

Remarks of Morton Rosenberg to the Participants at the July 18, 2008 COTS Session Sponsored by POGO

Two disclaimers to start. First, I totally owe whatever expertise I have in this area to key staffers like Peter Stockton and Eric Thorson, who worked for brilliant and effective overseers such as John Moss, Ben Rosenthal, and John Dingell. They allowed me a Zelig-like participation in some of the most important investigations of the last 35 years. Second, my remarks and observations are my own and not attributable in any way to the Congressional Research Service.

Let me begin by telling you about a federal appeals court decision that you may not be aware of. The case arose as a result of the congressional creation of a commission by law authorizing that body to investigate the books, accounts and operational methods of specified companies which had received aid from the United States in the form of grants and other substantive assistance. The commission was granted full subpoena power and authorized to seek compliance to enforce its subpoenas in the courts. The statutory authorization was quite detailed on what Congress wanted it to look for, and appeared to be concerned that public monies might have been used to influence congressional actions and other improper uses of public monies. The CEO of one of the companies was subpoenaed to testify and provide documents. He appeared and produced vouchers that showed he had expended and been reimbursed for significant amounts of money. The vouchers did not indicate to whom the monies were paid or what the purpose of the payments were. The CEO was asked to explain and detail the character of the expenditures. He said he couldn't remember and that the paperwork that might have revealed what was done had been routinely discarded over the years, as was his habit. But he claimed everything he did was approved by his Board of Directors. The appeals court goes on to describe his interrogation:

The commission then asked the CEO this question: “Was any part of the \$171,000 (the sum named in this bill that I have handed to you, and that you have) paid for the purpose of influencing legislation?” The counsel present acting for the company objected to the question, for the reason that the witness had said he did not remember what constituted the items composing the voucher, and stated that upon that point (of influencing legislation) any question the commission has asked, or might be disposed to ask, the witness would be advised not to answer, upon the ground that the company is willing to account to the government for its proportion of any voucher that is produced, or of any entry upon the books of the company that is unexplained and therefore it will no make any difference what is done with the money, – whether it was thrown into the sea, or wasted in any manner or form.

The chairman of the commission repeated the question in modified form as follows: “Was any part of the sum named in the voucher submitted to you, paid to any agent or individual for the purpose of influencing legislation?” To this the witness answered as follows: “I told you I did not know anything about this, but that I shall act upon the advise of my counsel. I don’t suppose it can make any possible difference as long as we account for the money. If the government is not satisfied with the vouchers which we present, whether the money was expended or wasted, or anything of the kind, it can make no possible difference, because if it went into the sea, if I had used this money improperly or thrown it away, I might be accountable to the stockholders for my trust; but the government cannot have any more than the money, and the company is willing

to account for that if you have not satisfied with the action.” The witness, therefore, under the advice of counsel, declined to give any further answer.

The appeals court ruled:

The Commission is not a judicial body, and possesses no judicial powers under the act of congress [of March 3, 1887] creating it and can determine no rights of government, or of the corporations whose affairs it is appointed to investigate.

* * *

Congress cannot compel the production of private books and papers of citizens for its inspection except in the course of judicial proceedings, or in suits instituted for that purpose, and then only upon averments that its rights in some way depend upon evidence therein contained.

* * *

Congress cannot empower a commission to investigate the private affairs, books, and papers of the officers and employees of corporations indebted to the government, as to their relations to other companies with which such corporations have had dealings, except so far as such officers and employees are willing to submit the same for inspection; and the investigation of the Commission into the affairs of officers and employees of the companies under the act, is limited to that extent.

* * *

The judicial power of the United States is limited to ‘cases’ and ‘controversies’ enumerated in article 3, Sec. 1, Const., as modified by the eleventh amendment, and to petitions on habeas corpus, and cannot be extended by congress; and by such ‘cases’ and ‘controversies’ are meant the claims of litigants brought for determination by regular judicial proceedings established by law or custom.

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The judicial department is independent of the legislative, in the federal government, and congress cannot make the courts its instruments in conducting mere legislative investigations.

That ruling was handed down in 1887 by Supreme Court Justice Stephen Field riding circuit in California. The CEO was Leland Stanford and the company being investigated was his Central Pacific Railroad Company. The ruling is styled *In the Matter of the Application of the Pacific Railroad Company* and can be found at 32 F. 241. Its rationale is founded on the Supreme Court’s 1881 decision in *Kilbourne v. Thompson* which propounded a narrow view of congressional investigative power. It took over 45 years for the Supreme Court to abandon those rulings in *McGrain v. Daugherty* (1927), and several decades to solidify that reversal. I present it as a cautionary tale in light of events that have and are currently taking place with respect to Executive challenges to Congress’ investigatory power. The longer a period of Congressional acquiescence in the face of Executive administrative challenges and lack of effective responses to judicial challenges, the more difficult it will be to retrieve and restore the legislatures investigative prerogatives. Those constitutionally-based powers are not legally lost but their re-establishment can be difficult.

Congress' right of access to Executive Branch and private party information is constitutionally-based and is absolutely integral to the maintenance of the integrity and effectiveness of our scheme of separated but balanced powers. This has been recognized by innumerable Supreme Court precedents establishing and supporting a broad and encompassing power in the Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees have virtually plenary power to compel information needed to discharge their legislative function from executive agencies, private persons and organizations, and within certain constraints, the information so obtained may be made public.

In the seminal Supreme Court ruling in *McGrain v. Daugherty* (1927), the Court declared that “the power of inquiry — with the process to enforce it — is an essential and appropriate auxiliary to the legislative function.”

In *Eastland v. United States Servicemen's Fund* (1975), the Court explained that “[t]he scope of its power of inquiry...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” In *Watkins v. United States*, the Court further described the breadth of the power of inquiry: “The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”

To support this power of inquiry, committees have been vested with a formidable array of tools and mechanisms to ensure access. Congress can issue subpoenas, give grants of immunity to force

testimony of witnesses invoking their 5th Amendment privilege against self-incrimination, give committee staff deposition authority, and can hold recalcitrant witnesses in contempt of Congress and subject them to criminal prosecution. You may be aware that there is some question whether a U.S. Attorney can be forced to even present a contempt citation of a federal official claiming executive privilege at the behest of the President to a grand jury, but before the recent events, the mere threat of contempt has been sufficient to achieve compliance. Since 1975 there have been 10 citations of contempt voted against cabinet-level officers by subcommittees, full committees, and once by the House of Representatives. In each instance substantial, if not complete compliance was achieved (Rogers Morton, Henry Kissinger, Joe Califano, Charles Duncan, James Edwards, James Watt, William French Smith, Anne Burford, Jack Quinn, and Janet Reno). No such question has been raised by private parties who are not former officials.

The Subpoena Power

The power of inquiry, with the accompanying process to enforce it, has been deemed “an essential and appropriate auxiliary to the legislative function.” A properly authorized subpoena issued by a committee or subcommittee has the same force and effect as a subpoena issued by the parent House itself.

A witness seeking to challenge the legal sufficiency of a subpoena has only limited remedies to raise objections. The Supreme Court has ruled that courts may not enjoin the issuance of a congressional subpoena, holding that the Speech or Debate Clause of the Constitution provides “an absolute bar to judicial interference” with such compulsory process. As a consequence, a witness’s

sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise the objections as a defense in a contempt prosecution.

But challenges to the legal sufficiency of congressional subpoenas must overcome formidable judicial obstacles. The standard to be applied in determining whether the congressional investigating power has been properly asserted was articulated in *Wilkinson v. United States*: (1) the committee's investigation of the broad subject matter area must be authorized by Congress; (2) the investigation must be pursuant to "a valid legislative purpose;" and (3) the specific inquiries must be pertinent to the broad subject matter areas which have been authorized by the Congress. As to the requirement of "valid legislative purpose," the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation.

Counsel often raise objections to the fact that as a Committee's investigation has progressed, its scope has increased: It is claimed that "The scope of the inquiry has become a moving target." However, the courts have not limited a congressional inquiry to its initial stated scope. In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975), the Supreme Court recognized that a congressional investigation may lead "up some 'blind alleys' and into non-productive enterprises. To be a valid investigative inquiry there need be no predictable end result." More recently, in *Senate Select Committee on Ethics v. Packwood*, 845 F.Supp. 17, 20-21 (D.D.C. 1994), *stay pending appeal denied*, 510 U.S. 1319 (1994), the court rejected a claim of overbreadth with regard to a subpoena for a Senator's personal diaries, holding that the Committee's investigation was not limited in its investigatory scope to its original demand "even though the diaries might prove compromising in respects to which the Committee has not yet foreseen." The court noted the long judicial acceptance

of the breadth of congressional subpoenas and the analogy of a legislative inquiry to that of a grand jury:

Constitutional confrontations, fortunately, are rare, avoidable, and should be avoided. Simply because congressional committees have a wide array of powerful oversight tools does not mean that bending the Executive's or a private party's reluctance to accede to the legislative will is a piece of cake. That is one of the lessons of the past and why POGO has been holding these workshops. This is not to be taken as a caution leading to advice to abandon the use of subpoenas or citations of contempt. But it is an observation that in order to engage in successful oversight, committees must establish their credibility early, often and consistently and in a manner that evokes respect: a request for information, documents or briefings, from a committee chairman or staffer should be treated the same: that it is a legitimate exercise of the committee oversight function and if not complied with without proper explanation, it will be followed up with more formal uncomfortable public processes.

How is this accomplished? Simply by very hard staff work. The first rule of successful oversight is that there must be, in most instance, intensive preparation. Nothing should be left to chance. Rarely should an inquiry begin with a subpoena for documents or for testimony at a hearing. Formal compulsory process should be the product of urgent need after a sufficient period of fact gathering and source checking. If the purpose of a document subpoena is to preserve the sought after material from possible destruction, that can be legally accomplished by a letter from the Chairman announcing the initiation of an inquiry pursuant to the committees authority, describing its purpose and scope, and requesting documents in categories that are pertinent to the inquiry. That is normally sufficient to trigger the notice necessary to invoke federal criminal law prohibits obstruction of a congressional proceeding.

Pay attention to details. Every letter, every phone call, every meeting, every hearing should have some well defined purpose. Asking yourself: “How am I furthering understanding or resolution of the matter?” should be the question at every step of an ongoing investigation. An oversight inquiry should be viewed as a “staged process.” That is, understand that you are going from one level of persuasion or pressure to the next to find out the who, what, when, where, and why of a situation. Normally, you shouldn’t serve a subpoena out of the blue. There should have been reached some sort of perceptible impasse. Even if an impasse appears to be reached, and the votes for a subpoena are available, a quite effective tactic is to vest authority for issuance of the subpoena in the Chairman either for a definite period, or indefinitely. My experience has been that letting the threat of service hang over the heads of officials for a defined period spurs reconsideration of previously adamant refusals (or brings a recognition that the committee wasn’t bluffing) that most often leads to further negotiation and accommodation.

Similarly, you shouldn’t hold an investigative hearing unless you have a compelling horror story, a smoking gun to reveal, or an important point to make. Executive witnesses should know explicitly what you want them to talk about and what materials to bring with them. Failure to be precise invites the response, “Gee, I didn’t anticipate that. We’ll get back to you with the answer in writing soon.”

Perhaps a useful way of approaching an investigative hearing would be to view it from the perspective of private counsel representing a witness called to testify.

First, all counsel preparations are likely guided by the understanding that the proceeding is adversarial and political in nature. So, as a first step, Counsel is going to discern the political and policy positions of the chairman and the ranking minority member with respect to the matter.

Second, counsel will attempt to determine why the client has been called. Has it been by letter or by subpoena? He'll likely decide that key majority and minority staff should be contacted at the earliest possible moment so as to begin negotiations over witnesses and document production. If documents that are sought are proprietary in nature, he'll try to seek disclosure only in closed sessions with a written agreement of confidentiality. He will try to enlist the aid of the minority in protecting proprietary information. He will then try to avoid subpoenas and attempt to resolve witness and document disputes in advance of a hearing. He knows that although most committee staffs are aware that acceptance of common law testimonial privileges is discretionary, most members, both lawyers and non-lawyers, are loathe to deny the privileges. Privilege logs that are as detailed as possible can be effective shields and help support the legitimacy of and necessity for the claim.

Fourth, he will know the House and committee procedures and where possible utilize them to the client's benefit. For example, the five minute rule often deters sustained intense questioning. Softball questions from friendly members can assist in making the witness' case on the record.

Fifth, in an investigative hearing a witness has a right to consult with an attorney, but counsel's overall role is circumscribed. Familiar rules of evidence do not apply; questions can be leading and wildly inflammatory; no foundation need be laid for a question; the most outrageous hearsay may be the basis of an inquiry. Counsel do not make objections in the proceedings except in the most

egregious situations. A knowledgeable chairman running a tightly controlled hearing has the power to deal severely with an obstreperous attorney, which can include expulsion from the hearing, or a demand that counsel take an oath and testify, thereby risking waiver of the attorney-client privilege. One possible way to overcome the problem is for the witness to state the objection after consulting with counsel and ask that the committee permit counsel to explain the legal basis of the objection.

Such are among the many folkways of the process. It will surely help to be aware what to expect from your adversaries, and prepare accordingly.