

# Self-Incrimination and Congressional Hearings

by Roberto Iraola\*

It is the[] unremitting obligation [of citizens] 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.<sup>1</sup>

The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial.<sup>2</sup>

[A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The [Fifth Amendment] privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.<sup>3</sup>

## I. INTRODUCTION

On December 2, 2001, Enron Corporation (“Enron”), America’s seventh largest company, filed for bankruptcy protection following a massive sale of the company’s stock precipitated by earnings restatements revealing approximately \$600 million in debt.<sup>4</sup> The collapse of Enron spawned

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1. *Watkins v. United States*, 354 U.S. 178, 187-88 (1957).

2. *Barsky v. United States*, 167 F.2d 241, 250 (D.C. Cir. 1948).

3. *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 557-58 (1956).

4. James Rosen, *Multiple Enron Probes Aim to Avoid Colliding*, THE SACRAMENTO BEE, Feb. 26, 2002, at A1, available at <http://www.sacbee.com/content/news/html> (click “article search” and search James Rosen and Enron).

inquiries by at least sixteen congressional committees.<sup>5</sup> The Department of Justice, the Securities and Exchange Commission ("SEC"), the Department of Labor, the Internal Revenue Service, and the Federal Energy Regulatory Commission also opened investigations.<sup>6</sup> As the inquiries by the various congressional committees proceeded, current and former Enron executives, as well as employees of Arthur Andersen LLP, Enron's auditing firm, were summoned to testify. Many of those called declined to do so, invoking their Fifth Amendment privilege against self-incrimination.<sup>7</sup>

One of the witnesses summoned before Congress was former Enron Chairman and Chief Executive, Kenneth Lay. He was subpoenaed<sup>8</sup> to testify before the Senate Commerce Committee, but publicly announced, prior to his scheduled appearance, that he would assert his Fifth Amendment privilege.<sup>9</sup> In compliance with the subpoena, Mr. Lay appeared before the committee on February 12, 2002.<sup>10</sup> He then sat for

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5. *Id.*

6. See *FERC to Probe Enron Role in California Power Market*, REUTERS, Feb. 14, 2002; *Enron Execs Take the Fifth*, UNITED PRESS INT'L, Feb. 8, 2002; Susan Schmidt, *On the Hill, Probes Reach Double Digits*, WASH. POST, Jan. 17, 2002, at A10.

7. See David Stout & Sherri Day, *Enron Chiefs at Odds in Hearing: Skilling Disputes Watkins's Testimony on Reasons for Company's Demise*, MONTREAL GAZETTE, Feb. 27, 2002, at D4 (reporting that four current or former Enron executives invoked their Fifth Amendment privilege and refused to testify); Calvin Woodward, *Lead Enron Auditor Takes Fifth Amendment*, DETROIT NEWS, Jan. 24, 2002, available at <http://www.detnews.com> (reporting that David B. Duncan, a former Arthur Andersen partner and lead Enron auditor, declined to testify invoking his Fifth Amendment privilege).

8. Originally, Mr. Lay indicated he would appear voluntarily before the Senate Commerce Committee and the House Financial Services Committee. Marcy Gordon, *Lay to Appear Before Congress*, ASSOCIATED PRESS, Feb. 12, 2002. As reported in the press, Mr. Lay's change of mind about appearing voluntarily arose after lawmakers publicly questioned the veracity of the testimony provided by Jeffrey K. Skilling, Enron's former chief executive, and suggested that he (Skilling) may have perjured himself. See Richard A. Oppel, Jr., *Ex-Chief Will Not Testify Before Congress*, N.Y. TIMES, Feb. 11, 2002, at A1, available at <http://nologo.org/newswire/02/02/27/0625206.shtml>. It was also speculated that Mr. Lay may have been influenced by a report released by a special committee of Enron's board, indicating that he bore substantial responsibility for the business deals that led to the company's collapse. *Id.* Mr. Lay subsequently was subpoenaed by the Senate Commerce Committee and the House Financial Services Committee. See *Enron Execs Take the Fifth*, UNITED PRESS INT'L, Feb. 18, 2002.

9. See Oppel, *supra* note 8 ("Mr. Lay's spokeswoman, Kelly Kimberly, said, 'Under instructions of counsel, Mr. Lay will exercise his Fifth Amendment rights at the hearing Tuesday.'").

10. After calling the meeting to order, its chairman, Senator Ernest F. Hollings (D-SC), acknowledged that the committee had been advised that "Mr. Lay would appear before the committee but assert his Fifth Amendment privilege against self-incrimination." *Panel One of a Hearing of the Senate Commerce, Science and Transportation Committee*, Feb. 12, 2002,

over an hour with his attorney, as senators from both sides of the aisle vilified his stewardship of the company and scolded him for refusing to testify.<sup>11</sup> Before discussing those remarks, it bears noting that the committee not only understood that Mr. Lay would decline to testify on advice of counsel,<sup>12</sup> but that some members deemed such a decision reasonable in light of all the facts and circumstances. For example, at the time of the hearing, Senator John Breaux (D-LA) stated:

I'm disappointed . . . that Mr. Lay is not going to be testifying. I don't think anybody in Congress or probably in Washington or anywhere else really thought that he was going to testify. If I were his attorney, I'd certainly be advising him to take the Fifth Amendment, which is what he's going to do this morning based on advice of counsel.<sup>13</sup>

Nonetheless, other members of the committee felt that Mr. Lay's compelled appearance provided them with a good opportunity to speak with Mr. Lay. For example, Senator Barbara Boxer (D-CA) remarked: "I know you're not going to talk to the committee. You have a right not to. But I have a chance to talk to you, so that's what I'm going to do, talk to you."<sup>14</sup> The "talking," as demonstrated below, consisted of committee members maligning Mr. Lay's stewardship of Enron and chiding him for invoking his Fifth Amendment privilege. The following statements illustrate the point:

— Senator John McCain (R-AZ): Mr. Lay, I regret that you've chosen not to explain to this committee, to the American public and to your former employees how you and others in senior management on the board of Enron apparently failed to completely fulfill your responsibilities.<sup>15</sup>

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at 4 available at LEXIS, Federal News Service [hereinafter "Transcript I"] .

11. See Susan Schmidt, *Senators Fill Lay's Silence*, WASH. POST, Feb. 13, 2002, at A1.

12. See Transcript I, *supra* note 10.

13. *Id.* In April 2002, David B. Duncan, the former Arthur Andersen partner and lead Enron auditor who had declined to testify before one of the congressional committees by invoking his Fifth Amendment privilege, pleaded guilty to one count of obstruction of justice. See Carrie Johnson, *Duncan Says Shredding Was Limited*, WASH. POST, May 17, 2002, at E3; Calvin Woodward, *Lead Enron Auditor Takes Fifth Amendment*, ASSOCIATED PRESS, Jan. 24, 2002. Duncan became one of the government's key witnesses in the subsequent prosecution of Arthur Andersen, which in June 2002, was convicted of obstruction of justice in connection with the Enron audit. Walter Hamilton & Nancy Rivera Brooks, *3 Ex-Bankers Charged in Enron Deal*, L.A. TIMES, June 28, 2002, at C1. That same month, three former investment bankers at Greenwich NatWest, a British bank, were charged with acquiring \$7 million in illicit profits in connection with an Enron partnership. *Id.*

14. Transcript I, *supra* note 10.

15. *Id.*

— Senator Byron Dorgan (D-ND): Mr. Lay's attorneys have told us that he will invoke his Fifth Amendment right against self-incrimination and he certainly has that right. I must say I'm disappointed by that decision. I think Mr. Lay has a story to tell. We and the American people would like to hear that story.<sup>16</sup>

— Senator Peter Fitzgerald (R-IL): I was disappointed to learn that you, Mr. Lay, have no intention of testifying this morning, because I have lots of questions that I think are important to ask you. And you know what, Mr. Lay? I thought that after any role you might have played in bankrupting a hundred-billion dollar-a-year company, devastating the retirement savings of thousands of your employees, spreading fear through millions of Americans concerned about their investment, and calling into question the very integrity of our capital markets—I thought that you might think it was important to answer those questions, too. But apparently you do not. Apparently you don't think that it's the least you can do . . . .

So what have I concluded? Mr. Lay, I've concluded that you're perhaps the most accomplished confidence man since Charles Ponzi. I'd say you were a carnival barker, except that wouldn't be fair to carnival barkers. A carnie will at least tell you up front that he's running a shell game. You, Mr. Lay, were running what purported to be the seventh largest corporation in America.<sup>17</sup>

— Senator Ron Wyden (D-OR): I strongly support the constitutional protections afforded Mr. Lay and all witnesses, but respectfully submit that the question shouldn't be what do the Enron executives have to gain by testifying, but rather it is what they owe the American people at this point.<sup>18</sup>

— Senator Olympia Snowe (R-ME): I, too, join my colleagues in expressing regret that Mr. Lay will not be testifying . . . . There are a number of implausibilities that need to be addressed. You, as CEO, had the responsibility of creating a culture of honesty, responsibility, integrity, and trust, and obviously that didn't happen in this instance, and now it is the employees and the investors who are bearing the brunt of these massive schemes and failures.<sup>19</sup>

— Senator Max Cleland (D-GA): Mr. Lay, I truly regret your failure to appear before this committee last week and your decision not to answer any questions today. It seems that the veil of secrecy that has surrounded Enron decisions at the top continues.<sup>20</sup>

— Senator Barbara Boxer (D-CA): Mr. Lay, my state was bled dry by price gouging. Many pension plans went under—I shouldn't say

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

went under—lost hundreds of millions of dollars because there was a limit on what they could put into Enron—I might say, a limit that I support in 401(k)s as well. And what you did to the employees was without conscience. That’s how I feel.<sup>21</sup>

— Senator Jean Carnahan (D-MO): Somehow, Enron got off course, and I’m sorry you have chosen not to help us uncover what went wrong, because in failure, there are always lessons to be learned. But despite your unwillingness to speak, I will continue to ask the question that I find so terribly haunting, a question that gets to those core values that define us as Americans; I want to know why no one in authority at Enron stood up and said, “This is wrong.”<sup>22</sup>

When finally permitted to testify after these remarks and a reference by Senator Hollings to a culture of corruption exemplified by “Kenny Boy” and “cash-and-carry government,”<sup>23</sup> Mr. Lay expressed “profound sadness about what . . . happened to Enron, its current and former employees, retirees, shareholders and other stakeholders.”<sup>24</sup> He further stated:

I am deeply troubled about asserting these rights, because it may be perceived by some that I have something to hide. But after agonizing consideration, I cannot disregard my counsel’s instruction. Therefore, I must respectfully decline to answer, on Fifth Amendment grounds, all of the questions of this committee and subcommittee and those of any other congressional committee and subcommittee . . . . I respectfully ask you not to draw a negative inference because I am asserting my Fifth Amendment constitutional protection on instruction of counsel.<sup>25</sup>

Immediately thereafter, Mr. Lay was excused.<sup>26</sup>

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* On the day of Mr. Lay’s congressional appearance, the Washington Post ran an editorial captioned “In Defense of Kenneth Lay.” Editorial, *In Defense of Kenneth Lay*, WASH. POST, Feb. 12, 2002, at A24. The editorial warned that Mr. Lay’s upcoming appearance would “serve three very critical purposes: Getting senators on TV, getting senators on TV and getting senators on TV.” *Id.* The editorial went on to state:

Mr. Lay isn’t a sympathetic figure; nor are the Enron executives who were dragged up to Capitol Hill by a House subcommittee to take the Fifth last week. But the attractiveness of the witness is not the issue. Congress should not be forcing any witnesses to testify solely in order to have television cameras filming their refusals. The whole idea of congressional hearings is that they elicit information that can then be used for legislating. When members know that a witness is not going to provide information, there is no legitimate purpose in creating a spectacle. The idea is for the members to appear to be holding the

More recently, and at the other end of the spectrum in terms of the current procedure followed by a committee when confronted with the historically familiar ritual of having a witness invoke his Fifth Amendment privilege at a hearing in front of television cameras, was the appearance of Dr. Samuel Waksal in June 2002 before the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee.<sup>27</sup> On June 13, 2002, that subcommittee held a hearing to examine whether ImClone Systems, Inc. ("ImClone"), a biotechnology company, had misled the Food and Drug Administration when seeking approval of a new drug to treat colorectal cancer.<sup>28</sup> One of the witnesses subpoenaed to appear was Dr. Waksal, who had been arrested on insider trading charges the previous day.<sup>29</sup>

After a panel consisting of two witnesses testified, the committee's chair, Representative James Greenwood (R-PA), called Dr. Waksal.<sup>30</sup> Upon being sworn, Dr. Waksal advised the subcommittee that he intended to assert his "constitutional rights and respectfully decline to

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witnesses' feet to the fire, and to impute guilt to them through their refusal to answer questions. That may be fun for the members, but it tarnishes an important constitutional protection. There are, after all, legitimate reasons why an innocent—or largely innocent—person might decline to testify under the current circumstances.

*Id.*

27. The invocation of the Fifth Amendment privilege against self-incrimination before congressional committees gained familiarity in the 1950s in connection with hearings designed to expose Communists and their associates. See Ellen Schrecker, "Congressional Committees and Unfriendly Witnesses," available at <http://www.english.upenn.edu/~afilreis/50s/schrecker-age.html>. Following the suicide of a witness called to testify in connection with those hearings, however, the House of Representatives changes its rules to "accommodate the request of people subpoenaed to testify at committee hearings to have cameras and microphones turned off during their testimony. In some cases, lawmakers excused individuals who cited their Fifth Amendment right against incriminating themselves from appearing in public at all." Katheryne Kranhold, *Taking the Fifth Before Congress Hasn't Always Been a Public Affair*, WALL ST. J., Feb. 13, 2002, at B1. During the Watergate hearings in the 1970s, witnesses were not asked to appear at public hearings if they were going to assert their rights. *Id.* at B4. More recently, in connection with the Iran-Contra scandal in the 1980s, witnesses invoked the privilege in public. See Sarah Brown, *Pleading the Fifth*, BBC NEWS, Feb. 5, 2002, available at <http://news.bbc.co.uk>. In 1997 the House of Representatives changed the rule governing the public invocation of the privilege. Kranhold, *supra*.

28. See Andrew Pollack, *Ex-Chief of ImClone Refuses to Testify To Congress About Testing of Drug*, N.Y. TIMES, June 13, 2002, at C1.

29. See Ben White, *Former ImClone CEO Charged*, WASH. POST, June 13, 2002, at A1.

30. *Hearing of the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee*, June 13, 2002, available at LEXIS, Federal News Service [hereinafter "Transcript II"] .

answer.”<sup>31</sup> The following colloquy then ensued between Chairman Greenwood and Dr. Waksal:

REP. GREENWOOD: We thank you, sir. We respect your right to do so. But let me be clear, Dr. Waksal, are you refusing to answer the question on the basis of the protections afforded to you under the 5th Amendment to the United States Constitution?

DR. SAMUEL WAKSAL: Yes.

REP. GREENWOOD: And, Dr. Waksal, do you intend to invoke your 5th Amendment rights in response to any and all questions posed to you here today?

DR. SAMUEL WAKSAL: Yes.

REP. GREENWOOD: Okay. Then you are excused from the witness table at this time, but I advise you that you remain subject to the processes of this committee and, if this committee needs such, then we may recall you, sir.

DR. SAMUEL WAKSAL: Thank you.

REP. GREENWOOD: Okay. You're excused, sir.<sup>32</sup>

Less than two weeks after the ImClone hearing, WorldCom Inc. (“WorldCom”), the country’s second largest telecommunications company, announced that “it had improperly accounted for \$3.8 billion in expenses.”<sup>33</sup> Days later, the SEC charged WorldCom with defrauding investors, and the familiar initiation of probes by the Justice Department and congressional committees commenced.<sup>34</sup> On July 8, 2002, WorldCom’s founder and ousted Chairman, Bernard J. Ebbers, and its former Chief Financial Officer, Scott D. Sullivan, were subpoenaed to testify before the House Financial Services Committee.<sup>35</sup> They invoked their Fifth Amendment privilege against self-incrimination and declined

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31. *Id.*

32. *Id.* On August 7, 2002, Dr. Waksal was indicted on charges of bank fraud, perjury, insider trading, forging a signature, and destroying records in an effort to obstruct a federal investigation. Andrew Pollack, *U.S. Adds Charges Against Ex-Chief of Drug Company*, N.Y. TIMES, Aug. 8, 2002, at A1; Ben White & Justin Gillis, *Former ImClone Chief Indicted*, WASH. POST, Aug. 8, 2002, at E1. On October 15, 2002, Dr. Waksal pleaded guilty to six of the thirteen charges against him. *See Ex ImClone Boss Admits Fraud*, Oct. 15, 2002, available at <http://news.bbc.co.uk/1/hi/business/2330649.stm>.

33. Yuki Noguchi & Renae Merle, *WorldCom Says Its Books Are Off By \$3.8 Billion*, WASH. POST, June 26, 2002, at A1. *See also* John Porretto, *WorldCom at Risk of Bankruptcy*, FRESNO BEE, June 27, 2002, at A1.

34. *See* Christopher Stern & Yuki Noguchi, *SEC Charges WorldCom With Fraud*, WASH. POST, June 27, 2002, at A1; P.J. Huffstutter, Alex Pham & Jube Shiver, *Congress Subpoenas 4 in WorldCom Scandal*, L.A. TIMES, June 28, 2002, at A1.

35. *See* Huffstutter, Pham & Shiver, *supra* note 34.

to testify.<sup>36</sup> Regarding Mr. Ebbers, who sat with a panel consisting of several other witnesses,<sup>37</sup> it was reported in the press that “[o]ne representative after another used him as an unwilling prop, a symbol of pretty much everything that ails America—greed, deceit and a callous disregard for the less-powerful.”<sup>38</sup>

In the past year, and as illustrated above, the emergence of corporate accounting scandals<sup>39</sup> has transformed the “humdrum legislative process into made-for-TV melodrama.”<sup>40</sup> Tomorrow, congressional oversight may involve other areas of commerce or the operations of

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36. See Jonathan Krim & Christopher Stern, *2 Key WorldCom Witnesses Silent*, WASH. POST, July 9, 2002, at A1. On July 21, 2002, WorldCom filed for bankruptcy, reportedly “the largest such filing in U.S. history.” Christopher Stern & Carrie Jackson, *WorldCom Files Record Bankruptcy Case*, WASH. POST, July 22, 2002, at A1. On August 1, 2002, Mr. Sullivan and David F. Myers, WorldCom’s former controller, were charged with executing a multi-billion dollar accounting fraud that allegedly led to the company’s bankruptcy. Kurt Eichenwald, *2 Ex-Officials at WorldCom Are Charged in Huge Fraud*, N.Y. TIMES, Aug. 2, 2002, at A1.

37. See Press Release, Oxley Releases WorldCom Witness List (July 5, 2002), available at <http://financialservices.house.gov/news.asp>. When invoking his privilege against self-incrimination, Mr. Ebbers, in his prepared remarks, also alluded to the fact that he was “proud of the work that [he] did at WorldCom” and noted that “despite its recent problems WorldCom continue[d] to be a valuable company that provides important services to many Americans and to the United States government.” *Panel I of a Hearing of the House Financial Services Committee*, July 8, 2002, available at LEXIS, Federal News Service [hereinafter “Transcript III”]. These remarks prompted some committee members to question whether Mr. Ebbers had waived his privilege against self-incrimination and should be held in contempt for failure to respond to the committee’s inquiries. *Id.*

38. Peter S. Goodman, *On the Hill, a Taciturn Ebbers, Former WorldCom CEO’s Silence Enrages Some Committee Members*, WASH. POST, July 9, 2002, at E1. For example, Representative Sue Kelly (R-NY) told Mr. Ebbers: “I think you throw a terrible burden on the committee by your being uncooperative, and I think you certainly demonstrate to the single moms and to the families and to the rest of America that it may be OK for somebody to try to get by. That’s not a model we want our kids to know about. It’s not the right thing.” Transcript III, *supra* note 37. In a similar vein, Representative Gary Ackerman (D-NY) caustically remarked to Mr. Ebbers:

It seems to me that there are thousands of people in this country who believe that you have ruined their lives and the lives of their children and their families. And it seems to me that there are probably millions of people in this country that are attributing to you a major role in undermining the public’s faith in the free market system. What I would like to know is a simple question: Do you sleep well at night? Mr. Ebbers?

*Id.*

39. See Christopher Stern, *House Committee To Question Analyst In WorldCom Scandal*, WASH. POST, July 8, 2002, at A8 (identifying a series of multi-billion dollar scandals involving Enron, Global Crossing Ltd., Xerox Corp., and Adelphia Communications).

40. Jayne O’Donnell, *Rep. Tauzin Turns Business Scandals Into Must-See TV*, USA TODAY, July 26, 2002, at 1B.

executive branch agencies or departments. Whatever the case may be, in many instances, witnesses will continue to invoke their privilege against self-incrimination and decline to testify, thereby frustrating the investigative mission of congressional committees.<sup>41</sup>

This Article explores some of the options available to a witness who is subpoenaed to appear before a congressional committee, has indicated he will invoke his Fifth Amendment privilege against self-incrimination, and is not interested in participating in a political spectacle at his expense. The Article is divided into four parts. First, the Article discusses Congress's power to investigate, to compel witnesses to testify through the issuance of subpoenas, and to hold recalcitrant witnesses in contempt. The Article then reviews the Fifth Amendment privilege against self-incrimination and Congress's power to confer immunity on a witness who has a valid Fifth Amendment privilege. The Article goes on to discuss how the requirement of due process, also found in the Fifth Amendment, applies to congressional investigations. Next, the Article addresses the application of the Fourth Amendment to congressional investigations. Finally, the Article concludes with a discussion of some of the options available to a witness subpoenaed to testify before a congressional committee who has indicated he will assert his Fifth Amendment privilege.

## II. CONGRESSIONAL INVESTIGATIONS

Under Article I, Section I of the Constitution, “[a]ll legislative Powers” are vested in Congress.<sup>42</sup> Inherent in Congress's authority to legislate

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41. Throughout this Article, references to the term committee also encompass a subcommittee.

42. U.S. CONST. art. I, § 1. *See generally* *Loving v. United States*, 517 U.S. 748, 758 (1996) (“lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (“It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”).

under Article I is the power to investigate.<sup>43</sup> The power to investigate covers

the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate for the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution.<sup>44</sup>

Furthermore, “when Congress asserts its power to investigate, courts may not examine Congress’s motives for launching an investigation, nor may they hold an investigation unconstitutional because it results in no legislation.”<sup>45</sup> But this broad investigative power, which “traces back to the British Parliament,”<sup>46</sup> has some limits.<sup>47</sup> For example,

[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . [n]or is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for

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43. See *Eastland v. United States Serviceman’s Fund*, 421 U.S. 491, 504 (1975) (“the power to investigate is inherent in the power to make laws”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (Congress’s power “to conduct investigations is inherent in the legislative process”); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function.”). See also J. Richard Broughton, *Paying Ambition’s Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 WHITTIER L. REV. 797, 803 (2000) (“Nowhere in Article I does the text grant Congress an explicit power to conduct investigations. However, the *structure* of the text, and the legislative power in general, fairly imply such authority where it is part of Congress’s effort to carry out other enumerated legislative powers.”).

44. *Barenblatt v. United States*, 360 U.S. 109, 111 (1958); *Watkins*, 354 U.S. at 187 (recognizing that the “power [to investigate] is broad”).

45. Howard R. Sklamberg, *Investigation Versus Prosecution: The Constitutional Limits on Congress’s Power to Immunize Witnesses*, 78 N.C. L. REV. 153, 185 (1999) (citations omitted).

46. *Id.* at 181. See R.S. Ghio, Note, *The Iran-Contra Prosecutions and the Failure of Use Immunity*, 45 STAN. L. REV. 229, 230 (1992) (“The exercise of investigative powers by legislative bodies has its roots in English and colonial history; the British House of Commons, for instance, asserted its investigative powers as early as the 16th century.”). See also James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159 (1926) (“A legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivaling most legislative institutions in the antiquity of its origin.”).

47. *Barenblatt*, 360 U.S. at 111.

the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.<sup>48</sup>

The power to investigate can be delegated by Congress to committees and subcommittees.<sup>49</sup> In *Wilkinson v. United States*,<sup>50</sup> the Court identified the following relevant factors when ascertaining whether congressional investigatory authority has been properly asserted: (i) the investigation of the subject matter area must be authorized by Congress; (ii) the investigation must be pursuant to a valid legislative purpose; and (iii) the inquiries at issue must be pertinent to the subject matter under investigation by Congress.<sup>51</sup>

To effect this investigative power, committees and subcommittees can depose witnesses,<sup>52</sup> issue subpoenas,<sup>53</sup> and hold hearings.<sup>54</sup> Through the issuance of subpoenas,<sup>55</sup> each House of Congress has the power<sup>56</sup>

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48. *Watkins*, 354 U.S. at 187; *Barenblatt*, 360 U.S. at 112 ("Congress, in common with all branches of the Government, must exercise its powers subject to limitations placed by the Constitution on governmental action, more particularly . . . the relevant limitations of the Bill of Rights.").

49. See *Eastland*, 421 U.S. at 505; *Watkins*, 354 U.S. at 200-01.

50. 365 U.S. 399 (1961).

51. *Id.* at 408-09. See Thomas E. Evans III, Comment, *Executive Privilege and the Congress: Perspectives and Recommendations*, 23 DEPAUL L. REV. 692, 694 (1974) ("First, there must be a subject matter for the inquiry. Second, the investigation must be authorized by Congress. Third, the legislature must have a valid legislative purpose which it is pursuing.").

52. Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry*, CRS Report for Congress, Aug. 1, 1995, at CRS-7 (noting that "with more frequency in recent years, congressional committees have utilized staff-conducted depositions as a tool in exercising the investigatory power.") (citation omitted).

53. See *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (The justification for the subpoena power is that "[e]xperience has taught that mere requests for . . . information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.").

54. See Louis Fisher, *Congress as Grand Inquest*, available at [www.ou.edu/special/albertctr/extensions/fall98/fisher.html](http://www.ou.edu/special/albertctr/extensions/fall98/fisher.html).

55. There are two types of subpoenas: (i) a subpoena ad testificandum, which commands the person to appear at a certain place and time and give testimony, and (ii) a subpoena duces tecum, which commands the production of papers, books, or things. See BLACK'S LAW DICTIONARY 1426 (6th ed. 1990).

56. See *Exxon Corp. v. Fed. Trade Comm'n*, 589 F.2d 582, 592 (D.C. Cir. 1978) ("There is no doubt that the subpoena power may be exercised on behalf of Congress by either House . . . and that the subpoenas issued by committees have the same authority as if they were issued by the entire House of Congress from which the committee is drawn."). Some maintain that "[a]lthough both the judicial and the legislative use of subpoenas serves vital interests, the legislative need is the more essential of the two, since initially more interests are involved in a legislative determination than are involved in a court decision." Evans,

“to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.”<sup>57</sup> So long as the subject under inquiry is “related to, and in furtherance of, a legitimate task of the Congress,”<sup>58</sup> this investigative tool “has long been held to be a legitimate use by Congress of its power to investigate.”<sup>59</sup>

But what if the witness refuses to comply with the subpoena, either by ignoring it, or by appearing but refusing to answer questions pertinent to the committee’s investigation?<sup>60</sup> Or what if the witness asserts his Fifth Amendment privilege against self-incrimination? It is to an examination of those questions that we now turn.

#### A. *The Contempt and Other Powers of Congress to Enforce Subpoenas*

Generally speaking, Congress can seek to enforce a subpoena against a private party through its inherent or statutory contempt powers<sup>61</sup> or, in the case of a Senate subpoena, a civil action.<sup>62</sup> Civil or common law contempt, which has fallen out of favor, essentially involves either House of Congress arresting, trying, and punishing a witness under its inherent contempt power.<sup>63</sup> Under this procedure, a recalcitrant witness “was committed to the Sergeant-at-Arms of the respective House until he was willing to ‘purge’ himself of his contempt by supplying the requested

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*supra* note 51, at 700 n.44.

57. *McGrain*, 273 U.S. at 160.

58. *Watkins*, 354 U.S. at 187. *See McGrain*, 273 U.S. at 177 (holding Congressional inquiry must pertain to subjects “on which legislation could be had”); *cf. In re Chapman*, 166 U.S. 661 (1897) (holding Senate acted with valid legislative purpose in propounding questions relevant to inquiry regarding corruption of Senators considering tariff legislation).

59. *Eastland*, 421 U.S. at 504.

60. *See generally* Oren C. Herwitz & William G. Mulligan, Jr., *The Legislative Investigating Committee*, 33 COLUM. L. REV. 1, 17 (1933) (“[T]he effectiveness of [a committee’s] investigation will largely depend upon the extent to which recalcitrant witnesses may be punished for their contumacy.”).

61. *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, § 8.2, at 606-08 (2d ed. 1992).

62. *See* Michael B. Rappaport, *Replacing Independent Counsels With Congressional Investigations*, 148 U. PA. L. REV. 1595, 1616-18 (2000).

63. Glenn A. Beard, Note, *Congress v. The Attorney-Client Privilege: A “Full and Frank” Discussion*, 35 AM. CRIM. L. REV. 119, 120 (1997). *See generally* ROTUNDA & NOWAK, *supra* note 61, § 8.3, at 608-09 (discussing procedure followed in the case of a citation for nonstatutory contempt).

information, but his confinement could not extend beyond the term of the session, and could always be challenged by habeas corpus.<sup>64</sup>

In 1857 Congress determined that “more severe sanctions were necessary to compel testimony” and passed the forerunner of the present criminal contempt statute, now codified at 2 U.S.C. § 192 (“Section 192”).<sup>65</sup> By doing so, “Congress invoked the aid of the federal judicial system in protecting itself against contumacious conduct.”<sup>66</sup>

Section 192<sup>67</sup> may be violated in one of two ways.<sup>68</sup> First, a person

64. *United States v. Fort*, 443 F.2d 670, 676 (D.C. Cir. 1970). *See also* James J. Mangan, Note, *Contempt for the Fourth Estate: No Reporter's Privilege Before a Congressional Investigation*, 83 GEO. L.J. 129, 134-35 (1994) (discussing process).

65. *Fort*, 443 F.2d at 676. One commentator has noted:

The statutory mechanism was created and relied upon to avoid the highly time-consuming, chaotic and controversial process of trying a witness at the bar of the House. Congress was also plagued by the problem of securing appropriate quarters in which to confine the contemptuous witness, as well as the negative publicity surrounding summary incarceration.

Jonathan P. Rich, Note, *The Attorney-Client Privilege In Congressional Investigations*, 88 COLUM. L. REV. 145, 149 (1988) (citations omitted). *See also* Note, *The Power of Congress To Investigate and To Compel Testimony*, 70 HARV. L. REV. 671, 675-76 (1957) (“Although Congress possesses inherent power to punish for contempt without resort to the courts, the power of the House of Representatives to imprison a witness and to hold him in confinement terminates upon adjournment. It was to overcome this limitation that the first congressional-contempt statute was enacted.”).

66. *Russell v. United States*, 369 U.S. 749, 755 (1961); *Deutch v. United States*, 367 U.S. 456, 471 (1961). As has been noted, however, “judicial proceedings [emanating from a prosecution under Section 192] are intended as an alternative method of vindicating the authority of Congress to compel the disclosure of facts which are needed in the fulfillment of the legislative function.” *United States v. Bryan*, 339 U.S. 323, 327 (1950). *See* ROTUNDA & NOWAK, *supra* note 61, § 8.4(a), at 611 (“This statute is merely supplementary to the nonstatutory power of Congress; it does not preempt the field.”) (citation omitted). Furthermore, “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. 1299, 1308 (M.D. Fla. 1977).

67. Section 192 states:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully 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.

*See Russell*, 369 U.S. at 752 n.8 (discussing changes to 2 U.S.C. § 192).

68. *United States v. Murdock*, 290 U.S. 389, 397 (1933) (citing § 192 and noting that “[t]wo distinct offenses are described in the disjunctive”); Note, *supra* note 65, at 676

may be under default “by willfully refraining, without adequate excuse, from appearing in response to a lawful summons [or] by appearing and then wilfully terminating attendance before being excused.”<sup>69</sup> The second method by which Section 192 may be violated occurs when a person “who, having appeared, refuses to answer any question pertinent to the question under inquiry.”<sup>70</sup> Under the procedural mechanism found in Section 194,<sup>71</sup> the President of the Senate or the Speaker of the House certifies the conduct constituting the contempt to a United States attorney, “whose duty it shall be to bring the matter before the grand jury for its action.”<sup>72</sup> In any “ensuing prosecution, the witness

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(“[The] statute currently provides that a witness may be punished as a misdemeanor if he ‘willfully makes default’ by failing to respond to a subpoena, or if he ‘refuses to answer any question pertinent to the question under inquiry.’”) (citation omitted).

69. *United States v. Josephson*, 165 F.2d 82, 85 (2d Cir. 1947). See *Townsend v. United States*, 95 F.2d 352, 357 (D.C. Cir. 1938) (“[A] witness is in default if he fails not only to appear but fails to attend, following appearance, so long as the committee requires his attendance.”).

70. 2 U.S.C. § 192. See *Livacoli v. United States*, 294 F.2d 207, 208 (D.C. Cir. 1961) (recognizing “that the intent essential to constitute an offense under these two clauses is the same in nature—a deliberate, intentional failure, without more, in each case”). With respect to a violation of the second prong of the statute, it is immaterial whether the witness appeared before the committee or subcommittee voluntarily, or pursuant to a subpoena. *Josephson*, 165 F.2d at 86.

71. 2 U.S.C. § 194 (2000). Section 194 states in part:

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 joint committee . . . and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

72. *Id.* One commentator has observed:

Members of Congress have interpreted this statute as imposing a ministerial obligation upon the U.S. attorney to seek a grand jury indictment. As such, the statute arguably constitutes an unconstitutional abrogation of prosecutorial discretion. Congress may not direct a U.S. attorney to seek a criminal indictment—a U.S. attorney, a purely executive officer, may not be converted into a congressional agent by statute.

Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 676 (1977) (citation omitted). See also Mangan, *supra* note 64, at 136 (“[A] conflict may arise if the U.S. attorney determines that a matter is not worthy of prosecution. The U.S. attorney could defend a decision not to prosecute

may present any defenses to the subpoena, including applicable privileges.<sup>73</sup>

A third method available for enforcing a subpoena is found under the Ethics in Government Act (the “Act”) passed by Congress in 1978.<sup>74</sup> Under the Act, the Senate or any of its committees or subcommittees may bring a civil action against any person who fails to comply with one of its subpoenas.<sup>75</sup> If an order is obtained from a court directing the party to comply with the subpoena and the party disobeys the order, the court may hold him in contempt.<sup>76</sup>

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by reference to prosecutorial discretion and separation of powers.”); Rappaport, *supra* note 62, at 1616 (“Because it is often difficult to prevail in a criminal prosecution, the U.S. Attorney could argue that it is not worth devoting resources to prosecution.”); Rosenberg, *supra* note 52, at CRS-15 (“It remains unclear whether the ‘duty’ of the U.S. Attorney to present the contempt to the grand jury is mandatory or discretionary, since the sparse case law that is relevant to the question provides conflicting guidance.”).

73. Todd D. Peterson, *Prosecuting Executive Branch Officials For Contempt of Congress*, 66 N.Y.U. L. REV. 563, 568 (1991). See *Sanders v. McClellan*, 463 F.2d 894, 899 (D.C. Cir. 1972); *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983). Two commentators have suggested that there are

at least two ways that a recalcitrant witness may mitigate the potentially harsh consequences of non-compliance in advance. First, the witness may stipulate with the prosecution that he will comply with the subpoena if ultimately adjudged guilty, which may allow the court to stay and suspend any eventual sentence. Second, the witness may be able to convince Congress to exercise its inherent contempt power rather than forward the case to a United States Attorney for prosecution. This inherent contempt power works very much like a civil enforcement mechanism. It must be stressed, however, that both of these mitigating schemes are dependent upon the voluntary cooperation of Congress, the prosecution and/or the courts.

Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means By Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 76-77 (1986) (citations omitted).

74. 2 U.S.C. § 288d (2000); 28 U.S.C. § 1365(a)-(b) (2000). See *In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238-40 (D.C. Cir. 1981); Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17 (D.D.C. 1994).

75. 28 U.S.C. § 1365(a). Such an action, however, cannot be brought against “an officer or employee of the executive branch of the Federal Government acting within his or her official capacity.” *Id.* See Brand & Connelly, *supra* note 73, at 76 (noting that “passage of the Act buttresses the conclusion that civil enforcement is not available outside the context of Senate subpoenas directed at private persons”).

76. 28 U.S.C. § 1365(b). Unlike the criminal contempt statute, this “civil enforcement mechanism . . . eliminates the requirement that a witness face criminal charges in order to challenge congressional process.” Stephen G. Dormer, Note, *The Not-So Independent Counsel: How Congressional Investigations Undermine Accountability Under the Independent Counsel Act*, 86 GEO. L.J. 2391, 2395 (1994); *In re the Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d at 1238 (noting that under inherent contempt power and criminal statutory contempt mechanism, there was no means by which a witness could judicially challenge the “the legality of the inquiry or procedures,

The discussion above addresses Congress's power to enforce a subpoena against a recalcitrant witness. Below, the Article discusses what occurs if the witness complies with the subpoena, but invokes his privilege against self-incrimination. This conduct raises two fundamental questions. First, is the invocation of this privilege recognized in the congressional setting? Second, if the privilege is available, is the committee or subcommittee left powerless to elicit testimony? The answers to these questions are found below.

*B. Assertion of the Fifth Amendment Privilege in Congressional Investigations and the Power to Immunize Witnesses*

Until the middle of the twentieth century, congressional investigations and oversight<sup>77</sup> "focused on the legitimacy of Congress's power as an investigator and the limits imposed on that authority in the separation of powers scheme."<sup>78</sup> Litigation involving the House Committee on Un-American Activities during the 1940s and early 1950s resulted in the recognition that, although Congress may have broad investigatory powers, those powers do not nullify the constitutional rights of citizens.<sup>79</sup>

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and then purge himself of his contempt by testifying if his contentions were not judicially upheld") (quoting *Fort*, 443 F.2d at 677)). Additionally, because this mechanism "provides a civil remedy, the Senate need not prove its case beyond a reasonable doubt as it would in a criminal trial. The Senate can also bring the action itself rather than having to rely on the executive branch." Rappaport, *supra* note 62, at 1617.

77. Congressional oversight, it has been noted, is guided by three theories:

The first is that the public is entitled to be informed of the workings of its government. Congress must therefore be able to determine how federal laws are operating in order to be able to report to its constituents. Second, Congress must be able to investigate in order to determine whether remedial legislation is needed. Third, Congress's exercise of oversight protects the liberties of the American people by serving as a check on unbridled executive power. Congress, by acquainting itself with the acts and dispositions of the administrative agents of the Government, will be able to uncover corruption, waste, inefficiency, and rigidity and to ensure that the President is enforcing the laws as enacted by Congress.

Ronald L. Claveloux, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1339 (1983) (footnotes omitted). See also Ghio, *supra* note 46, at 231-33 (discussing purpose of congressional investigations).

78. Broughton, *supra* note 43, at 807. See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1881) (committee investigation "clearly judicial" and no legislation could stem from it); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (providing that the House has power to punish for contempt private citizen whom it was investigating for attempting to bribe one of its members).

79. Broughton, *supra* note 43, at 808-10. See, e.g., *Watkins*, 354 U.S. at 188 (In congressional investigations, "[w]itnesses cannot be compelled to give evidence against

Although the Self-Incrimination Clause of the Fifth Amendment mentions incrimination only in the context of a “criminal case,”<sup>80</sup> it is well established that a witness also may invoke the privilege before a congressional committee.<sup>81</sup> Furthermore, when ascertaining the meaning of the Self-Incrimination Clause, the Supreme Court has observed that the clause “must have a broad construction in favor of the right which it was intended to secure.”<sup>82</sup> Thus, whether a witness’s

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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.”); *Quinn v. United States*, 349 U.S. 155 (1955) (valid assertion of privilege against self-incrimination serves to limit investigative committee’s questioning of witness).

80. The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he 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; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. The roots of the privilege against self-incrimination are found in medieval English common law. See Christine L. Reimann, *Fencing the Fifth Amendment in Our Own Backyard*, 7 PACE INT’L L. REV. 177, 178-79 (1995); Kevin Urick, *The Right Against Compulsory Self-Incrimination in Early American Law*, 20 COLUM. HUM. RTS. L. REV. 107, 108-15 (1988). English common law courts applied the privilege to defendants and then to witnesses by the early eighteenth century. *United States v. Gecas*, 120 F.3d 1419, 1451 (11th Cir. 1997). In the second half of the seventeenth century, American “colonists began to recognize the privilege as a common-law right. This recognition invariably coincided with movement by the British administrators to repress political dissidence.” *Id.* at 1453. Soon after declaring their independence, eight of the thirteen colonies incorporated a privilege against self-incrimination in their state constitutions. *Id.* at 1454. Then, in 1791, the privilege against self-incrimination became part of the federal Bill of Rights. *Quinn*, 349 U.S. at 161.

81. See *Quinn*, 349 U.S. at 162-63 (“If an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected both by the committee and by a court in a prosecution under Section 192.”); *United States v. DiCarlo*, 102 F. Supp. 597, 602 (N.D. Ohio 1952) (“That the privilege . . . extends to witnesses appearing before Congressional committees is well settled.”) Although the first reported case discussing the applicability of the Fifth Amendment privilege to congressional investigations appears to be *United States v. Abe*, 95 F. Supp. 991, 992 (D. Haw. 1950), see *Watkins*, 354 U.S. at 196 n.27, “Congress has long recognized that the privilege against self-incrimination applies to its investigations.” *Quinn*, 349 U.S. at 157 n.23.

82. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). Accord *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Quinn*, 349 U.S. at 162. As the Court explained in *Counselman*:

It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal

“admissions by themselves would support a conviction under a criminal statute is immaterial”,<sup>83</sup> the privilege extends to admissions “which would furnish a link in the chain of evidence needed to prosecute [the witness] for a federal crime.”<sup>84</sup>

Congress, of course, cannot hold a witness in contempt simply because the witness invokes his privilege against self-incrimination.<sup>85</sup> In order to compel testimony from such a witness, Congress must provide the witness with immunity.<sup>86</sup> Under the immunity order conferred by 18 U.S.C. § 6002,<sup>87</sup> “no testimony or other information . . . (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”<sup>88</sup> As illustrated by the convictions of Lieutenant Colonel Oliver North<sup>89</sup> and Rear Admiral John Poindexter<sup>90</sup> in the Iran-Contra matter, which were ultimately reversed and remanded by the United States Court of Appeals for the District of

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prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

147 U.S. at 562.

83. *Blau v. United States*, 340 U.S. 159, 161 (1950).

84. *Hoffman*, 341 U.S. at 486. *Accord Emspak v. United States*, 349 U.S. 190, 200 (1955). *See also Starkovitch v. United States*, 231 F.2d 411, 412 (9th Cir. 1956) (holding that witness before subcommittee “had reasonable ground to fear that his answer might furnish a link in the chain of evidence needed to prosecute him under the Smith Act”).

85. *See Ronald F. Wright, Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 413 (1995) (“The government cannot compel a witness in a non-criminal proceeding, such as a civil trial or congressional hearing, to provide evidence that would tend to expose the witness to later criminal charges.”) (citation omitted); Ghio, *supra* note 46, at 235-36 (“Rather than forego the testimony of . . . witnesses [whose testimony would incriminate them], Congress developed immunity statutes to protect the witness from subsequent use of his testimony in criminal proceedings.”).

86. The current statute, which provides for use and derivative use immunity, is found at 18 U.S.C. §§ 6002, 6005 (2000). *See Application of U.S. Senate Select Comm. on Presidential Campaign Activities*, 361 F. Supp. 1270 (D.D.C. 1973).

87. 18 U.S.C. § 6002.

88. *Id.* *See generally* *Braswell v. United States*, 487 U.S. 99, 117 (1988) (“Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively.”); *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (“[I]mmunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.”).

89. *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990).

90. *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991).

Columbia Circuit,<sup>91</sup> “a congressional committee which bestows immunity on a witness in order to overcome the Fifth Amendment’s protection against self-incrimination and coerce testimony may effectively nullify any possible criminal prosecution of that witness.”<sup>92</sup>

With these principles in mind, we now turn to how the constitutional right to due process impacts the procedures governing congressional hearings.

### III. DUE PROCESS AND CONGRESSIONAL INVESTIGATIONS

Courts have recognized that a witness’s right to due process<sup>93</sup> in the context of a congressional investigation differs significantly from that of a criminal investigation.<sup>94</sup> For example, witnesses appearing before congressional committees typically are not afforded the opportunity to present evidence or to cross-examine other witnesses who they believe may have defamed them.<sup>95</sup>

But this is not to say that due process has no place in congressional investigations. In particular, regarding hearings and holding witnesses in contempt, “when Congress seeks to enforce its investigating authority

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91. After the cases were remanded, Independent Counsel Lawrence E. Walsh moved to dismiss the prosecutions because he could not meet the test set forth by the court of appeals to ensure that no use whatsoever was made of the immunized testimony. Rosenberg, *supra* note 52, at CRS-12.

92. Miller, *supra* note 72, at 688 (citation omitted). One commentator has argued that unless the witness is going to testify in secret or the Attorney General endorses the grant of immunity, “as a general rule, Congress should have the power to immunize a witness only when doing so is ‘demonstrably critical’ to an investigation.” Sklamberg, *supra* note 45, at 198. See also Akhil Reed Amar, *Taking the Fifth Too Often*, N.Y. TIMES, Feb. 18, 2002, at A15 (“When Congress needs facts to determine whether existing laws are working and how they might be fixed, it often meets a Fifth Amendment stone wall. Congress can find the truth only if it gives witnesses sweeping immunity that then hinders the executive branch’s prosecutorial function.”).

93. The Fifth Amendment provides in part that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. While the concept of “due process” is elusive,

as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hannah v. Larche, 363 U.S. 420, 442 (1960).

94. See, e.g., *United States v. Fort*, 43 F.2d 670, 678-79 (D.C. Cir. 1970).

95. *Id.* See *Hannah*, 363 U.S. at 445 (“In the vast majority of instances, congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses.”) (citation omitted).

through the criminal process administered by the federal judiciary, the safeguards of criminal justice become operative.”<sup>96</sup> At this point, the question extends beyond “whether Congress, or the prosecutor, or even a judge might believe that the defendant is guilty of contempt; it is whether he has been accused and tried in full compliance with the transcending principles of fairness embodied in our Constitution and protected by our law.”<sup>97</sup>

This means that in a prosecution under Section 192, “fundamental fairness” requires that a witness be provided with sufficient information regarding the pertinency of questions propounded to the subject under inquiry so that the witness can determine whether he is within his rights in refusing to answer the questions.<sup>98</sup> Otherwise, a conviction under Section 192 in which a witness was not given a fair opportunity “to determine whether he was within his rights in refusing to answer . . . is necessarily invalid under the Due Process Clause of the Fifth Amendment.”<sup>99</sup> Similarly, the form in which a committee phrases a

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96. *Sacher v. United States*, 356 U.S. 576, 577 (1958). *Accord Flaxer v. United States*, 358 U.S. 147, 151 (1958) (“[C]ourts must accord to the defendant every right which is guaranteed to defendants in all other criminal cases.”) (quoting *Watkins v. United States*, 354 U.S. 178, 208 (1957); *Deutch v. United States*, 367 U.S. 455, 471 (1961)).

97. *United States v. Seeger*, 303 F.2d 478, 485 (2d Cir. 1962).

98. *Watkins*, 354 U.S. at 214-15. As one commentator explained:

[The Court in *Watkins*] held that the authorizing resolution of the House Committee on Un-American Activities which granted jurisdiction over “un-American propaganda . . . and all other questions in relation thereto” was too broad to be the basis for establishing the “question under inquiry” in a particular hearing and that due process required a more precise statement by the committee describing the nature of the current investigation and the manner in which the propounded questions were pertinent to that inquiry so that the witness might determine with reasonable certainty whether refusal to answer would subject him to a criminal penalty.

Note, *Congressional Investigations—Due Process Requires Congressional Committee to Furnish Witnesses More Precise Statements of Question Under Inquiry Than is Contained in Committee Authorizing Resolution*, 106 U. PA. L. REV. 124, 125 (1957) (citations omitted). See *Evans*, *supra* note 51, at 695 (“[Because] contempt . . . carries criminal penalties, it is incumbent upon the committee at the time of the refusal to relate to the uncooperative witness the relevancy of the request in view of the [subject] matter of the inquiry, or a contempt proceeding will fail on the basis of vagueness.”); *Rosenberg*, *supra* note 52, at CRS-38 (“[T]o satisfy both the requirement of due process as well as the statutory requirement that a refusal to answer be ‘wilful,’ a witness should be informed of the committee’s ruling on any objections he raises or privileges which he asserts.”).

99. *Watkins*, 354 U.S. at 215; *Sacher*, 356 U.S. at 577. (“Inasmuch as petitioner’s refusal to answer related to questions not clearly pertinent to the subject . . . the . . . subcommittee . . . had been authorized to take testimony, the conditions necessary to sustain a conviction for deliberately refusing to answer questions pertinent to the authorized subject matter of a congressional hearing are wanting.”); *Bart v. United States*,

question and issues rulings with respect to objections may be so vague that it would be a violation of due process to punish an individual for refusing to answer questions.<sup>100</sup>

In addition to the protections provided to witnesses appearing before congressional committees under the Due Process and Self-Incrimination Clauses of the Fifth Amendment, the Fourth Amendment also provides safeguards. These safeguards are discussed below.

#### IV. THE FOURTH AMENDMENT AND CONGRESSIONAL INVESTIGATIONS

It is well established that the protections against unreasonable searches and seizures found in the Fourth Amendment<sup>101</sup> apply to congressional investigations.<sup>102</sup> As noted by the court in *United States v. Fort*,<sup>103</sup> “an unreasonable search and seizure is no less illegal if conducted pursuant to a subpoena of a congressional subcommittee than if conducted by a law enforcement official.”<sup>104</sup> Notably, while courts have addressed challenges to congressional subpoenas for records on Fourth Amendment grounds,<sup>105</sup> there do not appear to be any reported

349 U.S. 219, 223 (1955) (“Because of the consistent failure to advise the witness of the committee’s position as to his objections, petitioner was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objection and compliance with a committee ruling.”). *See also* *Sweezy v. New Hampshire*, 354 U.S. 234, 254-55 (1957) (reversing contempt conviction for refusal to answer questions before a state legislative investigating committee on due process grounds).

100. *See* *Slagle v. Ohio*, 366 U.S. 259, 266 (1961) (holding under the Fourteenth Amendment that, under the circumstances, to conclude witnesses “willfully and contumaciously refused to answer . . . questions would deeply offend traditional notions of fair play and deprive them of due process”). *See generally* *Hutcheson v. United States*, 369 U.S. 599, 607-13 (1962) (rejecting argument that committee’s questioning of petitioner regarding matters germane to the state criminal charges pending against him violated the Fifth Amendment’s due process clause).

101. The Fourth Amendment states in part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. CONST. amend. IV. *See* *Horton v. California*, 496 U.S. 128, 133 (1990) (“A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.”).

102. *See* *Watkins*, 354 U.S. at 188; *In re Chapman*, 166 U.S. 661, 668-69 (1897). *See generally* ROTUNDA & NOWAK, *supra* note 61, § 8.5(c), at 708 (“The Fourth Amendment’s protections against unreasonable search and seizure apply to congressional investigations but the legislative subpoenas may be very broad in their inquiry and yet be upheld.”) (citations omitted).

103. 443 F.2d 670 (D.C. Cir. 1970).

104. *Id.* at 678. *Accord* *United States v. McSurely*, 473 F.2d 1178, 1193-94 (D.C. Cir. 1972).

105. *See, e.g.,* *McPhaul v. United States*, 364 U.S. 372, 382 (1960); *Shelton v. United States*, 404 F.2d 1292, 1299-1300 (D.C. Cir. 1968). Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 21-22 (1994). *In Bergman v. Senate Special Committee on*

cases on when, or if, a prolonged detention of a witness subpoenaed to appear before a congressional committee may, at a given point and depending on the circumstances, constitute an unreasonable seizure within the meaning of the Fourth Amendment.<sup>106</sup>

V. OPTIONS AVAILABLE TO A WITNESS WHO WILL BE INVOKING HIS FIFTH AMENDMENT PRIVILEGE AT A CONGRESSIONAL HEARING

Before addressing some of the options available to a witness who has been subpoenaed to appear before a congressional committee and has indicated that he will assert his Fifth Amendment privilege against self-incrimination, a brief discussion of the procedures governing congressional hearings is instructive. First, by way of background, a committee's chairman and staff "select the subject and timing, decide what will be said in the chair's opening statement, and select and sequence the witnesses."<sup>107</sup> Procedurally, a hearing commences with the chair calling the committee to order.<sup>108</sup> The chair then reads her opening statement, and if other members are attending the hearing, they also may deliver their own statements.<sup>109</sup> When this process is completed,

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*Aging*, 389 F. Supp. 1127 (S.D.N.Y. 1975), the court observed:

Materials subpoenaed by a Congressional committee in connection with an investigation must be produced in cases 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.

*Id.* at 1130.

106. In the context of a subpoena duces tecum issued by a grand jury, the Supreme Court observed in *United States v. Dionisio*, 410 U.S. 1 (1973), that the appearance compelled by such subpoena "is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." *Id.* at 9. But the Court also explained:

This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. . . . The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms to be regarded as reasonable.

*Id.* at 11 (citations omitted).

107. CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 153 (1989).

108. *Id.*

109. *Id.* at 153-54. As explained by Professor Tiefer, when there are several members present at a hearing, "a common pattern is for them to speak in order of descending party seniority, with alternation between parties, so that after the chair comes the ranking minority member, then the ranking majority member, and so on." *Id.* at 154. This procedure was aptly illustrated in the hearing before the Senate Commerce Committee involving Mr. Lay. See Transcript I, *supra* note 10.

witnesses (who may or may not be sworn)<sup>110</sup> are called to provide testimony, often prefaced by a prepared written<sup>111</sup> and oral statement.<sup>112</sup>

The second point about the conduct of hearings is that “congressional staffs normally have completed an extensive review of the facts before public hearings begin. Hearings, then, are held (often in front of television cameras) more for the sake of presenting, rather than gathering, the facts.”<sup>113</sup> Therefore, if a witness has elected to invoke his Fifth Amendment privilege with respect to the matter under inquiry, the committee is certainly well aware of this fact prior to any public hearing.<sup>114</sup>

Third, the hearing is most likely to be open.<sup>115</sup> There is also a good

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110. As explained by one commentator:

Not all committees swear their witnesses; some committees require that all witnesses be sworn. Most leave it to the discretion of the chair. If a committee wishes the potential sanction of perjury to apply, it should swear its witnesses, though false statements not under oath are subject to criminal sanctions.

Rosenberg, *supra* note 52, at CRS-34.

111. For example, the Rules of the Senate Committee on Commerce, Science, and Transportation provide that “[e]ach witness who is to appear before the Committee or any Subcommittee shall file with the Committee, at least 24 hours in advance of the hearing, a written statement of his testimony in as many copies as the Chairman of the Committee or Subcommittee prescribes.” Rule I.3. *See generally* Kathleen Wallman, *Preparing for a Congressional Hearing*, 10 CORP. COUNSEL Q. 11, 15 (1994) (discussing preparation of detailed written statement to submit for the record and script for oral statement at the hearing).

112. TIEFER, *supra* note 107, at 155. A witness typically is accorded the opportunity to make a statement before the questioning commences, although he has no right to do so. Rosenberg, *supra* note 52, at CRS-35. It has been noted, however, “that in [many] instances, the committee members’ ‘questions’ are not actually designed to elicit information from the witness. Rather, questioning is often more like speech-making designed to maximize camera time on the questioner to score political points against the opposition.” Jackson R. Sharman III, *Representing a Client in a Congressional Investigation*, WHITE-COLLAR CRIME RPTR., at 4 (May 1996).

113. Ghio, *supra* note 46, at 232 (citation omitted).

114. The Senate Commerce Committee, for example, was aware that Mr. Lay would be invoking his Fifth Amendment privilege against self-incrimination about two days prior to his scheduled appearance. *See* Transcript I, *supra* note 10 (“The committee was notified on Sunday night, February the 10th, that Mr. Lay would appear before the committee but assert his Fifth Amendment right against self-incrimination.”). Similarly, the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee was aware that Dr. Waksal would be asserting the privilege prior to his appearance. *See* Transcript II, *supra* note 30 (“Dr. Waksal authorized his counsel to advise the committee that he will rely on his constitutional right not to testify at today’s hearing.”).

115. As noted by Professor Tiefer:

In the nineteenth century, committees frequently held closed hearings, even when they intended eventually to publish the transcript and the report. Since then,

chance, depending on the amount of public interest associated with the matter under congressional scrutiny, that it will be televised.<sup>116</sup>

Finally, any contumacious behavior by a witness in response to a congressional subpoena is almost guaranteed to be addressed through the criminal contempt statute found in Section 192.<sup>117</sup> With these considerations in mind, what are some of the scenarios likely to confront, and options available to, a witness who has indicated that he will invoke his Fifth Amendment privilege against self-incrimination and who does not wish to participate in a public spectacle at his expense when invoking his constitutional right?

Generally, "a witness before a congressional committee must abide by the committee's procedures and has no right to vary them or to impose conditions upon his willingness to testify."<sup>118</sup> At an open hearing, this includes the presence of crowds, microphones, and television cameras.<sup>119</sup> The first step entails showing up in person and not by

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there has been a long trend from closed hearings (also called hearings in "executive session") to open ones. Steady pressure for open hearings ultimately resulted in Senate and House sunshine rules in the 1970s limiting when hearings could be closed. These rules require that a committee affirmatively vote to close a session. They restrict closings to particular grounds, such as that the testimony will defame persons or will concern national security.

TIEFER, *supra* note 107, at 160-61 (citations omitted).

116. See, e.g., Rule IV of the Rules of the Senate Committee on Commerce, Science and Transportation ("Public hearings of the full Committee, or any Subcommittee thereof, shall be televised or broadcast only when authorized by the Chairman and the ranking minority member of the full Committee.").

117. See Brand & Connelly, *supra* note 73, at 74 ("Although Congress' inherent power is still extant . . . it is . . . [Section 192] that is now almost exclusively used to punish witnesses for contempt of Congress."); Note, *The Power of Congress to Investigate and to Compel Testimony*, 70 HARV. L. REV. 671, 684 (1957) (noting that "in recent years Congress has relied exclusively upon statutory contempt proceedings") (citations omitted); Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 COLUM. L. REV. 416, 428 (1947) ("Although the House has power to punish recalcitrant witnesses for contempt without recourse to the courts, the usual sanction employed is prosecution under Title 2, section 192 of the United States Code.") (citations omitted).

118. *United States v. Orman*, 207 F.2d 148, 158 (3d Cir. 1953); *United States v. Costello*, 198 F.2d 200, 205 (2d Cir. 1952) (approving instruction which stated, in part: "The law is that a witness does not have the legal right to dictate the conditions under which he will or will not testify, or the conditions under which having appeared he will remain in attendance."); *Eisler v. United States*, 170 F.2d 273, 280 (D.C. Cir. 1948) ("Appellant could not impose his own conditions upon the manner of inquiry, and the trial court rightly instructed the jury to that effect.").

119. Note, *supra* note 65, at 683-84. See *United States v. Moran*, 194 F.2d 623, 627 (2d Cir. 1952) ("Opinions may differ as to whether [television cameras and photographers at hearing are] better calculated to achieve publicity for the investigators than to promote their investigations. But on the record . . . no facts have been proved which would justify

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holding that the tribunal was incompetent.”); *United States v. Hintz*, 193 F. Supp. 325, 331 (N.D. Ill. 1961) (“This court has no power to impose upon Congress, a coordinate branch of our government, either a proscription against or a prescription for radio, television, movies or photographs.”). In *United States v. Kleinman*, 107 F. Supp. 407, 408 (D.D.C. 1952), the court acquitted defendants of contempt on the grounds that the presence of television cameras and reporters at the hearing rendered their refusal to testify justified. Specifically, the court held:

In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all of these conditions. The concentration of all of these elements seems . . . necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again.

Under the circumstances . . . the refusal of the defendants to testify was justified and it is hereby adjudged that they are not guilty.

*Id.* Kleinman's rationale, however, has not been adopted by other courts. See *ROTUNDA & NOWAK*, *supra* note 61, § 8.5(b)(1), at 701.

120. See *Dennis v. United States*, 339 U.S. 162, 164 (1949) (discussing conviction under § 192 in which witness sent a representative but did not appear in violation of the subpoena). See also *Livacoli v. United States*, 294 F.2d 207, 209 (1961) (“Advice of counsel cannot immunize a deliberate, intentional failure to appear pursuant to a lawful subpoena lawfully served.”).

121. In the case of Dr. Samuel Waksal's appearance before the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee, this point was illustrated in the following remarks by Chairman Greenwood:

My understanding is that Dr. Waksal authorized his counsel to advise the committee that he will rely on his constitutional right not to testify at today's hearing. I believe that this privilege should be personally exercised before the members of the subcommittee as we have done in the past and that is why we have requested Dr. Waksal's appearance today, and I thank you for joining us, sir.

Transcript II, *supra* note 30. See *Hutcheson v. United States*, 369 U.S. 599, 619 (1962) (“[I]t is not until the question is asked that the interrogator can know whether it will be answered or will be met with some constitutional objection.”).

122. Prior to a scheduled hearing, committees routinely issue press releases identifying the panel or panels of witnesses who will be testifying. See, e.g., Press Release, Oxley Releases WorldCom Witness List (Jul. 5, 2002), available at <http://financialservices.house.gov/news.asp>.

### A. Scenario One

The first scenario involves the witness appearing at the hearing room where the committee will be holding its hearing and simply waiting to be called to the witness table. As illustrated by Mr. Lay's appearance,<sup>123</sup> this option leaves open the possibility that the witness may be subject to a "verbal mugging,"<sup>124</sup> involving both his invocation of the privilege and his relation to the issue or issues under investigation by the committee.<sup>125</sup> All the while, the television cameras are recording and transmitting every facial expression of the witness and the righteous indignation of the committee's members.<sup>126</sup>

### B. Scenario Two

A second but unlikely scenario—given how congressional hearings are conducted—would involve the witness appearing at the scheduled date and time but waiting outside the hearing room until the committee is ready to call him. The witness's counsel (or the witness, if he is not represented) could advise the committee that until such time as the committee is ready to call his client to the witness table, put him under oath, and allow him to invoke his Fifth Amendment privilege, the witness will wait outside the hearing room. While this may not make for good television drama, as the opening statements of the members would not be addressed to the witness in person in the hearing room, a compelling argument can be made that the witness should face no legal jeopardy as a result of said conduct. Put another way, it is difficult to

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123. The press release issued the day before the hearing on Enron indicated that Mr. Lay was the only witness slated in the first panel scheduled to testify. See Press Release, Commerce Committee Announces Details for Feb. 12th Hearing on Enron Collapse (Feb. 11, 2002), available at <http://commerce.senate.gov/press/107-154.html>.

124. See Richard Cohen, *Mugged in the Senate*, WASH. POST, Feb. 19, 2002, at A15 ("If you want to improve your image, get subpoenaed by the Senate of the United States and then submit to a verbal mugging in which, under the rules, you cannot talk back.").

125. See Transcript I, *supra* note 10.

126. Sarcastically, the press reported with respect to Mr. Lay's appearance:

Hollings's committee had no need to call Lay in the first place. Even though Lay didn't ask for it, he could have been given a pass since he was not going to say anything anyway. But as he well understood, he was not being forced to appear for the value of his testimony—the reform legislation that is supposed to result from such hearings (ha, ha)—but merely to enable bullies like Hollings to take a couple of whacks. As for the rest of the committee, they all have their statements to read for—God willing—the television audience back home.

Cohen, *supra* note 124, at 815.

see how such a course of conduct on the part of the witness would render him in willful default of his obligations under Section 192.

C. *Scenario Three*

A third and final scenario that could confront a witness who has been subpoenaed to appear before a congressional committee and intends to invoke his Fifth Amendment privilege is the following: Suppose the chair calls the hearing to order and, after he and the ranking minority member deliver their opening statements, the witness is called to the witness table. These members, in their remarks, make reference to the fact that the witness will be invoking his Fifth Amendment privilege, and as expected, the witness invokes the privilege when called. The witness is then set to be excused when one of the committee members asks the chair for the opportunity to deliver some remarks. Not sure how to proceed, the witness remains seated, the chair grants the member's request, and the member embarks upon a tirade against the witness, denigrating him for invoking his constitutional right against self-incrimination and maligning his role in the matter under investigation. If the witness leaves during or after those remarks, or similar remarks by yet another member, but before being formally excused, does the witness run a reasonable risk of prosecution and conviction under Section 192? The answer to this question depends on a number of factors generally discussed below.<sup>127</sup>

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127. In *Townsend v. United States*, 95 F.2d 352, 352 (2d Cir. 1947), the court upheld the conviction of a witness who, after making an oral statement, withdrew from the hearing room. In rejecting the witness's contention that Section 192 did not govern the situation in which a witness appears but then walks out of the hearing room without testifying, the court stated:

A reasonable interpretation of the statute under which appellant was convicted is that a witness is in default if he fails not only to appear but fails to attend, following appearance, so long as the committee requires his attendance . . . . There can be no doubt that . . . [appellant] deliberately absented himself before he was excused, or before any indication had been given that his attendance was no longer required. If appellant's contentions were correct, a witness might walk into the hearing room of the committee; announce his identity to the chairman or members of the committee; inform them that he had no intention of staying; depart; and yet be absolved of a willful default. Such a construction of the statute would be absurd.

*Id.* at 357. In a similar vein, the court in *Eisler v. United States*, 170 F.2d 273, 276-77 (D.C. Cir. 1948), affirmed the conviction of a witness who, after being called, refused to be sworn before he could make a few preliminary remarks. The court reasoned that the "refusal to be sworn as a witness effectively constituted a refusal to give testimony, except upon conditions which . . . [the witness] was not entitled to interpose." *Id.* at 280. The facts presented in Scenario 3 differ markedly from those in *Eisler* and *Townsend* in that, unlike the witnesses in those cases, the witness in Scenario 3 validly has asserted his

First, as noted previously, the initial step in any prosecution under Section 192 involves a certification by the President of the Senate or the Speaker of the House that the witness engaged in contumacious conduct.<sup>128</sup> This certification, however, does not automatically flow simply because a committee has transmitted a statement of facts or a report regarding the alleged contempt to the President or the Speaker.<sup>129</sup> Rather, such a report or statement “is subject to further consideration on the merits by the House involved.”<sup>130</sup> So, a preliminary question is whether under the facts presented in Scenario Three, the House involved would pass or defeat a contempt resolution.<sup>131</sup>

If the particular House defeats the resolution, that is the end of the matter. But what if the resolution is passed? The question now raised is whether the United States Attorney, to whom “the statement of facts . . . under the seal of the Senate or the House” alleging the contumacious conduct has been transmitted, will prosecute the case.<sup>132</sup> At that stage, counsel for the witness could present forceful arguments under the Fourth and Fifth Amendments that a prosecution is not warranted. Specifically, under the Fifth Amendment, recognizing that due process considerations envelop any prosecution under Section 192, it could be argued that forcing the witness to remain for any prolonged period of time after he has invoked his privilege for the purpose of having members of the committee denigrate the witness violates due process.<sup>133</sup> In other words, it cannot reasonably be said that such conduct on the part of the committee is “related to, and in furtherance of, a

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constitutional privilege against self-incrimination, and the principal purpose behind not excusing him appears to be the political aggrandizement of the committee members.

128. See 2 U.S.C. § 194 (2000).

129. *Wilson v. United States*, 369 F.2d 198, 199-200 (D.C. Cir. 1966).

130. *Id.* at 201. In support of its ruling, the court in *Wilson* relied upon congressional practice and judicial rulings construing § 194. *Id.*

131. See Christopher Stern, *WorldCom CEO Says Firm May Face Bankruptcy; Sidgmore Cites Dwindling Cash Reserves As Company Seeks New Funding*, WASH. POST, July 10, 2002, at E1 (“Under current law, the full House must find a defendant guilty of contempt before the case is referred to a federal prosecutor, who may, in turn, decline to pursue the case.”).

132. See George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of “Use” Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43, 65 (1990) (“[T]here is a critical uncertainty under the existing statute about whether the United States Attorney will always pursue a contempt prosecution that is referred to him by a house of Congress.”) (citation omitted).

133. What would constitute a prolonged period of time would depend on the circumstances.

legitimate task of Congress<sup>134</sup> so that if the witness leaves under the scenario described above, he would be in default under Section 192.

Unilaterally pillorying<sup>135</sup> and exposing<sup>136</sup> a witness to ridicule simply because he has invoked his constitutional right against self-incrimination is not tantamount to asking the witness questions pertinent to whatever broad subject matter area Congress has authorized the particular committee to investigate.<sup>137</sup> Congress has the power to confer immunity on a witness in order to elicit information from the witness that may be relevant to the investigative task at hand.<sup>138</sup> The grant of such immunity undoubtedly will have consequences on the ability of the executive branch subsequently to prosecute the witness.<sup>139</sup> But however steep the price for conferring immunity on a witness, political or otherwise, it may be argued that when a witness has appeared under legal compulsion before a committee and properly invoked his privilege against self-incrimination, a departure by the witness when the circumstances reveal that committee members are simply going to castigate and belittle the witness for asserting his constitutional rights should not, under the Due Process Clause, be considered a violation of either prong of Section 192.<sup>140</sup>

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

135. *Cf. Barenblatt v. United States*, 360 U.S. 109, 134 (1958) (“There is no indication in this record that the Subcommittee was attempting to pillory witnesses.”).

136. *Cf. Hutcheson v. United States*, 369 U.S. 599, 614 (1962) (“There is . . . no merit to petitioner’s contention that the Committee undertook simply ‘to expose’ petitioner ‘for the sake of exposure.’”) (quoting *Watkins*, 354 U.S. at 200); *Wilkinson v. United States*, 365 U.S. 399, 411 (1961) (“The petitioner’s contention that, while the hearing generally may have been pursuant to a valid legislative purpose, the sole reason for interrogating him was to expose him to public censure because of his activities against the Committee is not persuasive.”).

137. *See Wilkinson*, 365 U.S. at 408-09. In connection with the investigation of Enron, for example, prominent Washington lawyer Robert S. Bennett, who represents Enron, was quoted as saying that congressional committees should not “require the presence of witnesses who they know will assert their Fifth Amendment rights in order to humiliate them in a public setting . . . . This does not advance the factual inquiry or the legislative or oversight goals and demeans the congressional process.” O’Donnell, *supra* note 40, at 1B.

138. *See supra* pp. 956-57.

139. *See supra* note 88. *See also* John Van Loben Sels, *From Watergate to Whitewater: Congressional Use Immunity and Its Impact on the Independent Counsel*, 83 GEO. L.J. 2385, 2385 (1995) (“The grant of immunity by Congress . . . may seriously undermine the mission of the Justice Department or its offshoot . . . special prosecutor. In the process, society may lose the value of a high profile criminal prosecution.”).

140. This is not to say that criticism by members of a committee leveled against a witness who has invoked his Fifth Amendment privilege against self-incrimination is legally actionable. *See Doe v. McMillan*, 412 U.S. 306 (1973) (discussing how protections of Speech and Debate Clause encompass participation in committee investigations,

A second argument that could be presented to a United States Attorney on behalf of a witness under Scenario Three in support of a declination involves the Fourth Amendment. In this context, it could be argued that after the opening remarks by the chair and the ranking minority member and the witness having been sworn and formally invoked his privilege, a prolonged detention of the witness for the purpose of maligning him constitutes an unreasonable seizure under the Fourth Amendment.<sup>141</sup>

The United States Attorney may not be persuaded by these arguments and may seek return of an indictment before the grand jury. Assuming an indictment is returned, the witness could raise these Fourth and Fifth Amendment challenges in a pretrial motion seeking dismissal of the contempt charge.<sup>142</sup> If the motion is denied, then the matter comes full circle in that the People, those responsible for electing members of the House of Congress that returned the contempt resolution, will now be sitting in judgment on whether the conduct alleged rose to the level of criminal contempt of Congress. If a conviction thereafter ensues, the witness could raise his constitutional challenges and any other challenges on appeal.

## VI. CONCLUSION

Congressional investigations and their attendant hearings are a permanent fixture of our democracy. Unquestionably, they can accomplish a range of objectives broader than any single criminal prosecution or series of prosecutions.<sup>143</sup> In recent years, the congressional preference to forego full-blown and timely hearings by declining to immunize witnesses for fear of the impact such immunity will have on a possible future criminal prosecution displays a cynicism about Congress because "[i]t suggests that little worthwhile can come of a congressional hearing, and that any prospect of a criminal conviction should be enough to forego the pointless spectacle of hearings."<sup>144</sup> When subpoenaed witnesses are derided and disparaged for invoking their constitutional privilege against self-incrimination that cynicism inevitably grows.<sup>145</sup> As illustrated by the discussion above, in certain circumstances, a witness who takes particular measures to avoid turning

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proceedings, and reports).

141. See *Watkins*, 354 U.S. at 188 (recognizing that witnesses in congressional investigations "cannot be subjected to unreasonable search and seizure").

142. See FED. R. CRIM. P. 12(b).

143. Wright, *supra* note 85, at 467.

144. *Id.*

145. See *supra* notes 26, 126 & 137.

his invocation of a constitutional right into a politically abusive carnival may be able to present compelling arguments and thwart any contemplated prosecution for contempt of Congress.