



7. Executive Branch Investigations: Lessons from Department of Justice Probes

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

The history of congressional investigations of DOJ covers a broad scope of congressional inquiries, including committee requests for:

- particular agency witnesses;
- proprietary, trade secret, or other sensitive information;
- documentary evidence of how an agency came to a particular decision; and
- the opinion of an agency's general counsel with respect to the legality of a course of action taken by the agency.

In response, congressional inquiries into Justice Department operations have been frequently met with claims that such inquiries:

- interfere with the presumptive sensitivity of its principal law enforcement mission;
- intrude upon matters of national security; and
- constitute improper political and constitutional interference with deliberative prosecutorial processes that are discretionary in nature.

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

Since many other agencies have followed DOJ's examples, the resolution of such past investigative confrontations with DOJ provides useful lessons. These lessons, outlined in detail below, should guide future committees in determining whether to undertake similar probes of DOJ or other executive agencies, as well as inform them about the scope and limits of their investigative prerogatives and the practical problems of such undertakings. The outcomes of these inquiries provide formidable practice precedents which will allow committees to effectively engage uncooperative agencies.

A. Overview of Congressional Investigations of DOJ

The Congressional Research Service review of oversight of the Justice Department over the last 95 years is a particularly instructive tool. This compilation and review provides summaries of 22 selected congressional investigations, from the Palmer Raids and Teapot Dome scandal in the 1920s to controversies over the past 25 years, including the revelations of the Church Committee of domestic intelligence abuse by the FBI, ABSCAM, Iran-Contra, the misuse of informants in the FBI's Boston Regional Office, the termination and replacement of U.S. attorneys, and the probe of Operation Fast and Furious.¹

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

1. Congress's Power to Obtain Documents and Testimony

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

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

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

During the inquiries covered by the CRS compilation, committees sought and obtained a wide variety of evidence, including:

- deliberative prosecutorial memoranda;
- FBI investigative reports and summaries of FBI interviews;
- memoranda and correspondence prepared while cases were pending;

1. See, ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., R42811, CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920-2012 (Nov. 5, 2012) (periodically updated). Also useful is the two volume study CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY (revised edition edited by Roger A. Bruns, David L. Hostetter, and Raymond W. Smock, 2011), which presents case studies with accompanying commentary and documentary material on 29 important congressional investigations from General St. Clair's debacle in 1792 to the Hurricane Katrina inquiry in 2005. The CRS study of the history of congressional investigations of Justice Department actions originated as a result of a request to the author for a legal analysis in September 1993 from the chief counsel of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, chaired by Rep. John Dingell, for an assessment of the legal propriety of its requests and subpoenas for documents and testimony from line attorneys regarding certain prosecutorial decisions in which they were involved. The subcommittee was engaged in a contentious investigation of the department's Environmental Crimes Unit. At issue were department refusals to comply. The demands were characterized as an abrupt departure from "a time honored" department policy that shields its prosecutorial decision-making process from the political process that is based exclusively in the president as a result of the vestment in him of the constitutional duty to "take care" that the laws are faithfully executed. A statement by a former attorney general attested to that history and legal view. The memorandum I prepared was included in the subcommittee's final report following the successful conclusion of the inquiry. A detailed account of the investigation and an assessment of the oversight lessons learned is presented in a study by Deborah Jacobson, *The 1992-1994 Investigation of the Justice Department's Environmental Crimes Program*, may be found in Part II. Subsequently, a revised version of the memorandum was published as a CRS report, which I periodically updated until my retirement in 2008. Since then the report has been ably maintained by my successors.

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

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

There have been only four formal presidential assertions that executive privilege required withholding internal DOJ documents sought by a congressional subpoena. Two of those claims were ultimately abandoned by the president; one was not acted on further by a House committee before the end of the 110th Congress; and one is pending resolution before an appeals court.² The most recent Supreme Court and appellate court rulings covering the presidential communications privilege and the Take Care Clause of the Constitution³ suggest that a claim of executive privilege to protect internal deliberations would be unlikely to succeed.

2. Weighing Pragmatic Considerations When Seeking Disclosures

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

2. One of the abandoned claims involved subpoenaed documents sought in the 1981 investigation of the Environmental Protection Agency enforcement of the Superfund law which were all released following a negotiated settlement. H.R. REP. NO. 97-968, at 18, 28-29 (1982). The second concerned documents sought in the Boston FBI matter, which were all internal DOJ materials. A third claim of presidential privilege was invoked on July 16, 2008, in response to a subpoena by the House Oversight and Government Reform Committee seeking documents concerning DOJ's investigation by a special counsel of the disclosure of the identity of a CIA agent. The documents sought and withheld included FBI reports of the special counsel's interviews with the vice president and senior White House staff; handwritten notes taken by the deputy national security advisor during conversations with the vice president and senior White House officials; and other documents provided by the White House to the special counsel during the investigation. The documents were not pursued after the close of the legislative session. The fourth claim was invoked in response to the threatened contempt of former Attorney General Holder for withholding subpoenaed documents during the investigation of Operation Fast and Furious. A district court ruled that since the deliberative process privilege contains a constitutional element it may be raised against a congressional subpoena demand. That ruling is being challenged and is pending review before the D.C. Circuit Court of Appeals. *Comm. on Oversight & Gov't Reform of the U.S. House of Representatives v. Lynch*, 156 F. Supp. 3d 101 (D.C. Cir. 2016). See TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS, at 30-32, 36-39 (periodically updated).

3. The Take Care Clause of the Constitution states that the president "shall take Care that the Laws be faithfully executed." U.S. CONST., art. II, § 3.

B. The Justice Department's Responses to Congressional Inquiries

The reasons advanced by the executive branch for declining to provide information to Congress about open and closed civil and criminal proceedings have included:

- avoiding prejudicial pre-trial publicity;
- protecting the rights of innocent third parties;
- protecting the identity of confidential informants;
- preventing disclosure of the government's strategy in anticipated or pending judicial proceedings;
- avoiding the potentially chilling effect on the exercise of prosecutorial discretion by DOJ attorneys; and
- preventing interference with the president's constitutional duty to faithfully execute the laws.⁴

Historically, DOJ has continued to assert such objections. For example, in the 2001–2002 House Oversight and Government Reform Committee investigation of the FBI's misuse of informants, the Department resisted producing internal deliberative prosecutorial documents. In a February 1, 2002 letter to Chairman Dan Burton, the DOJ assistant attorney general for legislative affairs explained that: “the public interest in avoiding the polarization of the criminal justice process required greater protection of those documents ... This is not an ‘inflexible position,’ but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making.”⁵

More recently, during the George W. Bush administration, agencies asserted broader and more strenuous opposition to providing evidence and testimony to Congress through presidential signing statements,⁶ executive orders,⁷ and opinions of the Department of Justice's Office of Legal Counsel (OLC). In OLC's view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the president establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information. Thus, the executive branch has resisted congressional efforts to seek testimony by lower-level officers or employees without presidential authorization. OLC has declared that “right of disclosure” statutes “unconstitutionally limit the ability of the President and his or her appointees to supervise and control the work of subordinate officers and employees of the Executive Branch.”⁸ However, the OLC assertions of these broad notions of presidential prerogatives have not been supported by any authoritative judicial citations.

4. These reasons were most famously articulated by then Attorney General Robert Jackson in 1941, who stated that all would “seriously prejudice law enforcement.” See 40 Op. Att’y Gen. 45, 46–47 (1941). See also Letter from William French Smith, Att’y Gen., to Hon. John D. Dingell, Chair, House Subcomm. on Oversight & Investigation, Comm. on Energy and Commerce (Nov. 30, 1982), *reprinted in* H.R. REP. NO. 97-968 at 37–38.

5. See HOUSE COMM. ON GOV'T REFORM, EVERYTHING SECRET DEGENERATES: THE FBI'S USE OF MURDERERS AS INFORMANTS, H. REPT. NO. 108-414, vol. 1 at 132 (2004). See also, DOLAN & GARVEY, *supra* note 1, at app. A.

6. See T.J. HALSTEAD, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL & INSTITUTIONAL IMPLICATIONS (updated Sept. 17, 2007), <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

7. See, e.g., Executive Order 13233 issued by President Bush on November 1, 2001, which gave current and former presidents and vice presidents broad authority to withhold presidential records and delay their release indefinitely. It vested former vice presidents, and the heirs or designees of disabled or deceased presidents, the authority to assert executive privilege, and expanded the scope of claims of privilege. Hearings held by the House Committee on Government Reform in 2002 raised substantial questions as to the constitutionality of the order and resulted in the reporting of legislation (H.R. 4187) in the 107th Congress that would have nullified the order and established new processes for presidential claims of privilege and for congressional and public access to presidential records. H.R. REP. NO. 107-790 (2002). Substantially the same legislation (H.R. 1225) passed the House on March 14, 2007. See H.R. REP. NO. 110-44 (2007), and was reported out of the Senate Committee on Homeland Security and Governmental Affairs on June 20, 2007, without amendment and with no written report. President Obama revoked Executive Order 13233 by an executive order issued on January 21, 2009. See generally, Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 666–96 (2003).

8. See Letter from Jack L. Goldsmith III, Assistant Att. Gen., Office of Legal Counsel, Department of Justice, to Hon. Alex M. Azar, II, General Counsel, Department of Health and Human Services (May 21, 2004), <http://www.usdoj.gov/olc/crsmemoresponses.htm>. This broad view of presidential privilege was repeated in Attorney General Mukasey's request to the president that he claim executive privilege with respect to a House committee subpoena for DOJ documents in an investigation by a DOJ special counsel into the revelation of a CIA agent's identity. See Letter from Michael Mukasey, Att'y Gen., to the President (July 15, 2008) (on file with author).

C. Lessons from Prior Investigations of DOJ

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

The Supreme Court has repeatedly reaffirmed the breadth of Congress' right to investigate the government's conduct of criminal and civil litigation.⁹ Congress must be given access to agency documents, even in situations where the inquiry may result in pre-trial publicity and the exposure of criminal corruption or maladministration of agency officials. The Supreme Court has noted that a committee's investigation "need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding ... or when crime or wrongdoing is disclosed."¹⁰ Despite the existence of pending litigation, Congress may investigate facts that have a bearing on that litigation where the information sought is needed to determine what, if any, legislation should be enacted to prevent further ills.¹¹

Although several lower court decisions have recognized that congressional hearings may have the result of generating prejudicial pre-trial publicity, they have not suggested that there are any constitutional or legal limitations on Congress' right to conduct an investigation while a court case is still proceeding. Instead, the courts have granted additional time or a change of location for a trial to deal with the publicity problem.¹² For example, the court in one of the leading cases, *Delaney v. United States*, entertained "no doubt that the committee acted lawfully, within the constitutional powers of Congress duly delegated to it," but went on to note that the Justice Department

must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.¹³

Thus, the courts have recognized that the cases pose a choice for the Congress: congressionally generated publicity may result in harming the prosecutorial effort of the executive; but access to information under secure conditions can fulfill the congressional power of investigation. Courts have recognized that this remains a choice that is solely within Congress' discretion to make irrespective of the consequences. As the Iran-Contra independent counsel observed: "The legislative branch has the power to decide whether it is more important perhaps to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision, or a legal decision, but a political decision of the highest importance."¹⁴

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

Attorney general and OLC opinions have raised concerns that congressional oversight that calls for information that reflects the executive branch's strategy or its methods or weaknesses is somehow inappropriate. However, if this concern were permitted to block congressional inquiries, this would prevent Congress from performing a major portion of its constitutionally mandated oversight. Congressional inquiries into foreign affairs and military matters call for information on strategy and assessment of weaknesses in national security matters; congressional probes into waste, fraud, and

9. See Chapter 2.

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

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

12. See e.g., *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *United States v. Mitchell*, 372 F. Supp. 1259, 1261 (S.D.N.Y. 1973). For discussion of issues in addition to prejudicial publicity that have been raised in regard to concurrent congressional and judicial proceedings, including allegations of violation of due process, see CONTEMPT OF CONGRESS, H.R. REP. NO. 97-968, at 58 (1982).

13. *Delaney v. United States*, 199 F.2d 107, 114 (1st Cir. 1952). The court did not fault the committee for holding public hearings, stating that if closed hearings were rejected "because the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was of course free to go ahead with its hearing, merely accepting the consequence that the trial of Delaney on the pending indictment might have to be delayed." *Id.* at 114-15. It reversed Delaney's conviction because the trial court had denied his motion for a continuance until after the publicity generated by the hearing, at which Delaney and other trial witnesses were asked to testify, subsided. See also *Hutcheson*, 369 U.S. at 613 (upholding contempt conviction of person who refused to answer committee questions relating to activities for which he had been indicted by a state grand jury, citing *Delaney*).

14. Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 HOUS. L. REV. 1, 9 (1988).

inefficiency in domestic operations call for information on strategy and weaknesses. For Congress to forego such inquiries would be an abandonment of its oversight duties. The best way to correct either bad law or bad administration is to closely examine the methods and strategies that led to the mistakes. The many examples of congressional probes recounted in the CRS compilation demonstrate how important and effective proper congressional oversight can be.

a. The Revelations of the Cover-Up of Investigative Findings of Misconduct at Ruby Ridge

The DOJ Office of Professional Responsibility (OPR), which monitors the conduct of Department personnel, is notable for its revelations of a number of sensitive, previously undisclosed internal investigations in the face of extraordinary agency resistance. One such instance occurred during the 1995 investigation by the Senate Judiciary Committee's Subcommittee on Terrorism, Technology, and Government Information of allegations that several branches of DOJ and the Department of the Treasury had engaged in serious criminal and professional misconduct in the investigation, apprehension, and prosecution of Randall Weaver and Kevin Harris at Ruby Ridge, Idaho. The subcommittee, chaired by Senator Arlen Specter, held 14 days of hearings in which it heard testimony from 62 witnesses, including DOJ, FBI, and Treasury officials, line attorneys and agents, obtained various internal reports from these agencies,¹⁵ and issued a final report.¹⁶

The subcommittee's hearings revealed that the federal agencies involved conducted at least eight internal investigations into charges of misconduct, none of which had ever been publically released.¹⁷ DOJ expressed reluctance to allow the subcommittee to see any documents out of a concern they would interfere with the ongoing investigation but ultimately supplied some of them under agreed-upon conditions regarding their public release. The most important of these documents was the report of the Ruby Ridge Task Force.¹⁸

The task force submitted a 542 page report to OPR on June 10, 1994, which described numerous problems with the conduct of the FBI, the U.S. Marshals, and the U.S. Attorney's Office in Idaho, and made recommendations for institutional changes to address the problems it found. It also concluded that portions of the rules of engagement issued by the FBI during the incident were unconstitutional under the circumstances, and that the second of two shots fired by a member of the FBI's Hostage Rescue Team (HRT), which resulted in the death of Vicki Weaver, was not reasonable. The task force recommended that the matter be referred to a prosecutorial component of the department for a determination as to whether a criminal investigation was appropriate.

OPR reviewed the task force report and transmitted the report to the deputy attorney general with a memorandum that dissented from the recommendation that the shooting of Vicki Weaver by the HRT member be reviewed for prosecutorial merit. The dissent was based on the view that the agent's actions were not unreasonable considering the totality of the circumstances. The deputy attorney general referred the task force recommendations for prosecutorial review to the criminal section of the civil rights division, which concluded that there was no basis for criminal prosecution.

The task force report was the critical basis for the subcommittee's inquiries during the hearings and the discussion and for the conclusion in its final report that "With the exception of the [Ruby Ridge] Task Force report, which was partially disavowed by the Department, and the April 5, 1995 memorandum of Deputy Attorney General Jamie Gorelick, it appeared to the Subcommittee that the authors of every report we read were looking more to justify agency conduct than to follow the facts wherever they lead."¹⁹

15. *The Federal Raid on Ruby Ridge, Idaho: Hearings before the Senate Subcommittee on Terrorism, Technology and Government Information, Committee on the Judiciary*, 104th Cong. (1995) [hereinafter *Ruby Ridge Hearings*].

16. *Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary* [hereinafter *Ruby Ridge Report*]. The 154-page report appears not to have been officially reported by the full committee. A bound copy may be found in the United States Senate Library, catalogue number HV 8141.U56 1995.

17. *Id.* at 1; *Ruby Ridge Hearings*, *supra* note 15, at 722, 954, 961.

18. *See generally*, *Ruby Ridge Report*, *supra* note 16.

19. *See Ruby Ridge Hearings*, *supra* note 15, at 719-37, 941-85; *Ruby Ridge Report*, *supra* note 16, at 10-11, 61-69, 115, 122-23, 34-35, 139, 145-49; *see also* David Johnston, *Idaho Siege Report Says FBI Violated Procedure*, N.Y. TIMES, Dec. 14, 1994.

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

In the past, the executive frequently has made the broad claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is thereby limited. Under this view, matters of prosecutorial discretion are off-limits to congressional inquiry, and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor. However, court decisions have not upheld this view and have permitted congressional inquiries into prosecutorial decisions.

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

The Supreme Court has rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. In *Morrison v. Olson*,²⁰ the court recognized that while the executive regularly exercises prosecutorial powers, the exercise of prosecutorial discretion is in no way “central” to the functioning of the executive branch.²¹ The court therefore rejected a challenge to a statutory provision exempting the independent counsel from at-will presidential removal. The court held that insulating the independent counsel in this way did not interfere with the president’s duty to “take care” that the laws be faithfully executed.²²

The *Morrison* court reiterated that Congress’s oversight functions of “receiving reports or other information and to oversight of the independent counsel’s activities ... [are] functions that have been recognized generally as being incidental to the legislative function of Congress.”²³ Arguments that only the executive branch has the power to prosecute violations of the law also have been soundly rejected outside the realm of congressional investigations. In *United States ex rel Kelly v. The Boeing Co.*,²⁴ the Ninth Circuit upheld the constitutionality of *qui tam* provisions of the False Claims Act allowing private parties to bring enforcement actions against federal agencies, holding that: “[W]e reject Boeing’s assertion that *all* prosecutorial power of any kind belongs to the Executive Branch.”²⁵

Prosecution is not a core or exclusive function of the executive, but oversight is a constitutionally mandated function of Congress; therefore, a claim of executive privilege to protect the ability to prosecute a case would likely fail. Additionally, congressional oversight and access to documents and testimony, unlike the action of a court, cannot stop a prosecution or set limits on the management of a particular case. Access to information by itself would not seem to disturb the authority and discretion of the executive branch to decide whether to prosecute a case.

20. *Morrison v. Olson*, 487 U.S. 654 (1988).

21. *Id.* at 691–92.

22. Any doubt that this is the intended, clear ruling of the majority opinion may be dispelled by a reading of Justice Scalia’s famous lone dissent. *Morrison*, 487 U.S. at 703–715. “It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether ‘the President’s need to control the exercise of [the independent counsel’s] discretion is *so central* as to the functioning of the Executive Branch’, as to require complete control, ante at 487 U.S. at 691, (emphasis added), whether the conferral of his powers upon someone else ‘*sufficiently* deprives the President of control over the independent counsel to interfere with [his] constitutional obligation to ensure the faithful obligation of the laws’, ante at 487 U.S. at 696.” *Id.* at 708–09. “It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers must be within the full control of the President. The Constitution prescribes that they *all* are.” *Id.* at 709 (emphasis in original text).

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

24. *United States ex rel. Kelly v. Boeing Co.*, 9F.3d 743 (9th Cir. 1993).

25. *Id.* at 751 (emphasis in original). *See also*, *Vermont Agency of National Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (holding that *qui tam* relators meet Article III standing requirements).

Given the legitimacy of congressional oversight of the law enforcement agencies of government, and the need for access to information pursuant to such activities,²⁶ a claim of prosecutorial discretion by itself is unlikely to defeat a congressional need for information. The congressional action itself does not and cannot dictate prosecutorial policy or decisions in particular cases.

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

Judicial rulings over the past two decades in other contexts have rejected various assertions of presidential privilege that might be raised in attempts to deny congressional access to agency information. The Supreme Court's ruling in *Morrison v. Olson* casts significant doubt on whether prosecutorial discretion is a core presidential power, a doubt that has been magnified by the appellate court rulings in *Espy*²⁷ and *Judicial Watch*.²⁸ In those later decisions, assertion of the presidential communications privilege was held to be limited to "quintessential and non-delegable presidential power" and confined to communications with advisers in "operational proximity" to the resident.

Those decisions indicate that core powers include only decisions that the president alone can make under the Constitution: appointment and removal, pardoning, receiving ambassadors and other public ministers, negotiating treaties, and exercising powers as commander in chief. As discussed in Chapter 5, *Espy* strongly hinted, and *Judicial Watch* made clear, that the protection of the presidential communications privilege extends only to the boundaries of the White House and the executive office complex and not to the departments and agencies. Even if the actions at an agency related to a core power, unless the subject documents are "solicited and received" by a close White House adviser or the president, they are not covered by the privilege. *Judicial Watch*, which dealt with pardon documents in DOJ that had not been "solicited and received" by a close White House adviser, determined that "the need for the presidential communications privilege becomes more attenuated the further away the advisers are from the President ... [which] affects the extent to which the contents of the President's communications can be inferred from predecisional communications."²⁹ Of course, these rulings did not involve congressional requests, and they are rulings by the U.S. Court of Appeals for the D.C. Circuit, not decisions by the Supreme Court. However, they provide helpful guidance, especially since the D.C. Circuit is the court most likely to hear and rule on future claims of presidential privilege.³⁰

26. The district court ruling in *House Committee on the Judiciary v. Miers*, in rejecting a claim of lack of standing of the House Judiciary Committee to challenge an executive assertion of absolute immunity from compulsory congressional process, reiterated that prior Supreme Court rulings in *McGrain v. Daugherty*, *Eastland v. U.S. Servicemen's Fund*, and *Barenblatt v. United States*, among others, had firmly established that Congress's power and authority to seek and compel information from executive agencies in criminal and civil enforcement contexts is constitutionally based. In denying the claim by the executive that a jurisdictional committee charged with oversight of the Justice Department could not permissibly employ its investigative resources to determine the reasons for the forced resignations and replacement of nine U.S. attorneys, the court stated that "Given its 'unique ability to address improper partisan influence in the prosecutorial process ... [n]o other institution will fill the vacuum if Congress is unable to investigate and respond to this evil.' ... With the legitimacy of its investigation established, there is no need to belabor the argument concerning informational standing—non-compliance with a duly issued subpoena is a quintessential informational injury ... Thus, the Committee filed this suit to vindicate both its right to the information that is the subject of the subpoena and its institutional prerogative to compel compliance with its subpoenas. A harm to either interest satisfies the injury-in-fact standing requirement." *House Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 78 (2008). The court also remarked: "The exercise of Congress's investigative 'power,' which the Executive concedes that Congress has, creates rights. For instance, by utilizing its power to issue subpoenas and proceed with an investigation via compulsory process, Congress creates a legal right to the responsive information that those subpoenas will yield. To hold that Congress's ability to enforce its subpoenas in federal court turns on whether its investigative function and accompanying authority to utilize subpoenas are properly labeled as 'powers' or 'rights' would elevate form over substance. The Court declines to do so." *Id.* at 91. (emphasis in original). Subsequent district court rulings have reiterated and relied on the *Miers* rationale to uphold legal actions to protect core constitutionally-based institutional prerogatives. See, e.g., *United States House of Representative v. Burwell*, 130 F. Supp. 3d 53, 81 (D.D.C. 2015)(power of the purse); *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1, 4 (D.D.C. 2013) (document subpoena enforcement).

27. *In re Sealed Case (Espy)*, 121 F. 3d 279 (D.C. Cir. 1997).

28. *Judicial Watch v. Dep't of Just.*, 365 F.3d 1108 (D.C. Cir. 2004).

29. *Id.* at 1123.

30. It may be noted that the district court ruling in *House Committee on the Judiciary v. Miers*, however, did involve a direct confrontation between a congressional committee and the executive over demands for testimony and documents from present and past senior advisers to the president, and that the court's opinion approvingly cited the *Espy* ruling five times with respect to doctrinal trends and interpretations concerning the presidential communications privilege. See *Miers*, 558 F. Supp. 2d at 73, 74 n.15, 103 n.35, and 105 n.37. Arguably, these references reinforce the notion that *Espy* is the controlling law in the District of Columbia Circuit with respect to the applicability of the privilege and its nature and scope.

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

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

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

a. The Broad Right of Congressional Access and Disclosure

Generally speaking, Congress’ authority and power to obtain information, including but not limited to proprietary or confidential information, is extremely broad.³¹ Upon occasion, Congress has found it necessary and appropriate to limit its access to information it would normally be able to obtain by exercise of its constitutional oversight prerogatives.³² But where a statutory confidentiality or nondisclosure provision is not made explicitly applicable to the Congress, the courts have consistently held that agencies and private parties may not deny Congress access to such information on the basis of such provisions.³³ Ambiguities in such statutes as the Trade Secrets Act and the Privacy Act have been resolved in a committee’s favor.³⁴ The courts have also held that the release of information to a congressional requester is not considered to be disclosure to the general public.³⁵ Once documents are in congressional control, the courts will presume that committees of Congress will exercise their powers responsibly and with proper regard to the rights of the parties.³⁶ Moreover, it would appear that courts may not prevent congressional disclosure at least when such disclosure would serve a valid legislative purpose.³⁷

Two early instances in which committees used the contempt power to successfully overcome agency claims that general confidentiality provisions in their enabling legislation prohibited disclosures to Congress are important precedents. The first involved a 1975 investigation by the Subcommittee on Oversight and Investigations of the then-House Interstate and Foreign Commerce Committee, chaired by Rep. John Moss, seeking to learn the degree to which Arab countries had asked U.S. companies to refuse to do business with Israel. It requested the Commerce Department to disclose to it all boycott

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

32. *See, e.g.*, 1 U.S.C. § 112b (limiting congressional access to international agreements, other than treaties, where, in the opinion of the president, public disclosure would be prejudicial to the national security, to the foreign relations committees of each House under conditions of secrecy removable only by the president); 26 U.S.C. §§ 6103(d), 6104(a)(2) (limiting inspection of tax information to the Senate Finance Committee, House Ways and Means Committee, and the Joint Committee on Taxation, or any committees “specifically authorized by a resolution of the House or Senate”); 10 U.S.C. § 1582 (which provides that in reporting to Congress on certain sensitive positions created in the Defense Department, “the Secretary may omit any item if he considers a full report on it would be detrimental to national security”); and under 50 U.S.C. § 403j (b), the Congress’ ability to obtain information about the CIA, particularly with regard to expenditures, is very limited.

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

34. *See, e.g.*, *Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000); *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *Exxon Corp.*, 589 F.2d at 585–86; *Ashland Oil*, 548 F.2d at 979.

35. *See, e.g.*, *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *see also Exxon Corp.* 589 F.2d at 589; *Ashland Oil*, 548 F.2d at 979; *Moon v. CIA*, 514 F. Supp 836, 840–41 (S.D.N.Y. 1981).

36. *See, e.g.*, *Owens-Corning Fiberglass Corp.*, 626 F.2d at 974; *see also Exxon Corp.* 589 F.2d at 589; *Ashland Oil*, 548 F.2d at 979; *Moon*, 514 F. Supp at 849–51.

37. *See Doe v. McMillan*, 412 U.S. 306 (1973); *Eastland*, 421 U.S. at 491; *see also Owens-Corning Fiberglass Corp.* 626 F.2d at 970.

requests filed by U.S. companies under the Export Administration Act of 1969. Secretary Rogers C.B. Morton refused on the ground that a broad confidentiality provision of the act, which did not expressly mention Congress, precluded such disclosure. The subcommittee subpoenaed the documents but the secretary again refused to comply and was supported by an attorney general opinion that declared that the confidentiality provision did apply to Congress. The subcommittee voted the secretary in contempt after rejecting his proffer of information reflecting the number of such reports filed and other statistical information, but without revealing the names of the companies. The subcommittee had noted that there were at least 120 confidentiality provisions in various laws and that acceptance of their applicability to Congress would substantially undermine legislative oversight. The day prior to a scheduled vote by the full committee on contempt an agreement was reached under which the chairman of the subcommittee agreed to receive the documents in executive session and not make them public.³⁸

The second instance occurred during a 1978 investigation by the same House subcommittee which was dealing with allegations that a number of drug companies put their trade names on drugs actually manufactured by generic drug companies. The subcommittee requested pertinent company documents held by the Food and Drug Administration (FDA) that the companies were required to file. Refusals after negotiations failed resulted in a subpoena to Health, Education and Welfare Secretary Joseph A. Califano. The secretary, supported by another attorney general opinion, refused to comply, again on the ground that a general confidentiality provision in its enabling legislation precluded disclosure to Congress. The subcommittee rejected the contention and voted to cite the secretary for contempt. The matter was resolved by the release of the documents prior to full committee consideration.³⁹

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

Agencies, and private party submitters of sensitive information to agencies, often claim that acquiescing in a committee demand will waive agency rights under exemption 5 of the Freedom of Information Act (FOIA) as well as other privileges that they might assert in any subsequent court litigation. Exemption 5 of FOIA covers all the privileges against disclosure that would be provided under court rules governing civil litigation. While agencies have a legitimate interest in preserving these privileges, there should be no fear of waiver. “Waiver is the voluntary relinquishment of a known right or privilege.”⁴⁰ It is well established that acquiescence in a valid, official request from a jurisdictional committee to a subject agency does not constitute a waiver of applicable nondisclosure privileges elsewhere.⁴¹

In *Rockwell International Corp. v. U.S. Department of Justice*,⁴² the court acknowledged that the existence of statutory obligations to comply with congressional information requests is sufficient to demonstrate that compliance was not voluntary. *Rockwell* dealt with an assertion by the company that the Justice Department had waived the company’s claim of FOIA exemption 5 protection with respect to internal deliberative documents by giving the documents to a congressional investigating subcommittee at the subcommittee’s request. The appeals court rejected the waiver claim, remarking that since the Justice Department had given “the documents to the Subcommittee only after the Subcommittee expressly agreed not to make them public,” this indicated that “far from intending to waive the attachments’ confidentiality, the Justice Department attempted to preserve it. Under those circumstances, we find no Exemption 5 waiver.”⁴³

It is also well established that when the production of privileged communications is compelled, either by a court or a congressional committee, compliance with the order does not waive the applicable privilege in other litigation, as long

38. See *Contempt Proceedings against Secretary of Commerce Rogers C.B. Morton: Hearing Before the Subcomm. on Oversight and Investigations, H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 1st Sess. (1975); Paul C. Rosenthal and Robert S. Gressman, *Congressional Access to Confidential Information Collected by Agencies*, 15 HARV. J. ON LEGIS. 74, 82-83 (1977).

39. See *Contempt Proceedings Against Secretary of HES Joseph A. Califano, Jr.: Business Meeting of the Subcomm. on Oversight and Investigations, H. Comm. in Interstate and Foreign Commerce*, 95th Cong., 2d Sess. (1978) (Comm. Print No. 95-76, 1978).

40. *Florida House of Representatives v. U.S. Department of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992).

41. *Murphy v. Dep’t of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979); *Florida House of Representatives*, 961 F.2d at 946. See also *Owens-Corning Fiberglass Co.*, 626 F.2d at 970; *Ashland Oil*, 548 F.2d at 979, 980-81 (Release of confidential information to a congressional requester is not deemed to be disclosure to the public generally, and the legal obligation to surrender requested documents arises from the official request).

42. *Rockwell Int’l Corp. v. Dep’t of Justice*, 235 F.3d 598 (D.C. Cir. 2001).

43. *Id.* at 604.

as it is demonstrated that the compulsion was resisted.⁴⁴ Some courts have even refused to find waiver when the client's production, although not compelled, is pressured by the court.⁴⁵

Two court rulings involving the House Energy and Commerce Committee confirm that turning over documents to a committee does not necessarily waive claims of privilege. However, the rulings also highlight the importance of sufficiently challenging a subpoena to demonstrate that the turnover was, indeed, involuntary. Both cases involved claims in judicial forums that the Energy and Commerce Committee's receipt and dissemination of documents from tobacco companies waived claims of privilege asserted in those courts. Both courts agreed that there would be no waiver if the document turnover had been involuntary. Both courts found, however, that the companies had failed to sufficiently challenge the chairperson's subpoenas: "In short, a party must do more than merely object to Congress' ruling. Instead a party must risk standing in contempt of Congress."⁴⁶

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

The public release of proprietary, trade secret or other sensitive information, either through inclusion in a hearing record or via the Congressional Record, is protected by the Speech or Debate Clause. Moreover, because such information does not normally include classified material, it is unlikely that release or publication would be deemed to violate the ethics rules of the House. The Speech or Debate Clause of the Constitution⁴⁷ protects "purely legislative activities," including those considered inherent in the legislative process.⁴⁸ The protection afforded by the clause covers not only the words spoken during debate but also "[c]ommittee reports, resolutions, and the act of voting are equally covered, as [these] are 'things generally done in a session of the House by one of its members in relation to the business before it.'"⁴⁹ Finally, the clause has been held to encompass such activities integral to the lawmaking process as the circulation of information to other members, as well as participation in committee investigative proceedings and reports.⁵⁰

The Speech or Debate Clause's protections, however, do not extend to activities only casually or incidentally related to legislative affairs.⁵¹ For example, newsletters, press releases, or the direct distribution of reports containing information or quotes will likely

44. *See, e.g.*, *United States v. de la Jara*, 973 F.2d 746, 749–50 (9th Cir. 1992) ("In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered," citing *Transamerica Computer Corp. v. IBM*, 573 F.2d 646, 652 (9th Cir. 1978)); *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987), *aff'd in part, vacated in part*, 491 U.S. 554 (1989) ("When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege. *See Transamerica Computer*, 573 F.2d at 650."); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 n. 14 (3d Cir. 1991) ("We consider Westinghouse's disclosure to the DOJ to be voluntary even though it was prompted by a grand jury subpoena. Although Westinghouse originally moved to quash the subpoena, it later withdrew the motion and produced the documents pursuant to the confidentiality agreement. *Had Westinghouse continued to object to the subpoena and produced the documents only after being ordered to do so, we could not consider its disclosure of those documents to be voluntary.*") (emphasis added); *Jobin v. Bank of Boulder (In re M&L Business Machines Co.)*, 167 B.R. 631 (D. Colo. 1994) ("Production of documents under a grand jury subpoena does not automatically vitiate the attorney-client privilege, much less in an unrelated civil proceeding brought by a non-government entity. This is especially true in a case such as this, where the record demonstrates that the Bank has consistently sought to protect its privilege.").

45. *Transamerica Computer*, 573 F.2d at 651. Similarly, another court found that a client's voluntary production of privileged documents during discovery did not effect a waiver because it was done at the encouragement of the presiding judge. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1163 (S.D.S.C. 1974) (finding no waiver "where the voluntary waiver of some communications was made upon the suggestion of the court during the course of the in camera proceedings."). Moreover, a number of federal appeals and district courts similarly have held that disclosures to congressional committees do not waive claims of privilege elsewhere. *See Florida House of Representatives*, 961 F.2d at 946; *Murphy*, 613 F.2d at 1155 (D.C. Cir. 1979); *In re Sunrise Securities Litigation*, 109 B.R. 658 (D.C. E.D. Pa. 1990); *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 1987 U.S. Dist. Lexis 10912 (N.D. Ill. E.D. 1987).

46. *See Iron Workers Local Union No. 17 Insurance Fund v. Phillip Morris, Inc.*, 35 F. Supp. 2d 582 (N.D. Ohio, E.D. 1999); *Massachusetts v. Phillip Morris, Inc. et al.*, 1998 Lexis 438 (Mass. Super. Ct. July 30, 1998).

47. U.S. Const. art. 1, § 6, cl. 1 (providing that "for any Speech or Debate in either House, [Members] shall not be questioned in any other place").

48. *See id.*; *see also United States v. Swindall*, 971 F.2d 1531, 1534 (11th Cir. 1992); *Chastain v. Sundquist*, 833 F.2d 311, 314 (D.C. Cir. 1987), *cert denied* 487 U.S. 1240 (1988) (*quoting United States v. Brewster*, 408 U.S. 501, 512 (1972)).

49. *Powell v. McCormack*, 395 U.S. 486, 502 (1969).

50. *See, e.g., McMillan*, 412 U.S. at 311–12; *Gravel v. United States*, 408 U.S. 606, 625 (1972); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376–77 (1951).

51. *See Walker v. Jones*, 733 F.2d 923, 929 (1984) (holding that activities integral to the legislative process may not be examined, but peripheral activities not closely connected to the business of legislating do not get protection under the Clause). For an in-depth discussion of the Speech or Debate Clause *see* Chapter 10.

not be shielded, because they are considered “primarily means of informing those outside the legislative forum.”⁵² On the other hand, the distribution of such documents to members of a committee and/or their staff, or the inclusion of such information or reports in the public record of hearings or the Congressional Record, are likely to be considered “integral” and, therefore, protected by the clause. The key consideration in such cases appears to be the act, not the actor.

d. The Privacy Act is Inapplicable to Disclosures to Congress

Agencies often contend that the Privacy Act⁵³ prevents them from disclosing certain information to Congress in response to an official congressional inquiry. However, a review of the relevant statutory provisions, judicial interpretations, and congressional practice indicates that there is no such barrier.

The Privacy Act safeguards individuals against invasions of personal privacy by requiring government agencies to maintain accurate records and by providing individuals with more control over the gathering, dissemination, and accuracy of government information about themselves. To secure this goal, the act prohibits an agency from disclosing information in its files to any person or to another agency without the prior written consent of the individual to whom the information pertains.⁵⁴ This broad prohibition is subject to 12 exceptions, one of which specifically allows disclosures to Congress and its committees. Section 552a(b)(9) permits disclosure of covered information without the consent of the individual “to either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any joint committee.” A 2000 court of appeals ruling held that this provision “unambiguously permits federal agencies to disclose personal information about an individual without the individual’s consent to a Congressional subcommittee that has jurisdiction over the matter to which the information pertains.”⁵⁵

Similarly, DOJ’s Office of Legal Counsel has agreed that the section (b)(9) exception applies “where the Senate or House exercises its investigative and oversight authority directly, as is the case with a resolution of inquiry adopted by the Senate or House, each House of Congress exercises its investigative authority through delegations of authority to its committees, which act either through requests by committee chairs, speaking on behalf of the committee, or through some other action by the committee itself.”⁵⁶ More recently, a Department of Justice official agreed that based upon this Privacy Act exception, the Department was permitted to disclose to Congress details from nine U.S. attorneys’ personnel files in connection with the investigation of the removal of these U.S. attorneys. The official was testifying before the investigating congressional committee, and he explained in detail the Department’s position that the U.S. attorneys were removed for purely personnel-related reasons.⁵⁷

5. Access to Grand Jury Materials

Rule 6(e) of the Federal Rules of Criminal Procedure provides that members of the grand jury and those who attend grand jury proceedings may not “disclose matters occurring before the grand jury, except as otherwise provided in these rules.”⁵⁸ The prohibition does not ordinarily extend to witnesses.⁵⁹ Violations are punishable as contempt of court.⁶⁰

52. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

53. 5 U.S.C. § 552a (2000).

54. *See* 5 U.S.C. § 552a(b).

55. *Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000).

56. Letter from Jay S. Bybee, Assistant Atty Gen., Off. of Legal Counsel, Dept of Justice, to David D. Aufenhauser, Esq., General Counsel, Department of the Treasury (December 5, 2001).

57. *See H.R. 580, Restoring Checks and Balances to the Confirmation Process of U.S. Attorneys: Hearing before the Subcomm. on Commercial and Admin. Law*, 110th Cong. 1st Sess. (Mar. 6, 2007) (Testimony of Principal Associate Deputy Attorney General William F. Moschella).

58. *See id.*

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

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

There is some authority for the proposition that Rule 6(e), promulgated as an exercise of congressionally delegated authority and reflecting pre-existing practices, is not intended to address disclosures to Congress.⁶¹ As a general rule, however, neither Congress nor the courts have accepted that proposition.

But not all matters presented to a grand jury are covered by the secrecy rule. Rather, according to the courts, the aim of the rule is to “prevent disclosure of the way in which information is presented to the grand jury, the specific questions and inquiries of the grand jury, the deliberations and vote of the grand jury, the targets upon which the grand jury’s suspicions focuses, and specific details of what took place before the grand jury.”⁶² But, “when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.”⁶³ Congressional committees have gained access to documents under this theory, the courts ruling that the committee’s interest was in the documents themselves and not in the events that transpired before the grand jury.⁶⁴ However, Rule 6(e) bars congressional access to matters that “reflect exactly what transpired in the grand jury,” such as transcripts of witness testimony.⁶⁵

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

- Documents within the possession of the Department of Justice concerning a particular case or investigation, other than transcripts of grand jury proceedings and material indicating “the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.” Material that would not otherwise be identifiable as grand jury material does not become secret simply through Department of Justice identification.⁶⁶
- Immunity letters, draft pleadings, target letters, and draft indictments.⁶⁷
- Plea agreements as long as particular grand jury matters are not expressly mentioned.⁶⁸
- Third party records which pre-exist the grand jury investigation even if they are in the possession of the Department of Justice as custodian for the grand jury.⁶⁹
- Memoranda, notes, investigative files, and other records of FBI agents or other government investigators except to the extent those documents internally identify or clearly define activities of the grand jury.⁷⁰

61. See *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072, 1074–75 (S.D. Fla. 1987), *aff’d on other grounds*, 833 F.2d 1438 (11th Cir. 1987); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1230 (D.D.C. 1974), *petitions for writs of prohibition and mandamus den’d sub nom.*, *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974); *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1304–08 (M.D. Fla. 1977).

62. *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. at 1302–03 (citing *United States v. Interstate Dress Carriers*, 280 F.2d 52, 54 (2d Cir. 1960)).

63. *Interstate Dress Carriers v. Dress Carriers*, 280 F.2d 52, 54 (2d Cir. 1960). See also *SEC v. Dresser Industries*, 628 F.2d 1368 (D.C. Cir. 1980); *In re Grand Jury Investigation (New Jersey State Commission of Investigation)*, 630 F.2d 996 (3rd Cir. 1980); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972); *In re Senate Banking Committee Hearings*, 19 F.R.D. 410, 412 (N.D. Ill. 1956).

64. *In re Grand Jury Impaneled October 2, 1978*, 510 F. Supp. 112, 115 (D.D.C. 1981); *In re Grand Jury Proceedings, Newport News Drydock & Shipbuilding Co.*, Mem. Opinion (E.D. Va. Nov. 12, 1984); *In re Senate Banking Committee Hearings*, 19 F.R.D. 410 (N.D. Ill. 1956).

65. *In re Grand Jury Investigation Uranium Industry*, 1979 WL 1661 at 4 (D.D.C. (1979)); *In re Grand Jury Impaneled October 2, 1978*, 510 F. Supp. 112 (D.D.C. 1981).

66. *Senate of Puerto Rico v. U.S. Department of Justice*, 823 F.2d 574, 583 n. 30 (D.C. Cir. 1987); *In re Grand Jury Impaneled October 2, 1978 (79-2)*, 510 F. Supp. 112, 114–15 (D.D.C. 1981).

67. *In re Harrisburg Grand Jury 83-2*, 638 F. Supp. 43, 47 n.4 (M.D. Pa. 1986); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 n.4 (3d Cir. 1982).

68. *Washington Post v. Robinson*, 935 F.2d 282, 290–91 (D.C. Cir. 1991).

69. *SEC v. Dresser Industries, Inc.*, 628 F.2d at 1382–83; *United States ex rel Woodard v. Tynan*, 757 F.2d 1085, 1087–88 (10th Cir. 1985).

70. *Anaya v. United States*, 815 F.2d 1373, 1380–81 (10th Cir. 1987).

6. Committees Cannot be Denied Access to Subordinate Agency Personnel

a. Asserted Basis of Agency Refusals

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

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

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

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

If the requesting committee has jurisdiction over the agency, and has the authority to initiate and conduct investigations and issue subpoenas, the witness must be allowed to appear. An agency has no authority to determine who from the agency shall or shall not appear before a requesting committee or to set the terms and conditions of such appearances.⁷¹ Indeed, an agency official who blocks the appearance of a witness may be subject to criminal sanctions for obstruction of a congressional proceeding,⁷² loss of pay,⁷³ or a citation for contempt of Congress.⁷⁴

i. The Example of the Rocky Flats Investigation

Whether a witness access dispute ratchets up to a full-blown interbranch controversy depends on political factors. Illustrative is a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology. The subcommittee investigated the plea bargain settlement of the prosecution of Rockwell International Corporation for environmental crimes committed in its capacity as manager and operating contractor at the Department of Energy's (DOE) Rocky Flats nuclear weapons facility.⁷⁵ The settlement was a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA's National Enforcement Investigation Centers, and the DOE inspector general.

71. See Chapter 4 (section E.3.) for a discussion of a committee's prerogative to determine which agency witnesses shall appear before it and the conditions of such appearances, including limitations on attorney representation and the attendance of agency representatives during the testimony.

72. 18 U.S.C. § 1505.

73. P.L. 109-115, § 818, Transportation Treasury and Independent Agency Appropriations, 2005 (November 30, 2006) (carried over to date by continuing resolutions).

74. 2 U.S.C. §§ 192, 194, or if no subpoena has been issued, under each House's inherent contempt power.

75. See *Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space & Technology*, 102d Cong., 2d Sess., vols. I and II (1992) [hereinafter *Rocky Flats Hearings*]; *Meetings: To Subpoena Appearance by Employees of the Department of Justice and the FBI and To Subpoena Production of Documents From Rockwell International Corporation, Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology*, 102d Congress, 2d Sess., (1992) [Hereinafter *Subpoena Hearings*].

The subcommittee was concerned with several issues:

- the small size of the agreed-upon fine relative to the profits made by the contractor and the damage caused by inappropriate activities;
- the lack of personal indictments of either Rockwell or DOE personnel despite a DOJ finding that the crimes were “institutional crimes” that “were the result of a culture, substantially encouraged and nurtured by DOE, where environmental compliance was a much lower priority than the production and recovery of plutonium and the manufacture of nuclear ‘triggers;”
- and that expense reimbursements provided by the government to Rockwell and the contractual arrangements between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.

The subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the U.S. attorney for the District of Colorado; an assistant U.S. attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI field agent. It also received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e).⁷⁶

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

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

- DOJ issued a new instruction to all personnel under subpoena to answer all subcommittee questions, including those relating to internal deliberations about the plea bargain. Those instructions applied to all department witnesses, including FBI personnel, who might be called in the future. Those witnesses were advised to answer all questions fully and truthfully, and were specifically instructed that they were allowed to disclose internal advice, opinions, or recommendations connected to the matter.
- Transcripts were made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing.
- Witnesses were required to be interviewed by staff under oath.
- The subcommittee reserved the right to hold further hearings in the future, at which time it could call other department witnesses who would be instructed by the department not to invoke the deliberative process privilege as a reason for refusing to answer subcommittee questions.⁷⁷

Key to the success of the investigating committee was the support of the chairperson by the ranking minority member throughout the proceeding and the perception that there were sufficient votes on the full committee for a contempt citation. Media attention to the dispute also helped, particularly coverage of grand jury members who complained about

76. *Rocky Flats Hearings*, *supra* note 75, at vol. I, 389–1009, 1111–1251, vol. II.

77. *Rocky Flats Hearings*, *supra* note 75, at vol. I, 9–10, 25–31, 1673–1737; *Subpoena Hearings* at 1–3, 82–86, 143–51.

not being allowed to hand up indictments of Energy Department and Rockwell officials.

c. A Committee May Reject an Agency-Designated Attorney Appearing with an Agency Witness

Often as an alternative, an agency may offer to allow a subordinate official or employee to be interviewed or to testify if the witness is accompanied by agency counsel. Under certain circumstances, however, this may raise conflict-of-interest problems, particularly where the investigatory hearing involves issues of agency corruption, maladministration, abuse, or waste. In such instances, the agency attorney or other official may have a conflict of interest in representing both the interests of the employee-witness and those of the agency. Moreover, the presence of such an agency official may inhibit the witness from testifying fully. Thus, both pragmatic and legal concerns caution strongly in favor of limiting a witness' choice of counsel to someone who does not present the potential conflict of interest or pressure on the witness.

To be effective, a committee must be confident that the responses it obtains from officers and employees with respect to the administration of agency programs are candid, objective, and truthful. Committees have no way to ascertain whether a witness' statement that he or she personally requested to be accompanied by agency personnel is, in fact, based solely on the employee's personal wishes. Where a potential conflict-of-interest situation appears to arise, a committee should seek to insulate the witness from the presence of agency personnel during a staff interview, deposition, or hearing testimony.

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

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

An effective compromise to such situations is for the agency to direct its attorney to represent only the employee-witness' interests. This solution was employed by the Department of Health and Human Services (HHS) and House Energy and Commerce Committee in the 1990s. The secretary of HHS authorized a department attorney to represent an employee subpoenaed to testify before the committee, without reporting back to the department. The agreement reflected DOJ regulations authorizing personal representation by a DOJ attorney or private counsel of a government employee subpoenaed to testify about actions occurring during the course of the person's official duties.⁷⁸ The agreement solved the conflict of interest problem and removed the financial burden for subpoenaed government witnesses who no longer needed to pay substantial fees for private legal representation.⁷⁹

i. The Investigation of the DOJ Attempt to Block Enforcement of the Contempt Citation of Anne Burford

The end of the 97th Congress saw a dramatic illustration of the techniques and authorities just described. DOJ investigations grew out of the highly charged confrontation concerning the refusal, at the direction of President Ronald Reagan, of Environmental Protection Agency (EPA) Administrator Anne Gorsuch Burford to comply with House subcommittee subpoenas requiring the production of documentation about EPA's enforcement of the legislation requiring the cleanup of hazardous wastes (Superfund). The dispute culminated in the House of Representative's citation of Burford for contempt of Congress, the first head of an executive branch agency ever to have been so cited. It also resulted in an unprecedented legal action by DOJ against the House to obtain a judicial declaration that Burford had acted lawfully in refusing to comply with the subpoena at the behest of the president.

Ultimately the lawsuit was dismissed, all the documents sought were provided to the subcommittees, and the contempt citation was dropped. However, a number of questions about the role of the Justice Department during the controversy

78. See General Powers of Special Counsel, 28 C.F.R. § 600 (delineating the process for DOJ appointment of special counsel).

79. See STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, H. COMM. ON ENERGY AND COMMERCE, 103RD CONG., DAMAGING DISARRAY: ORGANIZATIONAL BREAKDOWN AND REFORM IN THE JUSTICE DEPARTMENT'S ENVIRONMENTAL CRIMES PROGRAM 54-6 (Comm. Print No. 103-T, 1994).

remained: whether DOJ, not EPA, had made the decision to persuade the president to assert executive privilege; whether the department had directed the United States attorney for the District of Columbia not to present the contempt citation to the grand jury and made the decision to sue the House; and, generally, whether there was a conflict of interest in the department's simultaneously advising the president, representing Burford, investigating alleged executive branch wrongdoing, and not enforcing the congressional contempt statute. These and other related questions raised by DOJ's actions became the subject of an investigation by the House Judiciary Committee beginning in early 1983. The committee issued a final report in December 1985.⁸⁰

Although the Judiciary Committee was able to gain access to virtually all the documentation and other information it sought from DOJ, in many respects the investigation proved as contentious as the earlier controversy. Among other clashes between DOJ and the Judiciary Committee, there was disagreement about the access that would be provided for DOJ staff interviews. DOJ demanded that any such interviewees be accompanied by DOJ lawyers. Ultimately DOJ agreed to permit interviews to go forward without its attorneys present, and if an employee requested representation, DOJ paid for a private attorney. In all, committee staff interviewed 26 current and former department employees, including four assistant attorneys general.

Partly as a result of these interviews, as well as from the handwritten notes initially withheld, the committee determined it needed access to Criminal Division documents respecting the origins of former EPA Assistant Administrator Rita Lavelle in order to determine whether department officials had deliberately withheld the documents in an attempt to obstruct the committee's investigation. The department first refused to provide the documents relating to the Lavelle investigation "[c]onsistent with the longstanding practice of the Department not to provide access to active criminal files."⁸¹ The department also refused to provide the committee with access to documents related to the department's handling of its inquiry, objecting on the ground of the committee's "ever-broadening scope of...inquiry."⁸² After a delay of almost three months the department produced both categories of documents.⁸³

The committee's final report asked for the attorney general to appoint an independent counsel pursuant to the Ethics in Government Act to investigate its allegations of obstruction of congressional proceedings. That appointment of an independent counsel and her subsequent inquiry led to the Supreme Court's landmark ruling in *Morrison v. Olson* which sustained the validity of the law creating the office and its function, held that prosecutorial discretion is not a core presidential power, and directly reaffirmed Congress's broad constitutionally-based oversight and investigatory authority.⁸⁴

e. Congress Has Enacted Witness Protection Laws

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

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

This so-called "anti-gag rule" statute was adopted by Congress in the face of the Taft and Theodore Roosevelt administrations' attempts to "gag" or restrain employees from speaking or providing information to Congress without the

80. See, REPORT OF THE H. COMM. ON THE JUDICIARY ON INVESTIGATION OF THE ROLE OF THE DEP'T OF JUSTICE IN THE WITHHOLDING OF EPA DOCUMENTS FROM THE CONG. IN 1982-83, H.R. REP. NO. 99-435 (1985) [hereinafter EPA WITHHOLDING REPORT].

81. *Id.* at 1265.

82. *Id.* at 1266.

83. *Id.* at 1270.

84. *Morrison*, 487 U.S. at 691-92, 694.

consent of the employees' heads of departments.⁸⁵ With such "gag rules" in place requiring departmental clearance for employees to speak to Congress or respond to members, Congress was specifically concerned that it would hear only the point of view of cabinet officials and not the views of the rank-and-file experts in the departments.⁸⁶ The anti-gag rule law has no enforcement mechanism.

But the provisions and the underlying policy of the "anti-gag rule" statute have been reaffirmed, strengthened, and clearly reasserted in recent appropriations laws. Repeatedly, Congress has expressly provided that no funds appropriated in *any* act of Congress may be spent to pay the salary of one who prohibits or prevents an employee of an executive agency from providing information to the Congress, or to any member or committee of Congress, when such information concerns relevant official matters. Similarly, current appropriations provisions also provide that no funds may be spent to enforce any agency nondisclosure policy, or any nondisclosure agreement with an officer or employee, without expressly providing an exemption for information provided to the Congress. In support, these provisions specifically cite the anti-gag rule law and other whistleblower protection provisions.⁸⁷ In discussing the latter provision when it was first added to appropriations laws in 1987, the House conference report stated clearly that the effect of the law was to reduce the potential that an overbroad nondisclosure agreement or agency nondisclosure policy might produce a "chilling effect on the first amendment rights of government employees, *including their ability to communicate directly with members of Congress.*"⁸⁸

Congress has also passed other provisions of law, such as the Whistleblower Protection Act of 1988, and in 2012 the Whistleblower Protection Enhancement Act,⁸⁹ to assure the free and unfettered passage of information from executive agency employees to, among others, the Congress, to assure the fair and honest administration of the laws of the nation.⁹⁰ The Senate report on the legislation noted that in large bureaucracies it is not difficult to conceal evidence of waste or mismanagement "provided that no one summons the courage to disclose the truth."⁹¹ The Whistleblower Act expressly protects employees from reprisals for the disclosure of certain information regarding waste, fraud, or abuse in federal programs. Although the act limits the right to disclose *publicly* certain confidential or secret information relating to national security or defense, it expressly allows the disclosure to the Congress of any and all such information: "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."⁹²

While the Whistleblower Act is generally used as a defense to personnel actions taken against covered employees for making protected disclosures, it clearly demonstrates Congress' continued policy of preserving open communications to the Congress from federal employees. Similarly, the Military Whistleblower Protection Act of 1989⁹³ provides that "No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General" and prohibits any retaliatory personnel action against a member of the armed forces for making or preparing a communication to a member of Congress.⁹⁴

85. Postal Service Appropriations Act of 1912, § 6, PUB. L. NO. 62-336, 37 STAT. 539, 555 (1912). For history of the gag rules and anti-gag rule law, see generally Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 623-625 (2000), and *Congressional-Executive Struggles Over Information: Secrecy Pledges*, 42 ADM. L. REV. 89, 98-100 (1990). For the text of the Taft and Roosevelt gag orders, see 48 CONG. REC. 4513 (Apr. 9, 1912).

86. 48 CONG. REC. 4656-57 (Apr. 12, 1912).

87. See Transportation, Treasury, and Independent Agency Appropriations, 2005, PUB. L. NO. 109-115 §§ 818, 820 (Nov. 30, 2006). These provisions have been carried over to the current fiscal year by subsequent continuing resolutions.

88. H.R. REP. NO. 100-498, at 1179 (1987) (emphasis added).

89. PUB. L. NO. 101-12 and PUB. L. NO. 112-199, *codified as amended at* 5 U.S.C. §§ 2301-2306, 1201-1222.

90. 5 U.S.C. § 2302(b)(8).

91. S. REP. NO. 95-969, at 8 (1978).

92. 5 U.S.C. § 2302(b). For an overview of the federal laws providing safeguards for whistleblowers see JON O. SHIMABUKURO & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R42727, WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAWS (periodically updated). See also the Supreme Court's recent ruling in *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015), holding that an agency regulation allowing retaliation for a legitimate whistleblower does not displace the protections of the act.

93. 10 U.S.C. § 1034 (2000).

94. 10 U.S.C. § 1034 (a)(1), (b).

Finally, the provisions of 18 U.S.C. § 1505 provide a criminal penalty for one who “corruptly,” or through the use of “any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede,” the “due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress. . . .” This statute makes it a criminal violation for anyone to use such threatening means to obstruct or impede a committee inquiry, or other such inquiry of the House or Senate.⁹⁵

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

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

Debra Jacobson: *1992–1994 Investigation of the Justice Department’s Environmental Crimes Program*

95. United States v. Mitchell, 877 F.2d 294 (4th Cir. 1989); United States v. Poindexter, 725 F. Supp. 13 (D.D.C. 1989) (a committee inquiry, however, need not be formally authorized, and may be a preliminary inquiry).