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# The Congressional Subpoena: Power, Limitations and Witness Protection\*

*Christopher F. Corr\*\**  
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## INTRODUCTION

In the past decade, Congress has made substantial use of the Congressional subpoena, liberally invoking its authority to compel witnesses to testify and produce documents in hearings such as the high-profile savings & loan,<sup>1</sup> Housing and Urban Development,<sup>2</sup> Iran-Contra<sup>3</sup> and Bank of Commerce and Credit International (BCCI)<sup>4</sup> scandals. This Congressional authority is a fundamental underpinning of Congress' critical constitutional oversight, investigative, and legislative functions.<sup>5</sup> However, society has a valid interest in ensuring

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\* The opinions expressed in this article are those of the authors alone. The authors gratefully acknowledge the assistance of Joseph Fischer in the preparation of this article.

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1. Richard Walker, *Governors Call for Independent Inquiry of Thrifts Crisis*, REUTER BUS. REP. July 31, 1990.

2. Philip Shendon, *Immunity is Seen as Possible for 2 Top H.U.D. Figures, But Not Pierce*, N.Y. TIMES, Oct. 9, 1989, at A12.

3. Ronald L. Goldfarb, *In Contempt*, WASH. POST, July 8, 1987, at A19; Haynes Johnson & Tracy Thompson, *North Charges Dismissed at Request of Prosecutor*, WASH. POST, Sept. 17, 1991, at A1.

4. Jim McGee, *Clifford, Altman Offer Own View of BCCI Data*, WASH. POST, Aug. 31, 1991, at A15.

5. Allen B. Moreland, *Congressional Investigations and the Private Person*, 40 S. CAL. L. REV. 189, 216-25 (1967) [hereafter Moreland]. See also Tom Kenworthy, *Special Counsel Drops Charges Against North in Iran-Contra Affair*, WASH. POST, Sept. 17, 1991, at A16. Senator Foley (D-Wash) who served on the Investigation Committee for the Iran-Contra Affair, stated that "there is an important role that

that there are clear limits on Congress' subpoena authority to protect individuals and entities who find themselves subject to this immense and somewhat nebulous Congressional fiat.

The tension between Congress' right to investigate and the individual's right to privacy and due process of law is the subject of the following discussion. The article begins by examining the Congressional rules implementing Congress' power to subpoena witnesses and documents (Section I), and by reviewing the few structural limitations on Congress' broad subpoena power (Section II). The article then discusses Congress' power to enforce its subpoenas through contempt proceedings (Section III). The subsequent sections are devoted to a discussion of the few protections available to the unfortunate citizen who becomes the object of Congressional curiosity, including defenses arising from procedural irregularities in issuing the subpoena, a witness' unintentional failure to comply, and those few instances in which the witness is sheltered by a constitutionally-based or common law privilege (Section IV). The final section discusses a mechanism for those instances in which all else fails and the witness must comply with the Congressional subpoena, and how the witness can at least get Congress to close its doors and keep out the television cameras (Section V).

## I. CONGRESSIONAL SUBPOENA RULES

Congress conducts its investigative work through its standing and special committees and subcommittees. The subpoena rules of each committee vary but are generally consistent with those established in the House and Senate Rules.

### A. *Senate Subpoena Power*

The Senate's broad authority to subpoena witnesses and documents is set forth in rule XXVI ¶ 1 of the Standing Rules of the Senate ("Senate Rules"):

Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recess-

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the Congress has in conducting investigations. It is one of its fundamental, constitutional powers vested by the Constitution and one of the fundamental legislative purposes of the institution conducting such investigations." *Id.*

es, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures out of the contingent fund of the Senate as may be authorized by resolutions of the Senate. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance . . . .<sup>6</sup>

Senate Rule XXVI ¶ 2 requires each of the standing committees to adopt its own procedural rules, which must be consistent with the Senate Rules. This is done, to different degrees, in each committee. For example, the rules of the Senate Judiciary and Commerce Committees do not mention the subpoena authority of these committees. The Finance Committee rules, however, expressly provide authority to issue subpoenas through the Committee Chairman. Specifically, Rule I ¶ 10 states that: "subpoenas for attendance of witnesses and the production of memoranda, documents, and records shall be issued by the Chairman, or by any other member of the Committee designated by him."<sup>7</sup> The Foreign Relations Committee rules also set forth that committee's subpoena powers, providing for depositions and document requests, and further requiring that subpoenas be issued only upon a majority vote.<sup>8</sup>

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6. SENATE COMM. ON RULES AND ADMIN., AUTHORITY AND RULES OF SENATE COMMITTEES, S. DOC. NO. 20, 101st Cong., 1st Sess. 209 (1990).

7. *Id.* at 85.

8. Specifically, rule 7 of the Foreign Relations Committee rules states:

(a) Authorization. The Chairman or any other member of the Committee, when authorized by a majority vote of the Committee at a meeting or by proxies shall have authority to subpoena the attendance of witnesses or the production of memoranda, documents, records, or any other materials. When the Committee authorizes a subpoena, it may be issued upon the signature of the Chairman or any other member designated by the Committee.

(b) Return. A subpoena, for documents may be issued whose return shall occur at a time and place other than that of a scheduled Committee meeting. A return on such a subpoena or request which is incomplete or accompanied by an objection constitutes good cause for a hearing on shortened notice. Upon such a return, the Chairman or any other member designated by him may convene a hearing by giving two hours notice by telephone to all other members. One member shall constitute a quorum for such a hearing. The sole purpose of such a hearing shall be to elucidate further information about the return and rule on the objection.

(c) Depositions. At the direction of the Committee, staff is authorized to take depositions from witnesses. SENATE COMM. ON RULES AND

Additionally, the Senate Rules require that each witness who is to appear before the committee file a written statement of the proposed testimony before the committee.<sup>9</sup>

### *B. House Subpoena Powers*

Like the Senate rules, the Rules of the House of Representatives ("House Rules") grant House committees and subcommittees vast authority to issue subpoenas. Rule XI ¶ 2(m) sets forth this subpoena power:

(1) For the purpose of carrying out any of its functions and duties under this rule and rule X . . . any committee, or any subcommittee thereof, is authorized

(A) To sit and act at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, and to hold such hearings, and

(B) To require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary. The chairman of the committee, or any member designated by such chairman, may administer oaths to any witness.

(2)

(A) A subpoena may be authorized and issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of any investigation or series of investigations or activities, only when authorized by a majority of the members voting, a majority being present. The power to authorize and issue subpoenas under subparagraph (1)(B) may be delegated to the chairman of the committee pursuant to such rules and under such limitations as the committee may prescribe. Authorized subpoenas shall be signed by the chairman of the committee or by

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ADMIN., AUTHORITY AND RULES OF SENATE COMMITTEES, S. DOC. NO. 20, 101st Cong., 1st Sess. 94 (1990).

9. Specifically, Senate Rule XXVI ¶4(b) states that: "Each committee (except the Committee on Appropriations) shall require each witness who is to appear before the committee in any hearing to file with the clerk of the committee, at least one day before the date of the appearance of that witness, a written statement of his proposed testimony unless the committee chairman and the ranking minority member determine that there is good cause for noncompliance." See SENATE COMM. ON RULES AND ADMIN., AUTHORITY AND RULES OF SENATE COMMITTEES, S. DOC. NO. 20, 101st Cong., 1st Sess. 210 (1990).

any member designated by the committee.

(B) Compliance with any subpoena issued by a committee or subcommittee under subparagraph (1)(B) may be enforced only as authorized or directed by the House.<sup>10</sup>

The rules of the various standing committees generally do not elaborate the subpoena power set forth in House Rule XI ¶ 2(m)(2)(A). Some, such as rule 21 of the Energy and Commerce Committee<sup>11</sup> rules, expressly apply House Rule XI ¶ 2(m)(2)(A) with minor modifications. Others, such as the Government Operations and Judiciary Committees, do not mention subpoena authority.

## II. STRUCTURAL LIMITS TO THE EXERCISE OF SUBPOENA POWER

The House and Senate rules discussed above illustrate the broad authority of the Congressional standing committees to subpoena witnesses and documents. Far-reaching and intrusive Congressional subpoenas issued pursuant to this power have been repeatedly upheld by the courts under the Speech and Debate Clause of the Constitution.<sup>12</sup> In *Eastland v. United States Servicemen's Fund*, the Supreme Court stated that the Speech and Debate Clause "was written to . . . forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority."<sup>13</sup> Under this view, the separation of powers doctrine prohibits the courts from interfering with Congress' legitimate exercise of its subpoena power to collect information pursuant to its legislative function. Accordingly, parties subject to a Congressional subpoena generally have little recourse to the courts.<sup>14</sup>

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10. Rules of the House of Representatives, Rule XI ¶ 2(m).

11. The Energy and Commerce Committee is the oldest standing committee in the House, with the broadest jurisdiction, including defense procurement, trade and finance. It is presently chaired by Rep. Dingell, an ex-prosecutor, who issues large numbers of subpoenas, aggressively takes testimony for long periods of time, and refuses to recognize the attorney-client privilege. See NEWSWEEK, Apr. 20, 1987, at 50; Rochelle L. Stanfield & Timothy Noah, *Coporate Watchdog, Big John's Preserve*, NAT'L J., May 16, 1987, at 1265.

12. U.S. CONST. art. I, § 6, cl. 1. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 511 (1975). See also *United States v. AT&T*, 551 F.2d 384, 388 (D.C. Cir. 1976).

13. 421 U.S. at 511. *Accord McGrain v. Daugherty*, 273 U.S. 135 (1927); *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299 (M.D. Fla. 1977); *In re Motion to Quash Subpoenas and Vacate Service*, 146 F. Supp. 792 (W.D. Pa. 1956).

14. See cases cited *supra* note 13. See also *Gulf Oil Corp. v. Westinghouse Elec.*

There are, however, very narrow structural limitations on Congress' subpoena power, that, if exceeded, may provide a party with grounds to challenge a Congressional subpoena. Those limitations involve the jurisdiction of the committee, the pertinence of the request, and the committee's compliance with procedural rules.

#### A. *Proper Jurisdiction and Legislative Purpose*

The first limitation is that the subpoena must fall within the proper jurisdiction of the issuing committee or subcommittee and have a legislative purpose. That is, a subpoena can only be issued where:

- (1) Congress has the power to investigate;
- (2) The Committee or Subcommittee has a proper grant of authority to conduct the investigation; and
- (3) The materials sought are pertinent to the investigation and within the scope of the grant of authority.<sup>15</sup>

Generally, the first requirement above is easily satisfied, because there is a presumption in the courts that Congressional committees will act properly and within their authority.<sup>16</sup> However, the third requirement, that the testimony or materials sought should be pertinent to the inquiry, has served as a basis for invalidating Congressional subpoenas.<sup>17</sup> For example, in *Bergman* the Court held that a subpoena calling for "any' and 'all' financial records from 1969 to date [which] might include records relating to plaintiffs' purely personal financial affairs,"<sup>18</sup> was invalid in part, where the issuing subcommittee only had general authority to inquire into housing for the elderly. The court reasoned that while the subcommittee may properly investigate nursing home profits, "a general inquiry designed to ascertain plaintiffs' personal wealth . . . is not pertinent to the investigation . . ."<sup>19</sup>

In *Watkins v. United States*,<sup>20</sup> the Court stated that

Corp., 434 F. Supp. 773 (D.D.C. 1977); *Exxon Corp. v. FTC*, 589 F.2d 582 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979).

15. See *Bergman v. Senate Special Comm. on Aging*, 389 F. Supp. 1127 (S.D.N.Y. 1975).

16. *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297 (D.C. Cir.), *aff'd* 548 F.2d 977 (1976).

17. See Moreland, *supra* note 5, at 230-42.

18. *Bergman*, 389 F. Supp. at 1130.

19. *Id.*

20. 354 U.S. 178, 198 (1957) (citing *Kilbourn v. Thompson*, 103 U.S. 168

where the information requested from a subpoenaed witness is “unrelated to any legislative purpose,” the individual’s constitutional right to privacy outweighs the committee’s interest in the information. Further, in *Tobin v. United States*,<sup>21</sup> the Court held that the House Judiciary Committee’s general authority to investigate interstate compacts did not authorize the Committee to issue a “deep and penetrating” subpoena of all internal administrative documents of a specified entity.<sup>22</sup>

### B. Compliance With Procedural Rules

The second limitation on Congress’ subpoena power is that, for a subpoena to be valid, it must be authorized and issued in compliance with the procedural rules applicable to the committee or subcommittee. The court discussed this limitation in *Exxon Corp. v. FTC*:

To issue a valid subpoena, however, a committee or subcommittee must conform strictly to the [rules] establishing its investigatory powers, and only those parties expressly authorized to sign subpoenas may do so validly. For example, where the [rules] granting subpoena power to a committee stated that subpoena would be issued only by the whole committee, not even the chairman himself could individually issue such a document . . .<sup>23</sup>

As the House and Senate rules discussed above establish, House and Senate committees and subcommittees have the power to authorize subpoenas.<sup>24</sup> However, courts have narrow-

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(1880)).

21. 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

22. See also *United States v. Rumely*, 345 U.S. 41 (1953) (the Court held that a House Select Committee on Lobbying Activities authorized to “conduct a study and investigation of . . . all lobbying activities intended to influence, encourage, promote, or retard legislation” could not require a subpoenaed witness who sold books of a political nature to disclose the names of bulk purchasers who intended to further distribute the books). *Id.*; *United States v. Patterson*, 206 F.2d 433 (D.C. Cir. 1953) (the Court ruled that a House Select Committee on Lobbying Activities subpoena for the plans of certain organizations to influence legislation was beyond the authority of the Committee).

23. 589 F.2d 582, 592 (D.C. Cir. 1978) (citing *Liveright v. United States*, 347 F.2d 473 (D.C. Cir. 1965)).

24. Prior to 1975, only certain House committees had the authority to issue subpoenas. The other committees and subcommittees could only issue subpoenas under authority of separate House resolutions. (H. Res. 988, 93d Cong., (1974) (enacted). Additionally, House subcommittees were not given authority to issue subpoenas until 1972. (H. Res. 5, 94th Cong., (1972) (enacted). [check cite]

ly interpreted the "number of persons entitled to issue subpoenas."<sup>25</sup> As the Court stated in *Exxon*:

The principle is important that disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members; and only for investigations and congressional activities. Election to the Congress does not give an individual subpoena power over whatever information he may happen to be interested in, and particularly not over trade secrets, whose oftentimes enormous value may be forfeited by disclosure to the public.<sup>26</sup>

In *Liveright v. United States*,<sup>27</sup> the court held that the committee rules place the power and responsibility of deciding who shall be subpoenaed with the subcommittee itself and not with any individual member. The court explained that the reason for this narrow interpretation of the right to issue subpoenas was to protect constitutional privacy rights from subpoenas issued by individual members. In *Shelton v. United States*,<sup>28</sup> the court ruled that while subcommittee rules permitted the chairman or "any other member of the subcommittee designated by him," to issue subpoenas, this rule merely refers to the ministerial duty of subpoenas, and not to the discretionary function of actually calling witnesses or requesting documents.<sup>29</sup> It should be noted, however, that while a valid subpoena requires formal committee authorization, motions to quash and other challenges to subpoenas may be heard by a quorum of one.<sup>30</sup>

If a subpoena complies with the above two limitations, requiring pertinence and compliance with committee rules, the

25. See *infra* notes 25-27 and accompanying text (under Congressional rules, subpoenas can only be issued by committees or subcommittees collectively, and a single member, other than the chairman of a house committee, cannot issue a subpoena solely on his own initiative).

26. *Exxon*, 589 F.2d at 582, 592-93.

27. 347 F.2d 473 (D.C. Cir. 1965).

28. 327 F.2d 601 (D.C. Cir. 1963).

29. *Id.* at 606 (quoting Rule 2 of the Subcommittee). In 1977, the House amended Rule XI ¶ 2(M)(2)(A) to allow for the delegation of the power to authorize subpoenas to the chairman of the full committee. The committee chairman is apparently the only individual in the House who can be delegated the authority to authorize subpoenas. H.R. Res. 5, 95th Cong., 1st Sess. (1977) (enacted).

30. See *Bergman v. Senate Special Comm. on Aging*, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975); *Flaxer v. United States*, 235 F.2d 821 (D.C. Cir. 1956), *vacated on other grounds*, 354 U.S. 929 (1957); *United States v. Moran*, 194 F.2d 623 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952).

courts will not interfere with its enforcement. If the above requirements are not satisfied, courts generally will hold the subpoena invalid.<sup>31</sup> However, even if a subpoena is invalid, courts generally will not interfere with its enforcement, prior to the deadline for compliance, by granting declaratory or injunctive relief to a party subject to such a subpoena. Rather, because of jurisprudential and separation of power considerations, courts generally will act to protect against invalid subpoenas only after Congress has brought contempt proceedings against a party who was served and refused to comply.<sup>32</sup> When this occurs, an invalid subpoena can be asserted as a defense to a prosecution for contempt of Congress.<sup>33</sup> However, even if a subpoena is ruled invalid, Congress may cure the defect and reissue the subpoena in valid form, especially where the defect involves a technical breach of committee rules.

### III. CONGRESSIONAL CONTEMPT POWER

It is well-established that failure to obey a subpoena or *subpoena duces tecum* issued by a House of Congress in furtherance of its legitimate activity—by failure to appear, respond or answer questions after appearance—constitutes a contempt of that House of Congress.<sup>34</sup> A prima facie case for a contempt offense is established when evidence is introduced that a witness was validly served with a subpoena and deliberately fails to comply.<sup>35</sup>

Case law indicates that contempt of Congress is punishable both criminally and civilly.<sup>36</sup> With respect to criminal penalties, Congress drafted a contempt statute in order to provide

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31. *Bergman*, 389 F. Supp. at 1130-31. *But see* *United States v. Presser*, 292 F.2d 171 (6th Cir. 1961), *aff'd*, 371 U.S. 71 (1962) (the court ruled that, where defendant knew Committee wanted documents and nevertheless destroyed them, validity of subpoena was not essential to prosecution for obstruction of justice (as opposed to contempt of Congress)). *See also* *Kamp v. United States*, 176 F.2d 618 (D.C. Cir. 1948), *cert. denied*, 339 U.S. 957 (1950) (the court stated that uncooperative witness may be in contempt of Congress even though no subpoena was served).

32. *In re Harrisburg Grand Jury--83-2*, 638 F. Supp. 43, 50 (M.D. Pa. 1986); *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir.), *cert. denied*, 364 U.S. 900 (1960).

33. *See* *Liveright v. United States*, 347 F.2d 473, 475 (D.C. Cir. 1965); *Shelton v. United States*, 327 F.2d 601, 606 (D.C. Cir. 1963). *But see* *Bergman*, 389 F. Supp. at 1130 (committee allowed subpoenaed party time to file for court intervention prior to deadline for compliance with subpoena).

34. *See* *McPhaul v. United States*, 364 U.S. 372 (1960).

35. *See* *United States v. Hintz*, 193 F. Supp. 325 (E.D. Ill. 1961).

36. *See* *Moreland*, *supra* note 5, at 242-48.

for proceedings in a judicial forum. This statute provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any Joint Committee established by a joint or concurrent resolution of two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.<sup>37</sup>

Congress also set forth rules governing how the contempt power it set forth in Section 192 would be enforced. The rules provide that the Senate or House, or when not in session the President Pro Temp or Speaker, must consider the facts and transmit them to the U.S. attorney for prosecution.<sup>38</sup> This further review of a committee's decision to prosecute for contempt was drafted as a "check against hasty action of the Committee."<sup>39</sup> For the same reasons, only a grand jury, rather than a prosecutor, can decide whether to issue a contempt indictment.<sup>40</sup>

The House Rules also expressly provide that a House committee or subcommittee is required to seek authorization of the full House prior to enforcing a subpoena. The relevant rule expressly requires that "compliance with any subpoena issued

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37. 2 U.S.C. § 192 (1992). *See also* United States v. Costello, 198 F.2d 200 (2d Cir.) *cert. denied*, 344 U.S. 874 (1952) (in situations involving repeated refusals to testify, a witness cannot be separately punished for each refusal).

38. 2 U.S.C. § 194 (1992). The section provides:

Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House . . . or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or speaker of the House, as the case may be, to certify, . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

*Id.*

39. *See* H.R. Rep. No. 1667, 74th Cong., 1st Sess. 2 (1935).

40. *See* Russell v. United States, 369 U.S. 749 (1962).

by a committee or subcommittee . . . may be enforced only as authorized or directed by the House."<sup>41</sup> This generally requires a House resolution authorizing committee or subcommittee involvement in a contempt prosecution.<sup>42</sup> While there is no rule on the matter, Senate Committees apparently must do the same.<sup>43</sup>

In addition to criminal penalties, some courts have held that contempt of Congress can still be punished civilly by Congress itself. These courts have stated that while Congress implemented its authority in the criminal statute, it "did not impair or divest itself of its 'essential and inherent power to punish for contempt' which 'still remains in each House'."<sup>44</sup>

#### IV. WITNESS PROTECTIONS FROM COMPULSORY PROCESS AND CONTEMPT PROCEEDINGS

In view of the significant Congressional contempt power, it is important to review the protections available to a subpoenaed witness who is subject to an enforcement proceeding. There are essentially three defenses to, or protections from, a contempt proceeding.<sup>45</sup> Specifically, failure to comply with a subpoena does not constitute contempt if the basis of the contempt proceeding is invalid (such as when the subpoena is invalid), if the failure is not willful, or if such failure is protected by privilege.<sup>46</sup>

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41. Rules of the House of Representatives, Rule XI ¶ 2(m)(2)(B).

42. See *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786 (5th Cir. 1979).

43. See *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966); *Ex Parte Frankfeld*, 32 F. Supp. 915 (D.D.C. 1940).

44. *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299, 1308 (1977), citing *In re Chapman*, 166 U.S. 661, 672 (1897). See also *In re Harrisburg Grand Jury—83-2*, 638 F. Supp. 43 (M.D. Pa. 1986). These courts have held that the criminal statute merely supplants Congress' contempt power: "Consequently, the same conduct before Congress can constitute both a criminal offense and civil contempt, punishable by civil contempt proceedings in the legislature and criminal prosecution in the courts, without any violation of the double jeopardy clause." *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. at 1308, citing *Jurney v. MacCracken*, 294 U.S. 125, 151 (1935).

45. See *United States v. Lamont*, 236 F.2d 312 (2d Cir. 1956).

46. Of course, if refusal to comply is based on the privilege against self-incrimination, testimony can be compelled if immunity from prosecution is granted by the committee or subcommittee, as in the North hearing. See *infra* notes 61-78 and accompanying text.

### A. *Invalid Basis for Proceeding*

First, contempt proceedings may be ruled invalid in the following circumstances:<sup>47</sup>

- (a) if Congress did not have the power to investigate;<sup>48</sup>
- (b) if the prosecuting committee or subcommittee did not have proper jurisdiction or authority to conduct the original investigation under which the contempt prosecution arose;<sup>49</sup>
- (c) if the questions asked were not pertinent to the inquiry,<sup>50</sup> or,
- (d) if the prosecuting committee did not follow the applicable procedural rules during the investigation, such as rules governing subpoenas, the taking of testimony and executive sessions.<sup>51</sup>

These bases for ruling the contempt proceedings invalid are, not surprisingly, the mirror image of the basic requirements identified by the court in *Bergman* for a validly issued Congressional subpoena.<sup>52</sup>

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47. See *supra* notes 12-26 and accompanying text.

48. See *supra* note 14 and accompanying text.

49. See *Gojack v. United States*, 384 U.S. 702 (1966); *United States v. Kamin*, 136 F. Supp. 791, 803 (D. Mass. 1956) (an investigation by Subcommittee of Government Operations Committee had no jurisdiction to investigate operation of private defense plant); *United States v. Rumely*, 345 U.S. 41 (1953) (an inquiry regarding private contracts and sales was outside jurisdiction of committee authorized to investigate "lobbying activities," which Court held to mean "representations made directly to the Congress, its members, or its committees"). *Id.* at 44.

50. *United States v. Orman*, 207 F.2d 148 (3d Cir. 1953); *Deutch v. United States*, 367 U.S. 456 (1961); *United States v. Kamin*, 136 F. Supp. 791 (D. Mass. 1956). The requirement that a question be pertinent is a major element of a contempt offense, and the right of a witness to refuse to answer an impertinent question is not a personal privilege that can be waived if not asserted. *Bowers v. United States*, 202 F.2d 447 (D.C. Cir. 1953). Congress has a burden to explain to the witness that a question is pertinent and that despite the witness' objection, the committee demands an answer. *Barenblatt v. United States*, 252 F.2d 129 (D.C. Cir. 1958), *affd.*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *Davis v. United States*, 269 F.2d 357 (6th Cir.), *cert. denied*, 361 U.S. 919 (1959). If challenged, Congress also must demonstrate the pertinence of a question to the court in a contempt proceeding. *Russell v. United States*, 369 U.S. 749 (1962). A presumption of pertinency will not suffice. *Bowers*, 202 F.2d at 447.

51. See *Yellin v. United States*, 374 U.S. 109 (1963). *But see United States v. Kamin*, 136 F. Supp. 791 (D. Mass. 1956) (the court ruled that committee's technical violations of procedural rules did not disturb contempt conviction, if such violation did not affect witness' refusal to comply with the subpoena).

52. See *supra* notes 15-32.

### B. Non-“Willful” Conduct

A second defense to a contempt proceeding is that the refusal to comply was not willful.<sup>53</sup> In order to be “willful,” the refusal need not be for a wrongful purpose, but instead need only be deliberate rather than inadvertent.<sup>54</sup> However, to ensure that a witness’ refusal is willful, a committee generally must propound the question and, after the witness’ refusal, reject the refusal and permit the witness another opportunity to answer.<sup>55</sup>

In this respect, it should be noted that a deliberate refusal to comply, either on grounds of privilege or invalidity, is made at the subpoenaed party’s risk. If the grounds for refusal are not upheld in court, the subpoenaed party will be held in contempt of Congress. The subpoenaed party’s good faith reliance on legal advice is no defense to the act of deliberately refusing to comply with a subpoena.<sup>56</sup>

### C. Privilege

The third and most important protection for subpoenaed witnesses is constitutional and common law privilege. While it is recognized that a Congressional committee’s power to investigate is limited by a witness’ constitutional rights, as a general rule, Congressional committees have refused to recognize that their investigative authority is limited by traditional common law privileges.<sup>57</sup>

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53. See Moreland, *supra* note 5, at 240.

54. Fields v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

55. Quinn v. United States, 349 U.S. 155 (1955); United States v. Kamp, 102 F. Supp. 757 (D.C. Cir. 1952); Bart v. United States, 349 U.S. 219 (1955).

56. See Sinclair v. United States, 279 U.S. 263 (1929); Carlson v. United States, 209 F.2d 209 (1st Cir. 1954); Townsend v. United States, 95 F.2d 352 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1937).

57. Executive privilege also may be invoked to preclude witness testimony or the release of documents from the Administration to Congress. This very broad privilege will not be further examined in this article; for further information, see Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987); Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Prescribing a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71 (1986).

### 1. *Constitutional protection*

There is no doubt that Congress' power to investigate, while broad, is limited by the protections afforded to individuals in the United States Constitution. This principle was defined by the Supreme Court of the United States in one of a number of cases arising out of hearings held by the Committee on Un-American Activities in the 1950's. In *Watkins v. United States*,<sup>58</sup> Chief Justice Warren wrote:

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. *Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion or political belief and association be abridged.*<sup>59</sup>

a. *Fifth Amendment privilege.* Of the constitutional protections identified by the *Watkins* court, the most frequently invoked in testimony before Congress is the Fifth Amendment's privilege against self-incrimination.<sup>60</sup> The relevant clause of the Fifth Amendment provides: "Nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."<sup>61</sup>

As early as 1879, the House of Representatives recognized that this privilege could be invoked by a witness testifying before Congress even though a Congressional investigation is not a "criminal case."<sup>62</sup> No Congressional committee or any

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58. 354 U.S. 178 (1957).

59. *Id.* at 187-88 (emphasis added).

60. The First Amendment privilege also is available to protect witnesses in limited circumstances. See Moreland, *supra* note 5, at 260-65.

61. U.S. CONST. amend. V.

62. 4 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 9 at 86 & n.20.

court presiding over a Congressional contempt proceeding has challenged the principle that Congress' power to investigate is limited by the witness' Fifth Amendment rights. Rather, the controversy surrounding a witness' invocation of the Fifth Amendment usually involves the question of whether the Fifth Amendment is appropriate in a particular situation, whether the Amendment has been invoked properly, or whether the privilege has been waived.<sup>63</sup> The best general statement of the availability of the Fifth Amendment privilege in a Congressional hearing was announced in *United States v. Jaffe*:<sup>64</sup>

[P]rivilege . . . may not be used as a subterfuge . . . .

The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answers would furnish some evidence upon which he could be convicted of a criminal offense against the United States, or which would lead to a prosecution of him for such offense, or which would reveal sources from which evidence could be obtained that would lead to such conviction, or to prosecution therefor.

[A] witness is not bound to explain why answers to apparently innocent questions might tend to incriminate him when circumstances render such reasonable apprehensive evident.

[O]nce it has become apparent that the answers to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions upon the ground that such answers would tend to incriminate him.<sup>65</sup>

The conflict between the witness' constitutional rights and Congress' power to investigate has been the subject of Congressional concern for some time. While Congress has over the years attempted to strike the proper balance between these two competing interests, and while questions of whether the Fifth Amendment protection applies in a particular case arise from time to time, Congressional committees universally acknowledge the Fifth Amendment as limiting their power to investigate.<sup>66</sup> In fact, Representative John Dingell (D-MI)

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63. See *Quinn v. United States*, 349 U.S. 155, 162 (1955) (an assertion of privilege proper because answer to question whether congressional witness was a member of the Communist Party might incriminate); *Emspak v. United States*, 349 U.S. 190, 197, 199 (1955) (held privilege not waived and 58 questions regarding witness' association with Communists were within scope of privilege).

64. 98 F. Supp. 191 (D.D.C. 1951).

65. *Id.* at 193-94.

66. See *Moreland*, *supra* note 5, at 253-60.

was criticized recently for requiring financier Michael Milken to assert repeatedly in a public hearing the Fifth Amendment privilege against self-incrimination.<sup>67</sup>

b. *Grant of immunity and compelled testimony.* In view of the well-established right of witnesses to invoke the Fifth Amendment privilege against self-incrimination, Congress passed a limited witness immunity statute<sup>68</sup> as part of the Organized Crime Control Act of 1970.<sup>69</sup> This statute contains a provision setting forth the rules for compelling testimony through a grant of immunity, which applies generally to witnesses in federal court and administrative proceedings, as well as congressional proceedings.<sup>70</sup> This provision states that a witness can be compelled or ordered to testify, provided an order is obtained from a federal district court, and provided: "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 prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."<sup>71</sup>

The federal immunity statute also sets forth a provision, specific to congressional proceedings,<sup>72</sup> elaborating the proce-

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67. See James Hamilton, *Take One, Take Two, Take the Fifth: In Congress, Rights Become Rites*, LEGAL TIMES, May 9, 1988, at 14. Critics point out that Dingell, having received from Milken a sworn affidavit that he would assert the Fifth Amendment if asked any questions in a public hearing, should not have required Milken to appear, or should at least have held an executive (closed) session to avoid forcing Milken to invoke the Fifth Amendment in public. *Id.* See *infra* notes 80-90 and accompanying text.

68. 18 U.S.C. § 6002 (1988). Prior to 1970, Congress had passed a number of immunity statutes, beginning with the Act of 1857 and including the Compulsory Testimony Act of 1954, which applied to Congressional hearings. See Moreland, *supra* note 5, at 253-57.

69. PUB. L. NO. 91-452, § 6002, 84 Stat. 922, 927 (1970-71).

70. 18 U.S.C. § 6002 (1988).

71. *Id.*

72. 18 U.S.C. § 6005 (1988). Provisions for obtaining a compulsion order in court and in administrative proceedings are set forth at 18 U.S.C. §§ 6003-04 (1988). In one of the first congressional actions under the statute, in the Watergate hearings in June of 1973, U.S. District Judge Sirica denied special prosecutor Archibald Cox's request for delay, and ordered a grant of immunity to White House counsel John Dean and aide Jeb Magruder. Dean had earlier argued unsuccessfully for a grant of total or transactional immunity. Both Dean and Magruder were later convicted of crimes related to the subjects on which they testified. *The Iran-Contra Puzzle*, CONG. Q. INC., (1987) at 60.

dures by which Congress may obtain an order from a federal District Court compelling the testimony of a witness who has refused to comply with a Congressional request on the basis of the Fifth Amendment privilege against self-incrimination.<sup>73</sup>

The fundamental tension inherent in the immunization of witness testimony is that it may have the unintended effect of allowing a witness guilty of wrongdoing to avoid prosecution.<sup>74</sup> In view of this concern, Congress sought to strike a balance between a witness' Fifth Amendment rights and the societal interest in investigating, and, prosecuting wrongdoing.<sup>75</sup> Thus, the federal immunity statute was intended to provide only "use immunity"<sup>76</sup> which excludes from subsequent criminal prosecution a witness' compelled testimony or any evidence derived from that testimony, but which does not prevent prosecution for offenses related to the subject matter of the witness' testimony if the government has independent evidence of the crime.<sup>77</sup> The granting of use immunity under this statute,<sup>78</sup> and in particular, with respect to witnesses in

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73. *The Iran-Contra Puzzle*, CONG. Q. INC., (1987) at 60. Under this provision, a majority of either House of Congress, or in the case of Committee or Subcommittee proceedings, a two-thirds majority, must approve a request to the federal District Court for an order compelling testimony. 18 U.S.C. § 6005(a), (b) (1988). If these conditions are satisfied, the court must grant the Immunity Orders requested, and may not judge the wisdom of granting immunity. See *In re Application of U.S. Senate Select Comm. on Presidential Campaign Activities*, 361 F. Supp. 1270 (D.D.C. 1973). Notice must be given to the Attorney General (or independent counsel) ten days prior to such request. 18 U.S.C. § 6005(b)(3) (1988). The Department of Justice may waive this notice requirement. *In re Application of U.S. Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

74. See Moreland, *supra* note 5, at 253-54.

75. *Id.* See also *United States v. Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) (sections 6001-6005 are an accommodation between the Government's right to compel testimony and the Fifth Amendment privilege to remain silent); *United States v. Pellon*, 475 F. Supp. 467 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir.), *cert. denied*, 446 U.S. 983 (1980) (under the statute, immunity precludes only the Government's use of testimony and the witness may still be prosecuted if the prosecution can prove its case independently the witnesses own testimony).

76. "Use immunity" is to be distinguished from "transactional immunity," which provides a witness with complete immunity from prosecution for the offense related to the subject matter on which the witness is compelled to testify. *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *Block v. Consino*, 535 F.2d. 1165 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976).

77. *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983); *Goldberg v. United States*, 472 F.2d 513 (2d Cir. 1973); *United States v. Quatermain*, 467 F. Supp. 782 (E.D. Pa. 1979).

78. *Kastigar v. United States*, 406 U.S. 441 (1972).

congressional proceedings, has been upheld as constitutional.<sup>79</sup> The obvious risk of compelled testimony under the use immunity provision is that in highly publicized trials, witnesses prosecuted following compelled testimony may not receive a fair and impartial trial. The Supreme Court in *Kastigar v. United States* was aware of this risk, stating that the prosecution must rely entirely on independent evidence of wrongdoing in a trial of a witness whose testimony was compelled.<sup>80</sup>

Moreover, the U.S. Circuit Court for the District of Columbia, in *United States v. North*,<sup>81</sup> expanded the application of the immunity granted under the statute in an effort to avoid this risk. The *North* Court held that the prosecutors<sup>82</sup> must establish that all prosecution witnesses are in no way influenced by a defendant's compelled testimony — a broadening of what is considered the "use" of a defendant's immunized testimony.<sup>83</sup> The same court made substantially the same ruling in *United States v. Poindexter*,<sup>84</sup> leading the reversal of the defendant's conviction on all counts because the Independent Counsel failed to demonstrate that the defendant's compelled testimony was not used against him.

The *North* and *Poindexter* decisions clearly make the prosecution of witnesses who have been compelled to testify more difficult. Some commentators assert that it will have a chilling effect on Congress' use of its power to investigate.<sup>85</sup> Never-

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79. *In re Application of U.S. Senate Select Comm. on Presidential Campaign Activities*, 361 F. Supp. 1270 (D.D.C. 1973).

80. *Kastigar*, 406 U.S. at 444.

81. 910 F.2d 843 (D.C. Cir. 1990), *modified and rehearing denied in part*, 920 F.2d 940 (1991) (en banc).

82. The prosecution in the *North* case was led by an independent counsel, Lawrence Walsh, who was appointed by Congress. Congress' authority to appoint a prosecutor was challenged unsuccessfully as an unconstitutional violation of the separation of powers requirement.

83. *North*, 910 F.2d at 851-54. In the *North* case, the D.C. Circuit held that, to ensure the prosecution (independent counsel) made no use of immunized congressional testimony and based its case solely on independent evidence, the trial court must conduct a "Kastigar inquiry" or hearing. In such a hearing, termed after the Supreme Court case *Kastigar v. United States*, 406 U.S. 441 (1972), the trial court must analyze whether the testimony of the prosecution's witnesses was influenced "directly or indirectly" by the compelled testimony. The burden is on the prosecution to prove that its witnesses did not draw upon or refresh their memory based on the immunized testimony; the culpability of the prosecution in tainting testimony is deemed irrelevant. *Id.*

84. 951 F.2d 369 (D.C. Cir. 1991).

85. See Joseph I. Liberman, *After the North Case: How Do We Get at the Truth?*, WASH. POST, Sept. 24, 1991, at A23. in which Senator Lieberman (D-CT)

theless, it appears to be absolutely appropriate, in instances where witnesses are forced to surrender their constitutional privilege, to place the burden on the prosecutor to ensure that the criminal case against the witnesses is in no way tainted by their compelled testimony. Further, Congress should ensure that the extraordinary measure of compelling testimony is reasonably and prudently invoked. In the words of Iran-Contra prosecutor Lawrence Walsh, the outcome of *United States v. North* was "a very serious warning that immunity is not to be granted lightly . . . [Congress has] the very broad political responsibility for making a judgment as to whether it is more important that the country hear the facts quickly, or that they await a prosecution."<sup>86</sup>

c. *Fourth Amendment privilege.* In addition to the Fifth Amendment privilege against self-incrimination, the Fourth Amendment's protection against unreasonable search and seizures has been recognized as providing some protection to witnesses whose papers have been subpoenaed by Congress. In *Strawn v. Western Union*,<sup>87</sup> the first case to challenge a broadly-worded congressional subpoena, the Supreme Court of the District of Columbia enjoined enforcement of a senate committee's subpoena requiring the Western Union Telegraph Company to supply all copies of all telegrams which were sent by or received by a certain law firm during 1935. The court

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stated that, as a result of the *North* decision, "the right to prosecute a witness granted use immunity has become an illusion; it is tantamount to waiving prosecution, no matter how heinous the crime . . . the incentive given to clever defense lawyers is clear: simply show your client's immunized testimony to every possible prosecution witness and—bingo—they're tainted and useless in court." *Id.* The Senator went on to state that "Congress will be forced to forgo shedding the light of public inquiry on major cases of fraud and abuse if it doesn't want to endanger the prosecution of those who committed crimes." *Id.*

86. Haynes Johnson et al., *North Charges Dismissed at Request of Prosecutor*, WASH. POST, Sept. 17, 1991, at A1. It is interesting that at the time immunity was granted, Senator Rudman (R-NH), vice chairman of the Senate investigating committee, stated that "Nobody is really avoiding prosecution by what we're doing." *The Iran-Contra Puzzle*, CONG. Q. INC., (1987) at 61. After the *North* case, however, Representative Lee Hamilton (D-IN), who chaired the House Investigation Committee in the Iran-Contra hearings, stated that "I think the lesson is that the Congress, when they grant immunity now, must be very cautious in doing so because doing so probably defeats any criminal prosecutions." *Id.* He also stated that "ithas always been my view that the policy questions exceeded in importance the question of individual criminal liability, and I do not think Congress made a mistake in granting that immunity."

87. 3 U.S.L.W. 646 (S.C.D.C. Mar. 11, 1936) (unreported decision).

held that such a subpoena went far beyond any legitimate exercise of the right of the subpoena duces tecum.<sup>88</sup>

Since this initial challenge, other courts have held that the Fourth Amendment limits Congress' power to subpoena documents.<sup>89</sup> Note, however, that to obtain a restraining order against the enforcement of a subpoena on Fourth Amendment grounds, the complaining witness' objections must be raised in a timely manner.<sup>90</sup>

Although these cases demonstrate that congressional subpoenas which are overly broad<sup>91</sup> or which are unrelated to the purpose of the committee's investigation<sup>92</sup> may be challenged under the Fourth Amendment, it must be noted that the likelihood of success of such a challenge is small. Even congressional subpoenas drafted in broad terms are likely to be considered valid if they relate to a legitimate investigatory purpose.<sup>93</sup> In addition, there is no reason why a congressional committee could not revise its subpoena if an objection is raised.

## 2. *Common Law Privileges*

In contrast to the consensus that the Constitution protects witnesses testifying before a Congressional committee, the witness' ability to invoke common law or statutory privileges as a basis for resisting compulsory disclosure is controversial and unsettled. As discussed below, neither Congress nor the courts have expressly decided whether Congress' power to investigate is limited by these privileges, and a number of influential members of the current Congress have expressly

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88. Moreland, *supra* note 5, at 226.

89. See *United States v. Groves*, 18 F. Supp. 3 (W.D. Pa. 1937) (dictum that broadly-worded subpoena amounting to "fishing expedition" is an encroachment upon defendant's rights under the Fourth Amendment); *Nelson v. United States*, 208 F.2d 505 (D.C. Cir. 1953) (the documentary evidence obtained by congressional committee representative while in the home of congressional witness suppressed).

90. See *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936); *United States v. Bryan*, 339 U.S. 323 (1950).

91. See *supra* note 15 and accompanying text.

92. See *supra* notes 16-20 and accompanying text.

93. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (a subpoena for any and all records appertaining to or involving the account or accounts of [USSF] issued by a congressional subcommittee which had been authorized by the Senate to "make a complete study of the 'administration, operation, and enforcement of the International Security Act of 1950'" was valid). *Id.* at 506 (citation omitted).

rejected any such limitation.

Of the common law witness protections, the two most relevant are those applying to an attorney testifying before a congressional committee—the attorney-client privilege and the qualified immunity for attorney-work product. Each of these is discussed in turn below.

*a. Attorney-Client privilege.* The courts have traditionally protected communications between an attorney and client from compulsory disclosure in judicial proceedings. The modern rationale for this privilege is that effective legal representation requires complete honesty and frankness by the client, and that this is unlikely without a rule protecting from disclosure certain communications between an attorney and client.<sup>94</sup> While there is little disagreement on the propriety of protecting certain attorney-client communications for these reasons, the scope of the privilege, that is, which communications qualify for the privilege, has never been settled definitively. In its most standard formulation, the privilege provides:

- 1) where legal advice of any kind is sought;
- 2) from a professional legal advisor in his/her capacity as such;
- 3) the communications relating to that purpose;
- 4) made in confidence;
- 5) by the client;
- 6) are at the client's instance permanently protected;
- 7) from disclosure by the client or by the legal advisor;
- 8) unless the protection is waived.<sup>95</sup>

There is ample case law in the state and federal courts on each element of the privilege.<sup>96</sup>

The case law and the written authority demonstrate that the privilege applies with equal force to both oral and written communications.<sup>97</sup> The clearest case arguing for the equal

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94. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); John Henry Wigmore, 8 WIGMORE ON EVIDENCE § 2291, at 545 (McNaughton rev. 1961) [hereinafter WIGMORE].

95. WIGMORE, *supra* note 94, § 2292 at 554; *United States v. El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982).

96. See, e.g., 40 FED. PRAC. DIG. 3D, *Federal Civil Procedure* § 1600.1 (1975); 28 U.S.C.A. Rule 501 nn. 61-310 (Federal Rules of Evidence).

97. See, e.g., Edward W. Cleary, et al., MCCORMICK ON EVIDENCE § 89, at 184 (2d ed. 1984).

application of the privilege to documents is that in which the client writes a letter to the lawyer containing exactly the same information that the client could have disclosed orally. In this case, the means of transmission should not, and will not, affect the availability of the privilege. However, the extension of the privilege to all documents sent by a client to a lawyer would present an obvious method for avoiding the disclosure of documents. A person wanting to prevent disclosure of sensitive documents could simply ship them to the lawyer and claim that they are privileged. In order to avoid this subterfuge, the courts have held that the availability of the privilege in such cases will depend on the status of the documents in the client's hands; if a document would be subject to an order for production if it were in the hands of the client, it will be equally subject to such an order if it is in the hands of his attorney.<sup>98</sup> The fact that the documents are sent to the attorney is irrelevant.

The case law and the general description above illustrates that the attorney-client privilege is not easily asserted. The availability of the privilege to protect statements or documents in each case depends on an analysis of the factual situation in which the communications are made. A completely separate question is whether the privilege, even if available, will be accepted by a congressional committee as a basis for withholding testimony or documents. A review of the commentary and some of the congressional investigations<sup>99</sup> reveals that while the attorney-client privilege has been raised a number of times, neither Congress nor any court has ever decided whether the attorney-client privilege is a limitation on Congress' investigative powers.

From its earliest cases, Congress avoided taking any definitive position as to whether the privilege limits its investigative powers.<sup>100</sup> The applicability of common law privileges

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98. *Id.* § 89, at 185 (and cases cited); WIGMORE, *supra* note 94, § 2307, at 591-93.

99. See Thomas Millet, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 J. MARSHALL L. REV. 309 (1988); Jonathan P. Roch, Note, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145 (1988); James Hamilton, *Attorney-Client Privilege in Congress*, 12 LITIGATION No. 2 at 3; Moreland, *supra* note 5, at 265-68.

100. For example, during the congressional hearings accompanying the impeachment proceedings of Andrew Johnson in 1868, a House Committee investigated the activities of Charles W. Woolley, a lawyer suspected of bribing certain Senators. Mr. Woolley refused to answer the Committee's questions regarding his

was called into question more recently during the hearings held in the 1950s by the Committee on Un-American Activities. In an apparent attempt to remove any doubt about the applicability of the common law privileges in congressional proceedings, Senate Resolution 256 was introduced as an amendment to the Senate Rules which would explicitly recognize these privileges. However, the Senate did not adopt the resolution, and avoided the issue by declaring that a rule was not necessary.<sup>101</sup>

The most extensive discussion of the application of the attorney-client privilege in congressional investigations occurred in the context of the recent contempt proceedings against Ralph and Joseph Bernstein, both of whom allegedly had acted as agents of President Ferdinand Marcos of the Philippines in certain real estate investments. Joseph Bernstein, an attorney, refused to answer the committee's questions regarding his dealings with Marcos on the basis that the communications were privileged as attorney-client communications. After considering the extensive legal memoranda submitted on the issue,<sup>102</sup> the subcommittee voted to report contempt resolutions against the Bernsteins, which were subsequently ratified by the full committee. On February 27, 1986, the entire House of Representatives—for the first time in more than a century—held a lawyer in contempt of Congress

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business dealings, and the Committee then cited Woolley for contempt and introduced a resolution to arrest and hold him in the Capitol until he answered the questions. While various views of the applicability of the attorney-client privilege were offered during the floor debate, the House eventually adopted the contempt citation on the grounds that Woolley had not met his burden of showing that the communications he sought to protect came within the traditional scope of the privilege. See Millet, *supra* note 99, at 312.

101. With few exceptions, it has been Committee practice to observe the testimonial privileges of witnesses with respect to communications between clergymen and parishmen, doctor and patient, lawyer and client, and husband and wife. Controversy does not appear to have arisen in this connection. While the policy behind the protection of confidential communications may be applicable to legislative investigations as well as to court proceedings, no rule appears to be necessary at this time. Millet, *supra* note 99, at 316.

102. The *Congressional Record* contains memoranda submitted in favor of the privilege from the Bernstein's own counsel, from Professor Dershowitz of Harvard University, and from James Hamilton. Memoranda arguing against the privilege were submitted by the General Counsel of the Clerk, by Professor Stephen Gillers of the New York University Law School, and by the American Law Division of the Congressional Research Service. 132 CONG. REC. H676, H679, H681, H694, H693 (daily ed. Feb. 27, 1986).

after rejecting his claim of attorney-client privilege.<sup>103</sup>

As in other cases, Congress avoided the general issue of the availability of the attorney-client privilege and instead asked the prosecutor to proceed "on the primary ground . . . that the claim of privilege would not have been upheld even in a court."<sup>104</sup> However, this case is different than the others because of the extensive legal memoranda presented (and reprinted in the *Congressional Record*) on the issue of the viability of the privilege before Congress.<sup>105</sup>

In reaction to the congressional ambivalence and the increasing frequency of congressional investigations, the American Bar Association in August 1988 adopted Guidelines Regarding the Rights of Witnesses in Congressional Investigations. Guideline No. 2 provides:

Witnesses in Congressional proceedings shall have the privileges in connection with their appearance which are recognized by the courts of the United States in Administrative and Judicial Proceedings, including the Fifth Amendment privilege against self-incrimination, and the attorney-client, work-product and spousal privileges. A witness shall not be compelled to exercise his or her Fifth Amendment privilege against self-incrimination in a public proceeding where the witness has provided notice to the Committee.

There has been no reaction from Congress to the ABA Guidelines, and the ABA apparently has no present plans to seek legislation implementing the Guidelines.

Regardless of the precise legal status of the attorney-client privilege before Congress, there remains a perception that Congress has discretion in deciding whether to recognize the attorney-client privilege. Indeed, in a 1983 committee document, Congressman Dingell (D-MI) stated that:

The position of the Subcommittee has consistently been that the availability of the attorney-client privilege to witnesses before it is a matter subject to the discretion of the Chair . . . . [A]lthough there are no judicial precedents directly on point, there is ample support for the view that the availability of the attorney-client privilege is a matter of discretion with the Subcommittee based on analogous judicial

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103. 132 CONG. REC. H697-98 (daily ed. Feb. 27, 1986).

104. 132 CONG. REC. H680 (daily ed. Feb. 27, 1986).

105. See sources cited *supra* note 93.

authority, coupled with the full investigative prerogatives of Congressional committees acting within their jurisdiction and for a valid legislative purpose, the custom, practice and precedent of both Houses of Congress and the British Parliament and the consistent practice of the Subcommittee on Oversight and Investigations.<sup>106</sup>

*b. The work product doctrine.* Analogous to the perceived need for frank communications between the attorney and client which underlies the attorney-client privilege is the need to protect materials produced by any attorney in preparing the client's case for trial. This policy gives rise to what is referred to as the "work product" doctrine, which provides that certain material produced by an attorney is immune from discovery in litigation. The "work product" which is protected from discovery covers "materials prepared by an attorney in anticipation of litigation including private memoranda, written statements of witnesses and mental impressions of personal recollections prepared or formed by attorney in anticipation of litigation or for trial."<sup>107</sup> The work product doctrine thus provides a qualified immunity from discovery, which is only available if the various elements of the doctrine are satisfied.<sup>108</sup>

The most frequently litigated element of the work product doctrine is the requirement that the material be prepared "in anticipation of litigation." For example, the federal courts have consistently held that the work product doctrine does not cover materials prepared in "the ordinary course of business," but only those prepared for or in contemplation of litigation.<sup>109</sup>

As with the attorney-client privilege, neither Congress nor the courts have decided whether an attorney testifying before a congressional committee can resist compulsory disclosure on the basis that the document is protected by the work product doctrine. In 1985, the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations rejected the assertion of the work-product privilege by an Amtrak employee attempting to withhold a document describing an equal employment opportunity investigation she

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106. See Hamilton, *supra* note 99, at 3.

107. Puerto Rico v. SS Zoe Colocotroni, 61 F.R.D. 653, 658 (D.C.P.R. 1974).

108. See generally FED. PRAC. DIG., *supra* note 96, at § 1600.2. 28 U.S.C.A. Rule 501 nn. 311-360 (Federal Rules of Evidence).

109. Hardy v. New York News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987); Fann v. Giant Food, Inc., 115 F.R.D. 593, 596 (D.D.C. 1987).

had conducted for the company counsel. The Subcommittee stated:

[W]hen a claim of privilege that is not of Constitutional origins is asserted before a Congressional investigating committee, it is within the discretion of the committee whether to uphold the claim. In exercising that discretion, the Committee must weigh Congress' constitutional right to compel the disclosure of information needed for legislative and oversight purposes against the purpose served by the privilege.<sup>110</sup>

However, the Committee did not elaborate on its decision, and there does not appear to be any other discussion of the work product doctrine before any other congressional committee.

## V. CLOSED HEARINGS

In addition to the witness protections discussed *supra*, subpoenaed witnesses also may take certain measures to minimize the public nature of the hearing and consequent embarrassment and injury to reputation.<sup>111</sup> If a witness is subject to a valid subpoena to appear, there are provisions in both Houses through which a witness can request that a hearing be closed to the public.<sup>112</sup>

### A. Senate Hearings

The Senate Rules provide that in certain circumstances an investigative hearing may be closed to the public. Senate Rule

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110. Hamilton, *supra* note 99, at 3.

111. Of course, the potential for embarrassment is no basis for refusing to testify. Section 193 of the Congressional Procedural rules enacted in 1926 state that "no witness is privileged to refuse to testify to any fact, or to produce any paper respecting which he shall be examined by either House of Congress . . . upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." 2 U.S.C. § 193 (1988).

112. See Moreland, *supra* note 5, at 248. It should also be noted that the *North* case may have established a precedent for pretestimony negotiations between a subpoenaed witness and the issuing committee with respect to the parameters of the testimony. In the *North* case, North's counsel, Brendan Sullivan, exploited Congress' desire to have the hearing in public and to conclude the hearing at an early date; after threatening to contest the committee's subpoena, Sullivan won concessions on the duration of the testimony, the order of North's appearance, and the subject matter of the closed session testimony. Dan Morgan et al., *Hill Concessions to North Expected: Iran-Contra Leader Ensure Public Testimony*, WASH. POST, June 23, 1987, at A1; Stephen Engelberg, *Iran-Contra Hearings: The Non-Audience and the Audience; On First Day, Spotlight is on Lawyer's Sparring*, N.Y. TIMES, July 8, 1987, at A10.

XXVI ¶ 5(b) provides that a hearing "may be closed to the public on a motion made and seconded to go into closed session to discuss only whether the matters enumerated . . . below would require the meeting to be closed."<sup>113</sup> These matters include whether testimony:

(3) Will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(5) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if (A) an act of Congress requires the information to be kept confidential by government officers and employees; or (B) the information has been obtained by the government on a confidential basis, other than through an application by such persons for a specific government financial or other benefit, and is required to be kept secret in order to prevent undue injury to the competitive position of such person; or

(6) may divulge matters *required to be kept confidential under other provisions of law* or government regulations.<sup>114</sup>

Senate Rule XXVI ¶ 5(c) provides that when a hearing is open to the public, it may be broadcast by radio or television or both.<sup>115</sup> Senate Rule XXVI ¶ 5(b) also mandates that, if a committee determines in closed session that one of the above matters is present and requires a closed meeting, a majority of the committee must then vote in open session on the matter.<sup>116</sup> Senate Rule XXVI ¶ 5(b) does not clarify whether a subpoenaed witness can request that a hearing be closed pursuant to that rule.

With respect to the individual committee rules, while the Judiciary Committee rules do not discuss the issue, rule 11 of

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113. SENATE COMM. ON RULES AND ADMIN., AUTHORITY AND RULES OF SENATE COMMITTEES, S. DOC. NO. 20, 101st Cong., 1st Sess. 211 (1990).

114. *Id.*

115. *Id.* At least one court has held that a witness' refusal to testify was justified when the press coverage was substantially disturbing to the witness. See *United States v. Kleinman*, 107 F. Supp. 407 (D.D.C. 1952). Other courts have rejected a refusal to testify on the same grounds. See *United States v. Hintz*, 193 F. Supp. 325 (N.D. Ill. 1961); *United States v. Moran*, 194 F.2d 623 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952).

116. *Id.*

the Finance Committee rules states that "hearings shall be open to the public to the extent required by rule [XXVI ¶ 5] of the Standing Rules of the Senate." Rule 2 of the Commerce Committee rules basically repeats Senate Rule XXVI ¶ 5. Rule 6 of the Foreign Relations Committee rules expressly states that a witness can request that a hearing be closed:

Requests. Any witness called for a hearing may submit a written request to the Chairman no later than twenty-four hours in advance for his testimony to be in closed or open session, or for any other unusual procedure. The Chairman shall determine whether to grant any such request and shall notify the Committee members of the request and of his decision.<sup>117</sup>

The above rules indicate that a witness generally may request that a Senate committee hearing be closed to the public. The Supreme Court has ruled that, once a witness makes such a request pursuant to a committee rule, the committee or subcommittee must consider the request as required under the rule, even if the request is made on the ground that the witness' reputation would be injured. If the committee fails to do so, the witness can refuse to answer without being in contempt. This precedent apparently applies to both Houses of Congress.<sup>118</sup>

While Congressional Committees clearly must consider a request to go into closed session, it is uncertain how amenable committee members are to such requests. Some courts have held that they will not interfere with a determination by Congress regarding how a hearing is to be conducted, provided the committee acts consistent with its own rules.<sup>119</sup> However, other courts have examined whether, even if a committee had considered closing a hearing in accordance with its own rules, such committee could properly have held the hearing in open session under the facts of the particular case.<sup>120</sup>

The recent confirmation hearings of President Bush's nominee to the Supreme Court, now Justice Clarence Thomas, focused public debate on whether the Senate should be more

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117. *Id.*

118. *Yellin v. United States*, 374 U.S. 109 (1963); *United States v. Grumman*, 227 F. Supp. 227 (D.D.C. 1964).

119. *See United States v. Hintz*, 193 F. Supp. 325 (N.D. Ill. 1961).

120. *See United States v. Grumann*, 227 F. Supp. 227 (D.D.C. 1964); *see also United States v. Watkins*, 354 U.S. 178 (1957).

willing to close certain hearings pursuant to Senate Rule XXVI ¶ 5(b).<sup>121</sup> While the Thomas hearings technically were not investigative hearings, but rather hearings held pursuant to the Senate's constitutional role of providing "advice and consent" to the President's appointment of "officers of the United States," the hearings took on an investigative tone when allegations arose that the nominee had sexually harassed a former employee. The hearings were broadcast live over the major television networks for several days, and the sometimes sexually explicit nature of the testimony caused not only commentators, but also some Senators, to criticize the failure to close the hearings under Senate Rule XXVI ¶ 5(b).<sup>122</sup>

### B. House Hearings

The House Rules also provide that in certain circumstances investigative hearings may be closed to the public. House Rule XI ¶ 2(k)(5) provides for closed hearings:

- (5) whenever it is asserted that the evidence or testimony at an investigatory hearing may tend to defame, degrade, or incriminate any person,
- (A) such testimony or evidence shall be presented in executive session, notwithstanding the provisions of clause 2(g)(2) of this rule, if by a majority of those present, there being in attendance the requisite number required under the rules of the committee to be present for the purpose of taking testimony, the committee determines that such evidence or testimony may tend to defame, degrade, or incriminate any person . . . .

This rule also provides that no testimony or evidence taken in executive session may be publicly released without the committee's consent.

Even when a hearing is open to the public, the House Rules provide for limitations on the broadcast coverage of the hearings. While at rule XI ¶ 3(e) the rules state that a committee can vote to permit the hearing to be broadcast, they also provide a subpoenaed witness with the right to prevent such broadcast, at 3(f)(2):

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121. See, e.g., Lloyd N. Cutler, *Why Not Executive Sessions?*, WASH. POST, Oct. 17, 1991, at A25.

122. See, e.g., 137 CONG. REC. S14670-71 (daily ed. Oct. 15, 1991) (statement of Senator Bond).

(2) No witness served with a subpoena by the committee shall be required against his or her will to be photographed at any hearing or to give evidence or testify while the broadcasting of that hearing, by radio or television, is being conducted. At the request of any such witness who does not wish to be subjected to radio, television, or still photography coverage, all lenses shall be covered and all microphones used for coverage turned off. This subparagraph is supplementary to clause 2(k)(5) of this rule, relating to the protection of the rights of witnesses.<sup>123</sup>

With regard to the rules of specific House committees governing the broadcast of hearings, they generally allow for the coverage of hearings in accordance with rule XI ¶ 3.<sup>124</sup>

## VI. CONCLUSION

Congress has significant investigative powers. Through its subpoena power, it can compel citizens to appear, give testimony and produce documents, and Congress has the power to hold in contempt any citizens who dare to disobey. The exercise of that power is arguably justified by Congress' need to have access to information of national importance, and to ensure that the information is brought swiftly before the American public.

A witness compelled by a congressional subpoena has some protections. The issuance of the subpoena may suffer some procedural irregularity, or it may be too broad or beyond the reasonable scope of the issuing congressional body. Also, the witness may be sheltered by the same constitutional or common law privileges which operate in a court of law, or the witness may be offered immunity from prosecution. If all else fails, the witness can in appropriate circumstances avoid the indignity of giving compelled testimony on all the major televi-

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123. During the subpoenaed testimony of Michael Milken of Drexel Burnham, before the Oversight and Investigation Subcommittee of the Energy and Commerce Committee, Chairman Dingell granted Edward Bennett Williams' request that "all cameras and tape recorders be removed or shut off during the hearing, which lasted 45 minutes." (At the hearing, Milken refused to answer questions under the Fifth Amendment privilege against self-incrimination.) Nathaniel C. Nush, *Panel Gets No Answers from Milken*, N.Y. TIMES, Apr. 28, 1987, at A1.

124. Judiciary Rule V (hearings broadcasted if majority vote permits), Energy and Commerce Rule 20 (Hearings broadcasted unless majority forbids), and Government Operations Rule 13.

sion networks by moving for a closed session.

Despite the fact that Congress has been exercising its investigative role for almost as long as it has been in existence, recent events remind us that the rules of the investigative process, and the proper balancing of Congress' need to know and the citizen's right to due process, have not been resolved. The *North* and *Poindexter* cases raise the significant questions whether Congress' power should restrain its investigative power when criminal prosecution is likely, and whether Congress' need to know simply must take a back seat to the citizen's right to due process in certain circumstances. The Senate Confirmation Hearings of Supreme Court Justice Clarence Thomas raise other significant questions, including whether Congress should use the executive session more frequently. These and other issues will only be resolved through the *ad hoc*, trial and error process which characterizes congressional investigations, as Congress appears to have little interest in curbing its own power to investigate, issue subpoenas, and enforce these subpoenas through contempt proceedings, if necessary.