



3. *The Powers and Tools Available to Congress for Conducting Investigative Oversight*

A. Congress's Power to Investigate

1. The Breadth of the Investigatory Power

Congress possesses broad and encompassing powers to engage in oversight and conduct investigations reaching all sources of information necessary to carry out its legislative functions. In the absence of a countervailing constitutional privilege or a self-imposed restriction upon its authority, Congress and its committees have virtually plenary power to compel production of information needed to discharge their legislative functions. This applies whether the information is sought from executive agencies, private persons, or organizations. Within certain constraints, the information so obtained may be made public.

These powers have been recognized in numerous Supreme Court cases, and the broad legislative authority to seek information and enforce demands was unequivocally established in two Supreme Court rulings arising out of the 1920s Teapot Dome scandal. In *McGrain v. Daugherty*,¹ which considered a Senate investigation of the Justice Department, the Supreme Court described the power of inquiry, with 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 possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.²

The court also pointed out that the target of the Senate investigations, the Department of Justice (DOJ), like all other executive departments, is a creation of Congress and subject to its plenary legislative and oversight authority. Congress has clear authority to investigate whether and how agencies are carrying out their missions.³

1. 273 U.S. 135 (1927).

2. 273 U.S. at 174-75.

3. “[T]he subject to be investigated was the administration of the Department of Justice—whether the functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject is one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the attorney general and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.” 273 U.S. at 177-78.

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States*,⁴ a different witness at the congressional hearings refused to provide answers and was prosecuted for contempt of Congress. Based on a separate lawsuit between the government and the Mammoth Oil Company, the witness had declared, “I shall reserve any evidence I may be able to give for those courts...and shall respectfully decline to answer any questions propounded by your committee.”⁵ The Supreme Court upheld the witness’ conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness’ contention that the pending lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, “operated to divest the Senate, or the committees, of the power further to investigate the actual administration of the land laws.”⁶ The court further explained: “It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of lawsuits; but the authority of the body 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.”⁷

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress’ investigative authority. For example, in *Eastland v. U.S. Servicemen’s Fund*, the court explained that “[t]he scope of [Congress’] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”⁸ In addition, the court, in *Watkins v. United States*, stated that the broad power of inquiry “encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”⁹ Congress’s investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department.¹⁰

A forceful reiteration of Congress’ broad right-of-access to information, and the means to enforce that right, appears in *House Committee on the Judiciary v. Miers*.¹¹ In that ruling, the district court upheld the right of a House committee to subpoena former presidential aides. The court rejected a presidential assertion that a claim of executive privilege bestowed an absolute immunity on any present or former presidential aide from ever appearing before the committee in response to the subpoena. The court also rejected the executive’s claims that the case could not be contested in the courts, finding it had jurisdiction and that the committee had both standing, or a right to sue, and an implied cause of action because Congress possesses “the power of inquiry” under Article I. It concluded, “In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.” The ruling reflected prior appellate and district court decisions recognizing the constitutional basis of each house’s capacity to protect its core prerogatives and has been relied on in subsequent analogous judicial determinations.¹² In the spring of 2009, the parties settled the *Miers* case before an appeal was heard. The settlement provided that the subpoenaed officials would testify, certain documents would be disclosed, the

4. 279 U.S. 263 (1929).

5. 279 U.S. at 290.

6. *Id.* at 295.

7. *Id.*

8. 421 U.S. 491, 504, n.15 (1975) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)).

9. 354 U.S. 178, 187 (1957).

10. The investigative power, the court stated, “comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.” *Id.* Accordingly, the Court now clearly recognizes “the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiency in agencies of the Government.” *Id.* at 200 n.33; *see also* *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (noting that Congress’ role under the Independent Counsel Act of “receiving reports or other information and oversight of the independent counsel’s activities ... [are] functions that we have recognized generally as being incidental to the legislative function of Congress”) (citing *McGrain v. Daugherty*, 273 U.S. 135 (1927)).

11. 558 F. Supp. 2d 53 (D.D.C. 2008).

12. *Id.* at 84. Obstruction of congressional access to information, the court held, is an injury to its core constitutional prerogative to inform itself, an injury that it declared is redressable by the judiciary. Appellate and district courts have consistently upheld the House’s right to seek judicial enforcement of its constitutionally-based investigative prerogative. *See, e.g.*, *United States v. AT&T*, 551 F.2d 384, 388-89, 391 (D.C. Cir. 1976) (finding it “clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.”); *Comm. on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 14 (D.D.C. 2013) (“The Committee and several supporting *amici* are correct that AT&T[] is on point and establishes that the Committee has standing to enforce its duly issued subpoena through a civil suit); *House of Representatives v. Dep’t of Commerce*, 11 F. Supp. 2d 76, 85 (D.D.C. 1988) (“[T]he court finds that the [House of Representatives] has properly alleged a judicially cognizable injury through its right to receive information by statute and through the institutional interest in its lawful composition....”). Most recently, in *U.S. House of Representatives v. Burwell*, a district court held that the House “has standing to pursue allegations that the Secretaries of Health and Human Resources and the Treasury violated Article I, §9, cl. 7 of the Constitution when they spent public monies that were not appropriated by the Congress” 130 F. Supp. 3d 53, 81 (D.D.C. 2015). In a subsequent ruling on the merits, that court held that a cost-sharing provision of the Affordable Care Act had not been unambiguously funded and that the expenditures were unlawful. *U.S. House of Representatives v. Burwell*, 2016 U.S. Dist.LEXIS 62646 (D.D.C. May 12, 2016). The case is on appeal before the D.C. Circuit.

government's appeal would be withdrawn, and the district court's opinion would be allowed to stand.

2. The Limits of the Investigatory Power

But while the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only “in aid of the legislative function”¹³ and cannot be used to expose for the sake of exposure alone. In the Court's words: “There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress ... [n]or is the Congress a law enforcement or trial agency [An] inquiry ... must be related to, and in furtherance of, a legitimate task of the Congress.”¹⁴ Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by the full House or Senate.¹⁵ But once having established its jurisdiction and authority, and the pertinence of the matter under inquiry to its area of authority, a committee's investigative purview is substantial and wide-ranging.¹⁶

B. Congress's Ability to Obtain Documents and Witness Testimony

1. The Subpoena Power

A critical tool for congressional investigations is the subpoena power because “[e]xperience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.”¹⁷ A properly authorized subpoena issued by a committee or subcommittee has the same force and effect as a subpoena issued by the parent house itself.

a. The Power to Issue a Subpoena

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

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

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

Rules of standing committees: The rules or practices of standing committees may restrict the issuance of subpoenas only to full committees or in certain instances allow issuance by a committee chairman alone, with or without the concurrence of the ranking minority member. During the 114th Congress fourteen standing House committees empowered their chairpersons to unilaterally issue subpoenas, double the number so authorized in the 113th Congress.¹⁸ The ranking minority member of these committees cannot block the subpoena but usually must either be consulted or given notice prior to the issuance of the subpoena. In the Senate, five standing committees permit the chairperson to issue a subpoena so long as the ranking member does not object within a specified period of time.¹⁹ Only the Senate Permanent

13. *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880).

14. *Watkins v. United States*, 354 U.S. 178,187 (1957).

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

16. *Wilkinson v. United States*, 365 U.S. 399, 408–09 (1961).

17. *McGrain*, 273 U.S. at 175.

18. They are the House Committees on Agriculture, Education and the Workforce, Energy and Commerce, Financial Services, Foreign Affairs, Homeland Security, Judiciary, Natural Resources, Oversight and Government Reform, Rules, Science, Space and Technology, Select Intelligence, Transportation and Infrastructure, and Ways and Means. For a general overview of committee subpoena authority, see MICHAEL L. KOEMPEL, CONG. RESEARCH SERV., R44247, A SURVEY OF HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS (March 16, 2017).

19. They are the Senate Committees on Agriculture, Nutrition, & Forestry; Commerce, Science and Technology, Homeland Security and Governmental Affairs; Small Business and Entrepreneurship; and Veterans Affairs. Also, despite the provision of Senate Rule XXVI, cl. 1, authorizing subcommittee subpoenas, the rules of at least one committee expressly prohibit subcommittee subpoenas (Small Business).

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Subcommittee on Investigations permits the chairperson to issue a subpoena without the consent of the ranking minority member. One committee requires a quorum of six members, at least two of whom are members of the minority party, to authorize the issuance of a subpoena.²⁰

Vetting subpoenas: House Rule II.2(d)(1) requires that House committees may only issue subpoenas under the seal of the clerk of the House. In practice, every subpoena issued by a committee is reviewed by the House general counsel for substance and form. There is no equivalent rule in the Senate, but the Senate legal counsel performs a subpoena vetting function informally.

Service: In practice, congressional subpoenas are most frequently served by the U.S. marshal's office or by committee staff, or less frequently, by the Senate or House sergeants-at-arms. Service may be effected anywhere in the United States. The subpoena power reaches non-citizens in the United States. Securing compliance of people living in foreign countries presents more complex problems.²¹

Challenges: A witness seeking to challenge the legal sufficiency of a subpoena has only limited remedies to raise objections. The Supreme Court has ruled that courts may not block a congressional subpoena, holding that the Speech or Debate Clause of the Constitution²² provides “an absolute bar to judicial interference” with such compulsory process.²³ As a consequence, a witness's sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise the objections as a defense in a contempt prosecution.

Challenges to the legal sufficiency of subpoenas must overcome formidable judicial obstacles. The standard for whether the congressional investigating power has been properly asserted was articulated in *Wilkinson v. United States*:²⁴ (1) the committee's investigation of the broad subject matter area must be authorized by Congress; (2) the investigation must be pursuant to “a valid legislative purpose;” and (3) the specific inquiries must be pertinent to the broad subject matter areas which have been authorized by Congress.

b. The Permissible Scope of a Subpoena

A congressional committee is a creation of its parent house and only has the power to inquire into matters within the scope of the authority that has been delegated to it by that body. Therefore, the enabling rule or resolution that gives the committee life or particular direction is the charter that defines the grant and the limitations of the committee's power.²⁵ In deciding whether a subpoena's scope is permissible, the Supreme Court looks first to the words of the resolution itself, and then, if necessary, to the usual sources of legislative history, including floor statements, reports, and past committee practice.²⁶

Subpoenaed persons often attack subpoenas as overbroad or nothing more than a “fishing expedition.” However, the courts have not limited a congressional inquiry to an initial stated scope, understanding that historically, such investigations evolve, and, akin to grand jury probes, must be allowed to develop in order to be effective. In *Eastland v. United States Servicemen's Fund*, the Supreme Court recognized that a congressional investigation may lead “up some ‘blind alleys’ and into non-productive enterprises. To be a valid legislative inquiry there need be no predicable end result.”²⁷

Permitting the scope of inquiry to evolve: The scope of an inquiry is permitted to evolve as the investigation proceeds. In

20. Senate Environmental and Public Works Committee, Rule 2(a).

21. See discussion *infra*, Chapter XI.

22. U.S. Const. Art. I, Sec. 6, cl. 1.

23. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503–07 (1975).

24. 365 U.S. at 408–09 (1961).

25. *Rumely*, 345 U.S. at 44; *Watkins*, 354 U.S. at 201; *Gojak v. United States*, 384 U.S. 702, 708 (1966).

26. As explained by the Court in *Barenblatt v. United States*, “Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meanings 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.” 360 U.S. 109, 117 (1959). See also *Watkins*, 354 U.S. at 209–215.

27. 421 U.S. at 509.

Senate Select Committee on Ethics v. Packwood,²⁸ the court rejected a claim that a subpoena for a senator's personal diaries was overbroad, holding that the committee's investigation was not limited in its investigatory scope to its original demand "even though the diaries might prove compromising ... in respects the Committee has not yet foreseen." The court noted the long judicial acceptance of the breadth of congressional subpoenas and the analogy of a legislative inquiry to a grand jury:

In determining the proper scope of a legislative subpoena, this Court may only inquire as to whether the documents sought by the subpoena are "not plainly incompetent or irrelevant to any lawful purpose [of the subcommittee] in the discharge of [its] duties." *McPhaul v. United States*, 364 U.S. 374, 381, 81 S.Ct. 138, 143, 5 L. Ed. 2d 36 (1960) (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S. Ct. 339, 343, 87 L. Ed. 424 (1943)) ... Senator Packwood's principal apprehension appears to be that somewhere within the diaries will be found evidence of other conduct presently not within anyone's contemplation (other than perhaps his own) that the Ethics Committee will deem to be senatorial misbehavior. Yet where, as here, an investigative subpoena is challenged on relevancy grounds, the Supreme Court has stated that the subpoena is to be enforced "unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the ... investigation." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301, 111 S. Ct. 722, 727, 12 L. Ed. 795 (1997)...At this stage of its proceedings, the Ethics Committee is performing the office of a legislative branch equivalent of a grand jury, in furtherance of an express constitutional grant of authority to Congress to keep its own house in order "The function of the grand jury is to inquire about all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *R. Enterprises, Inc.*, 498 U.S. at 297, 111 S. Ct. at 726.²⁹

c. The Necessary Legislative Purpose for a Subpoena

Although a subpoena must be issued for a valid legislative purpose, the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation. In *In re Chapman*,³⁰ the court upheld a resolution authorizing an inquiry into charges of corruption against certain senators, despite the fact that it was silent as to what might be done when the investigation was completed. The court stated: "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."³¹

The subpoena may simply include an open-ended statement that it seeks information that may provide a basis for whatever legislation Congress deems appropriate. For example, in the Senate investigation into the Teapot Dome affair in the 1920s, the original authorizing resolution made no mention of a legislative purpose. A subsequent resolution regarding a recalcitrant witness declared that his testimony was sought for the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." The court found that the investigation was presumptively ordered for a legitimate object. It wrote: "An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable."³²

It can be helpful to include in the statement of purpose a reference to "specific problems which in the past have been, or in the future could be, the subjects of appropriate legislation."³³ In the past, the types of legislative activity which have justified exercising the power to investigate have included: the primary functions of legislating and appropriating;³⁴

28. 845 F. Supp. 17, 20–21 (D.D.C. 1994), *stay pending appeal denied*, 510 U.S. 1319 (1994).

29. *See also* *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946) (holding that determining whether a subpoena is overly broad "cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry").

30. 166 U.S. 661 (1897).

31. *Id.* at 670.

32. *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927).

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

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

the function of deciding whether or not legislation is appropriate;³⁵ oversight of the administration of the laws by the executive branch;³⁶ and the essential congressional function of informing itself in matters of national concern.³⁷

d. The Pertinency of the Subpoena to the Investigation

The congressional contempt statute, 2 U.S.C. § 192, provides that a committee's questions or subpoena requests must be "pertinent to the subject under inquiry." However, the standard is very broad, and permits a wide range of questions relevant to an investigation. In deciding whether a subpoena is pertinent, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.³⁸

Comparison to rules of evidence in court proceedings: Because of the breadth of congressional investigations, the courts have long recognized that pertinency in the legislative context is broader than that of relevance under the law of evidence applicable in court. "A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad."³⁹

The standard: The Supreme Court has warned that a witness "acts at his peril" in deciding not to respond to a committee's questions or subpoena demands on grounds of pertinency. However, to help them decide whether to comply with a subpoena, witnesses are entitled to receive a description of the investigation's scope "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."⁴⁰ The subject matter of an investigation may be shown through a variety of sources: (1) the declaration of the question under inquiry found in the authorizing rule or resolution of the committee or subcommittees, (2) the introductory remarks of the committee chair or other members, (3) the response of the chair to the witness' pertinency objection, (4) the question itself, or (5) the "nature of the proceedings."⁴¹

The Supreme Court has distinguished cases in which the pertinency standard is met from those in which it is not. For example, an inquiry is *not* pertinent where "the question under inquiry had not been disclosed in any illuminating matter; and the questions asked . . . were not only amorphous on their face, but in some instances clearly foreign to the alleged subject matter of the investigation," whereas an inquiry *is* pertinent when "[t]he subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education" and the scope of the particular hearing "had been announced as 'in the main communism in education and the experiences and background in the party by Frances X. T. Crowley.'"⁴²

2. Staff Deposition Authority

a. Express Authorization of Staff Deposition Authority Is Necessary

At the opening of the 115th Congress, the House, in the adoption of the standing rules for the new Congress, authorized all standing committees (other than the Committees on House Administration and Rules) to permit depositions to be conducted by staff, the first time either house has accorded such a blanket authorization.⁴³ The chairman of each committee,

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

36. *McGrain*, 273 U.S. at 295.

37. *Rumely*, 345 U.S. at 43, 45; *Watkins*, 354 U.S. at 209 n.3.

38. *Rumely*, 345 U.S. 41, 43, 45; *Watkins*, 354 U.S. at 200 n.3.

39. *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938), *cert. denied*, 303 U.S. 665 (1938) (emphasis added).

40. *Watkins*, 354 U.S. at 209.

41. *Barenblatt*, 360 U.S. at 117–18.

42. *Id.* at 123–24.

43. See H. Res. 5, § 2(b), CONGRESSIONAL RECORD H9 (daily ed. Jan. 3, 2017). In the past the House granted such authority to twenty special investigating committees. See ALISSA M. DOLAN, TODD GARVEY, WENDY GINSBERG, ELAINE HALCHIN, WALTER J. OLESZEK, CONG. RESEARCH SERV., RL30240,

upon consultation with the ranking minority member of the committee, may order the taking of depositions, including pursuant to subpoena, by a member or counsel of the committee. A member of the committee must be present for the staff deposition unless the witness waives that requirement, in writing, or the committee expressly authorizes it. When exercising this authority, a committee will follow procedures for taking depositions prescribed by the House Rules Committee, which have included provisions for notice (with or without a subpoena); transcription of the deposition; the right to be accompanied only by non-government, private counsel (even if the witness is a government official or employee) who may be permitted (or excluded) from being present and will be subject to punishment for failure to comply with the committee's rules; and the manner in which objections to questions are to be resolved. No one other than a member, or designated committee staff, and the witness and his counsel are permitted to attend the deposition.⁴⁴ The blanket grant of staff deposition authority may portend the encouragement of a more aggressive investigative posture of the standing committees.

In the Senate, five committees have received authorization for staff to take depositions. The Senate Committee on Homeland Security and Governmental Affairs and its Permanent Subcommittee on Investigations receives authority each Congress from the Senate's funding resolution. The Aging and Indian Affairs committees were authorized by S. Res. 4 in 1977, which the committees incorporate into their rules each Congress. The Ethics Committee's deposition power was authorized by S. Res. 338 in 1964, which created the committee and is incorporated in its rules each Congress. Similarly, the Intelligence Committee was authorized to take depositions by S. Res. 400 in 1976, which it too incorporates in its rules each Congress.

Several other Senate committees (the Committees on Agriculture, Commerce, Foreign Relations, and Small Business and Entrepreneurship) simply authorize staff depositions in their rules. Since it is not clear whether compelled appearance at a deposition is authorized by the Senate, it is problematic whether such appearance at a deposition can be compelled by the committee alone. The Senate's view appears to be that Senate rules do not authorize staff depositions by subpoena. If so, Senate committees cannot delegate that authority to themselves and may only have it conferred through Senate resolution.

b. The Utility of Staff Depositions

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

- Staff depositions may assist committees in obtaining sworn testimony quickly and confidentially without the necessity of members devoting time to lengthy hearings that may be unproductive because witnesses do not have the facts needed by the committee or refuse to cooperate.
- Depositions are conducted in private and may be more conducive to candid responses than would be the case in a public hearing.
- Statements made by witnesses that might defame or even tend to incriminate third parties can be verified before they are repeated in an open hearing.
- Depositions can prepare a committee for the questioning of witnesses at a hearing or provide a screening process that can obviate the need to call some witnesses.

The deposition process also allows questioning of witnesses outside of Washington D.C., thereby avoiding the inconvenience of conducting field hearings requiring the presence of members of Congress.

CONGRESSIONAL OVERSIGHT MANUAL (Dec. 19, 2014). Deposition authority has also been granted for a particular investigation being conducted by a committee. *See, e.g.*, H.R. Res. 5, § 4 (f)(2), 155 CONG. REC. H 9, (daily ed. Jan. 6, 2009) (authorizing the House Judiciary Committee to conduct staff depositions in its investigation of the firings of U.S. attorneys).

44. 162 CONG. REC. H536-37 (daily ed. Jan. 13, 2017).

Moreover, Congress has enhanced the efficacy of the staff deposition process by re-establishing the applicability of 18 U.S.C. § 1001 to its proceedings. This statute makes false statements made during congressional proceedings, including depositions, subject to criminal prosecution.⁴⁵

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

3. Congressional Grants of Immunity

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

The Fifth Amendment to the Constitution provides in part that “no person ... shall be compelled in any criminal case to be a witness against himself ...” This privilege against self-incrimination is available to witnesses in congressional investigations.⁴⁶ However, a witness’ Fifth Amendment privilege can be restricted if the government chooses to grant immunity. When a witness asserts his or her constitutional privilege, the committee may obtain a court order that compels the witness to testify and grants immunity against the use of this testimony, and information derived from it, in a subsequent criminal prosecution. The witness may still be prosecuted on the basis of other evidence.

Immunity provides the witness with the constitutional equivalent of his or her Fifth Amendment privilege.⁴⁷ Immunity grants may be required in the course of an investigation because “many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime.”⁴⁸ Such grants may be desirable when a committee is convinced that the witness will describe new or vital facts that would otherwise be unavailable or implicate persons of greater rank or authority. Grants of immunity have figured prominently in a number of major congressional investigations, including Watergate (John Dean and Jeb Magruder) and Iran-Contra (Oliver North and John Poindexter).

b. How a Committee Grants Immunity

The scope of the immunity that is granted and the procedure to be employed are outlined in 18 U.S.C. §§ 6002, 6005. If a witness before the House, Senate, or a committee or subcommittee of either body asserts this privilege, or if a witness who has not yet been called is expected to assert this privilege, an authorized representative of the relevant house or committee may apply to a federal district court for an order directing the individual to testify or provide other information sought by Congress.⁴⁹ If the testimony is to be before the full House or Senate, the request for the court order must be approved by a majority of the members present. If the testimony is to be given before a committee or subcommittee, the request for the order must be approved by an affirmative vote of two-thirds of the members of the full committee.⁵⁰

At least ten days prior to applying to the court, Congress must notify the attorney general of its intent to seek the order,⁵¹ and issuance of the order will be delayed by the court for as much as 20 additional days at the request of the attorney general.⁵² Notice to the attorney general is required so that he or she can identify any information in Justice Department files that would provide an independent basis for prosecuting the witness and place that information under

45. False Statements Accountability Act of 1996, PUB. L. 104–292. Congress acted in response to the Supreme Court’s decision in *Hubbard v. United States*, 514 U.S. 695 (1995), holding that 18 U.S.C. § 1001 applied only to false statements made in executive branch department and agency proceedings.

46. See *Watkins*, 354 U.S. at 178; *Quinn v. United States*, 349 U.S. 155 (1955).

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

48. *Id.* at 446.

49. 18 U.S.C. § 6005(a); See also *Application of Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

50. 18 U.S.C. § 6005(b).

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

52. 18 U.S.C. § 6005(c).

seal. The attorney general does not have a right to veto a committee's application for immunity.⁵³

The role of the court in issuing the order is ministerial and, therefore, if the procedural requirements under the statutes are met, the court may not refuse to issue the order or impose conditions on the grant of immunity.⁵⁴ However, the court does have power to determine whether the testimony and information sought is within the jurisdiction of the particular committee and relevant to the committee's inquiry.⁵⁵

c. Scope of the Immunity Granted

After an immunity order has been issued by the court and communicated to the witness by the chair, the witness can no longer decline to testify on the basis of the Fifth Amendment privilege, "but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."⁵⁶

The immunity that is granted is "use" immunity, not "transactional" immunity.⁵⁷ That is, neither the immunized testimony that the witness gives to the committee, nor information derived from that testimony, may be used against him or her in a subsequent criminal prosecution, except a prosecution for false testimony or for contempt charges. However, the witness may be convicted of the underlying crime (the "transaction") on the basis of evidence independently obtained by the prosecution and sealed before the congressional testimony, and/or on the basis of information obtained after the witness' congressional appearance but which was not derived, either directly or indirectly, from congressional testimony.

d. Impact of Immunity Grants on Future Prosecutions

In determining whether to grant immunity to a witness, a committee must consider the trade-offs involved. The committee must weigh its need for the testimony in order to perform its legislative, oversight, and informing functions against the possibility that the witness's immunized congressional testimony could jeopardize a successful criminal prosecution against the witness. If a witness is prosecuted after giving immunized testimony, the burden is on the prosecutor to establish that the case was not based on the witness's previous testimony or evidence derived therefrom.⁵⁸ In high profile cases, this burden may be extremely difficult to meet. In these instances, Congress must carefully evaluate whether the public interest is better served by a prompt congressional hearing to uncover the truth or by a criminal prosecution.

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

53. See H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. 43 (1970).

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

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

56. 18 U.S.C. § 6002.

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

58. *Kastigar*, 406 U.S. at 460.

3. The Powers and Tools Available to Congress for Conducting Investigative Oversight

Indeed, the appellate court decisions in 1990 reversing the convictions of North⁵⁹ and Poindexter⁶⁰ appeared to make the prosecutorial burden substantially more difficult, if not insurmountable, in high-profile cases. The independent counsel and his staff made extraordinary efforts to avoid being exposed to any of North's or Poindexter's immunized congressional testimony, and they submitted sealed packets of evidence to the district court to show that the material was obtained independently of any immunized testimony to Congress. Nonetheless, the appeals court remanded both cases to the trial court for a further determination of whether the prosecution had directly or indirectly used immunized testimony. Upon remand in both cases, the independent counsel determined that he could not meet the strict standards set by the appeals court and moved to dismiss the prosecutions.

While the *North* and *Poindexter* rulings in no way diminish Congress's authority to immunize testimony, they do alter the calculus as to whether to seek such immunity. It has been argued that the constitutional dimensions of the crisis created by the Iran-Contra affair required the type of quick, decisive disclosures that could result from a congressional investigation but not from the slower, more deliberate criminal investigation and prosecution process.⁶¹ Under this view, the demands of a national crisis may justify sacrificing the criminal prosecution of those involved in order to allow Congress to uncover and publicize the truth. The role of Congress as overseer, informer, and legislator arguably warrants this sacrifice. The question becomes more difficult when there is not a sense of national crisis, or where the object is to trade-off a lesser figure in order to reach someone higher up in a matter involving "simple" fraud, abuse, or maladministration at an agency. In the end, case-by-case assessments by congressional investigators will be needed, guided by the sensitivity that these are political judgments.

A recent committee decision not to grant immunity to a witness in a high profile investigation demonstrates the difficulties of making the proper calculus, particularly if the key premise of the immunity granting authority is mistaken. The question arose during the contentious 2015-16 inquiry of the House Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi. A major focus of the proceeding was the propriety of former Secretary of State Hillary Clinton's establishment and use of a private email account during her tenure at the State Department. At the same time a parallel probe was being conducted by the Federal Bureau of Investigation to determine whether the handling of State Department email traffic created a security violation or involved criminal offenses. It was revealed that a former State Department employee, Bryan Pagliano, set up Clinton's private email server in her New York home in 2009. In September 2015, upon learning of the interest of the Benghazi and Senate Judiciary and Homeland Security committees in taking his testimony, Pagliano's counsel advised the committees that he would invoke his Fifth Amendment privilege against self-incrimination if forced to appear, citing the ongoing FBI probe as the basis of his fear.

The Senate committees expressed a predilection to grant immunity, but the chairman of the Benghazi committee, a former federal prosecutor, demurred, arguing that a congressional grant of immunity might interfere with the FBI investigation, so the Justice Department should be the one to make the immunity determination, stating, "The entity with the best investigatory tools, greatest access to information and largest jurisdiction should consider the immunity grant—that is the executive branch in all regards now....Perhaps it's my background, but the legislative branch should not...do anything to jeopardize an ongoing executive branch investigation."⁶² Six months later, after inconclusive public hearings, Pagliano accepted an immunity offer from the Justice Department.

At the time of the Benghazi Committee's consideration of immunity, many observers did not believe Pagliano faced a serious threat of prosecution, nor was he a senior or central figure in the investigation. It was known that he personally assisted in setting up the system and therefore could have shed light on how and why it was created in the first place, who else was involved and whether security precautions were taken into account. He was a near quintessential type of witness to receive an immunity offer.⁶³ Since the Justice Department had to be informed of the proposed immunity grant before

59. *United States v. North*, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990) *cert. denied*, 111 S. Ct. 1344 (1991).

60. 951 F.2d 369 (D.C. Cir. 1991).

61. Michael Gilbert, *The Future of Congressional Use Immunity After United States v. North*, 30 AMER. CRIM. L. REV. 417, 430-31 (1993). *See also* Arthur L. Limon and Mark A. Belnick, *Congress Had to Immunize North*, WASH. POST, July 29, 1990, at p. C7.

62. Rachel Bade, *GOP Debates Immunity for former Clinton Staffer*, <http://www.politico.com/story/2015/09/immunity-debate-213449>.

63. Michael Stern, *Why Wouldn't Congress Give Pagliano Immunity?*, <http://.pointoforder.com/2015/09/03/why-wouldnt-congress-give-pagliano-immunity/>; Charles Tiefer, *Immunity for Bryan Pagliano Will Help End the Hillary Clinton Email Inquiry*, <http://www.forbes.com/sites/charles-tiefer/2016/03/02/immunity-for-bryan-pagliano-will-help-end-the-hillary-clinton-email-inquiry>.

it was filed, there would have been an opportunity for Justice to advise the committee of any serious dangers to an imminent prosecution. But even assuming an equipoise of considerations, it may be seen as an error of judgment, both legal and political, for the chairman to have apparently publically conceded that an investigative committee must automatically defer to the Justice Department whenever there is a parallel, on-going criminal investigation. That was exactly why the immunity statute was installed: to give an investigative committee unfettered discretion to gain access to information that is in the public's interest to be aware of, even if it means making a future prosecution more difficult. That was why immunity for John Dean, John Poindexter and Oliver North, among others, was acceptable. The proper understanding of the guiding rationale of the immunity statute was provided by the Iran-Contra independent counsel: "The legislative branch has the power to decide whether it is more important perhaps to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision, or a legal decision, but a political decision of the highest importance."⁶⁴

e. Frequency of Issuance of Immunity Grants

It is not entirely clear whether, as a consequence of the *North* and *Poindexter* rulings, congressional committees have been any more reluctant to issue immunity grants. Since the enactment of the statute in 1970, congressional committees have obtained approximately 350 immunity orders. Of these, about 70% (247) were obtained in connection with four investigations: the 1978 investigation into the assassinations of President Kennedy and Martin Luther King, Jr. (165), the investigation of Watergate by the Senate Watergate Committee (28), the investigations by the House and Senate Iran-Contra committees (28), and the 1989 investigation by the Special Committee on Investigations of the Senate Select Committee of Indian Affairs (26). Since the Iran-Contra rulings in 1990, House committees have obtained 32 immunity orders, and Senate committees have obtained 20. However, the most recent such grant occurred during the House Judiciary Committee's 2007 hearings on the forced resignations of nine U.S. attorneys.

4. Special Investigatory Powers Authorized in Extraordinary Inquiries

Special panels of inquiry established since Watergate have been granted investigative authorities not ordinarily available to standing committees. Staff deposition authority is given in almost all such instances. Depending on the particular circumstance of the inquiry, special panels have also been vested with authority to gain access to tax information, seek international assistance in information gathering abroad, and participate in judicial proceedings. For example, both the House and Senate committees jointly investigating the Iran-Contra matter had the full panoply of special powers because of the international scope of the inquiry. Similarly, the House committee investigating the propriety of undercover activities of the FBI and other Justice Department components known as ABSCAM was provided all the powers except tax access.⁶⁵

C. Enforcement of the Investigation Power

1. Courts Have Recognized the Need for Effective Enforcement Mechanisms

As a result of the current uncertainty raised by executive challenges respecting congressional authority to exercise traditional coercive authorities to gain timely and full access to information from the executive necessary to fulfill its legislative functions and responsibilities, it is imperative to understand and appreciate the arguably unchallengeable legal and historic basis and need for those mechanisms.

While the threat or actual issuance of a subpoena for testimony or documents in the past has normally provided sufficient leverage to ensure compliance, it is through the contempt power, or its threat, that Congress may act with ultimate force. The contempt power may be used in response to actions that obstruct the legislative process in order to command compliance with the subpoena and punish the person violating the order. The Supreme Court early on recognized the power as an inherent attribute of Congress' legislative authority, reasoning that if it did not possess this power, it would be

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

65. Comprehensive compilations of authorities and rules of Senate and House special investigatory committees may be found in S. COMM. ON RULES AND ADMIN., *AUTHORITY AND RULES OF SENATE SPECIAL INVESTIGATORY COMMITTEES AND OTHER SENATE ENTITIES*, 1973-97, S. Doc. No. 105-16 (1998); and in CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 43.

“exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it.”⁶⁶

There are three different kinds of contempt proceedings. Both the House and Senate may cite a witness for contempt under their inherent contempt power or under a statutory criminal contempt procedure. The Senate also has a limited third option, enforcement by means of a statutory civil contempt procedure. Similarly, district courts have recently recognized the authority of the House of Representatives to authorize civil enforcement by a standing committee by passage of a House resolution.⁶⁷

2. The Inherent Contempt Power

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

Congress’s inherent contempt power is not specifically granted by the Constitution, but is considered necessary for Congress to investigate and legislate effectively. The validity of the inherent contempt power was upheld in the early Supreme Court decision in *Anderson v. Dunn* and reiterated in *McGrain v. Daugherty*. Under the inherent contempt power, the individual is brought before the House or Senate by the sergeant at arms, tried in the House or Senate chamber, and then can be imprisoned upon conviction. The purpose of the imprisonment or other sanction may be either punitive⁶⁸ or coercive.⁶⁹ Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period until he or she agrees to comply. In the House, however, this period may not extend beyond the end of a session of the Congress.

b. Rights of a Person Cited for Contempt

When a witness is cited for contempt under the inherent contempt process, the witness may obtain prompt judicial review through a petition for a writ of *habeas corpus*.⁷⁰ The writ of *habeas corpus* is a right recognized in the Constitution, and it provides a means for anyone imprisoned to challenge the legal basis for the detention.

In a *habeas* proceeding for a contempt case, the issues decided by the court might be limited to (a) whether the House or Senate acted in a manner within its jurisdiction,⁷¹ and (b) whether the contempt proceedings complied with minimum due process standards.⁷² While Congress would not have to afford a person cited for contempt the whole panoply of procedural rights available to a defendant in criminal proceedings, it would have to grant notice and an opportunity to be heard.⁷³ Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure (e.g., pertinency of the question asked to the committee’s investigation) might be mandated by the Due Process Clause.

c. Fines as an Alternative to Imprisonment for Inherent Contempt

Although most of the court decisions reviewing use of the inherent contempt power have involved incarceration, Congress, utilizing the House’s internal rulemaking authority,⁷⁴ would be able to impose monetary fines as an alternative to imprisonment that would automatically reduce the pay of the official held in contempt. Such a fine would potentially have the advantage of avoiding a court proceeding through a *habeas corpus* petition, since the person held in contempt would

66. *Anderson v. Dunn*, 19 U.S. 204 (1821).

67. See House Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); House Committee on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013). For a comprehensive treatment of the history and legal development of the congressional contempt power, see TODD GARVEY & ALISSA DOLAN, CONG. RESEARCH SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE, <https://fas.org/sgp/crs/misc/RL34097.pdf> [hereinafter CRS CONTEMPT REPORT].

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

69. *McGrain*, 273 U.S. at 161.

70. 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*, 31 GEO. WASH. L. REV. 399, 400 n.3 (1962).

71. *Jurney*, 294 U.S. at 147 (1935); see also *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880); *Ex Parte Nugent*, 1 Hay. & Haz. 287, 18 F.Cas.471 (C.C.D.C. 1848).

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

73. *Id.*

74. See Art. I, §5, cl. 2, “Each House may determine the rules of its proceedings.”

never be detained or incarcerated. Drawing on the analogous inherent authority that courts possess to impose fines for contemptuous behavior,⁷⁵ it appears that Congress, in its exercise of a similar inherent function, will be able to impose fines rather than incarceration.

d. Inherent Contempt Does Not Require Judicial Enforcement Assistance

Unlike criminal and civil contempt proceedings, Congress's inherent contempt power may be used without the cooperation or assistance of either the executive or judicial branches. Under the traditional, historic practice, the House or Senate can, on its own, conduct summary proceedings and cite the offender for contempt, which would lead to incarceration. However, although the person cited can seek judicial review by means of a petition for a writ of *habeas corpus*, the scope of such review may be relatively limited⁷⁶ compared to the plenary review accorded by the courts in cases of conviction under the criminal contempt statute.

e. The Perceived Limitations of the Inherent Contempt Mechanism

There are also certain limitations on the inherent contempt process. Although the person cited can be incarcerated until he or she agrees to comply with the subpoena, imprisonment may not extend beyond the end of the current session of Congress.⁷⁷ Moreover, inherent contempt has been described as “unseemly,” cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial in the House or Senate chamber.⁷⁸ Because of these drawbacks, the inherent contempt process has not been used by either body since 1935.⁷⁹ 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.⁸⁰ As suggested above, the penalty for conviction could be limited to fines, with no incarceration. With such modifications, the process might be a more attractive option for members of Congress to pursue.

Finally, it is interesting and important to note that despite the enactment of the criminal contempt statute in 1857, inherent contempt remained the almost exclusive, and highly successful, congressional enforcement vehicle until 1934. A detailed history of its usage during that period 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.⁸¹ In addition, two executive branch officials were arrested pursuant to contempt citations, indicating an early understanding of the availability of the inherent contempt option against executive officials.⁸² Also noteworthy is that the Supreme Court's landmark 1927 ruling that defined the breadth of contemporary legislative investigative authority, *McGrain v. Daugherty*, emerged from an inherent contempt citation.

75. 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).

76. See *Journey*, 243 U.S. at 152.

77. *Watkins*, 354 U.S. at 207, n.45; *Anderson*, 19 U.S. at 231.

78. See S. REP. NO. 95-170 (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 (1977). In *Miers*, the court commented that arrest of a close presidential advisor would be particularly inappropriate. No executive official has ever been subject to an inherent contempt proceeding (558 F. Sup. 2d. at 91-2).

79. 4 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, ch. 15 § 17, 139 n.7 (1977); see also Rex E. Lee, *supra* note 78, at 255.

80. See *Nixon v. United States*, 506 U.S. 224 (1993) (upholding the power of the Senate to establish its own rules for the conduct of any impeachment, in this case the appointment of a special committee to make findings of fact and recommendations).

81. See CARL BECK, *CONTEMPT OF CONGRESS: A STUDY OF PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945-1957*, 191-214 (1959).

82. Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHIC. L. REV. 1083, 1137-38 (2010).

3. Statutory Criminal Contempt

a. The Origin and Nature of the Criminal Contempt Statute

Congress long ago recognized the problem raised by its inability to punish a person cited for contempt beyond the adjournment of a congressional session. In 1857, Congress enacted a statutory criminal contempt procedure as an alternative to the inherent contempt procedure that, with minor amendments, is codified today at 2 U.S.C. §§ 192 and 194. A person who has been subpoenaed to testify or produce documents before the House or Senate or a committee and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine of up to \$100,000 and imprisonment for up to one year. A contempt citation must be approved by the subcommittee (if that was where the contempt initially occurred), the full committee, and then by the full House or Senate (or by the presiding officer if Congress is not in session). The statute provides that after a contempt citation has been certified by the president of the Senate or the speaker of the house, it is the “duty” of the U.S. attorney “to bring the matter before the grand jury for its action.”

b. Congressional Use of Criminal Contempt against Executive Officials

The criminal contempt procedure was rarely used until the twentieth century, but since 1935 it has been essentially the exclusive vehicle for punishment of contemptuous conduct. Prior to Watergate, no executive branch official had ever been the target of a criminal contempt proceeding. Between 1975 and 1998, however, ten cabinet-level or senior executive officials were cited for contempt for failure to produce subpoenaed documents by a subcommittee, a full committee, or a house of Congress.⁸³ In each instance the contempt citation led to substantial or full compliance with the document demands before it was necessary to initiate criminal proceedings.

Although such citations have led to compliance without need for an actual criminal prosecution, the executive branch has not always agreed that compliance is required. For example, in 1982, the Justice Department filed a lawsuit to block enforcement following the House’s vote of contempt of EPA Administrator Anne Gorsuch Burford. The department filed suit seeking to prevent referral of the contempt citation to the U.S. attorney for grand jury action on the grounds that the House action unconstitutionally imposed an “unwarranted burden on executive privilege” and “interferes with the executive’s ability to carry out the laws.” A district court dismissed the suit as premature because settlement opportunities had not been exhausted and noted that resolution of the privilege claims could only occur during a criminal trial for contempt.⁸⁴ The Department of Justice did not appeal the ruling, opting instead to resume negotiations, which resulted in full disclosure of the documents to Congress. Throughout the litigation, the U.S. attorney refused to present the contempt citation to a grand jury. Subsequent DOJ Office of Legal Counsel opinions reiterated the executive’s opposition to use of the contempt process against executive branch officials.⁸⁵

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

It is no longer clear what action is required by the U.S. attorney to comply with Section 194’s statement that it is the “duty” of the U.S. attorney to enforce contempt of Congress citations. As a result, it is not certain how useful criminal contempt proceedings may be against executive branch officials. During investigations in the 110th Congress, incumbent

83. The ten officials are as follows: 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); EPA Administrator Anne Gorsuch Burford (1983); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); and Attorney General Janet Reno (1998).

84. *United States v. U.S. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

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

and former White House aides were directed to refuse to appear in response to testimonial and document subpoenas, and the Bush administration relied upon Justice Department opinions to support the refusals to testify. Similarly, the attorney general ordered the U.S. attorney for the District of Columbia not to submit contempt of Congress citations against these witnesses for grand jury consideration. That action forced the House of Representatives to take the historic action of seeking civil enforcement of the subpoenas, a subject to which we now turn.

4. Civil Contempt

a. In the Senate

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

As an alternative to both the inherent contempt power of each house of Congress and the criminal contempt statute,⁸⁶ in 1978 Congress enacted a civil contempt procedure,⁸⁷ which is applicable only to the Senate.⁸⁸ The statute authorizes the Senate to file a lawsuit in the U.S. District Court for the District of Columbia to enforce subpoenas issued by the Senate or a committee or subcommittee. This includes authority to seek a “declaratory judgment” confirming the validity of a subpoena and an order requiring compliance when a witness has refused or threatened to refuse to comply. Generally, such a suit will be brought by the Senate legal counsel on behalf of the Senate or a Senate committee or subcommittee.⁸⁹ The statute does not apply in the case of a subpoena to officers or employees of the executive branch acting in their official capacities.⁹⁰

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.”⁹¹ It is solely within the discretion of the Senate whether to use such a two-step enforcement process.⁹²

This statute gives the Senate the option of a civil action to enforce a subpoena,⁹³ but does not eliminate its ability to rely on the inherent contempt power or institute criminal contempt proceedings as described above.⁹⁴ Civil contempt might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues

86. The perceived deficiencies 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 S. Judiciary Subcomm. on Separation of Powers*, 94th Cong. 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 70, at 400 n.3 (1962).

87. Ethics in Government Act of 1978, Pub. L. No. 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. § 1365 (2000)).

88. 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.R. REP. NO. 95-1756 at 80 (1978)

89. 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. § 1365(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).

90. 28 U.S.C. § 1365(a) (2000).

91. S. REP. NO. 95-170 at 89 (1970).

92. *Id.* at 90.

93. 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. REP. NO. 95-170 at 16-21, 40-41, 88-97; *see also* S. 555: *Hearings Before the S. Comm. on Gov'tal Affairs*, 95th Cong., 59-62, 69 et seq. (1977) (statement of Senator Abourezk and attachments) [hereinafter *Civil Contempt Hearing*]; 123 CONG. REC. 20,956-21,019 (June 27, 1977).

94. Not only do the inherent and criminal contempt procedures remain available as an alternative to the civil contempt mechanism, but the legislative history indicates the understanding 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. REP. NO. 95-170 at 95; *see also Civil Contempt Hearing*, *supra* note 93, at 798-800.

than with punishing the objecting witness. Unlike criminal contempt, in a civil context, sanctions such as imprisonment and/or a fine can be imposed until the subpoenaed party agrees to comply. This creates an incentive for compliance to end the punishment.⁹⁵ 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 seven times, most recently in 2016.⁹⁶

ii. The Benefits of the Senate Civil Contempt Mechanism

The Senate civil contempt process has been generally found to be faster than a criminal proceeding, where a court may more closely scrutinize congressional procedures and give greater weight to the defendant's constitutional rights. The civil contempt procedure also provides an element of flexibility, allowing the subpoenaed party to raise possible constitutional and other defenses (e.g., the privilege against self-incrimination, lack of compliance with congressional procedures, or an inability to comply with the subpoena)⁹⁷ without risking a criminal prosecution.

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

The Senate civil contempt process, however, has limitations. Most notable is that the statute granting jurisdiction to the courts to hear such cases is, by its terms, inapplicable in the case of a subpoena issued to officers or employees of the federal government acting in their official capacities.⁹⁸ A report from the House Judiciary Committee in 1988 stated that the exclusion was to apply only in cases in which the president had directed the recipient of the subpoena not to comply with its terms.⁹⁹ Therefore, the procedure may only be used in investigations of private companies and individuals, and Senate members, officials, and employees subject to internal inquiries. The Senate has yet to directly face the problem of an executive refusal to comply with a subpoena demand.

b. In the House of Representatives

i. Past House Resolutions Authorizing Special Committee Actions

While the House of Representatives cannot pursue actions under the Senate's civil contempt statute just discussed, as an alternative, the House has frequently created special investigatory panels. There are numerous examples of the House, by resolution, providing special investigatory committees with authority not ordinarily available to its standing committees. These extra powers have included staff deposition authority, the authority to obtain tax information, and the authority to seek international assistance in information-gathering efforts abroad.¹⁰⁰ In addition, at least six special panels have been specifically granted the power to seek judicial orders and participate in judicial proceedings.¹⁰¹

95. 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. § 1365(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).

96. See Senate Permanent Subcommittee on Investigations v. Ferrer, 2016 U.S. Dist. LEXIS 103143 (D.D.C. Aug. 5, 2016).

97. S. REP. NO. 95170, 93 (1977).

98. 28 U.S.C. § 1365(a) (2000). The statutory exception was explained in the Senate's Report as follows:

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

Id. at 91-2.

99. H. COMM. ON THE JUDICIARY, CLARIFYING THE INVESTIGATORY POWERS OF THE UNITED STATES CONGRESS, H.R. REP. NO. 100-1040 at 2 (1988).

100. See CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 43.

101. *Id.*

Before the 110th Congress, the House of Representatives never directly sought civil enforcement of a subpoena in federal court by filing its own lawsuit, but had only sought to participate in cases brought by others. There were several situations in which the House by resolution authorized *intervention* by counsel representing a House committee into litigation involving congressional committees.¹⁰² The House's authority to file such lawsuits has been recognized by the Justice Department. Several opinions of DOJ's Office of Legal Counsel argued that civil enforcement proceedings were a proper means to resolve interbranch information access disputes, rather than inherent or statutory criminal contempt proceedings.¹⁰³

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

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

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

In 2008, the federal district court hearing this subpoena enforcement case, *House Committee on the Judiciary v. Miers*,¹⁰⁴ ruled that the House subpoenas must be enforced. Under the district court decision, a one-House authorization in such subpoena enforcement cases is sufficient to provide the necessary jurisdiction and standing. Although the case was settled in March 2009, after the change in administration and before the appeal was heard, the settlement provided that the district court decision rejecting both the executive's broad privilege claims and its assertions that the case could not be heard by the court would stand as precedent.

The district court's lengthy opinion principally dealt with the executive's claims that the suit should be dismissed because the committee: (1) lacked standing or a right to sue, (2) had not stated a cause of action authorizing the suit, and (3) inappropriately involved the court in a dispute between the political branches that should be resolved by negotiation and accommodation by the parties. The court rejected the executive's first two claims, finding that Article I of the Constitution, which provides that Congress possesses "the power of inquiry," was sufficient to provide a basis for the suit—both standing and an implied cause of action. The court observed that the Supreme Court had consistently recognized that the power carries with it the "process to enforce it," which is "an essential and appropriate auxiliary to the legislative function" and that "issuance of a subpoena pursuant to an authorized investigation is ... an indispensable ingredient of lawmaking."¹⁰⁵

The trial court also rejected the suggestion that the court dismiss the suit so as to avoid involvement in a political dispute between the branches. The court noted that since the initial Watergate rulings, many courts had considered subpoena disputes raising privilege and immunity questions in both civil and criminal contexts, and often only judicial intervention could prevent "a stalemate that could result in a paralysis of government." The court particularly relied on the lesson of the

102. See *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976); *Ashland Oil v. FTC*, 409 F. Supp. 297, 301 (D.D.C. 1976), *aff'd*, 548 F.2d 977, 979 (D.C. Cir. 1976).

103. The OLC opinions conceded such disputes created federal question jurisdiction under 28 U.S.C. § 1331. See *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*, 8 Op. OLC 101 (1984); *Response to Congressional Requests for Information Made Under the Independent Counsel Act*, 10 Op. OLC 68 (1986).

104. 558 F. Supp. 2d 53 (D.D.C. 2008).

105. *Miers*, 558 F. Supp. 2d at 75, citing *McGrain*, 273 U.S. at 174 and *Eastland*, 421 U.S. at 505.

3. The Powers and Tools Available to Congress for Conducting Investigative Oversight

House's authorization to a subcommittee chair to intervene in an earlier landmark appeals court ruling¹⁰⁶ in commenting: "Two parties cannot negotiate in good faith when one side asserts legal privileges but insists that they cannot be tested in court in the traditional manner. That is true whether the negotiating parties are private firms or the political branches of the federal government."¹⁰⁷

The *Miers* litigation extended for almost two years and was settled only because of change in political party control of the presidency in 2009.

The next such case, *House Committee on Oversight and Government Reform v. Lynch*,¹⁰⁸ arose out of an investigation of DOJ's Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) "Operation Fast and Furious." In this operation, the ATF knowingly allowed firearms purchased illegally in the United States to be unlawfully transferred to third-parties and transported into Mexico, so as to enable ATF to follow the flow of the firearms to the Mexican drug cartels that purchased them.

On February 4, 2011, in response to Congress's initial inquiries, a DOJ assistant attorney general flatly denied that the agency had ever "sanctioned or otherwise knowingly allowed the sale of assault weapons to a straw purchaser." In December of 2011, however, DOJ withdrew its February 4 letter, conceding that it had contained "inaccurate information" about the depth of DOJ's knowledge of ATF's actions, and that the operation itself was fundamentally flawed.

The House Committee on Oversight and Government Reform (COGR) shifted the focus of its investigation to how and why DOJ had provided Congress with such inaccurate information; why it took almost ten months to correct the mistake; and whether the agency had sought to obstruct the Committee's inquiry by providing misleading information. COGR then narrowed its attention to documents created after the February 4th letter relating to DOJ's response to COGR's investigation. There followed subpoenas, negotiations and an ultimate refusal by Attorney General Holder to turn over key documents he claimed were protected by the deliberative process privilege (DDP). The full House voted Holder in contempt on June 28, 2012. DOJ informed the House that, as in *Miers*, no action would be taken to prosecute the attorney general.

Following a House resolution authorizing it, COGR brought a civil suit on August 13, 2012. A central issue was whether the government's asserted DDP was constitutionally based, or solely a common law creation which Congress could override if necessary for its investigation. (Congress had long taken the latter view). The U.S. district court for the District of Columbia in 2014 rejected "the Committee's contention that the privilege cannot be asserted at all if it is Congress that is making the request."¹⁰⁹ Judge Jackson determined "that there is a constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege [therefore may] be properly invoked in response to a legislative demand." She also found, however, that DOJ's "blanket assertion" of privilege was insufficient, and ordered DOJ to review all the withheld documents and either produce them or provide a detailed privilege log.

Sixteen months later, the court ruled on the Committee's motion to compel production of the withheld documents. With respect to the thousands of documents over which DOJ had invoked the DDP, the court reiterated its prior holding that the executive could invoke the privilege against Congress, but determined that because of a parallel DOJ Inspector General investigation "any harm that would flow from the disclosures sought here would be merely incremental, [and] the records must be produced."¹¹⁰

The unusual ruling perhaps reflects second thoughts on the judge's part about her initial DDP ruling and an attempt

106. See *AT&T*, 551 F.2d at 392 rejecting the Executive's claim that its assertion of privilege with respect to national security information being sought by a congressional committee was absolute and could not be adjudicated by a court).

107. *Miers*, 558 F. Supp. 2d at 99. For an in-depth discussion of the implications and importance of the court's justiciability rulings, see CRS CONTEMPT REPORT, *supra* note 67.

108. 2016 U.S. Dist. LEXIS 5713 (D.D.C. Jan.19, 2016). The original defendant, former Attorney General Eric Holder, left office and his successor was substituted as the defendant of record.

109. Order on Motion for Summary Judgement at 5, *Committee on Oversight and Government Reform v. Holder*, No. 12-cv-1332 (D.D.C. Aug. 20, 2014), ECF No. 81.

110. *Committee on Oversight and Government Reform v. Lynch*, 2016 U.S. Dist. LEXIS 5713 (D.D.C. Jan.19, 2016).

to foreclose an appeal (since the Committee would have gotten all it originally asked for and DOJ gained an important precedent that agencies could rely on going forward). At the Committee's urging, however, the Court issued a final appealable order on February 8, 2016. The Committee filed a notice of appeal shortly thereafter, but the appeal has been placed on indefinite hold in light of the 2016 presidential election. As of the date of this publication, the investigation and subsequent litigation has spanned almost six and a half years with no satisfactory resolution in sight, and with the court's DDP ruling casting a cloud over the effectiveness of future investigations. Indeed, there is growing evidence of general agency slow-walking responses to committee information requests and even to subpoena demands.¹¹¹

5. Alternatives to Contempt

When an executive branch official refuses to comply with a congressional subpoena and the dispute cannot be resolved by negotiation and compromise, none of the three types of contempt proceedings just described may be completely satisfactory. The statutory civil contempt procedure in the Senate is inapplicable in the case of a subpoena to an executive branch official. The House experience with its current civil contempt suits have not been as expeditious as anticipated. Inherent contempt is described as "unseemly" in such situations and cumbersome as well. And if the criminal contempt route is taken, a committee faces the almost certain prospect that the U.S. attorney may decline to prosecute. The U.S. attorney may rely on the doctrine of prosecutorial discretion to refuse to present the contempt citation or to sign a grand jury indictment if one is handed up, or, alternatively, he or she may be directed by the president not to file the citation on the basis of a claim of executive privilege.

In the absence of a direct court challenge to the validity of the executive's refusal to present and prosecute contempt citations of executive officials, there are various alternatives to the three modes of contempt in the case of an executive branch official:

- the appropriations for the agency or department involved can be cut off or reduced when requested information is not supplied;
- a hold can be placed by a senator on agency nominees until the information is released;
- the inherent contempt process can be streamlined by having the fact-finding and recommendation stage of the proceeding performed by a committee before the trial on the floor, and by limiting the penalty for conviction to fines through the exercise of each house's internal rulemaking power;
- a law might be passed modeled after the now expired Independent Counsel Act that requires a special court to appoint an independent advocate to prosecute contempt of Congress cases when a U.S. attorney refuses, or is directed not to present a proper citation to a grand jury; and
- in an exceptional case, the official might be impeached.

With the exception of making the inherent contempt process more "seemly" and expeditious, a long term solution that can be effected by internal rulemaking processes alone, the other remedies do not present the direct, precise and /or immediate threat that is needed in the investigative oversight context. Appropriations cuts likely would come well after time they are needed and are blunt instruments that may cause unintended consequences to necessary programs. Riders cannot be too precise or they may run the risk of failing as a bill of attainder.¹¹² Senate holds may have to await an appropriate agency

111. *See, e.g.*, JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA'S COST-SHARING REDUCTION PROGRAM, HOUSE COMMITTEES ON ENERGY AND COMMERCE AND WAYS AND MEANS, 89-156 (July 2016), detailing the obstructive efforts over a period of 18 months of the Departments of Treasury and Health and Human Services and the Office of Management and Budget of an ongoing joint committee investigation that include the failure to comply with document subpoenas; refusals to confirm its delivery of deposition subpoenas to agency witnesses; the issuance of limited authorizations to employees to respond to committee staff interview questions or, in some instances, prohibitions for any responses; limitations on the scope of interviews; and refusals to allow witnesses to answer any substantive or factual questions about the Cost-Sharing program. Chapter 6 provides further discussion of the consequences of the executive branch's obstructionism in the Fast and Furious litigation, and the resulting ruling that the court would accept an agency claim of applicability of the common law deliberative process privilege in defense of a withholding of documents.

112. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303 (1948).

specific nomination and even then the broad power given presidents to make lengthy temporary appointments under the Federal Vacancies Reform Act¹¹³ while a nomination is pending can moot a hold threat. Also, it is unlikely that any president will sign any revival of the independent counsel model or that an override of a presidential veto would succeed. Finally, an impeachment proceeding is too onerous, time consuming, and heavy-handed to be considered seriously for most agency withholding situations that do not implicate impeachable official conduct.

6. Perjury, False Statements, and Obstruction Prosecutions

a. Testimony under Oath

A witness under oath before a congressional committee who willfully gives false testimony is subject to prosecution for perjury under Section 1621 of Title 18 of the U.S. Code. The false statement must be “willfully” made before a “competent tribunal” and involve a “material matter.” For a legislative committee to count as a competent tribunal for perjury purposes a quorum must be present.¹¹⁴ The quorum problem has been ameliorated in recent years with the adoption of rules establishing less than a majority of members as a quorum for taking testimony: normally two members for House committees¹¹⁵ and one member for Senate committees.¹¹⁶ The requisite quorum must be present at the time the alleged perjurious statement is made, not merely at the time the session convenes. No prosecution for perjury will be permitted for statements made only in the presence of committee staff unless the committee has deposition authority and has taken formal action to allow prosecution.¹¹⁷

b. Unsworn Statements

Most statements made before Congress, at both the investigatory and hearing phases of oversight, are unsworn. The practice of swearing in all witnesses at hearings is infrequent. However, prosecutions may be brought to punish congressional witnesses for giving willfully false testimony not under oath. Under 18 U.S.C. § 1001, false statements by a person in “any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House and Senate” are punishable by a fine of up to \$250,000 or imprisonment for not more than five years, or both.¹¹⁸

c. Obstruction of a Congressional Proceeding

Section 1505 of Title 18 makes it a crime for a person to “corruptly” or through the use of “any threatening letter or communication influence, obstruct, or impede, or endeavor to obstruct or impede” the “due and proper exercise of the power of inquiry under which any inquiry or investigation is being held by either House, or any committee of either House or any joint Committee of the Congress” The statute makes it a criminal matter for any obstruction or impeding conduct in relation to a committee inquiry of the House or Senate. Conviction can result in imprisonment for up to five years or a fine.¹¹⁹

113. *Codified* at 5 U.S.C. § 3345 et seq.

114. *Christoffel v. United States*, 338 U.S. 84, 89 (1949).

115. H.R. R. XI(2)(h)(2).

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

117. *See* CHARLES DOYLE, CONG. RESEARCH SERV., R98-808, PERJURY UNDER FEDERAL LAW (January 28, 2014) (periodically updated).

118. *Id.*

119. *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL34303, OBSTRUCTION OF JUSTICE: AN OVERVIEW OF SOME FEDERAL STATUTES THAT PROHIBIT INTERFERENCE WITH JUDICIAL, EXECUTIVE, OR LEGISLATIVE ACTIVITIES (April 17, 2014) (periodically updated).