, 105th Cong., 2d Sess., 11-15 (1998); *Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)*, H.Rept. 104-598, 104th Cong., 2d Sess., 40-54 (1996); *Refusal of William H. Kennedy, III, To* (continued...)

constitutionally based privileges, such as attorney-client privilege, is a matter of congressional discretion is consistent with both traditional British parliamentary and the Congress's historical practice.³³⁷

Although there is limited case law with respect to attorney-client privilege claims before congressional committees,³³⁸ appellate court rulings on the privilege in cases involving other investigative contexts (e.g., grand jury) have raised questions as to whether executive branch officials may claim attorney-client, work product, or deliberative process privileges in the face of investigative demands.³³⁹ These rulings may lead to additional arguments in support of the long-standing congressional practice.

³³⁶ (...continued)

Produce Notes Subpoenaed by the Special Committee to Investigate Whitewater Development Corporation and Related Matters, S.Rept. 104-191, 104th Cong. 1st Sess., 9-19 (1995); *Proceedings Against Ralph Bernstein and Joseph Bernstein*, H.Rept. 99-462, 99th Cong. 2d Sess., 13, 14 (1986); *Hearings, International Uranium Control, before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess., 60, 123 (1977).

³³⁷ See, CRS Report 95-464, *Investigative Oversight: An Introduction to the Law Practice and Procedure of Congressional Inquiry*, pp. 43-55 (April 7, 1995); see also, Glenn A. Beard, *Congress v. the Attorney-Client Privilege: A "Full and Frank Discussion"*, 35 Amer. CRIM. L. REV. 119 122-127 (1997) (“[C]ongressional witnesses are not legally entitled to the protection of the attorney-client privilege, and investigating committees therefore have discretionary authority to respect or overrule such claims as they see fit.”); Thomas Millett, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 JOHN MARSHALL L. REV. 309 (1988).

³³⁸ See *In the Matter of Provident Life and Accident Co.*, E.D. Tenn., S.D., CIV-1-90-219, June 13, 1990 (noting that the court's earlier ruling on an attorney-client privilege claim was “not of constitutional dimensions, and is certainly not binding on the Congress of the United States.”).

³³⁹ *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910 (8th Cir. 1997), *cert. denied sub. nom.*, *Office of the President v. Office of the Independent Counsel*, 521 U.S. 1105 (1997) (rejecting claims by the First Lady of attorney-client and work-product privilege with respect notes taken by White House Counsel Office attorneys); *In re Bruce R. Lindsey (Grand Jury Testimony)*, 158 F. 3d 1263 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 996 (1998) (holding that a White House attorney may not invoke attorney-client privilege in response to grand jury subpoena seeking information on possible commission of federal crimes); *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997) (deciding that the deliberative process privilege is a common law agency privilege which can be overcome by a showing of need by an investigating body); *In re: A Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002) (holding that the attorney-client privilege is not applicable to communications between state government counsel and state office holder); *But see In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005) (upholding a claim of attorney-client privilege with respect to communications between a former chief legal counsel to the governor of Connecticut who was under grand jury investigation. It is worth noting that the Second Circuit recognized its apparent conflict with the afore-cited cases, however, the ruling is arguably distinguishable on its facts. See Kerri R. Blumenauer, *Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged*, 75 FORDHAM L. REV. 75 (2006)).

The legal basis for Congress's practice in this area is based upon its inherent constitutional prerogative to investigate which has been long recognized by the Supreme Court as extremely broad and encompassing, and which is at its peak when the subject is fraud, abuse, or maladministration within a government department.³⁴⁰ The attorney-client privilege is, on the other hand, not a constitutionally based privilege, rather it is a judge-made exception to the normal principle of full disclosure in the adversary process which is to be narrowly construed and has been confined to the judicial forum.³⁴¹

While no court has recognized the inapplicability of the attorney-client privilege in congressional proceedings in a decision directly addressing the issue,³⁴² an opinion issued by the Legal Ethics Committee of the District of Columbia Bar in February 1999, clearly acknowledges the longstanding congressional practice.³⁴³ The occasion for the ruling arose as a result of an investigation of a Subcommittee of the House Commerce Committee into the circumstances surrounding the planned relocation of the Federal Communications Commission to the Portals office complex.³⁴⁴ During the course of the inquiry, the Subcommittee sought certain documents from the Portals developer, Mr. Franklin L. Haney. Mr. Haney's refusal to comply resulted in subpoenas for those documents to him and the law firm representing him during the relocation efforts. Both Mr. Haney and the law firm asserted attorney-client privilege in their continued refusal to comply. In addition, the law firm sought an opinion from the D.C. Bar's Ethics Committee as to its obligations in the face of the subpoena and a possible contempt citation. The Bar Committee notified the firm that the question was novel and that no advice could be given until the matter was considered in a plenary session of the Committee.³⁴⁵ The firm continued its refusal to comply until the Subcommittee cited it for contempt, at which time the firm

³⁴⁰ *McGrain v. Daugherty*, 272 U.S. 135, 177 (1926); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975).

³⁴¹ *Westinghouse Electric Corporation v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991).

³⁴² The Supreme Court has recognized that "only infrequently have witnesses . . . [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding." *Hannah v. Larche*, 363 U.S. 420, 425 (1960); see also, *United States v. Fort*, 443 F. 2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (rejecting the contention that the constitutional right to cross-examine witnesses applied to a congressional investigation); *In the Matter of Provident Life and Accident Co.*, E.D. Tenn., S.D., CIV-1-90-219, June 13, 1990 (noting that the court's earlier ruling on an attorney-client privilege claim was "not of constitutional dimensions, and is certainly not binding on the Congress of the United States.").

³⁴³ Opinion No. 288, *Compliance With Subpoena from Congressional Committee to Produce Lawyers' Files Containing Client Confidences or Secrets*, Legal Ethics Committee, District of Columbia Bar, February 16, 1999. (D.C Ethics Committee Opinion).

³⁴⁴ See H. Rep. No. 105-792, 105th Cong., 1st Sess., 1-6, 7-8, 15-16 (1997).

³⁴⁵ See *Meeting on Portal Investigation (Authorization of Subpoenas; Receipt of Subpoenaed Documents and Consideration of Objections); and Contempt of Congress Proceedings Against Franklin L. Haney*, H. Comm. On Commerce, 105th Cong., 2d Sess., 48-50 (1998).

proposed to turn over the documents if the contempt citation was withdrawn. The Subcommittee agreed to the proposal.³⁴⁶

Subsequently, on February 16, 1999, the D.C. Bar's Ethics Committee issued an opinion vindicating the action taken by the firm. The Ethics Committee, interpreting D.C. Bar Rule of Professional conduct 1.6(d)(2)(A),³⁴⁷ held that an attorney faced with a congressional subpoena that would reveal client confidences or secrets

has a professional responsibility to seek to quash or limit the subpoena on all available, legitimate grounds to protect confidential documents and client secrets. If, thereafter, the Congressional subcommittee overrules these objections, orders production of the documents and threatens to hold the lawyer in contempt absent compliance with the subpoena, then, in the absence of a judicial order forbidding the production, the lawyer is permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents. A directive of a Congressional subcommittee accompanied by a threat of fines and imprisonment pursuant to federal criminal law satisfies the standard of "required by law" as that phrase is used in D.C. Rule of Professional conduct 1.6(d)(2)(A).

The D.C. Bar opinion urges attorneys to press every appropriate objection to the subpoena until no further avenues of appeal are available, and even suggests that clients might be advised to retain other counsel to institute a third-party action to enjoin compliance,³⁴⁸ but allows the attorney to relent at the earliest point when he is put in legal jeopardy. The opinion represents the first, and thus far the only, bar in the nation to directly and definitively address the merits of the issue.

In the end, of course, it is the congressional committee alone that determines whether to accept a claim of attorney-client privilege.

Work Product Immunity and Other Common Law Testimonial Privileges. Common law rules of evidence as well as statutory enactments recognize a testimonial privilege for witnesses in a judicial proceeding so that they need not reveal confidential communications between doctor and patient, husband and wife, or clergyman and parishioner.³⁴⁹ Although there is no court case directly on

³⁴⁶ *Id.* at 101-105.

³⁴⁷ Under Rule 1.6(d)(2)(A) a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. Bar rules or when "required by law or court order."

³⁴⁸ A direct suit to enjoin a committee from enforcing a subpoena has been foreclosed by the Supreme Court's decision in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975), but that ruling does not appear to foreclose an action against a "third party," such as the client's attorney, to test the validity of the subpoena or the power of a committee to refuse to recognize the privilege. *See, e.g., United States v. AT&T*, 567 F. 2d 121 (D.C.Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a subpoena to provide telephone records that might compromise national security matters).

³⁴⁹ *See generally*, 8 Wigmore, EVIDENCE § 2285 (McNaughton ed. 1961); *see also* FED. R. EVID. 501. For an analysis of the attorney client privilege, *See infra* notes 331-344 and (continued...)

point, it appears that, like the privilege between attorney and client, congressional committees are not legally required to allow a witness to decline to testify on the basis of other similar testimonial privileges.³⁵⁰ It should be noted, however, that the courts have denied claims by the White House Counsel's office of attorney work product immunity in the face of grand jury subpoenas that have been grounded on the assertion that the materials sought were prepared in anticipation of possible congressional hearings.³⁵¹ In addition, court decisions indicate that various rules of procedure generally applicable to judicial proceedings, such as the right to cross-examine and call other witnesses, need not be accorded to a witness in a congressional hearing.³⁵² The basis for these determinations is rooted in Congress's Article I section 5 rulemaking powers,³⁵³ under which each House is the exclusive determiner of the rules of its own proceedings. This rulemaking authority, as well as general separation of powers considerations, suggest that Congress and its committees are not obliged to abide by rules established by the courts to govern their own proceedings.³⁵⁴

Though congressional committees may not be legally obligated to recognize the privilege for confidential communications, they may do so at their discretion. Historical precedent suggests that committees often have recognized such privileges.³⁵⁵ The decision as to whether or not to allow such claims of privilege turns on a "weighing [of] the legislative need for disclosure against any possible resulting injury."³⁵⁶

³⁴⁹ (...continued)
accompanying text.

³⁵⁰ *Compare Attorney-Client Privilege: Memoranda Opinions of the American Law Division, Library of Congress, Comm. Print of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 98th Cong., 1st Sess., 926 (1983) [hereinafter Attorney-Client Privilege Comm. Print], with Id. at 41, 44 et. seq; see also generally, Moreland, supra note 5 at 265-67.*

³⁵¹ *See e.g., In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 907, 924-25 (8th Cir. 1997); *In re Grand Jury Proceedings*, 5 F.Supp.2d 21, 39 (D.D.C. 1998).

³⁵² *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971), (citing *Hannah v. Larche*, 363 U.S. 420 (1960)).

³⁵³ U.S. CONST. Art. 1, § 5, cl. 2

³⁵⁴ *See generally*, Telford Taylor, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 227-28 (1974).

³⁵⁵ *See Hamilton, supra note 320, at 244; see also S.Rept. No. 2, 84th Cong., 1st Sess., (1955).* Hamilton notes that John Dean, the former counsel to the President, testified before the Senate Watergate Committee after Nixon had "waived any attorney-client privilege he might have had because of their relationship." *Id.*

³⁵⁶ Attorney-Client Privilege Comm. Print, *supra* note 346, at 27 (citing *Hearings on an International Uranium Cartel before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., 60, 123 (1977)*).

Constitutional Limitations

The Supreme Court has observed that “Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights.”³⁵⁷ There are constitutional limits not only on Congress’s legislative powers, but also on its investigative powers.

First Amendment. Although the First Amendment, by its terms, is expressly applicable only to legislation that abridges freedom of speech, press, or assembly, the Court has held that the amendment also restricts Congress in conducting investigations.³⁵⁸ In the leading case involving the application of First Amendment rights in a congressional investigation, *Barenblatt v. United States*,³⁵⁹ the Court held that “where First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.” Thus, unlike the Fifth Amendment privilege against self-incrimination, the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.³⁶⁰

The Court has held that in balancing the personal interest in privacy against the congressional need for information, “the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness.”³⁶¹ To protect the rights of witnesses, in cases involving the First Amendment, the courts have emphasized the requirements discussed above concerning authorization for the investigation, delegation of power to investigate to the committee involved, and the existence of a legislative purpose.³⁶²

³⁵⁷ *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). Not all of the provisions of the Bill of Rights are applicable to congressional hearings. For example, the sixth amendment right of a criminal defendant to cross-examine witnesses and to call witnesses in his behalf has been held not applicable to a congressional hearing. *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

³⁵⁸ *Watkins v. United States*, 354 U.S. 178, 197 (1957).

³⁵⁹ 360 U.S. 109, 126 (1959).

³⁶⁰ *Id.*

³⁶¹ *Watkins*, 354 U.S. at 198. A balancing test was also used in *Branzburg v. Hayes*, which involved the issue of the claimed privilege of newsmen not to respond to demands of a grand jury for information. *See* 408 U.S. 665 (1972). In its 5-4 decision, the Court concluded that the need of the grand jury for the information outweighed First Amendment considerations, but there are indications in the opinion that “the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose,” and that “a State’s interest must be ‘compelling’ or ‘paramount’ to justify even an indirect burden on First Amendment rights.” *Id.* at 699-700; *see also Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) (applying the compelling interest test in a legislative investigation).

³⁶² *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Rumely*, 345 U.S. 41 (1953); *see also* 4 Deschler’s (continued...)

While the Court has recognized the application of the First Amendment to congressional investigations, and although the amendment has frequently been asserted by witnesses as grounds for not complying with congressional demands for information, the Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.³⁶³ However, the Court has narrowly construed the scope of a committee's authority so as to avoid reaching a First Amendment issue.³⁶⁴ 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.³⁶⁵

In a 1976 investigation of the unauthorized publication in the press of the report of the House Select Committee on Intelligence, the Committee on Standards of Official Conduct subpoenaed four news media representatives, including Daniel Schorr.³⁶⁶ The Standards of Official Conduct Committee concluded that Mr. Schorr had obtained a copy of the Select Committee's report and had 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," it declined to cite him for contempt for his refusal to disclose his

³⁶² (...continued)

Precedents, *supra* note 87, ch. 15, § 10, n. 15 and accompanying text.

³⁶³ Leading Cases, *supra* note 297, at 42; Hamilton, *supra* note 320, at 234. 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. *See* 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 although 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. Chord*, 442 F. 2d 1207 (D.C. Cir. 1970); *Ansara v. Eastland*, 442 F.2d 751 (D.C. Cir. 1971). However, in *Eastland v. United States Servicemen's Fund*, 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).

³⁶⁴ *United States v. Rumely*, 345 U.S. 41 (1953).

³⁶⁵ *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.

³⁶⁶ H.Rept. 94-1754, 94th Cong. 2d Sess., 6 (1976).

source.³⁶⁷ The desire to avoid a clash over First Amendment rights apparently was a major factor in the committee's decision on the contempt matter.³⁶⁸

In another First Amendment dispute, the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, in the course of its probe of allegations that deceptive editing practices were employed in the production of the television news documentary program *The Selling of the Pentagon*, subpoenaed Frank Stanton the president of CBS, directing him to deliver to the subcommittee the "outtakes" relating to the program.³⁶⁹ When, on First Amendment grounds, Stanton declined to provide the subpoenaed materials, the subcommittee unanimously voted a contempt citation, and the full committee by a vote of 25-13 recommended to the House that Stanton be held in contempt.³⁷⁰ After extensive debate, the House failed to adopt the committee report, voting instead to recommit the matter to the committee.³⁷¹ 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.³⁷²

Fourth Amendment. Several opinions of the Supreme Court indicate that the Fourth Amendment's prohibition against unreasonable searches and seizures is applicable to congressional committees; however, there has not been an opinion directly addressing the issue.³⁷³ It appears that there must be a legitimate legislative or oversight-related basis for the issuance of a congressional subpoena.³⁷⁴ The Fourth Amendment protects a congressional witness against a subpoena which is

³⁶⁷ *Id.* at 42-43.

³⁶⁸ *Id.* at 47-48 (additional views of Representatives Spence, Teague, Hutchinson, and Flynt).

³⁶⁹ 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.

³⁷⁰ H.Rept. 92-349, 92d Cong., 1st Sess. (1971). The legal argument of CBS was based in part on the claim that Congress could not constitutionally legislate on the subject of editing techniques and, therefore, the subcommittee lacked a valid legislative purpose for the investigation. *Id.* at 9.

³⁷¹ See 117 CONG. REC. 23922-926, 24603-59, 24720-53 (1971).

³⁷² *Id.* at 24731-732.

³⁷³ *Watkins v. United States*, 354 U.S. 178, 188 (1957); see also *McPhaul v. United States*, 364 U.S. 372 (1960).

³⁷⁴ 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 records, relevant or irrelevant, in the hope that something will turn up.")); see also *United States v. Groves*, 188 F. Supp. 314 (W.D. Pa. 1937) (dicta); *But see Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975), (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.").

unreasonably broad or burdensome.³⁷⁵ The Court has outlined the standard to be used in judging the reasonableness of a congressional subpoena:

Petitioner contends that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment ‘Adequacy or excess in the breath of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry’ The subcommittee’s inquiry here was a relatively broad one ... and the permissible scope of materials that could reasonably be sought was necessarily equally broad. It was not reasonable to suppose that the subcommittee knew precisely what books and records were kept by the Civil Rights Congress, and therefore the subpoena could only ‘specify ... with reasonable particularity, the subjects to which the documents ... relate ‘The call of the subpoena for ‘all records, correspondence and memoranda’ of the Civil Rights Congress relating to the specified subject describes them ‘with all of the particularity the nature of the inquiry and the [subcommittee’s] situation would permit ‘The description contained in the subpoena was sufficient to enable [petitioner] to know what particular documents were required and to select them adequately.’³⁷⁶

If a witness has a legal objection to a subpoena *duces tecum* or is for some reason unable to comply with a demand for documents, he must give the grounds for his noncompliance upon the return of the subpoena. As the D.C. Circuit stated:

If [the witness] felt he could refuse compliance because he considered the subpoena so broad as to constitute an unreasonable search and seizure within the prohibition of the fourth amendment, then to avoid contempt for complete noncompliance he was under [an] obligation to inform the subcommittee of his position. The subcommittee would then have had the choice of adhering to the subpoena as formulated or of meeting the objection in light of any pertinent representations made by [the witness].³⁷⁷

Similarly, if a subpoenaed party is in doubt as to what records are required by a subpoena or believes that it calls for documents not related to the investigation, he must inform the committee. Where a witness is unable to produce documents he will not be held in contempt “unless he is responsible for their unavailability ... or is impeding justice by not explaining what happened to them.”³⁷⁸

The application of the exclusionary rule to congressional committee investigation is in some doubt and appears to depend on the precise facts of the situation. It seems that documents which were unlawfully seized at the direction of a congressional investigating committee may not be admitted into evidence in a subsequent unrelated criminal prosecution because of the command of the

³⁷⁵ *McPhaul v. United States*, 364 U.S. 372 (1960); see also *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969).

³⁷⁶ *McPhaul*, 364 U.S. at 832.

³⁷⁷ *Shelton*, 404 F.2d at 1299-1300; see also *Leading Cases*, supra note 297, at 49.

³⁷⁸ *McPhaul*, 364 U.S. at 382.

exclusionary rule.³⁷⁹ In the absence of a Supreme Court ruling, it remains unclear whether the exclusionary rule bars the admission into evidence in a contempt prosecution of a congressional subpoena which was issued on the basis of documents obtained by the committee following their unlawful seizure by another investigating body (such as a state prosecutor).³⁸⁰

Fifth Amendment Privilege Against Self-Incrimination. Although it has never been necessary for the Supreme Court to decide the issue, in dicta it has been indicated that the privilege against self-incrimination afforded by the Fifth Amendment is available to a witness in a congressional investigation.³⁸¹ The privilege is personal in nature,³⁸² and may not be invoked on behalf of a corporation,³⁸³ small

³⁷⁹ *Nelson v. United States*, 208 F.2d 505 (D.C. Cir.), cert. denied, 346 U.S. 827 (1953).

³⁸⁰ In *United States v. McSurely*, 473 F.2d 1178, 1194 (D.C. Cir. 1972), the court of appeals reversed contempt convictions where the subcommittee subpoenas were based on information “derived by the subcommittee through a previous unconstitutional search and seizure by [state] officials and the subcommittee’s own investigator.” The decision of the court of appeals in the contempt case was rendered in December, 1972. In a civil case brought by the criminal defendants, Alan and Margaret McSurely, against Senator McClellan and the subcommittee staff for alleged violations of their constitutional rights by the transportation and use of the seized documents, the federal district court in June, 1973, denied the motion of the defendants for summary judgment. While the appeal from the decision of the district court in the civil case was pending before the court of appeals, the Supreme Court held, in *Calandra v. United States*, 414 U.S. 338 (1974), that a grand jury is not precluded by the Fourth Amendment’s exclusionary rule from questioning a witness on the basis of evidence that had been illegally seized. A divided court of appeals subsequently held in *McSurely v. McClellan*, 521 F.2d 1024, 1047 (D.C. Cir. 1975), that under *Calandra* “a congressional committee has the right in its investigatory capacity to use the product of a past unlawful search and seizure.”

The decision of the three-judge panel in the civil case was vacated and on rehearing by the full District of Columbia Circuit, five judges were of the view that *Calandra* was applicable to the legislative sphere and another five judges found it unnecessary to decide whether *Calandra* applies to committees but indicated that, even if it does 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, 54 U.S.L.W. 3372 (Dec. 3, 1985).

³⁸¹ *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955).

³⁸² See *McPhaul v. United States*, 364 U.S. 372 (1960); see also McCormick, EVIDENCE § 120 (Cleary ed. 1984) [hereinafter McCormick].

³⁸³ *Hale v. Henkel*, 201 U.S. 43 (1906).

partnership,³⁸⁴ labor union,³⁸⁵ or other “artificial” organizations.³⁸⁶ The privilege protects a witness against being compelled to testify but generally not against a subpoena for existing documentary evidence.³⁸⁷ However, where compliance with a subpoena *duces tecum* would constitute implicit testimonial authentication of the documents produced, the privilege may apply.³⁸⁸

There is no required verbal formula for invoking the privilege, nor does there appear to be necessary a warning by the committee.³⁸⁹ A committee should recognize any reasonable indication, such as “the fifth amendment,” that the witness is asserting his privilege.³⁹⁰ 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 his privilege or objection.³⁹¹

The committee can review the assertion of the privilege by a witness to determine its validity, but the witness is not required to articulate the precise hazard that he fears. In regard to the assertion of the privilege in judicial proceedings, the Supreme Court has advised:

To sustain the privilege, it need only be evident, from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result To reject a claim, it should be ‘perfectly clear, from a careful consideration of all the circumstances of the case, that the witness is mistaken, and that the answers cannot possibly have a tendency’ to incriminate.³⁹²

The basis for asserting the privilege was elaborated upon in a lower court decision:

³⁸⁴ *Bellis v. United States*, 417 U.S. 85 (1974).

³⁸⁵ *See United States v. White*, 322 U.S. 694 (1944).

³⁸⁶ *Bellis*, 417 U.S. at 90; *see also Rogers v. United States*, 340 U.S. 367 (1951) (Communist Party).

³⁸⁷ *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 378 at §§ 126, 127.

³⁸⁸ *United States v. Coe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976). *see also Curcio v. United States*, 354 U.S. 118 (1957); *McCormick, supra* note 378 at § 126.

³⁸⁹ 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).

³⁹⁰ *Quinn v. United States*, 349 U.S. 155 (1955).

³⁹¹ *Emspak v. United States*, 349 U.S. 190 (1955); *see also* Leading Cases, *supra* note 297 at 63.

³⁹² *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answer would furnish some evidence upon which he could be convicted of a criminal offense ... or which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution thereforeOnce it has become apparent that the answers to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions.³⁹³

The privilege against self-incrimination may be waived by declining to assert it, specifically disclaiming it, or testifying on the same matters as to which the privilege is later asserted. However, because of the importance of the privilege, a court will not construe an ambiguous statement of a witness before a committee as a waiver.³⁹⁴

Where a witness asserts the privilege, the full House or the committee conducting the investigation may seek a court order which (a) directs the witness to testify and (b) grants him immunity against the use of his testimony, or other evidence derived from his testimony, in a subsequent criminal prosecution.³⁹⁵ 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 him in a subsequent criminal prosecution, except one for perjury or contempt relating to his testimony. However, he may be convicted of the crime (the “transaction”) on the basis of other evidence.³⁹⁶

The application for the judicial immunity order must be approved by a majority of the House or Senate or by a two-thirds vote of the full committee seeking the order.³⁹⁷ The Attorney General must be notified at least ten days prior to the request for the order, and he can request a delay of twenty days in issuing the order.³⁹⁸

³⁹³ *United States v. Jaffee*, 98 F. Supp. 191, 193-94 (D.D.C. 1951); *see also Simpson v. United States*, 241 F.2d 222 (9th Cir. 1957) (privilege inapplicable to questions seeking basic identifying information, such as the witness’s name and address).

³⁹⁴ *Emspak v. United States*, 349 U.S. 190 (1955); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

³⁹⁵ 18 U.S.C. §§ 6002, 6005 (2000).

³⁹⁶ The constitutionality of granting a witness only use immunity rather than transactional immunity, was upheld in *Kastigar v. United States*, 406 U.S. 441 (1972). In *United States v. Romano*, 583 F.2d 1 (1st Cir. 1978), the defendant appealed from his conviction of several offenses on the ground, *inter alia*, that the prosecution’s evidence had been derived, in part, from immunized testimony that he had given before a Senate subcommittee. Although the conviction was affirmed, the case illustrates the difficulty that the prosecutor may have in establishing that its evidence was not “tainted,” but rather was derived from independent sources, especially in a case where there was some cooperation in the investigation between a committee and the Justice Department prior to the grant of immunity to testify before the committee. *See Kastigar*, 406 U.S. at 461-621.

³⁹⁷ 18 U.S.C. § 6005(a) (2000).

³⁹⁸ 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. 1980), (continued...)

Although the order to testify may be issued before the witness's appearance,³⁹⁹ it does not become legally effective until the witness has been asked the question, invoked his privilege, and been presented with the court order.⁴⁰⁰ 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.⁴⁰¹

Fifth Amendment Due Process Rights. The due process clause of the Fifth Amendment requires that “the pertinency of the interrogation to the topic under the ... committee’s inquiry must be brought home to the witness at the time the questions are put to him.”⁴⁰² “Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto.”⁴⁰³ Additionally, to satisfy both the requirement of due process as well as the statutory requirement that a refusal to answer be “willful,” a witness should be informed of the committee’s ruling on any objections he raises or privileges which he asserts.⁴⁰⁴

Recent Developments

An investigation into the resignations of nine United States Attorneys by the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law (“the Committee”) has resulted in the first legal confrontation over Congress’s contempt authority since the early 1980s and the first civil lawsuit filed by a House of Congress in an attempt to enforce its prerogatives.

After an extensive investigation, which involved numerous witness interviews and several congressional hearings, the Committee ultimately sought information relating to the resignations directly from the White House.⁴⁰⁵ After several attempts

³⁹⁸ (...continued)

cert. denied, 454 U.S. 1084 (1981).

³⁹⁹ *Application of the Senate Permanent Subcommittee on Investigations*, 655 F.2d at 1257

⁴⁰⁰ *See In re McElreath*, 248 F.2d 612 (D.C. Cir. 1957) (en banc).

⁴⁰¹ *Application of the U.S. Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1270 (D.D.C. 1973). In *dicta*, however, the court referred to the legislative history of the statutory procedure, which suggests that although a court lacks power to review the advisability of granting immunity, a court may consider the jurisdiction of Congress and the committee over the subject area and the relevance of the information that is sought to the committee’s inquiry. *See id.* at 1278-79.

⁴⁰² *Deutch v. United States*, 367 U.S. 456, 467-68 (1961). As the court explained in that case, there is a separate statutory requirement of pertinency.

⁴⁰³ *Watkins v. United States*, 354 U.S. 178, 214-15 (1957).

⁴⁰⁴ *Deutch v. United States*, 367 U.S. 456, 467-68 (1961).

⁴⁰⁵ *See generally*, H.Rept. 110-423 (2007), available at, [<http://judiciary.house.gov/Media/> (continued...)]

to obtain the information sought informally, on June 13, 2007, the Committee issued and served subpoenas on Ms. Harriet Miers, the former White House Counsel and Mr. Joshua Bolten, the White House Chief of Staff and custodian of White House records.⁴⁰⁶ Ms. Miers's subpoena was for both documents and testimony about her role, if any, in the resignations; while Mr. Bolten's subpoena was only for White House records and documents related to the resignations.

In response to the Committee's action, the White House, via its Counsel Fred F. Fielding, notified the Committee that it did not intend to comply with the subpoena to Mr. Bolten on the grounds of executive privilege. As a result, the White House has not produced any documents in response to Mr. Bolten's subpoena and has also not yet provided a privilege log or any information describing the contents of the documents being withheld.

With respect to the subpoena to Ms. Miers, Mr. Fielding first sent a letter to Ms. Miers's private attorney containing notice of the President's assertion of executive privilege over information related to this investigation, and suggested that Ms. Miers refrain from producing any documents pursuant to her subpoena.⁴⁰⁷ Several days later Mr. Fielding sent a second letter to Ms. Miers's attorney that indicated that she was "not to provide ... testimony" pursuant to the subpoena, on the grounds that any such testimony would also be covered by the President's assertion of executive privilege.⁴⁰⁸ Subsequently, Ms. Miers's attorney notified the Committee that, as a result of the President's claim of executive privilege, Ms. Miers would not appear at the scheduled hearing.⁴⁰⁹

On July 25, 2007, the Committee voted to hold Ms. Miers and Mr. Bolten in contempt of Congress for failure to comply with the duly issued subpoenas.⁴¹⁰ The full House of Representatives voted to hold Ms. Miers and Mr. Bolten in criminal contempt of Congress on February 14, 2008, for their failure to comply with the Committee's subpoenas.⁴¹¹ In addition to invoking the criminal contempt statutes, the resolutions adopted by the House of Representatives expressly authorized the filing of a civil lawsuit in the event that the Department of Justice would not pursue the criminal contempt actions.⁴¹² On February 28, 2008, pursuant to 2 U.S.C. § 194, the Speaker of the House certified the report to the U.S. Attorney for the District of

⁴⁰⁵ (...continued)

PDFS/ContemptReport071105.pdf]; *see also* H. Jud. Comm. Mot. Summ. J. at 11 (copy on file with authors).

⁴⁰⁶ H. Jud. Comm. Mot. Summ. J. at 12.

⁴⁰⁷ *See Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *See* H.Rept. 110-423, 60 (2007).

⁴¹¹ *See* H.Res. 979, 980, 982, 110th Cong. (2008),

⁴¹² *See* H.Res. 982, 110th Cong. (2008).

Columbia for presentation to the grand jury.⁴¹³ The next day, the Attorney General sent a letter to the Speaker, stating that the Department of Justice “will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers.”⁴¹⁴ On March 10, 2008, pursuant to the resolution adopted by the House of Representatives, a civil suit was filed in the United States District Court for the District of Columbia “seek[ing] [a] declaratory judgment[]” and other “appropriate relief, including injunctive relief” to enforce the Committee’s subpoenas.⁴¹⁵

Pursuant to the Federal Rules of Civil Procedure, on April 10, 2008, the Committee requested partial summary judgment on the grounds that there are no genuine issues regarding any material facts and, therefore, the Committee argued that it is entitled to judgment as a matter of law.⁴¹⁶ The Department of Justice’s opposition and any cross-motions are due no later than May 9, 2008, and a hearing on the Committee’s motion is currently scheduled for June 23, 2008.

⁴¹³ H. Jud. Comm. Mot. Summ. J. at 13.

⁴¹⁴ *Id.* at 13-14.

⁴¹⁵ *Id.*

⁴¹⁶ *See* FED. R. CIV. P. 56.