

# THE POLITICS OF EXECUTIVE PRIVILEGE

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CAROLINA ACADEMIC PRESS  
Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Fisher, Louis

The politics of executive privilege / by Louis Fisher

p. cm.

Includes bibliographical references and index.

ISBN 0-89089-416-7 (paperback)

ISBN 0-89089-541-4 (hardcover)

1. Executive privilege (Government information—United States. 2. Executive power—United States. 3. Legislative power—United States. 4. Separation of powers—United States. I. Title.

JK468.S4F57 2003  
352.23'5'0973—dc22

2003060238

CAROLINA ACADEMIC PRESS  
700 Kent Street  
Durham, NC 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
[www.cap-press.com](http://www.cap-press.com)

*Cover art by Scot C. McBroom for the Historic American Buildings Survey, National Parks Service. Library of Congress call number HABS, DC, WASH, 134-1.*

Printed in the United States of America

# CONGRESSIONAL SUBPOENAS

The Supreme Court has described the congressional power of inquiry as “an essential and appropriate auxiliary to the legislative function.”<sup>1</sup> The issuance of a subpoena pursuant to an authorized investigation is “an indispensable ingredient of lawmaking.”<sup>2</sup> To be legitimate, a congressional inquiry need not produce a bill or legislative measure. “The very nature of the investigative function—like any research—is that it takes the searchers up some ‘blind alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.”<sup>3</sup>

This chapter describes how committee subpoenas are used to force testimony and the release of documents. For witnesses who invoke their Fifth Amendment privilege against self-incrimination, Congress can grant them immunity from prosecution. Five examples of subpoena power are examined: Rep. John Moss arrayed against the Federal Trade Commission, a House subcommittee requesting a Justice Department legal opinion on seizing suspects abroad, a conflict between a House committee and the Justice Department involving the Inslaw affair, a Senate committee seeking documents on White-water, and a House investigation into FBI corruption.

## Issuing a Subpoena

Lawmakers and their committees usually obtain the information they need for legislation or oversight without threats of subpoenas. They understand that committee investigations have to satisfy certain standards. Legislative in-

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1. *McGrain v. Daugherty*, 272 U.S. 135, 174 (1927).

2. *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 505 (1975).

3. *Id.* at 509.

quiries must be authorized by Congress, pursue a valid legislative purpose, raise questions relevant to the issue being investigated, and inform witnesses why questions put to them are pertinent.<sup>4</sup> Congressional inquiries may not interfere with the independence of decisionmakers in adjudicatory proceedings before a department or agency.<sup>5</sup> However, lawmakers may still use oversight powers to monitor the adjudicatory process.<sup>6</sup> Other arguments may be offered to resist a subcommittee subpoena, such as the need to protect confidential trade secrets or to protect information within the Justice Department,<sup>7</sup> but those justifications can be overridden by legislative needs.

Federal courts give great deference to congressional subpoenas. If the investigative effort falls within the “legitimate legislative sphere,” the congressional activity—including subpoenas—is protected by the absolute prohibition of the Speech or Debate Clause, which prevents members of Congress from being “questioned in any other place.” In a 1975 case, the Supreme Court ruled that such investigative activities are immune from judicial interference.<sup>8</sup> A concurrence by Justices Marshall, Brennan, and Stewart did not agree that “the constitutionality of a congressional subpoena is always shielded from more searching judicial inquiry.”<sup>9</sup> In a dissent, Justice Douglas rejected the majority’s position regarding broad legislative immunity from judicial review.<sup>10</sup>

As a tool of legislative inquiries, both Houses of Congress authorize their committees and subcommittees to issue subpoenas to require the production of documents and the attendance of witnesses regarding matters within the committee’s jurisdiction. Committee subpoenas “have the same authority as if they were issued by the entire House of Congress from which the committee is drawn.”<sup>11</sup> If a witness refuses to testify or produce papers in re-

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4. *Wilkinson v. United States*, 365 U.S. 399, 408–09 (1961); *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 305 (1976).

5. *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966).

6. *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994); *State of California v. FERC*, 966 F.2d 1541 (9th Cir. 1992); *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984); *Peter Kiewit Sons’ Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983).

7. See John C. Grabow, *Congressional Investigations: Law and Practice* 79–85 (1988); James Hamilton & John C. Grabow, “A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas,” 21 *Harv. J. Legis.* 145 (1984); James Hamilton, *The Power to Probe* 57–78 (1977); and Raoul Berger, “Congressional Subpoenas to Executive Officials,” 75 *Colum. L. Rev.* 865 (1975).

8. *Eastland v. United States Servicemen’s Fund*, 421 U.S. at 501.

9. *Id.* at 515.

10. *Id.* at 518.

11. *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (1978), cert. denied, 441 U.S. 943 (1979).

sponse to a committee subpoena, and the committee votes to report a resolution of contempt to the floor, the full House or Senate may vote in support of the contempt citation. The contempt power is covered in detail in the next chapter.

Committees and subcommittees are authorized to request, by subpoena, “the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.” For a committee or subcommittee to issue a subpoena, a majority must be present, although the power to authorize and issue subpoenas may be delegated to the committee chairman.<sup>12</sup> Committee rules can vary the procedures for issuing subpoenas.

A congressional subpoena identifies the name of the committee or subcommittee; the date, time, and place of the hearing a witness is to attend; and the particular kind of documents sought. A subpoena may state that if the documents are delivered by a particular date, the person who has custody over the documents need not appear. Congressional subpoenas are typically served by the U.S. Marshall’s office or by committee staff. The Senate has statutory authority to seek civil enforcement of its subpoenas over private individuals.<sup>13</sup> The House relies on its rules and criminal contempt statutes.<sup>14</sup>

It is rare for an executive official to wholly sidestep a congressional subpoena. In 1989, a House subcommittee issued a subpoena to former Housing and Urban Development Secretary Samuel Pierce. He appeared, but invoked his constitutional right not to incriminate himself. He became the first former or current Cabinet official to invoke the Fifth Amendment since the Teapot Dome scandal of 1923.<sup>15</sup> In 1991, Secretary of Commerce Robert Mosbacher became the first sitting Cabinet officer to refuse to appear before a congressional committee to explain why he would not comply with a subpoena.<sup>16</sup>

In 1981, Attorney General William French Smith issued an opinion that analyzed how the administration should respond to a congressional subpoena.

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12. House Rule XI(2)(m). See also Senate Rule XXVI(1).

13. 2 U.S.C. §§288b(b), 288d (2000); 28 U.S.C. §1365 (2000).

14. 2 U.S.C. §§192–194 (2000).

15. Valerie Richardson and Jerry Seper, “House Committee Subpoenas Pierce,” *Washington Times*, September 21, 1989, at A5; Gwen Ifill, “Pierce Invokes Fifth Amendment,” *Washington Post*, September 27, 1989, at A1; Haynes Johnson, “Teapot Dome of the ’80s,” *Washington Post*, September 29, 1989, at A2.

16. Susan B. Glasser, “Secretary Spurns Census Subpoena,” *Roll Call*, December 12, 1991, at 1.

He concluded that when Congress issues a subpoena as part of a “legislative oversight inquiry,” access by Congress has less justification than when it seeks information for legislative purposes.<sup>17</sup> He acknowledged that Congress “does have a legitimate interest in obtaining information to assist it in enacting, amending, or repealing legislation.” Yet “the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question.”<sup>18</sup> This distinction between legislation and oversight is strained and unconvincing. Congress has as much constitutional right to oversee the execution of laws as it does to pass them. Moreover, even if such a distinction could be drawn, Congress could easily erase it by introducing a bill to “justify” every oversight proceeding.

## Immunity

Private citizens, more so than agency officers, may invoke certain constitutional protections, such as the First Amendment rights of free association and free speech. Witnesses may claim the Fifth Amendment privilege against self-incrimination.<sup>19</sup> A witness before a congressional committee has a constitutional right not “to be a witness against himself.”<sup>20</sup> If a witness refuses to testify by invoking the Fifth Amendment, Congress can vote to force testimony by granting the witness either partial or full immunity.

By majority vote of either House or a two-thirds vote of a committee, Congress may request a federal court to issue an order that compels a witness to testify, giving the witness either partial immunity or full immunity. Partial immunity (“use immunity”) means that the person’s testimony may not be used against him in a criminal case, although the person might be prosecuted on the basis of other information, including information gathered and sequestered before the immunized testimony is delivered. Full immunity (“transactional immunity”) offers absolute protection against prosecution for the offense.

During the Iran-Contra investigation in 1987, Congress offered partial immunity to several witnesses, including Col. Oliver North. He was later convicted of three felonies, but those charges were subsequently dismissed be-

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17. 5 Op. O.L.C. 27, 29–30 (1981).

18. *Id.* at 30.

19. *Wilkinson v. United States*, 365 U.S. at 409.

20. U.S. Const., amend. 5 (“No person...shall be compelled in any criminal case to be a witness against himself”).

cause of his immunized testimony. Under standards imposed by the D.C. Circuit, prosecutors must show that a defendant's testimony could have had no influence on the witnesses called to a trial. Otherwise, the remarks of the witnesses are "tainted" and may not be used to convict.<sup>21</sup>

In such situations Congress decides whether it is more important to inform itself and the public rather than have a successful prosecution. Lawrence Walsh, the independent counsel for Iran-Contra, described this setting of national priorities: "If the Congress decides to grant immunity, there is no way that it can be avoided. They have the last word and that is a proper distribution of power.... The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need."<sup>22</sup>

### The *Ashland* Case

A dispute between a House subcommittee and the Federal Trade Commission (FTC) began on April 16, 1975, when the commission issued an order requiring Ashland Oil, Inc. to submit information on Ashland's estimates of natural gas reserves on various leases. Ashland submitted the information on August 27, stating that the information was confidential and of a proprietary nature, and that disclosure to competitors would cause injury to Ashland.<sup>23</sup>

On October 6, in his capacity as a member of Congress, John Moss asked the commission to make available to him data gathered by the commission relating to lease extensions on federal lands. FTC denied the request for the reason that the data sought constituted "trade secrets and commercial or financial information [and] geological and geophysical information and data, including maps, concerning wells," and that such materials were exempt from mandatory disclosure under subsections (b)(4) and (b)(9) of the Freedom of

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21. *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991). See also *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992).

22. Lawrence E. Walsh, "The Independent Counsel and the Separation of Powers," 25 *Houston L. Rev.* 1, 9 (1988). For proposals to change the immunity statute to make congressional grants of immunity less costly to prosecutors and to Congress, see Ronald F. Wright, "Congressional Use of Immunity Grants After Iran-Contra," 80 *Minn. L. Rev.* 407 (1995).

23. H. Rept. No. 94-756, 94th Cong., 1st Sess. 6-7 (1975).

Information Act (FOIA).<sup>24</sup> The agency's position was remarkably lame. Moss had to point out that FOIA specifically provides that the statutory procedure for withholding certain information from the public has nothing to do with Congress. The procedure "is not authority to withhold information from Congress."<sup>25</sup> Moss proceeded to make a second request for the material, this time as chairman of the Subcommittee on Oversight and Investigation (of House Committee on Interstate and Foreign Commerce).

After the commission agreed to furnish Moss with the information, Ashland Oil, Inc., went to court to enjoin the FTC from releasing the data. At that point the subcommittee issued a subpoena on December 2, ordering the FTC chairman to appear the following day with the requested documents.<sup>26</sup> On the deadline day, the commission wrote to Moss, advising him that on November 24 a district judge had issued a temporary restraining order enjoining the commission "from disclosing the documents to any third party, including Congress..."<sup>27</sup> With the matter tied up in court, the Committee on House Administration reported a resolution on December 17, providing for the appointment of a special counsel to represent the House and the Committee on Interstate and Foreign Commerce in judicial proceedings related to the subpoena. The committee vote for the resolution was strongly bipartisan, 17 to 2.<sup>28</sup>

The full House passed the resolution on December 18, authorizing Moss to intervene and appear in the case in order to secure the information needed for his subcommittee. Wayne Hays, chairman of the Committee on House Administration, objected that the judicial proceedings "infringe upon the rights of the House of Representatives or...could infringe upon the rights of the House of Representatives."<sup>29</sup> In a bipartisan display of the House protecting its institutional interests, the resolution passed without a dissent.

A federal district court agreed that the data at issue constituted "trade secret" information within the purview of Section 6(f) of the Federal Trade Commission Act.<sup>30</sup> However, the court noted that the exemptions in FOIA do

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24. *Ashland Oil, Inc. v. F.T.C.*, 409 F.Supp. 297, 300 (D.D.C. 1976). Subsection (b)(4) covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential"; subsection (b)(9) covers "geological and geophysical information and data, including maps, concerning wells."

25. 5 U.S.C. §552(d) (2000).

26. H. Rept. No. 94-756, at 3.

27. *Id.* at 4.

28. *Id.* at 1.

29. 121 Cong. Rec. 41707 (1975).

30. *Ashland Oil, Inc.*, 409 F.Supp. 297, 303-04 (D.D.C. 1976).

not apply to Congress,<sup>31</sup> and that the information sought in the subpoena was properly within the subcommittee’s jurisdiction.<sup>32</sup> Finally, the court ruled that Ashland Oil had failed to show that release of the material to the subcommittee would irreparably injure the company. The court rejected the argument that the transfer of the data from the FTC to the subcommittee would lead “inexorably to either public dissemination or disclosure to Ashland’s competitors.” An abstract, unsubstantiated charge that a committee might leak sensitive materials is no ground for withholding documents from Congress. Courts must assume that congressional committees “will exercise their powers responsibly and with due regard for the rights of affected parties.”<sup>33</sup>

That decision was affirmed by the D.C. Circuit.<sup>34</sup> A dissenting judge concluded that the subpoena was invalid, but the majority noted that FTC’s decision to turn over the materials to the subcommittee “was not based on—and in fact predated—issuance of the subpoena.”<sup>35</sup> The commission had agreed to provide Moss with the material after receiving the letter in his capacity as subcommittee chairman. The majority pointed out that the dissent’s discussion of the subpoena “rests solely on an interpretation of statements made by the Government counsel during oral argument.”<sup>36</sup>

## DOJ Opinion: Seizing Suspects Abroad

Beginning in 1989, Congress held hearings on whether the FBI could seize a suspect in a foreign country without the cooperation and consent of that nation. On November 8, a subcommittee of the House Judiciary Committee received testimony from William P. Barr, head of the Office of Legal Counsel (OLC) in the Justice Department, State Department Legal Adviser Abraham D. Sofaer, and Oliver B. Revell, Associate Deputy Director of Investigations in the FBI.<sup>37</sup> Although OLC concluded in 1980 that the FBI had no authority

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31. *Id.* at 302.

32. *Id.* at 305–06.

33. *Id.* at 308.

34. *Ashland Oil, Inc. v. F.T.C.*, 548 F.2d 977 (D.C. Cir. 1976).

35. *Id.* at 979. For additional analysis of *Ashland*, see Paul C. Rosenthal and Robert S. Grossman, “Congressional Access to Confidential Information Collected by Federal Agencies,” 15 *Harv. J. Legis.* 74 (1977).

36. *Id.* at 980.

37. “FBI Authority to Seize Suspects Abroad,” hearing before a subcommittee of the House Committee on the Judiciary, 101st Cong., 1st Sess. (1991).

to make such arrests,<sup>38</sup> Barr explained that OLC had reexamined its position and issued an opinion on June 21, 1989, partially reversing the 1980 opinion.<sup>39</sup> Notwithstanding publication of the first opinion, Barr insisted that the second “must remain confidential.”<sup>40</sup> Although he refused to release the 1989 opinion, he offered to explain “our conclusions and our reasoning to the committee.”<sup>41</sup> He gave reasons why he regarded the 1980 opinion “flawed.”<sup>42</sup>

Sofaer noted that Barr had restricted his analysis to the application of domestic legal authority to kidnappings abroad. Under international law, Sofaer said, such kidnappings are a violation. He continued: “While Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our Nation’s respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice.”<sup>43</sup>

The administration decided to withhold the 1989 document. Attorney General Dick Thornburgh wrote to the subcommittee on November 28, 1989, explaining why it could not have the OLC opinion: “Apart from classified information, there is no category of documents in the Department’s possession that I consider more confidential than legal opinions to me from the Office of Legal Counsel.”<sup>44</sup> Subcommittee chair Don Edwards replied that OLC opinions had been made available to Congress in previous years.<sup>45</sup> In a letter on January 24, 1990, Edwards provided Thornburgh with other examples of OLC opinions being released to Congress.<sup>46</sup>

On January 31, 1990, the chairman of House Judiciary, Jack Brooks, wrote to Thornburgh about a number of difficulties that Congress had experienced in receiving executive branch documents. With regard to the OLC opinion on extraterritorial arrests, Brooks said:

There should be no question that this is a matter involving an extremely serious national policy to which both the Congress and the Executive Branch should give extremely careful consideration. No

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38. 4B Op. O.L.C. 543 (1980).

39. “FBI Authority to Seize Suspects Abroad,” at 3.

40. *Id.* at 4.

41. *Id.* at 5.

42. *Id.*

43. *Id.* at 23.

44. *Id.* at 92.

45. *Id.* at 94.

46. *Id.* at 96–98.

purpose is served by denying Congress access to all of the legal thought and analysis that have been directed to this issue, including that upon which the Justice Department relied in reaching its decision. I do not believe that it is either legally supportable or in the nation's best interests for the Justice Department to pick and choose which opinions of the Office of Legal Counsel are made available to the Congress. Indeed, it is my understanding that these opinions are published periodically. There is no justification for shielding them from Congressional access at the precise moment that critical decisions are being made.<sup>47</sup>

Responding on February 20, 1990, Thornburgh suggested to Brooks a possible accommodation. As a substitute for the OLC opinion, the Justice Department would prepare "a comprehensive written statement of the Department's legal position on these issues."<sup>48</sup> Thornburgh concluded that he was "not sure it is useful for us to exchange volleys over competing legal theories on this issue. No concrete dispute over national security information is before us. What is important is that on a practical, day-to-day basis we are able to work out our differences in this sensitive area in good faith."<sup>49</sup>

The two sides, however, were unable to reach an acceptable accommodation, resulting in a subcommittee subpoena on July 25, 1991. The subcommittee argued that it needed the 1989 memo to determine whether it was necessary for Congress to legislate in this area. Unless Thornburgh turned over the document by 9 A.M. on July 31, the committee would vote to hold him in contempt.<sup>50</sup> The administration decided not to comply with the subpoena, threatening to assert executive privilege. Some administration officials argued that release of the document might jeopardize the criminal prosecution of such defendants as General Manuel Antonio Noriega, who was arrested in Panama in January 1990, after the U.S. invasion. Brooks denied this line of reasoning: "This committee's request will in no way expose sensitive information to the public nor will it in any way deter or slow criminal prosecutions in these matters."<sup>51</sup>

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47. *Id.* at 102.

48. *Id.* at 119.

49. *Id.* at 120–21.

50. Joan Biskupic, "Panel Challenges Thornburgh Over Right to Documents," *CQ Weekly Report*, July 27, 1991, at 2080.

51. David Johnston, "Administration to Fight House Panel's Subpoena," *New York Times*, July 30, 1991, at A12.

As the interbranch collision neared, the two sides were able to find some common ground. In a letter to Brooks on July 30, 1991, Assistant Attorney General W. Lee Rawls stated that in return for President Bush not asserting executive privilege, the subcommittee and the department agreed that the subcommittee “will suspend, but not dissolve, the subpoena until further notice,” to permit further negotiations toward an accommodation.<sup>52</sup> Bush decided not to invoke executive privilege, and the Justice Department agreed to allow one or more committee members to review the legal memo if the subcommittee would suspend the subpoena and remove the threat of a contempt vote.<sup>53</sup>

During this period, the Bush administration leaked the 29-page opinion to the *Washington Post*.<sup>54</sup> In 1993, the department decided to publish the memo in its regular series of OLC opinions. Although the cloth edition of *Opinions of the Office of Legal Counsel* suggests it was printed in 1989, the preliminary print (paper) was not released until 1993.<sup>55</sup>

## DOJ Documents: The Inslaw Affair

During the same time period as the confrontation over the kidnapping memo, the House and the Justice Department engaged in another showdown. On December 5, 1990, Chairman Brooks convened a hearing of the Judiciary Committee to review the refusal of Attorney General Thornburgh to provide the committee with access to all documents regarding a civil dispute brought by Inslaw, Inc., a computer company. Inslaw charged that high-level officials in the Justice Department conspired to force Inslaw into bankruptcy and have its computer software program, called PROMIS, transferred or bought by a rival company to help the department keep track of civil and criminal cases. Federal Bankruptcy Judge George Bason had already ruled that the Justice Department “took, converted, and stole” Inslaw’s proprietary software, using “trickery, fraud, and deceit.”<sup>56</sup>

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52. Letter from Rawls to Brooks, July 30, 1991.

53. David Johnston, “Both Sides Softening Stance on Documents on Foreign Arrests,” *New York Times*, August 1, 1991, at B7; “Justice Yields to House, Averting Showdown,” *CQ Weekly Report*, August 3, 1991, at 2179.

54. Michael Isikoff, “U.S. ‘Power’ on Abductions Detailed,” *Washington Post*, August 14, 1991, at A14.

55. 13 Op. O.L.C. 163 (1989).

56. “The Attorney General’s Refusal to Provide Congressional Access to ‘Privileged’ Inslaw Documents,” hearing before a subcommittee of the House Committee on the Judiciary, 101st Cong., 2d Sess. 1 (1990).

The Justice Department denied those charges, claiming that what was at stake was a contract dispute. Brooks said that the controversy reached the highest levels of the department, including at least two Assistant Attorneys General, a Deputy Attorney General, and Attorney General Meese. Because House and Senate investigating committees had been denied access to documents needed to establish the department's guilt or innocence, Brooks concluded that he was "even more convinced that the allegations concerning IN-SLAW must be fully and independently investigated by the committee."<sup>57</sup>

Although the committee and the Justice Department disagreed over access to particular documents, the ranking member of the committee, Hamilton Fish (R-N.Y.), pointed out that the department had given considerable assistance to the legislative investigation, arranging for over fifty interviews with departmental employees, handing over "voluminous written materials," and providing space for congressional staff.<sup>58</sup> In a letter to Fish, Assistant Attorney General W. Lee Rawls noted that in an accommodation with House Judiciary, "the Department did not insist on its usual practice of having a Department representative at these interviews."<sup>59</sup> Committee staff also had access, pursuant to a confidentiality agreement, "to the files reflecting investigations by the Office of Professional Responsibility, and we have provided documents generated during investigations by the Criminal Division into allegations of wrongdoing relating to Inslaw."<sup>60</sup> Committee staff were allowed to depose departmental employees "without the presence of Department counsel," and were given access to the Civil Division's files on the Inslaw litigation. Out of tens of thousands of documents, the department "withheld only a minute fraction, which are privileged attorney work product that would not be available to a party in litigation with the United States."<sup>61</sup>

At the hearing, the committee heard testimony from Steven R. Ross, House General Counsel, who analyzed the Attorney General's decision to withhold documents because of pending civil litigation and the need for the department to protect litigation strategy and agency work products.<sup>62</sup> Ross took exception to the position advanced by Rawls in his letter to Rep. Fish that congressional investigations "are justifiable only as a means of facilitating the task of passing legislation." Such a standard, Ross said, would "eradicate the time-hon-

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57. *Id.* at 2.

58. *Id.* at 3.

59. *Id.* at 163.

60. *Id.* at 164.

61. *Id.*

62. *Id.* at 77.

ored role of Congress of providing oversight, which is a means that has been upheld by the Supreme Court on a number of occasions, by which the Congress can assure itself that previously passed laws are being properly implemented.”<sup>63</sup> Fish interrupted at that point to agree that the sentence by Rawls was “not a technically correct statement of the power of the Congress” and was “far too narrow.”<sup>64</sup>

Ross also challenged the claim by the Justice Department that it could deny Congress documents to protect pending litigation. Ross reviewed previous decisions by the Supreme Court to demonstrate that information could not be withheld from Congress simply because of “the pendency of lawsuits.”<sup>65</sup> The congressional investigation of Anne Gorsuch, discussed in the next chapter, was cited by Ross as another example of the Justice Department labeling documents as “enforcement sensitive” or “litigation sensitive” to keep materials from Congress.<sup>66</sup>

The media monitored the collision between Brooks and the Justice Department.<sup>67</sup> Finally, on July 25, 1991, a subcommittee of House Judiciary issued a subpoena to Thornburgh. A newspaper story said that the night before the subcommittee was scheduled to vote on the subpoena, the Justice Department indicated that it was willing to turn over the Inslaw documents. Brooks, given recent departmental promises, said he was too skeptical to accept the offer.<sup>68</sup> He wanted access to the documents to decide whether the department had acted illegally by engaging in criminal conspiracy. When the committee failed to receive the materials, Brooks said that the committee would consider contempt of Congress proceedings against the department.<sup>69</sup>

At that point several hundred documents were delivered to the committee, which later released a formal investigative report on the Inslaw affair.<sup>70</sup> The committee gained access to sensitive files of the Office of Professional Re-

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63. *Id.* at 78.

64. *Id.*

65. *Id.* at 79.

66. *Id.* at 80–81.

67. Mary McGrory, “Nixon’s Shadow Lengthens,” *Washington Post*, December 6, 1990, at A2; Paul M. Barrett, “Thornburgh, Brooks Clash Over Charge of Wrongdoing at Justice Department,” *Wall Street Journal*, December 10, 1990, at B7A.

68. Joan Biskupic, “Panel Challenges Thornburgh Over Right to Documents,” *CQ Weekly Report*, July 27, 1991, at 2080. See also David Johnston, “Administration to Fight House Panel’s Subpoena,” *New York Times*, July 30, 1991, at A12.

69. Susan B. Glasser, “Deadline Passes, But Justice Dept. Still Hasn’t Given Papers to Brooks,” *Roll Call*, September 19, 1991, at 12.

70. H. Rept. No. 857, 102d Cong., 2d Sess. (1992).

sponsibility (OPR) in the Justice Department and received more than 400 documents that the department had described as related to “ongoing litigation and other highly sensitive matters and ‘protected’ under the claims of attorney-client and attorney work product privileges.”<sup>71</sup>

## Whitewater Notes

On December 8, 1995, the Special Senate Committee to Investigate Whitewater Development Corporation and Related Matters (the Senate Whitewater Committee) issued a subpoena for certain documents. The White House announced that it would withhold material concerning a November 5, 1993, meeting at the law offices of Williams & Connolly, which had been retained by President Clinton and First Lady Hillary Clinton to provide personal counsel for Whitewater-related matters. Senior presidential aides and private lawyers discussed whether documents sought by Congress could be withheld on the ground that they were protected by the lawyer-client privilege and executive privilege. Present at the meeting: White House Counsel Bernard Nussbaum, White House aides Neil Eggleston and Bruce Lindsey, three private attorneys (David Kennedy, Stephen Engstrom, and James Lyon), and Associate White House Counsel William Kennedy, who took extensive notes at the meeting.<sup>72</sup>

President Clinton said that he believed the President “ought to have a right to have a confidential conversation with his minister, his doctor, his lawyer.”<sup>73</sup> That argument would carry weight if Clinton had met solely with private attorneys, but his claim was undermined by the presence of four government lawyers at the meeting. Government lawyers are not expected to provide advice to Presidents on private financial and legal matters and certainly not on the same confidential basis as a private attorney. Lloyd Cutler, when he was appointed special counsel to President Clinton, explained: “When it comes to a President’s private affairs, particularly private affairs that occurred before he

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71. *Id.* at 92–93.

72. S. Rept. No. 104-191, 104th Cong., 1st Sess. 3 (1995); Stephen Labaton, “White House Gives Rationale for Balking at a Subpoena,” *New York Times*, December 13, 1995, at B14; Susan Schmidt, “White House Rejects Subpoena,” *Washington Post*, December 13, 1995, at A1.

73. Ruth Marcus and Susan Schmidt, “Legal Experts Uncertain on Prospects of Clinton Privilege Claim,” *Washington Post*, December 14, 1995, at A14.

took office, those should be handled by his own personal private counsel, and in my view not by the White House Counsel.”<sup>74</sup>

Moreover, communications between a government attorney and an executive official lack the confidentiality that exists between a private attorney and an executive official. Under law, any government attorney who learns of “[a]ny information, allegation, or complaint” involving government officers and employees shall report such matter to the Attorney General, with certain exceptions.<sup>75</sup> Aware of that statute, government attorneys should alert officials in the government, “even the President, . . . not to expect counsel to keep confidential what a private counsel would in such a situation.”<sup>76</sup>

Within a few days, the White House offered to turn over the Kennedy notes if the committee agreed that the meeting was privileged. The committee refused because it learned of other meetings attended by White House officials and private attorneys. As part of the effort at compromise, the White House told the committee that it could assume that whatever material White House officials had obtained about Whitewater—including confidential documents from the Resolution Trust Corporation (RTC)—had been turned over to Clinton’s private lawyers during the meeting. Some Republicans regarded it as improper for the White House to pass along confidential RTC or any other law enforcement documents to the President’s private lawyers. Unable to reach an acceptable compromise, the committee voted to send the issue to the Senate floor and from there to federal district court.<sup>77</sup> Clinton objected that he should not be “the first president in history” to give up his right to attorney-client confidentiality.<sup>78</sup>

By December 15, the White House had indicated its willingness to drop most of the conditions it had established for turning over the Kennedy notes to the committee. The change in White House policy occurred hours after the committee voted to ask the full Senate to go to court to enforce the subpoena.<sup>79</sup>

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74. S. Rept. No. 104-191, at 13.

75. 28 U.S.C. § 538(b) (2000). The information is reported “unless (1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.”

76. Charles Tiefer, “The Specially Investigated President,” 5 U. Chi. Roundtable 143, 191 n.212 (1998).

77. Susan Schmidt, “Compromise on Notes Rejected,” *Washington Post*, December 15, 1995, at A2.

78. *Id.*

79. Susan Schmidt, “White House Eases Stance on Notes,” *Washington Post*, December 16, 1995, at A19.

As a step toward an accommodation, the chairman of the Senate committee said he would be willing “to send a letter saying we do not feel that there would be any waiver of any privilege, that the administration’s turning over the notes would not be deemed a waiver in our eyes.”<sup>80</sup>

On December 20, the Senate debated a resolution that directed the Senate Legal Counsel to bring a civil action to enforce the subpoena. The resolution invoked a special statute regarding the authority of the Senate Legal Counsel.<sup>81</sup> In a letter on that same day to the committee, White House Special Counsel Jane Sherburne described various options, stating: “We have said all along that we are prepared to make the notes public; that all we need is an assurance that other investigative bodies will not use this as an excuse to deny the President the right to lawyer confidentiality that all Americans enjoy.”<sup>82</sup> That was a red herring. No one denied Clinton the right to confidentiality with a *private* attorney, the same right that all Americans enjoy. She said that Independent Counsel Kenneth Starr had agreed that he would not argue that turning over the Kennedy notes constituted a waiver of the attorney-client privilege claimed by President Clinton. The White House sought a similar understanding from two House committees with jurisdiction over Whitewater matters. Sherburne asked the Senate for assistance in obtaining from the House the same understanding reached with Starr.<sup>83</sup>

The resolution passed the Senate by a vote of 51 to 45.<sup>84</sup> On the following day, the White House agreed to give the Kennedy notes to the Senate Whitewater Committee. Rep. Jim Leach, chairman of the House Banking and Financial Services Committee, objected to the “apparently unprecedented circumstance of a request by the White House that information not be conveyed to one legislative body without the procedural concurrence of the other.”<sup>85</sup> Leach also expressed concern that government attorneys working in the White House might have given confidential law enforcement information to the Clintons’ private attorney.<sup>86</sup> Further, Leach noted that Congress throughout its his-

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80. John Solomon, “D’Amato Yields on Some Terms Set by Clinton,” *Washington Post*, December 17, 1995, at A13.

81. 141 Cong. Rec. 37705 (1995); Charles Tiefer, “The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client,” 61 *Law & Contemp. Prob.* 47, 56–57 (1998).

82. 141 Cong. Rec. at 37730.

83. *Id.*

84. *Id.* at 37761.

85. Letter from Leach to Speaker Newt Gingrich, December 21, 1995, at 1.

86. *Id.* at 2.

tory has maintained that the attorney-client privilege “cannot be claimed as a matter of right before a legislative committee,”<sup>87</sup> and stated that the attorney-client privilege did not apply to the November 5, 1993 meeting because government attorneys were present. To Leach, “one cannot waive a privilege that never came into being in the first place.”<sup>88</sup>

Having discussed these fundamental principles, Leach stated this position for the House: “(1) It is well-established by congressional precedent and practice that acceptance of a claim of attorney-client privilege rests in the sole and sound discretion of Congress, and cannot be asserted as a matter of right; (2) It is the opinion of the House that no valid claim of attorney-client privilege has been asserted by the President, rendering unnecessary any exercise of congressional discretion to recognize a privilege in this instance; (3) Even if the document in question qualified for the attorney-client privilege, its disclosure to Congress would not constitute a waiver of the privilege as to third parties, under well-settled House and judicial precedents; and (4) The House accordingly will not assert that any such waiver has occurred.”<sup>89</sup> Under these cross-pressures, the Kennedy notes were released to Congress.<sup>90</sup> White House spokesman Mark Fabiani put a positive spin on the long-simmering dispute: “We’re eager to release these notes to the public.”<sup>91</sup>

## FBI Corruption in Boston

Toward the end of 2001, President George W. Bush invoked executive privilege for the first time. He acted in response to subpoenas issued by the House Government Reform Committee covering two issues: campaign finance and FBI corruption in Boston. He advised Attorney General John Ashcroft not to release the documents to the committee because disclosure “would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions.” He argued that giving the committee access to the documents “threatens to politicize the criminal justice process” and undermine the fundamental purpose of the separation of powers doctrine, which “was to protect individual liberty.”<sup>92</sup>

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87. *Id.* at 3.

88. *Id.* at 3–4.

89. *Id.* at 4–5.

90. Susan Schmidt, “Whitewater Notes Being Surrendered,” *Washington Post*, December 22, 1995, at A1. See Tiefer, “The Specially Investigated President,” at 189–93.

91. Schmidt, “Whitewater Notes Being Surrendered,” at A11.

92. 37 Weekly Comp. Pres. Doc. 1783 (2001).

This kind of sweeping language, grounded in fundamental constitutional principles, appeared to shut the door in the face of the committee. In fact, Bush's statement made it clear he was ready to negotiate. He advised the Justice Department to "remain willing to work informally with the Committee to provide such information as it can, consistent with these instructions and without violating the constitutional doctrine of separation of powers."<sup>93</sup> In the end, Bush succeeded in withholding the campaign finance documents but folded on the Boston materials.

There could hardly be a subject area less attractive for Bush's first use of executive privilege than FBI's conduct in Boston. During hearings on May 3, 2001, the House Government Reform Committee laid out the basic facts. It wanted documents concerning the FBI's role in a 30-year-old scandal in Boston that sent innocent people to prison for decades and allowed mobsters to commit murder. The FBI tolerated this injustice because it wanted to preserve its access to informers, while at the same time knowing that the individuals imprisoned were innocent of the charges. During this crime spree, some FBI agents took cash from the mobsters.<sup>94</sup> This sordid record prompted the committee investigation, and it was on such a dispute that Bush decided to invoke executive privilege.

On December 13, 2001, the day following Bush's decision to assert executive privilege, the committee held further hearings on the Boston matter. Michael Horowitz, appearing on behalf of the Justice Department, defended the use of executive privilege to keep from the committee documents regarding the department's decision to prosecute or decline to prosecute. The reason for withholding these pre-decisional documents was "to protect the integrity of Federal prosecutive decisions" and to make sure that such decisions are based on "evidence and the law, free from political and other improper influences."<sup>95</sup> Releasing such documents to the committee, he said, "would undermine the integrity of the core executive branch decisionmaking function."<sup>96</sup>

This testimony was far too rigid to survive as departmental doctrine. Six days after the hearings, the department wrote a much more conciliatory letter to the committee chairman. It now stated "that the Department and the

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93. *Id.*

94. "Investigation Into Allegations of Justice Department Misconduct in New England—Volume 1," hearings before the House Committee on Government Reform, 107th Cong., 1st–2d Sess. 1–4 (2001–02).

95. *Id.* at 379.

96. *Id.* at 380.

Committee can work together to provide the Committee additional information without compromising the principles maintained by the executive branch. We will be prepared to make a proposal as to how further to accommodate the Committee's needs as soon as you inform us in writing of the specific needs the Committee has for additional information."<sup>97</sup>

On January 10, 2002, White House Counsel Alberto R. Gonzales wrote to the committee, noting that it was a "misimpression" that congressional committees could never receive deliberative documents from a criminal investigation or prosecution. "There is no such bright-line policy, nor did we intend to articulate any such policy." Instead, the department would treat such documents "through a process of appropriate accommodation and negotiation to preserve the respective constitutional roles of the two Branches." The committee's subpoenas "sought a very narrow and particularly sensitive category of deliberative matters—prosecution and declination memoranda—as well as the closely related category of memoranda to the Attorney General regarding the appointment of a special prosecutor" for the campaign finance investigation. Yet Gonzales signaled that such materials, under certain conditions, might be shared with the committee: "Absent unusual circumstances, the Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure."<sup>98</sup>

The dispute had clearly moved away from fixed departmental principles to the specific question of whether "unusual circumstances" were absent or present. Clearly it was the latter. Gonzales said that the administration "recognizes that in unusual circumstances like those present here, where the Executive Branch has filed criminal charges alleging corruption in the FBI investigative process, even the core principle of confidentiality applicable to prosecution and declination memoranda may appropriately give way, to the extent permitted by law, if Congress demonstrates a compelling and specific need for the memoranda."<sup>99</sup> The White House was now "prepared to accommodate the Committee's interest in a manner that should both satisfy the Committee's legitimate needs and protect the principles of prosecutorial candor and confidentiality."<sup>100</sup>

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97. Letter from Assistant Attorney General Daniel J. Bryant to Rep. Dan Burton, chairman of the House Committee on Government Reform, December 19, 2001, at 2.

98. Letter from Alberto R. Gonzales, Counsel to the President, to Rep. Dan Burton, January 10, 2002, at 1.

99. *Id.* at 2.

100. *Id.* at 3.

The committee held hearings a third time, on February 6, 2002, to hear testimony from experts who cited specific instances of the executive branch giving congressional committees access to prosecutorial memoranda for both open and closed investigations.<sup>101</sup> Under these multiple pressures, the Bush administration agreed to give the Government Reform Committee prosecutorial memos on FBI conduct in Boston. Some of the documents were released within a hour of the committee's decision to hold President Bush in contempt.<sup>102</sup>

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Congressional subpoenas represent the first volley from a committee that has decided that executive branch documents are necessary to fulfill legislative responsibilities, and that informal negotiations between the two branches have failed. Issuance of a subpoena is usually successful in dislodging the documents, particularly when the committee request enjoys broad bipartisan support, as was the case with the probe into FBI operations in Boston. If that step is ineffective, the committee can deliberate on the necessity of going the next step by holding an executive official in contempt.

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101. "Investigation Into Allegations of Justice Department Misconduct in New England—Volume 1," at 520–604 (testimony by Charles Tiefer and Morton Rosenberg).

102. Vanessa Blum, "White House Caves On Privilege Claim," *Legal Times*, March 18, 2002, at 1. See Charles Tiefer, "President Bush's First Executive Privilege Claim: The FBI/Boston Investigation," 33 *Pres. Stud. Q.* 201 (2003).

