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MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Suing to Enjoin the Enforcement of a Senate Committee's Subpoena

This memorandum confirms and amplifies the views this office has given on whether the Department of Justice might have sued to enjoin the Senate Judiciary Committee from issuing or enforcing a subpoena for certain files on criminal investigations. The Committee requested these files in connection with what it called an oversight hearing focusing on the Public Integrity Section of the Department. The files included, among other things, grand jury materials, internal memoranda reflecting recommendations about whether to prosecute in particular cases, and information gathered during investigations. Although we have not examined the files, we understand that there is at least a basis for claiming that the executive branch may, or in some instances must, refuse to disclose them to Congress. Rule 6(e) of the Federal Rules of Criminal Procedure appears to prohibit the disclosure of "matters occurring before [a] grand jury" to congressional committees in most circumstances. See p. 8 infra. In our view, the Constitution empowers the executive branch to refuse to disclose certain of its internal deliberations to Congress. See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425, 446-55 (1977); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc). And in some circumstances, disclosing information acquired during a criminal investigation may violate the constitutional rights of the private parties involved or interfere with the duty of the executive branch to enforce the criminal laws. See 40 Op. Att'y Gen. 45 (1941). For these reasons, if the Judiciary Committee had proposed to subpoena the files, the Department of Justice would have considered suing to enjoin the Committee from issuing or enforcing the subpoena.

So far as we can tell, such a suit would have been unprecedented. Its success would have depended in large measure on how the courts chose to exercise their discretion; that is difficult to predict. Grand jury materials aside, we believe that such a suit would have been unlikely to succeed until after the Department had refused to comply with the subpoena, the Committee had recommended that the

responsible official be held in contempt, and the whole Senate had accepted the Committee's recommendation. 1/ A suit to enjoin the Committee's efforts to obtain matters that "occurr[ed] before [a] grand jury" within the meaning of Federal Rule of Criminal Procedure 6(e) would, however, have been likely to succeed as soon as the Committee had issued a subpoena.

A suit to enjoin the issuance or enforcement of a congressional subpoena faces two obstacles. One is posed by the speech or debate clause of the Constitution. The second is the courts' reluctance to intercede in disputes between the executive and legislative branches, or to interfere prematurely in the operations of another branch.

1/ No sanction can be imposed on a person who refuses to comply with a congressional subpoena until the whole house has voted to accept its committee's recommendation and hold the person in contempt. Compare 2 U.S.C. §§ 194 with Kinoy v. District of Columbia, 400 F.2d 761, 765 n.6 (D.C. Cir. 1968) and Wilson v. United States, 369 F.2d 198, 202 (D.C. Cir. 1966). After a full house votes to hold a person in contempt, the matter is referred to the United States Attorney. See 2 U.S.C. § 194. This has apparently never happened to an executive branch official. In the past this office has consistently taken the position that the United States Attorney has his customary discretion to decline to prosecute for contempt cases referred by a house of Congress. It is unclear how the special prosecutor provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-598, would apply to a referral from a house of Congress, although this office has consistently taken the position that no official can properly be charged with a crime for relying, in good faith, on the Attorney General's opinion that a proposed action was lawful.

In theory the house of Congress can itself seize the contemnor and hold him, see McGrain v. Daugherty, 273 U.S. 135 (1927), but this power has seldom been used.

1. The speech or debate clause

The speech or debate clause almost certainly bars any suit to enjoin the Judiciary Committee or its members from, for example, issuing a subpoena or voting to recommend a contempt citation. See Eastland v. United States Servicemen's Fund, Inc., 421 U.S. 491 (1975). But the Supreme Court has consistently allowed suits against employees of Congress who execute or enforce a congressional order, or who carry out an express congressional direction, even if Congress and its members cannot be challenged for issuing the order or voting for it. See Gravel v. United States, 408 U.S. 606, 618-21 (1972); Powell v. McCormack, 395 U.S. 486, 504-06 (1969); Jurney v. MacCracken, 294 U.S. 125 (1935); Kilbourn v. Thompson, 103 U.S. 168 (1881). See also Dombrowski v. Eastland, 387 U.S. 82 (1967). See generally United States v. American Tel. & Tel. Co., 567 F.2d 121, 129-30 (D.C. Cir. 1977). Thus the speech or debate clause does not prohibit the Department from naming as defendants, and suing for an injuction, any employees of Congress who play a role in the mechanical process of issuing or enforcing a subpoena -- by placing a seal on the subpoena, or serving or delivering it, for example. 2/ Therefore if such

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2/ The Supreme Court has said, in dictum:

> [N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances.

Gravel v. United States, 408 U.S. 606, 621 (1972). A subpoena for materials which the recipient has a right not to disclose is comparable to an "invalid resolution"; an effort to enforce such a subpoena may, in some circumstances, be equivalent to an attempt to seize property without any authority.

an employee can be identified, the speech or debate clause should not bar this suit. 3/

2. Judicial reluctance to interfere with the operations of Congress

This barrier to a suit against a congressional subpoena is more difficult to overcome. As far as we can tell, the

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3/ The speech or debate clause protects not only words spoken on the floor of a house of Congress but all "legislative acts," that is, those activities which are:

> an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

See Gravel v. United States, 408 U.S. 606, 625 (1972). As we said, we understand that some of the information sought by the Judiciary Committee consists of "matters occurring before [a] grand jury" within the meaning of Federal Rule of Criminal Procedure 6(e). It might be argued that seeking grand jury materials covered by Rule 6(e) is not a legislative act. Rule 6(e) permits prosecutors access to grand jury materials, and it allows such materials to be revealed in connection with a judicial proceeding. But it contains no provision allowing grand jury materials to be used in legislative investigations. Since Rule 6(e) has the effect of an act of Congress, it might be argued that Congress itself has declared that inquiring into grand jury materials is a prosecutorial and judicial function and is no part of Congress's legislative activity. If this argument succeeded, it would remove the speech or debate clause barrier to a suit to enjoin the issuing or enforcement of a congressional subpoena for materials covered by Rule 6(e).

the executive branch has never brought suit directly against Congress, or its agents or employees, to enjoin them from enforcing a subpoena. 4/ Private parties have brought such suits before the full house voted to cite them for contempt, and courts have acknowledged that they have jurisdiction in such cases and have declared that the issues are justiciable. See, e.g., Sanders v. McClellan, 463 F.2d 894, 897-99 (D.C. Cir. 1972). But the courts, especially in the District of Columbia Circuit, have consistently declined to grant relief in these cases.

They have given two principal reasons. First, they have said that the plaintiff may be able to challenge the subpoena by raising his objections before the subcommittee or committee involved. If the plaintiff's claims are rejected they can be raised again before the whole house, which, the courts have said, can be relied upon to consider the issue fairly. Then if the United States Attorney prosecutes, see note 1 supra, the challenge to the subpoena can be raised in court as a defense. With all of these alternative forums available, the courts have said, traditional doctrines of equity counsel against granting an injunction at an early stage. See, e.g., Sanders v. McClellan, 463 F.2d 894, 899-900 (D.C. Cir. 1972); Ansara v. Eastland, 442 F.2d 751, 753-54 & n.6 (D.C. Cir. 1971). See also Eastland v. United States Servicemen's Fund, Inc., 421 U.S. 491, 498 (1975).

Second, the courts have emphasized their desire to avoid "needless friction" with Congress. See Davis v. Ichord, 442 F.2d 1207, 1220 (D.C. Cir. 1970) (Leventhal, J., concurring). Until the whole house votes to cite a party for contempt, the challenge to the subpoena may be resolved without the court's having to direct an order to a coordinate branch. See, e.g., id.; Sanders v. McClellan, 463 F.2d at 902; Ansara v. Eastland, 442 F.2d at 753.

4/ The government did sue the American Telephone and Telegraph Company to enjoin it from complying with a congressional subpoena. See United States v. American Tel. and Tel. Co., 551 F.2d 384 (D.C. Cir. 1976); United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977).

When a suit is brought by the executive branch, the first of these reasons has less force; the second, somewhat more force. The Supreme Court has refused to require that the President be held in contempt of court in order to appeal a lower court order requiring him to provide documents which he believed were privileged under the Constitution. See United States v. Nixon, 418 U.S. 683, 690-92 (1974). The Supreme Court emphasized that it would be "unseemly" and "peculiarly inappropriate" to force the President to place himself in contempt for this reason. Id. at 691. One court of appeals appears to have held that no government official need subject himself to contempt in order to obtain review of his claim that a privilege entitles the government to refuse to comply with a court's demand for documents. See Cates v. LTV Aerospace Corp., 480 F.2d 620, 622 (5th Cir. 1973); Carr v. Monroe Manufacturing Co., 431 F.2d 384, 387 (5th Cir. 1970), cert. denied, 400 U.S. 1000 (1971). Another court of appeals refused to extend this principle even to Cabinet officers, see In re the Attorney General, 596 F.2d 58, 62 (2d Cir.), cert. denied, 444 U.S. 903 (1979), but said:

> [W]e cannot ignore the fact that a contempt sanction imposed on the Attorney General in his official capacity has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant. . . . [H]olding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted.

Id. at 64-65. These cases suggest that a court might not force an executive branch official to place himself in contempt of Congress in order to raise a claim of privilege against a congressional demand for information.

On the other hand, courts are reluctant to intervene in disputes between the executive and Congress until they are convinced that the other two branches are at loggerheads. They have insisted that the other branches try to accommodate their respective needs; they have suggested that they will not act until Congress, or a whole house, has firmly rejected the position of the executive branch. See, e.g., United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977); United States v. American Tel. and Tel. Co., 551 F.2d 384, 393 & n.16 (D.C. Cir. 1976); Goldwater v. Carter, 100 S.Ct. 533, 534 (1979) (Powell, J. concurring). Therefore, we believe that in this case the courts would not have granted the executive branch an injunction against the Judiciary Committee's subpoena -- to the extent that the subpoena sought material that was not "matters occurring before [a] grand jury" -- at least until the whole Senate had voted to hold the responsible official in contempt. 5/

5/ The Senate did take an action in this case that appears to have endorsed the Judiciary Committee's demands. On June 19, 1980, the Senate amended the Department of Justice fiscal year 1981 appropriation authorization bill by adding a provision that:

> It is the sense of the Senate that the Department of Justice comply with the request of the Committee on the Judiciary to produce files and information relating to the Committee's oversight of the Public Integrity Section of the Criminal Division of the Department of Justice.

176 Cong. Rec. S 7468-70 (daily ed. June 19, 1980). The Senate then passed the bill. Id. at S 7478. On June 19, the Judiciary Committee had not issued a subpoena; it was still negotiating with the Department. The Senate had not yet fully heard the Department's reasons for its position. Changed circumstances, and additional discussion, might have altered the Senate's views. But it might be argued that unless the courts wait until the Senate has voted to hold an official in contempt -- a result that, as we have said, the courts are reluctant to force -- the Senate's passage of a bill with this amendment is likely to be the clearest indication the courts will ever have that the executive branch and the Senate are at loggerheads. (This bill was not passed by the

A suit to enjoin efforts to obtain "matters occurring before [a] grand jury," see Federal Rule of Criminal Procedure 6(e), would have been more likely to succeed. Rule 6(e) permits grand jury materials to be released to government attorneys and government employees who must aid those attorneys in enforcing the criminal law, and "when so directed by a court preliminarily to or in connection with a judicial proceeding." 6/ In other words, Rule 6(e) authorizes disclosures to the executive branch and to judicial proceedings but makes no provision for disclosures intended only to aid legislative investigatons. Consequently, courts have held, fairly consistently, that Rule 6(e) does not authorize disclosures to congressional committees engaged in legislative investigations. See, e.g., In re Grand Jury Proceedings, 309 F 2d 440, 443-44 (3d Cir. 1962); In re Grand Jury Investigation Uranium Industry, Misc. No. 78-0173 (D.D.C. Aug. 16, 1979); United States v. Salantrino, 437 F. Supp. 240, 243 (D. Neb. 1977), aff'd sub nom. In re Disclosure of Testimony Before the Grand Jury, 580 F.2d 281, 284 n.6 (8th Cir. 1978). But see In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299 (M.D. Fla. 1977). See also In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1227-30 (D.D.C.), mandamus denied sub nom. Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974) (ordering disclosure to congressional committee considering impeachment).

5/ (Continued from p. 7.)
House of Representatives, but since each house of Congress asserts the right to cite persons for contempt, it is necessary only that the whole Senate take a position on the Judiciary Committee's subpoena.) For this reason, it can be argued in this case that once the Committee had recommended that a Department official be held in contempt for failing to comply with a subpoena, a suit to enjoin further enforcement of the subpoena should be entertained. Despite this argument, we believe that on balance such a suit would probably still not be entertained, even in this case.

6/ Rule 6(e) also allows grand jury materials to be disclosed "when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

For several reasons, a court will likely be willing to decide whether the Department must give Rule 6(e) materials to the Judiciary Committee, especially after the Committee has issued a subpoena. First, a violation of Rule 6(e) "may be punished as a contempt of court." Fed. R. Crim. P. 6(e)(2). An executive branch official faced with a subpoena for grand jury materials therefore must choose between being held in contempt of Congress and taking an action that would ordinarily place him in contempt of court. This dilemma, combined with the "unseemliness" of forcing executive branch officials to be held in contempt, makes it particularly appropriate for a court to act in this case.

Moreover, courts are better suited to resolving a dispute over disclosing grand jury materials than they are to dealing with other sorts of congressional demands for information held by the executive branch. Such demands generally present controversies that have some of the attributes of political questions. See United States v. American Tel. and Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976). But courts routinely decide disputes about disclosing grand jury materials. Indeed Rule 6(e) assigns this task to the courts. 7/ The grand jury is supervised by the court, so the court's own functioning is at stake. In particular, the court has an interest -- affirmed by Rule 6(e) -- in having a dispute over the disclosure of grand jury materials resolved in a principled fashion that protects the court's own interests and the interests of the private persons involved. For this reason, it ought not permit the dispute to be settled by a political struggle between Congress and the executive. This, too, suggests that a court might be

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7/ Ordinarily a court would consider such a dispute upon the application of the party seeking disclosure. If the Judiciary Committee refuses to apply to the court, there is no reason, once the speech or debate clause problems are overcome, to doubt that the executive branch's suit for an injunction would be an appropriate vehicle.

willing to intervene at a relatively early stage in the dispute. 8/

In summary, we believe that, grand jury materials aside, a court would be unlikely to entertain a suit by the executive branch to enjoin a congressional subpoena. Such a suit probably could be structured in a way that would not violate the speech or debate clause; but a court would ordinarily be reluctant to intervene in a dispute between the other two branches, at least before a whole house of Congress had endorsed the committee's action by voting to hold an executive branch official in contempt. We do believe, however,

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8/ If a court did entertain the Department's suit to enjoin the enforcement of the subpoena to the extent that the subpoena required Rule 6(e) material, the court might be more inclined to consider the Department's claims against other aspects of the subpoena. See United Mine Workers v. Gibbs, 383 U.S. 715, 724-25 (1966) ("the weighty policies of judicial economy and fairness to parties" justify a federal court's entertaining state law claims over which it otherwise would have no jurisdiction). But cf. Doran v. Salem Inn, Inc., 422 U.S. 922, 927-29 (1975) (traditional equity doctrine can justify denying relief to one party while granting it to an identically situated party). By entertaining the claim based on Rule 6(e), the court would already have intervened in a dispute between the other two branches and possibly created some "friction," see p. 5 supra, between itself and Congress. Once the court had done so, it would create relatively little additional unpleasantness and constitutional tension if it resolved the entire matter. In fact, by deciding some of the issues involved in the controversy the court would inevitably have influenced the political struggle over the other issues; if the court then refused to consider those issues it might even increase the disruption and the friction among the branches. Nonetheless, we think it unlikely that a court would entertain the Department's suit against a committee subpoena, except to the extent that the subpoena sought grand jury materials.

that there is a good chance a court would entertain a suit against a subpoena to the extent that the subpoena sought "matters occurring before [a] grand jury" within the meaning of Rule 6(e) of the Federal Rules of Criminal Procedure.

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