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*Staff Depositions in Congressional Investigations*

Jay R. Shampansky, American Law Division

Updated December 3, 1999

**Abstract.** Depositions in the legislative branch are often taken by committee staff, but Members sometimes are involved in the process. Depositions may be a desirable alternative to a committee hearing, enabling a panel to obtain the information that it needs quickly, confidentially, and without the attendance of Members. However, concerns have been raised that staff depositions may compromise the rights of deponents and restrict the role of the minority in the investigative process.

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## Staff Depositions in Congressional Investigations

Updated December 3, 1999

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# Staff Depositions in Congressional Investigations

## Summary

Depositions have been used in a relatively small number of major congressional investigations in the last quarter of a century. Depositions in the legislative branch are often taken by committee staff, but Members sometimes are involved in the process. Depositions may be a desirable alternative to a committee hearing, enabling a panel to obtain the information that it needs quickly, confidentially, and without the attendance of Members. However, concerns have been raised that staff depositions may compromise the rights of deponents and restrict the role of the minority in the investigative process.

On a number of occasions, authority for committee staff to take depositions has been granted pursuant to Senate and House resolutions. Committees that have been granted deposition authority often adopt rules establishing procedures for depositions.

Assuming, *arguendo*, that staff depositions are appropriately authorized, the two main legal issues presented by these depositions are (a) enforcement of a subpoena for a staff deposition and (b) sanctions for false statements in such a deposition.

There are three methods of citing a witness for contempt of Congress. Statutory criminal contempt (2 U.S.C. §§ 192 and 194) and the inherent contempt power may be utilized by either the Senate or the House. The statutory civil contempt mechanism (28 U.S.C. § 1365) is, by its terms, available only to the Senate. It may be argued that any of these three methods could be utilized to enforce a subpoena for a staff deposition. However, in recent investigations in which the House has authorized staff depositions by a standing committee, the majority and minority have debated the propriety of citing a deponent for contempt for failure to appear at such a deposition or to answer questions in such a proceeding if he subsequently responds fully at a committee hearing.

A witness who makes a false statement in a deposition given before committee staff might be prosecuted under various statutory provisions, including 18 U.S.C. § 1001 (false statements), § 1505 (obstruction of investigation), or § 1621 (perjury). Of course, a prosecution under the perjury statute would be possible only if the witness was placed under oath. In resolutions adopted in recent years authorizing depositions, the House and Senate often have provided for the taking of such depositions under oath, arguably indicating that, in the view of Congress, statements at such depositions could be subject to a perjury prosecution. Although judicial decisions afford an inadequate basis for a definitive determination as to whether all of the elements of the perjury statute could be satisfied in a prosecution of a witness for a statement made in a staff deposition, administration of an oath puts a witness on notice of the significance attached by the committee to his deposition.

## **ABSTRACT**

This report provides a legal analysis of issues relating to staff depositions in congressional investigations. Depositions taken by congressional staff may help a panel exercise its investigatory power to obtain the information it requires quickly and confidentially. This report examines the authorization for such depositions and legal questions that may arise concerning the application to such depositions of (a) the congressional contempt power to enforce a subpoena for a deposition and (b) various sanctions for false statements (including the false statements statute and laws governing perjury and obstruction of a congressional investigation).

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# Staff Depositions in Congressional Investigations

## Introduction

A deposition is a pre-trial discovery device commonly used in litigation. Typically, a deposition involves oral questioning of a witness (the deponent) by an attorney for one party, outside the courtroom, and out of public view. The deposition testimony is given under oath or affirmation and a transcript is made and authenticated.<sup>1</sup>

Although it is not known when they were first utilized in congressional investigations,<sup>2</sup> depositions have been used in a relatively small number of major congressional investigations in the last quarter of a century.<sup>3</sup> As is true of a

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<sup>1</sup>See *Black's Law Dictionary*, at p. 440 (6<sup>th</sup> ed. 1990). The "deposition-discovery process," which plays a "vital role in the preparation for trial" (*Hickman v. Taylor*, 329 U.S. 495, 500 (1947)), was established by provisions of the Federal Rules of Civil Procedure adopted in 1938. Wright, Miller, and Marcus, *Federal Practice and Procedure*, § 2001, at p. 41 (2<sup>nd</sup> ed. 1994). For an historical review of the use of depositions in judicial proceedings, see *United States v. Microsoft Corp.*, 165 F.3d 952 (D.C. Cir. 1999). Although depositions are generally taken in private and made public if used at trial, depositions in certain antitrust cases brought by the government under the Sherman Act are required to be taken in public pursuant to the Publicity in Taking Evidence Act, 15 U.S.C. § 30. That requirement would be repealed by H.R. 1801, 106<sup>th</sup> Cong., which has been passed by the House. 145 *Cong. Rec.* 11318 (daily ed. Nov. 2, 1999).

<sup>2</sup>In the congressional sphere, depositions are utilized not only in congressional investigations conducted in furtherance of Congress' legislative and oversight functions, but also in quasijudicial proceedings in which the Senate and House perform their constitutional responsibilities with regard to seating and disciplining Senators and Representatives and with regard to impeaching officials of the executive and judicial branches. In some quasijudicial proceedings in which depositions have been used, persons other than Members and congressional staff have been authorized to take depositions. See 2 U.S.C. § 386(a) (authorizing either party, in a proceeding pursuant to the Federal Contested Elections Act (FCEA), to take a deposition); S.Res. 30, 106<sup>th</sup> Cong. (authorizing depositions in the impeachment trial of President Clinton to be taken by the counsel for the President as well as by the House Managers and their counsel). Depositions in quasijudicial proceedings may be used for discovery purposes or may be introduced into evidence. See, e.g., 2 U.S.C. §§ 386(a), 392 (depositions under FCEA); Rule 24, Rules of the House Committee on Standards of Official Conduct. Questions have arisen as to the rights of respondents in impeachment proceedings to engage in discovery (see notes 18 and 19, *infra*) and as to the constitutionality of the provisions of the FCEA that delegate to a private party subpoena authority with regard to a deposition. See *Dornan v. Sanchez*, 978 F. Supp. 1315 (C.D.Cal. 1997).

<sup>3</sup> The House Rules Committee, in its report on the resolution granting deposition authority to  
(continued...)

deposition in the judicial sphere, a deposition is given under oath and a transcript is made. (The oath<sup>4</sup> and the transcript distinguish a deposition from an informal staff interview.) A deposition is taken following notice (sometimes accompanied by a subpoena) to the deponent. Depositions in the legislative branch are often taken by committee staff, but Members sometimes are involved in the process. In some circumstances, depositions may be a desirable alternative to a hearing, enabling a panel to obtain the information that it needs quickly, confidentially, and without the attendance of Members.<sup>5</sup> Since depositions are conducted in private, witnesses may be more willing to talk freely than in an open hearing. And statements by witnesses that might defame or even tend to incriminate third parties can be verified before the statements are repeated in an open hearing. A deposition can help a committee prepare for questioning a witness at a hearing or can eliminate the need to call some witnesses.

However, concerns have been raised that staff depositions may “circumvent the traditional committee process” (*i.e.*, hearings and informal staff interviews) and, depending on the terms of the resolution authorizing such depositions and related committee procedural rules, compromise the rights of deponents and restrict the role of the minority in the investigative process.<sup>6</sup> Furthermore, executive agencies may raise legal, constitutional, and policy objections to the attendance of agency officials at staff depositions.<sup>7</sup>

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<sup>3</sup>(...continued)

the Committee on Government Reform and Oversight for purposes of its investigation of alleged political fund-raising improprieties, observed that the House has granted deposition authority in “at least 10 major investigations” since 1974. H.Rept. 105-139, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 12 (1997). Perhaps the first major Senate investigation to make extensive use of depositions was the 1980 probe of the relationship between President Carter’s brother, Billy, and Libya. See *Inquiry into the Matter of Billy Carter and Libya: Hearings before the Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the Senate Judiciary Committee*, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Vol. III (App.) at 1741 (1980)[hereinafter, *Senate Judiciary Committee Hearings*]. Thirty-five depositions were taken in that probe. *Id.* The House and Senate committees that investigated the Iran-Contra affair took some 250 sworn depositions. Such depositions were taken by counsel for the committees and/or one or more Members. S.Rept. 100-216, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. at xiv, 685 (1987).

<sup>4</sup>*United States v. Weissman*, 1996 U.S. Dist. LEXIS 19125 (S.D.N.Y. Dec. 19, 1996).

<sup>5</sup>Use of depositions in the legislative sphere obviates the need to comply with quorum requirements applicable to hearings. In the House, two Members must be present to receive hearing testimony. House Rule XI, cl. 2(h)(1). In the Senate, committees can establish one-Member quorum requirements for the purpose of receiving testimony. Senate Rule XXVI, cl. 7(a)(2).

<sup>6</sup>H.Rept. 105-139, *supra* note 3, at 20-26 (minority views).

<sup>7</sup>See *Final Report of the Select Subcommittee to Investigate the U.S. Role in Iranian Arms Transfers to Croatia and Bosnia* (“*The Iranian Green Light Subcommittee*”), 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 44-64 (1996)[hereinafter, *The Iranian Green Light Subcommittee Report*]. Agencies cooperated to some extent with the efforts of the Iranian Green Light Subcommittee to obtain deposition testimony. The Department of Defense made agency personnel (with  
(continued...)

Legal questions sometimes arise concerning (a) the authority of committees to take staff depositions and to compel witnesses to attend such depositions and (b) the applicability of various sanctions if a witness refuses to appear at a deposition, declines to answer a question posed to him, or makes a false statement.<sup>8</sup>

## Congressional Investigatory Power

Depositions need to be examined as a tool that can be used in the exercise of Congress' constitutionally-rooted investigatory power. The Supreme Court has considered that power to be "inherent in the legislative process."<sup>9</sup> In the leading case of *McGrain v. Daugherty*, the Court explained:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such 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.

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<sup>7</sup>(...continued)

the exception of the Secretary of Defense) available for subcommittee depositions (*id.* at 50) while the Department of State questioned the authority of the subcommittee to take depositions from "principals" (the Secretary, Deputy Secretary, and Undersecretary) (*id.* at 54). The White House asserted that the President's deliberative process (executive privilege) would be infringed by efforts of the subcommittee to obtain deposition testimony from senior National Security Council staff. *Id.* at 55-57. Executive privilege was asserted "on dozens of occasions in depositions" taken by the House Committee on Government Reform and Oversight in its investigation of the White House Travel Office firings and related matters. H.Rept. 104-849, 104<sup>th</sup> Cong., 2d Sess. 178 (1996). Compromise between the branches in a controversy over executive compliance with a congressional request for attendance at a staff deposition may be possible. Alternatives to a staff deposition may include an interview (distinguished from a deposition by the absence of an oath and a transcript) and a briefing of Members by senior executive branch officials. *The Iranian Green Light Subcommittee Report, supra*, at 55, 57.

<sup>8</sup>"[T]he law regarding staff depositions, and what it takes to authorize and to conduct them, is complex and getting more, not less so." *False Statements after the Hubbard v. United States Decision, Hearing before the Senate Judiciary Committee*, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 41 (1996) [hereinafter, *False Statements after Hubbard*] (response by Prof. Charles Tiefer to questions from committee members). For an overview of issues relating to depositions in congressional investigations, see *Senate Judiciary Committee Hearings, supra* note 3, at 1718-27, 1741-70. See also Grabow, *Congressional Investigations: Law and Practice* § 3.3 (1988). For a detailed analysis of procedural issues raised by the use of depositions in judicial proceedings, see North, *Deposition Strategy, Law and Forms*, Vol. 1, chap. 2 (1994).

<sup>9</sup>*Watkins v. United States*, 354 U.S. 178, 187 (1957)(Warren, C.J.). The Court in that case also described the investigatory power as being "broad," and as "encompass[ing] inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes .... It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste." *Id.*



All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.<sup>10</sup>

There seems to be no reason to question Congress' authority (a) to exercise its investigatory power and obtain information by means, such as depositions, short of a formal hearing<sup>11</sup> or (b) to involve staff in the process of taking depositions.<sup>12</sup>

## Authorization for Depositions

In the congressional sphere, authority generally flows from the House or Senate to full committees and, in turn, to subcommittees.<sup>13</sup> In their rules, both bodies have granted subpoena and other investigative powers to their standing committees and subcommittees but these rules do not expressly mention depositions.<sup>14</sup> A commentator on congressional investigations has observed that “staff may take depositions only if

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<sup>10</sup>273 U.S. 135, 175 (1927). See also *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

<sup>11</sup>The courts have upheld another alternative to a congressional hearing, statutes requiring the filing of information with administrative agencies, on the ground that they are an exercise of the legislative power to obtain information. See *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938)(upholding statutory provision requiring public utility holding companies to register with SEC); *United States v. Rappeport*, 36 F. Supp. 915 (S.D.N.Y.), *aff'd sub nom. United States v. Herling*, 120 F.2d 236 (2<sup>nd</sup> Cir. 1941). There is also specific statutory recognition of the use of depositions in congressional probes. In 1978, Congress granted the District Court for the District of Columbia original jurisdiction over civil actions brought by the Senate to enforce process issued by the Senate, including Senate subpoenas to respond to depositions. 28 U.S.C. § 1365.

<sup>12</sup>In light of the fact that staff can conduct interviews (*see United States v. Weissman*, 1996 U.S. Dist. LEXIS 19125 (S.D.N.Y. Dec. 19, 1996)) and pose questions at hearings (see House Rule XI, cl. 2(j)(2)(C)), then it would seem that they can be permitted to take depositions. The Supreme Court has recognized, in a decision extending constitutional immunity under the speech or debate clause to congressional staff, that “the day-to-day work of such aides is so critical to Members’ performance that *they must be treated as the latter’s alter egos ....*” *Gravel v. United States*, 408 U.S. 606, 616-17 (1972)(emphasis added). The value of the information elicited at a deposition is not diminished by the fact that it is obtained by staff since, presumably, a transcript of the deposition will be available for Members of the committee to read. *Cf. Christoffel v. United States*, 338 U.S. 84, 91 (1949)(Jackson, J., dissenting).

<sup>13</sup>See *Gojack v. United States*, 384 U.S. 702 (1966).

<sup>14</sup>House Rule XI, cls. 1(b), 2(k), 2(m); Senate Rule XXVI. The House Rules Committee has observed that the standing rules of the House generally provide committees with sufficient powers, but that those powers may be supplemented with special authorities (including deposition authority) on a case-by-case basis in complex and broad investigations. H.Rept. 105-139, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 12 (1997).

the committee is given that authority by its parent house.”<sup>15</sup> On a number of occasions, Senate<sup>16</sup> and House<sup>17</sup> resolutions have authorized committee

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<sup>15</sup>Grabow, *supra* note 8, at § 3.3. See also Alba, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 *Syr. J. Legis.* 1, 7 (1995) [hereinafter, *Overview of Congressional Investigation of the Executive*].

<sup>16</sup>See, e.g., S.Res. 189, 106<sup>th</sup> Cong. § 11(d)(3)(E) (committee funding resolution for period Oct. 1, 1999, through Feb. 28, 2001, which, *inter alia*, grants staff deposition authority to the Senate Committee on Governmental Affairs and to the Permanent Subcommittee on Investigations; see also Rule 5.J of the Rules of Procedure of the Committee on Governmental Affairs, 145 *Cong. Rec.* S2045 (daily ed. Feb. 25, 1999), and Rule 9 of the Rules of Procedure of the Permanent Subcommittee on Investigations); S.Res. 120, 104<sup>th</sup> Cong. (staff deposition authority for Special Committee to Investigate Whitewater Development Corporation and Related Matters)(Whitewater II investigation); S.Res. 229, 103<sup>rd</sup> Cong. (staff deposition authority for Committee on Banking, Housing, and Urban Affairs) (Whitewater I investigation); S.Res. 185, 102<sup>nd</sup> Cong. (staff deposition authority for Select Committee on POW/MIA Affairs); S.Res. 219, 101<sup>st</sup> Cong., amending S.Res. 66, 101<sup>st</sup> Cong. (staff deposition authority for HUD/MOD Rehabilitation Investigation Subcommittee of the Committee on Banking, Housing, and Urban Affairs); S.Res. 103, 101<sup>st</sup> Cong. (staff deposition authority for Special Committee on Investigations, established as a subcommittee of the Select Committee on Indian Affairs); S.Res. 23, 100<sup>th</sup> Cong. (authority for depositions to be taken by Members or staff of Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition (Senate Iran-Contra Committee); see also Rule 6 of the Rules of Procedure of the Senate Iran-Contra Committee); S.Res. 350, 97<sup>th</sup> Cong. (staff deposition authority for Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice (Abscam investigation); S.Res. 495, 96<sup>th</sup> Cong. (staff deposition authority for the Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the Senate Committee on the Judiciary).

In some cases resolutions have been adopted which grant deposition authority but make no specific reference to *staff* depositions. See, e.g., S.Res. 208, 105<sup>th</sup> Cong. § 3, as amended by S.Res. 231, 105<sup>th</sup> Cong. and by S.Res. 7, 106<sup>th</sup> Cong. (Special Committee on the Year 2000 Technology Problem); S.Res. 4, 95<sup>th</sup> Cong. § 104, as amended by S.Res. 78, 95<sup>th</sup> Cong., S.Res. 376, 95<sup>th</sup> Cong., S.Res. 274, 96<sup>th</sup> Cong., and by S.Res. 389, 96<sup>th</sup> Cong. (Special Committee on Aging); S.Res. 4, 95<sup>th</sup> Cong. § 105, as amended by S.Res. 274, 96<sup>th</sup> Cong. and by S.Res. 127, 98<sup>th</sup> Cong. (Senate Select Committee on Indian Affairs, redesignated as the Committee on Indian Affairs by S.Res. 71, 103<sup>rd</sup> Cong.); S.Res. 400, 94<sup>th</sup> Cong. § 5(a)(establishing Senate Select Committee on Intelligence); S.Res. 21, 94<sup>th</sup> Cong. (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Committee)); S.Res. 60, 93<sup>rd</sup> Cong. (Senate Select Committee on Presidential Campaign Activities); S.Res. 338, 88<sup>th</sup> Cong. § 3(a)(establishing Senate Select Committee on Ethics). In some of these cases, committee rules indicate that the resolutions have been understood by the committees as authorization for staff depositions. See Rule VI, Rules of Procedure of the Special Committee on Aging, 145 *Cong. Rec.* S2150 (daily ed. Mar. 2, 1999); Rule 6(b)(1) of the Supplementary Procedural Rules of the Senate Select Committee on Ethics, 145 *Cong. Rec.* S14203 (daily ed. Nov. 5, 1999)(authorizing depositions to be taken by any person designated by the committee chairman and vice chairman, acting jointly, including a Member of the committee, outside counsel, committee staff, other employees of the Senate, or government employees detailed to the committee).

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staff to take depositions in a variety of investigations, including those related to impeachment proceedings.<sup>18</sup> Pretrial deposition authority was sought in the Senate

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<sup>16</sup>(...continued)

Various resolutions which have granted staff deposition authority to Senate special investigative panels are collected in *Authority and Rules of Senate Special Investigatory Committees and Other Senate Entities, 1973-97*, S. Doc. No. 105-16, 105<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1998).

<sup>17</sup>See, e.g., H.Res. 507, 105<sup>th</sup> Cong. (authority for depositions to be taken by Member or staff of Committee on Education and the Workforce in investigating the administration of labor laws by government agencies in regard to the International Brotherhood of Teamsters); H.Res. 463, 105<sup>th</sup> Cong. (authority for depositions to be taken by Member or staff of House Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China); H.Res. 167, 105<sup>th</sup> Cong. (authority for depositions to be taken by Member or staff attorney of House Committee on Government Reform and Oversight in investigating allegations of misconduct in political fundraising during 1996 election campaign); H.Res. 369, 104<sup>th</sup> Cong. (authority for depositions to be taken by Member or staff of the House Committee on Government Reform and Oversight in investigating the White House Travel Office matter); H.Res. 258, 102<sup>nd</sup> Cong. (authority for depositions to be taken by Member or staff of the Task Force of Members of the House Committee on Foreign Affairs to Investigate Certain Allegations Concerning the Holding of Americans as Hostages by Iran in 1980); H.Res. 12, 100<sup>th</sup> Cong. (authority for depositions to be taken by Member or staff of House Select Committee to Investigate Covert Arms Transactions with Iran); H.Res. 752, 95<sup>th</sup> Cong. (authority for depositions to be taken by Member or staff attorney of House Committee on Standards of Official Conduct in investigation of allegations of improper South Korean influence on Members); H.Res. 222, 95<sup>th</sup> Cong. (deposition authority for House Select Committee on Assassinations, permitting the committee and its subcommittees to "take testimony on oath anywhere within the United States or in any other country and to authorize designated counsel for the select committee to obtain statements from any witness who is placed under oath by an authority who is authorized to administer oaths in accordance with the applicable laws of the United States or of any State").

Excerpts from various resolutions which have granted staff deposition authority in House investigations are collected in H.Rept. 105-139, *supra* note 3, at App. A.

In the debate on the adoption of H.Res. 320, 100<sup>th</sup> Cong., 134 *Cong. Rec.* 33720 (1987), which authorized depositions in the impeachment proceedings concerning Judge Hastings, Rep. Conyers explained that the measure was required because the depositions were to be taken by staff, and implied that if depositions were to be taken by Members, House Rule XI, cl. 2(m)(1)(B)(which, *inter alia*, authorizes committees to issue subpoenas and take sworn testimony) would provide the needed authority. However, the report of the House Rules Committee on H.Res. 167, 105<sup>th</sup> Cong., granting authority for depositions to be taken by a Member or staff attorney of the House Committee on Government Reform and Oversight in investigating allegations of misconduct in political fundraising during the 1996 election campaign, indicates that a House resolution is needed in order for a single Member to take a deposition. H.Rept. 105-139, *supra*, at 13.

<sup>18</sup>In several instances, the House has authorized its Judiciary Committee to utilize staff depositions in impeachment investigations. See H.Res. 803, 93<sup>rd</sup> Cong. (deposition authority for Judiciary Committee in impeachment proceedings concerning President Nixon, permitting the committee to require "by subpoena or otherwise—the attendance and testimony of any  
(continued...)

impeachment proceedings concerning Judge Hastings<sup>19</sup> and deposition authority was

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<sup>18</sup>(...continued)

person (including at a taking of a deposition by counsel for the committee”); H.Res. 320, 100<sup>th</sup> Cong. (allowing the Committee on the Judiciary or its Subcommittee on Criminal Justice, in the impeachment proceedings concerning Judge Alcee Hastings, to “authorize the taking of affidavits and depositions by counsel to [the] committee pursuant to notice or subpoena”); H.Res. 562, 100<sup>th</sup> Cong. (authority for Judiciary Committee, in impeachment proceedings concerning Judge Walter Nixon, “to authorize the taking of affidavits and of depositions by [committee] counsel”); H.Res. 581, 105<sup>th</sup> Cong. (deposition authority for the Judiciary Committee in impeachment proceedings concerning President Clinton, allowing the committee to require “the attendance and testimony of any person (including at a taking of a deposition by counsel for the committee) ....”). In addition to the specific grants of deposition authority, noted above, it appears that section 5 of H.Res. 525, 105<sup>th</sup> Cong., which directed the Judiciary Committee to review the communication of September 9, 1998, from the Independent Counsel (transmitting information relating to the possible impeachment of President Clinton), contemplated that the committee would take depositions during its review. See H.Rept. 105-703, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 7 (1998) (dissenting views).

As noted above, the House Judiciary Committee was authorized to take staff depositions in its inquiry concerning the impeachment of Judge Alcee Hastings. Following his impeachment by the House, Hastings argued that, because he was neither permitted to participate in the Judiciary Committee’s depositions or given copies of the transcripts of those depositions, the Senate should order the House managers to produce the depositions and other requested materials. Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered, *reprinted in* S.Rept. 100-542, 100<sup>th</sup> Cong., 2d Sess. 101, 102 (1988). The House Managers responded to Hastings’ request for discovery by arguing that the House does not permit an accused official to participate in the investigation by the House and that pretrial discovery in impeachment proceedings was unprecedented. S.Rept. 100-542, *supra*, at 109-112.

Pursuant to the deposition authority granted by the House in H.Res. 581, 105<sup>th</sup> Cong., for the Clinton impeachment, the Judiciary Committee scheduled several depositions (see H Rept. 105-830, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess., App. at 39-40 (1998)), but at least some of those depositions may have been cancelled by the committee, and the privilege against self-incrimination was asserted by a witness in one deposition. See *Impeachment Scope Divides Judiciary’s Republicans*, Washington Post, Dec. 1, 1998, at p. A1.

<sup>19</sup>Judge Hastings sought the Senate’s permission to conduct pretrial depositions of witnesses. Statement on Behalf of United States District Judge Alcee L. Hastings Concerning Procedures Necessary for A Fair Trial in the Senate in the Present Case of Impeachment, *reprinted in* S.Rept. 101-1, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 73-74 (1989) (report of Senate Committee on Rules and Administration with regard to procedural matters concerning the Hastings impeachment). See also *id.* at 72 (apparently arguing that Hastings should be allowed to conduct such depositions because the House managers had made inappropriate use of the subpoena power of the House to gather information subsequent to the adoption of articles of impeachment). The Rules Committee was of the view that the request for deposition authority should be determined by the body that heard the evidence in the trial. *Id.* at 81. The impeachment trial committee, established pursuant to Senate impeachment rule XI, knew of “no precedent for the pretrial examination of witnesses in connection with a Senate impeachment trial,” but the committee was willing to further consider Hastings’ request upon the condition that he provide a

(continued...)

granted in the Senate impeachment trial of President Clinton,<sup>20</sup> although such depositions were not authorized<sup>21</sup> and taken until after both the House and the President had made opening arguments based on the record.

Although the Senate<sup>22</sup> and the House<sup>23</sup> presently appear to be of the view that standing committees lack specific authority under the rules of each chamber to compel attendance at staff depositions, both the Senate<sup>24</sup> and the House<sup>25</sup> have at times taken

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<sup>19</sup>(...continued)

statement setting forth, *inter alia*, the names of proposed deponents and a proffer of the testimony expected from each proposed deponent. *Impeachment Trial Committee Disposition of Pretrial Issues*, Apr. 14, 1989, at p. 10. Perhaps in response to Hastings' request for deposition authority, the impeachment trial committee adopted a rule which reduced to one member the committee quorum for taking sworn pretrial testimony. "The rule implements the committee's determination that pretrial examinations may proceed before a quorum of one member." *Proceedings of the Senate in the Impeachment Trial of Alcee L. Hastings*, S. Doc. No. 101-18, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 831 (1989). Although this rule did not authorize depositions, it did provide an alternative means of taking testimony prior to the trial.

<sup>20</sup>S.Res. 16, 106<sup>th</sup> Cong., which established procedures for the Clinton trial, authorized a motion to subpoena witnesses, but provided that if the Senate agreed to permit either the House or the President to call witnesses, they were first to be deposed and the Senate would then decide which witnesses were to present live testimony. The resolution specified that "no testimony shall be admissible...unless the parties have had an opportunity to depose such witnesses." The depositions in the Clinton trial were authorized to be taken by the House Managers, their counsel, and counsel for the President. S.Res. 30, 106<sup>th</sup> Cong. § 204.

In the impeachment trial of Judge Louderback, the Senate declined to grant a request by the respondent's counsel that he be commissioned to take the deposition of a witness. 77 *Cong. Rec.* 3396-97, 3445 (1933).

<sup>21</sup>The Senate authorized subpoenas compelling three witnesses to appear for depositions. S.Res. 30, 106<sup>th</sup> Cong. § 201. In a letter signed by 28 Senators, the President was requested to submit to a deposition (*Parties Split as Key Votes in Trial Loom*, Washington Post, Feb. 4, 1999, at p. A1), but the White House Counsel replied that it was "neither necessary nor appropriate for the President to testify." *Senate Rejects Live Testimony*, Washington Post, Feb. 5, 1999, at p. A1 (quoting letter from White House Counsel Ruff to Senator Lott).

<sup>22</sup>*Authority and Rules of Senate Special Investigatory Committees and Other Senate Entities, 1973-97*, S. Doc. No. 105-16, 105<sup>th</sup> Cong. 1<sup>st</sup> Sess., at p. v (1998).

<sup>23</sup>See, e.g., 143 *Cong. Rec.* H4092 (daily ed. June 20, 1997) (remarks of Rep. Pryce in debate on H.Res. 167, 105<sup>th</sup> Cong.); 143 *Cong. Rec.* at H4094 (remarks of Rep. Solomon on H.Res. 167); H.Rept. 105-139, *supra* note 3, at 12 (report of House Rules Committee on H.Res. 167); H.Rept. 104-472, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 6 (1996).

<sup>24</sup>The Senate apparently at one time took the position that there was standing authority for its committees and subcommittees to conduct staff depositions but nevertheless adopted a specific authorizing resolution "out of an abundance of caution." Section 3 of S.Res. 495, 96<sup>th</sup> Cong., which authorized the taking of depositions by staff of the subcommittee of the Judiciary Committee established to investigate activities relating to individuals representing the interests of foreign governments, stated:

(continued...)

the position that standing committees could conduct staff depositions in the absence of a resolution from the chamber specifically granting such authority to be employed in a particular investigation.

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<sup>24</sup>(...continued)

Subpoenas for staff examinations and depositions may be issued under the authority granted by Order of July 24, 1980 [which order established the subcommittee], or under any other relevant authority. This resolution shall supplement without limiting in any way *the existing authority of Senate committees and subcommittees to conduct examinations and depositions.* (emphasis added)

In the appendix to its hearings, the subcommittee explained: “Section three of [S.Res. 495] recognized there was existing authority for committees to notice depositions, but clear supplementary authority was provided through this resolution out of an abundance of caution.” *Senate Judiciary Hearings, supra* note 3, at 1742. The “existing authority” for depositions was likely a reference to a 1928 Senate resolution which authorized the President of the Senate, “on the request of any of the committees of the Senate, to issue commissions to take testimony within the United States or elsewhere.” S.Res. 118, 70<sup>th</sup> Cong., 69 *Cong. Rec.* 1926 (1928).

A memorandum prepared by the Office of Legal Counsel of the Department of Justice for the Deputy Attorney General suggested that the 1928 resolution was “in a state of desuetude” and denied that staff of the Senate Committee on Labor and Human Resources could, by committee resolution alone, be authorized to take depositions, particularly depositions of executive branch officials. 6 Op. Off. Legal Counsel 503 (1982).

Some standing committees of the Senate apparently continue to maintain that they can take staff depositions even in the absence of a specific authorizing resolution from the Senate. See, e.g., Rule 8 of the Rules of Procedure of the Senate Committee on Agriculture, Nutrition, and Forestry, 145 *Cong. Rec.* S2531 (daily ed. Mar. 10, 1999); Rule 7(c) of Jurisdiction and Rules of Procedure of the Senate Committee on Foreign Relations, 145 *Cong. Rec.* S1962 (daily ed. Feb. 24, 1999).

<sup>25</sup>The report of the House Rules Committee on a resolution granting staff deposition authority to the Committee on Government Reform and Oversight for purposes of its probe of the White House Travel Office matter observed that House rules do not expressly grant staff deposition authority to staff of standing committees. H.Rept. 104-472, *supra* note 23, at p. 10. However, the report stated that nothing in the resolution granting deposition authority in the Travel Office inquiry “shall be construed as undermining or reversing procedural precedents established in the course of past congressional investigations .... [T]he committee is aware that, in the past, sworn testimony has been taken from witnesses [at staff depositions] in the absence of a specific resolution authorizing the taking of such statements.” *Id.* at 12.

Committees that have been granted deposition authority often adopt rules establishing procedures for depositions.<sup>26</sup> The Senate adopted detailed procedures for the depositions authorized in the Senate impeachment trial of President Clinton.<sup>27</sup>

Assuming, *arguendo*, that staff depositions are appropriately authorized, the two main legal issues presented by these depositions are (a) enforcement of a subpoena for a staff deposition and (b) sanctions for false statements in such a deposition.

## Enforcement of Subpoenas to Attend Staff Depositions

A witness served with a subpoena for a staff deposition might perhaps contend that he cannot be compelled to attend a proceeding in the absence of any Members to constitute a quorum, administer the oath, and pose questions, and might further argue that the various modes of contempt procedures are unavailable to enforce his

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<sup>26</sup>For a discussion of deposition procedures, see Grabow, *supra* note 8, at § 3.3; *Senate Judiciary Committee Hearings*, *supra* note 3.

In the debate on H.Res. 167, 105<sup>th</sup> Cong., providing deposition authority for the House Committee on Government Reform and Oversight, the chairman of the Rules Committee observed that, while the House should grant deposition authority, the committee receiving such authority should adopt its own procedural rules governing depositions. 143 *Cong. Rec.* H4094 (daily ed. June 20, 1997)(remarks of Rep. Solomon). In accordance with the recommendation of the Rules Committee, in this instance the Committee on Government Reform and Oversight adopted procedural rules before the Rules Committee and the House approved the grant of deposition authority. H.Rept. 105-139, *supra* note 3, at 15. See also *id.*, App. B, at pp. 33-34 (reprinting procedural rules of Committee on Government Reform relating to depositions); *id.* at 20-24 (minority views, opposing H.Res. 167 and related procedural rules of Committee on Government Reform).

In one instance, a committee adopted procedural rules for depositions which were to “be applicable subsequent to approval by the Senate of authority for the committee to take depositions by committee staff or consultants.” Rule E of Supplement to Rules of Procedure of the Senate Committee on Rules and Administration, *reprinted in* 143 *Cong. Rec.* S3414 (daily ed. Apr. 22, 1997)(rules for investigation of 1996 Louisiana contested election). However, it does not appear that the Senate subsequently authorized the committee to take staff depositions.

<sup>27</sup>These procedures were established by resolution (S.Res. 30, 106<sup>th</sup> Cong.) and a unanimous consent agreement (145 *Cong. Rec.* S1073 (daily ed. Jan. 28, 1999)). The procedures provided for videotaped and transcribed records of the depositions (S.Res. 30, § 205), and authorized the House Managers and/or White House counsel to move to admit the depositions or portions thereof into evidence (*id.*, § 102). The Senate agreed to a motion by the House Managers to admit into evidence transcriptions and videotapes of depositions taken pursuant to S.Res. 30, and also agreed to a motion by the House Managers that the parties be permitted to present before the Senate all or portions of the parts of the videotapes of the depositions of three witnesses that were admitted into evidence. 145 *Cong. Rec.* S1199-1210 (daily ed. Feb. 4, 1999). Pursuant to a unanimous consent agreement, those parts of the transcripts of the depositions which were admitted into evidence were printed in the *Congressional Record*. 145 *Cong. Rec.* at S1212-54.

attendance at such a proceeding.<sup>28</sup> There are three methods of citing a witness for contempt of Congress<sup>29</sup> and it may be argued that any of the three could be utilized to enforce a subpoena for a staff deposition.

The *criminal contempt* mechanism provides for contempt proceedings against a person “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 ....”<sup>30</sup> A witness might contend that, in the absence of any Members, the entity seeking to question him is not a “committee,” or that even if it is a “committee,” it lacks a quorum necessary to do business.<sup>31</sup> Although the presence of a quorum is not an essential element of the government’s case in a prosecution for criminal contempt, a person served with a

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<sup>28</sup>Recently, when the House has authorized staff depositions by a standing committee, the majority and minority have debated the propriety of citing a deponent for contempt for failure to appear at a staff deposition or to answer questions in such a proceeding if he subsequently responds fully at a committee hearing. *Compare* H.Rept. 105-139, *supra* note 3, at 16 (majority views) *with id.* at 23 (minority views).

<sup>29</sup>The discussion in this report of the various sanctions for failure to appear at or respond to questioning during a staff deposition, or for making false statements in such a deposition, is generally limited to special issues possibly raised by the questioning of witnesses in such a deposition. No attempt is made here to provide a complete analysis of all the elements that must be established in prosecutions under the various statutes cited below. For a detailed analysis of contempt, see *Congress’ Contempt Power*, CRS Report 86-83 A (Feb. 28, 1986). See also *Overview of Congressional Investigation of the Executive*, *supra* note 15.

<sup>30</sup>U.S.C. § 192. In one case, an indictment charging the defendant with criminal contempt for refusing to answer a question posed by a committee was based on the witness’ deposition testimony. The indictment was dismissed because, under the circumstances, the statutory grant of immunity was considered to provide the defendant with insufficient protection of his fifth amendment rights. *United States v. Kim*, 471 F. Supp. 467 (D.D.C. 1979). Although the case makes no reference to the witness’ deposition testimony, the report on the contempt citation makes it clear that the citation was based on a refusal to answer a question at a deposition before a committee Member. H.Rept. 95-1214, 95th Cong., 2nd Sess. (1978).

<sup>31</sup>Oliver North argued that he could not be compelled to provide testimony at a deposition to be taken by staff of the House and Senate Iran-Contra investigating committees because such a deposition would not be a proceeding before Congress or a congressional committee and, therefore, such testimony would not be protected by the immunity order obtained for him by the committees pursuant to the immunity statute (18 U.S.C. § 6005). Van Cleve and 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, 57-59 (1990). For a review of a legislative recommendation by the Iran-Contra committees to address this issue, and a discussion of the initial attempt to adopt this recommendation, see *id.* at 59 n.63; *False Statements after Hubbard*, *supra* note 8, at 22-23. The recommendation of the Iran-Contra committees was included in the False Statements Accountability Act of 1996, P.L. 104-292, 110 Stat. 3459, 3460, which amended 18 U.S.C. § 6005 so as to specify that grants of immunity apply, *inter alia*, to testimony at any proceeding “ancillary” to either House of Congress, or any committee or subcommittee of either House. The legislative history of the 1996 measure makes it clear that a staff deposition would be considered an “ancillary” proceeding. 142 *Cong. Rec.* S11608 (daily ed. Sept. 27, 1996).



subpoena can raise the absence of a quorum as a defense in his criminal trial, at least if he made the point before the committee.<sup>32</sup> But Congress has the authority to determine what constitutes a competent tribunal and a quorum,<sup>33</sup> and the decision to have depositions conducted by staff is not only arguably within the province of the House and Senate to make under their rule-making authority<sup>34</sup> but is also a reasonable one in light of the numerous demands on Members' time.<sup>35</sup> Furthermore, doubts as to the applicability of contempt sanctions might be diminished if the authorization for staff depositions or committee rules (a) provide a procedure whereby a Member can rule on any objections raised by a witness and (b) specify that the committee shall not initiate enforcement proceedings unless the deposition notice was accompanied by a subpoena and unless the witness declines to answer a question after being directed to do so by a Member.<sup>36</sup>

As an alternative to criminal contempt, a Senate committee might institute enforcement proceedings under the statutory *civil contempt* procedure<sup>37</sup> and either

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<sup>32</sup>*United States v. Bryan*, 339 U.S. 323 (1950).

<sup>33</sup>See *Christoffel v. United States*, 338 U.S. 84, 88-89 (1949)(majority opinion); *id.* at 91 (Jackson, J., dissenting); *United States v. Ballin*, 144 U.S. 1 (1892).

<sup>34</sup>See *United States v. Ballin*.

<sup>35</sup>*Cf. Gravel v. United States*, 408 U.S. 606, 616-17 (1972).

<sup>36</sup>For example, the rules of the Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the Senate Judiciary Committee, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980), specified:

6.2 The subcommittee shall not initiate procedures leading to criminal or civil enforcement proceedings in the event a witness fails to appear at a deposition unless the deposition notice was accompanied by a subcommittee subpoena.

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6.4 ... Questions shall be propounded orally by committee staff. Objections by the witness as to the form of questions shall be noted for the record. If a witness objects to a question and refuses to testify, the committee staff may proceed with the deposition, or may, at that time or at a subsequent time, seek a ruling by telephone or otherwise on the objection from a member of the subcommittee. If the member overrules the objection, he may refer the matter to the subcommittee or he may order and direct the witness to answer the question, but the subcommittee shall not initiate procedures leading to civil or criminal enforcement unless the witness refuses to testify after he has been ordered and directed to answer by a member of the subcommittee.

<sup>37</sup>2 U.S.C. §§ 288b(b), 288d; 28 U.S.C. § 1365. Before enforcing the subpoena, the court would consider objections raised by a witness as to the validity of the subpoena, the necessity of a quorum, *etc.* See S.Rept. 95-170, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 41 (1977). The Senate Legal Counsel observed in 1996 that "in no instance since the creation [in the Ethics in Government Act of 1978] of ... [the civil enforcement] alternative has the Senate certified a criminal contempt for failure to comply with a subpoena, opting on each occasion to pursue civil enforcement over criminal penalties." *False Statements after Hubbard*, *supra* note 8, at 20

(continued...)

House might utilize its *inherent contempt* authority and try the witness at the bar of the House or Senate.<sup>38</sup>

## Possible Sanctions For False Statements<sup>39</sup>

On their face, several criminal statutes might seem to be applicable to a witness who makes a false statement in a staff deposition. Resolutions authorizing staff depositions often specifically provide that the statements are to be taken under oath, apparently to signal to witnesses that the committee considers depositions seriously and to try to bring such statements within the scope of the perjury laws. The application of the federal perjury statute to staff depositions will be considered in detail below.

<http://wikileaks.org/wiki/CRS-95-949>

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<sup>37</sup>(...continued)

n.3 (prepared statement of Thomas Griffith).

The statutory civil contempt mechanism is not available in the case of an officer or employee of the executive branch of the federal government acting in his official capacity, where a “refusal to comply is based on the assertion of a ... governmental privilege or objection the assertion of which ... is authorized by the executive branch ....” 28 U.S.C. § 1365.

<sup>38</sup>Due in part to the fact that inherent contempt is cumbersome and time-consuming, especially for a modern Congress with a heavy legislative agenda that would be interrupted by a trial at the bar, the process has not been used by either body since 1935. Deschler’s *Precedents of the U.S. House of Representatives*, ch. 15, § 17 at p. 139 n.7 (1977); *False Statements after Hubbard*, *supra* note 8, at 19 n.1 (prepared statement of Senate Legal Counsel Thomas Griffith).

<sup>39</sup>For a useful analysis of statutory provisions applicable to false statements, see *Perjury Defeats Justice*, 42 Wayne L. Rev. 1755 (1996).

## Obstruction of Congressional Investigation

One who makes a false statement in a congressional staff deposition risks prosecution under the criminal code section barring obstruction of any congressional investigation, 18 U.S.C. § 1505.<sup>40</sup> The application of that section to lying to Congress was severely constricted by a 1991 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *United States v. Poindexter*.<sup>41</sup> That case held that, because the adverb “corruptly,” as employed in § 1505, was intended to have a transitive meaning, the statute could be used to punish a person who induced another to lie, but could not be used to punish one who violates a legal duty by himself lying.<sup>42</sup> Congress overturned *Poindexter*’s interpretation of § 1505 by means of a provision included in the False Statements Accountability Act of 1996,<sup>43</sup> which defined “corruptly,” for purposes of § 1505, to mean “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”<sup>44</sup>

### False Statements Statute

A false statement in a congressional staff deposition might be prosecuted under the federal false statements statute, 18 U.S.C. § 1001. That law was amended by the False Statements Accountability Act of 1996,<sup>45</sup> which reestablished § 1001 as a

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<sup>40</sup>Section 1505 provides:

Whoever, corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress [s]hall be fined under this title or imprisoned not more than five years, or both.

<sup>41</sup>951 F.2d 369 (D.C.Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992).

<sup>42</sup>951 F.2d at 379.

<sup>43</sup>P.L. 104-292, 110 Stat. 3459.

<sup>44</sup>18 U.S.C. § 1515(b), as added by P.L. 104-292. The legislative history of the 1996 act made it clear that Congress intended to “restore the strength and usefulness of the congressional obstruction statute ....” 142 *Cong. Rec.* S8940, S8941 (daily ed. July 25, 1996).

<sup>45</sup>Section 1001, as amended by the 1996 act, provides in pertinent part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false

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provision applicable to congressional investigations. The application of § 1001 to false statements to the legislative branch had been suspended by the Supreme Court's 1995 ruling in *Hubbard v. United States*<sup>46</sup> that § 1001 did not apply to statements made in judicial proceedings.

According to the Court in *Hubbard*, §1001 “criminalizes false statements and similar misconduct occurring ‘in any matter within the jurisdiction of any department or agency of the United States.’”<sup>47</sup> In the course of its opinion in *Hubbard*, the Court overruled its 1955 decision in *United States v. Bramblett*, which had concluded that “department” (as that term was employed in § 1001 at the time of the decisions in *Bramblett* and *Hubbard*) “was meant to describe the executive, legislative and judicial branches of the Government.”<sup>48</sup> *Bramblett* was overruled because, according to *Hubbard*, there was nothing in the text of § 1001 or in its legislative history to suggest that Congress intended “department” to encompass the legislative and judicial

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<sup>45</sup>(...continued)

writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under ... title [18, U.S. Code] or imprisoned not more than 5 years, or both.

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(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

<sup>46</sup>514 U.S. 695 (1995).

<sup>47</sup>*Id.* at 699, quoting 18 U.S.C. § 1001 (1994), which provided:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

<sup>48</sup>348 U.S. 503, 509 (1955) (emphasis added). The defendant in *Bramblett* was a former Member of the House who was prosecuted for falsely representing to the House Disbursing Office that an individual was entitled to salary as his clerk. The defendant argued, unsuccessfully, that § 1001 did not apply to falsehoods addressed to offices within the legislative branch.

branches.<sup>49</sup> *Hubbard* was read broadly by the lower courts as concluding that § 1001 applied only to statements to the executive branch.<sup>50</sup>

Prior to *Hubbard*, the false statements statute had been used to prosecute<sup>51</sup> falsehoods in statements to administrative units of Congress<sup>52</sup> and in statements to congressional committees acting on internal House affairs,<sup>53</sup> probing the executive branch,<sup>54</sup> and investigating other matters.<sup>55</sup> The statute had been applied to a variety

<sup>49</sup>514 U.S. at 699-702. The Court noted the availability of other statutes to punish falsehoods in the legislative branch, including 18 U.S.C. § 1505 (obstruction of congressional investigation), *supra* notes 40-44 and accompanying text, and 18 U.S.C. § 1621 (perjury), *infra* notes 65-85 and accompanying text. 514 U.S. at 714 n.14. The Court also noted the possible applicability of 18 U.S.C. § 287, which proscribes making or presenting “to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent ....” The false claims provision is directed at the offense of making or presenting false or fraudulent financial claims against the United States. 514 U.S. at 703 n.5. Depending on the circumstances under which a false statement is made (including whether or not the statement is made as part of a conspiracy), an array of statutes might be invoked. See Doyle, “Impact of *United States v. Hubbard*, 115 S.Ct. 1754 (1995), on the Prosecution of False Statements Made in Matters of Concern to the Judiciary and the Congress,” CRS general distribution memorandum (July 13, 1995).

<sup>50</sup>*False Statements after Hubbard*, *supra* note 8, at 13 (prepared statement of Deputy Assistant Attorney General Robert Litt). Following *Hubbard*, charges and convictions were dismissed in several cases involving false statements to the legislative branch. *Id.*, citing *United States v. Dean*, 55 F.3d 640 (D.C.Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996); *United States v. Rostenkowski*, 59 F.3d 1291, 1301 (D.C.Cir. 1995); *United States v. Hansen*, 906 F. Supp. 688 (D.D.C. 1995). Other cases in which § 1001 charges and convictions, based upon false statements to the legislative branch, were dismissed following *Hubbard* are collected in *Congressional Response to Hubbard v. United States: Restoring the Scope of 18 U.S.C. § 1001 and Codifying the “Judicial Function” Exception*, 46 Cath.U.L.Rev. 523, 555 n. 213 (1997)[hereinafter *Congressional Response to Hubbard*].

<sup>51</sup>For a detailed review of indictments and prosecutions under § 1001 for statements made to Congress, see Doyle, “Application of 18 U.S.C. § 1001 to Statements Made to Congress Between *Bramblett* and *Hubbard*,” CRS general distribution memorandum (June 26, 1995).

<sup>52</sup>*Bramblett* itself involved a statement made by a Member to the House Disbursing Office. See also *United States v. Rostenkowski*, 59 F.3d 1291 (D.C.Cir. 1995); *United States v. Diggs*, 613 F.2d 988 (D.C.Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

<sup>53</sup>*United States v. Hansen*, 772 F.2d 940, 943-44 (D.C.Cir. 1985) (omissions in financial disclosure forms filed, pursuant to Ethics in Government Act of 1978, with Clerk of the House for transmission to Committee on Standards of Official Conduct), *cert. denied*, 475 U.S. 1045 (1986)). In *United States v. Oakar*, 111 F.3d 146 (D.C.Cir. 1997), the court dismissed, in light of *Hubbard*, a § 1001 count in the indictment based on defendant’s failure to disclose personal liabilities on her financial disclosure form.

<sup>54</sup>The statute was employed in a number of Iran-Contra prosecutions. See *United States v. Poindexter*, 951 F.2d 369, 386-87 (D.C.Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992); *United States v. Clarridge*, 811 F. Supp. 697 (D.D.C. 1992); *United States v. George*, 1992 U.S. Dist. LEXIS 6716 (D.D.C. May 18, 1992); *United States v. North*, 708 F. Supp. 380,

(continued...)

of conduct, including deposition testimony;<sup>56</sup> false written material submitted to committee staff;<sup>57</sup> statements in unsworn hearing testimony;<sup>58</sup> and unsworn statements

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<sup>54</sup>(...continued)

384 (D.D.C. 1988).

After he left office, Caspar Weinberger was indicted under § 1001 for making false statements to Congress during his tenure as Secretary of Defense regarding his knowledge of a matter related to the Iran-Contra affair. *Final Report of the Independent Counsel for Iran-Contra Matters*, U.S. Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel [hereinafter, *Independent Counsel Report*], Vol. I at 414 (1993). Another count in the indictment charged him with obstruction of a congressional investigation by concealing and withholding relevant notes. When the obstruction count was dismissed, it was replaced by a count in a second indictment charging him with another violation of § 1001 for statements he had made as Secretary of Defense to staff of the House and Senate Iran-Contra investigating committees in deposition testimony under oath. *United States v. Weinberger*, 1992 U.S. Dist. LEXIS 16537 (D.D.C. Oct. 30, 1992). The second indictment was dismissed by the district court on statute-of-limitations grounds, and Weinberger was pardoned by President Bush on December 24, 1992, before the Independent Counsel had made a decision as to whether to appeal the dismissal. *Independent Counsel Report*, *supra*, at 415.

There have been other instances of the use of § 1001 in proceedings involving executive branch officials providing information to Congress. Statements made by Theodore Olson, Assistant Attorney General for the Office of Legal Counsel, in unsworn testimony in a House Judiciary Committee hearing (*Report on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83*, H.Rept. 99-435, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess., Vol. 1 at 617 (1985)) resulted in the appointment of an independent counsel to investigate whether he had violated § 1001 or any other provision of federal criminal law. See *Morrison v. Olson*, 487 U.S. 654, 665-67 (1988)(upholding constitutionality of independent counsel statute). The independent counsel was also authorized to investigate related allegations involving actions of Deputy Attorney General Schmults and Assistant Attorney General Dinkins. *Id.* Apparently no indictments resulted from the probe.

Deborah Gore Dean, a former employee of the Department of Housing and Urban Development, was convicted of, *inter alia*, four counts of violating § 1001 for statements she made to the Senate Committee on Banking, Housing and Urban Affairs regarding her nomination for the position of Assistant Secretary for Community Planning and Development. The convictions on these counts were reversed on the basis of the ruling in *Hubbard*. However, Dean had also been charged with four counts of perjury for the same statements upon which the § 1001 counts were based, and her convictions under three of these counts were affirmed. *United States v. Dean*, 55 F.3d 640 (D.C.Cir. 1995).

<sup>55</sup>*United States v. Levine*, 860 F. Supp. 880 (D.D.C. 1994), *rev'd*, 72 F.3d 920 (D.C. Cir. 1995).

<sup>56</sup>See case of Caspar Weinberger, *supra* note 54.

<sup>57</sup>See *United States v. Levine*, 860 F. Supp. 880 (D.D.C. 1994), *rev'd*, 72 F.3d 920 (D.C. Cir. 1995).

<sup>58</sup>See, *e.g.*, investigation of Theodore Olson, *supra* note 54.

made to Members in a relatively informal setting which did not constitute a committee meeting or hearing.<sup>59</sup>

It appears that, as a result of the amendments to § 1001 adopted in the False Statements Accountability Act of 1996, the false statements statute is once again available to a prosecutor in cases similar to those in which it had been utilized prior to *Hubbard*. The 1996 law repealed the term “department” (which had caused the Court in *Hubbard* to conclude that § 1001 did not apply to the legislative branch) and clarified that the false statements law applies to matters within the jurisdiction of the “executive, legislative, or judicial branch of the Government of the United States....”<sup>60</sup> However, the 1996 amendments to § 1001 also somewhat restricted the scope of that section by (a) expressly establishing materiality as an element of any offense under the section;<sup>61</sup> and (b) creating a “legislative function” exception<sup>62</sup> which limits the use of the section in any matter within the jurisdiction of the legislative branch to administrative matters<sup>63</sup> and investigations or reviews.<sup>64</sup>

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<sup>59</sup>*United States v. Poindexter*, 725 F. Supp. 13 (D.D.C. 1989), *rev'd on other grounds*, 951 F.2d 369, 386-87 (D.C.Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992).

<sup>60</sup>18 U.S.C. § 1001(a) (emphasis added).

<sup>61</sup>H.Rept. 104-680, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 8 (1996).

<sup>62</sup>142 *Cong. Rec.* H11138 (daily ed. Sept. 25, 1996) The legislative function exception was intended to exclude certain matters, such as “legislative advocacy” and correspondence from constituents, from the scope of the statute. *Id.* at H11138-39; S11606 (daily ed. Sept. 27, 1996).

<sup>63</sup>18 U.S.C. § 1001(c)(1).

<sup>64</sup>*Id.*, § 1001(c)(2). A false statement is covered under this subsection if it is made in an “investigation or review” which is (a) “conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress”; and (b) conducted consistent with applicable rules of the House or Senate.”

Several points concerning the intended scope of § 1001(c)(2) were addressed in the floor debate on the 1996 legislation. The phrase “investigation or review” was not meant to encompass “routine fact gathering” and “miscellaneous inquiries by committee or personal staff.” 142 *Cong. Rec.* H11138 (daily ed. Sept. 25, 1996); *id.* at S11606 (daily ed. Sept. 27, 1996). An “investigation” is a relatively “formal inquiry into a particular matter,” and includes “ancillary proceedings, such as depositions, and formal steps employed by certain committees that are a necessary prelude to an investigation, such as a preliminary inquiry and initial review employed by the [Senate] Select Committee on Ethics.” *Id.* at S11605-06. A false statement made to a Member or to congressional staff in an authorized investigation could be prosecuted. *Id.* at H11139. The term “review” is to be construed broadly and includes a committee’s oversight activity and other matters (*e.g.*, confirmation proceedings). *Id.*, at S11606; see also *id.* at H11138. Changes to Senate and House rules, adopted subsequent to the 1996 amendments to the false statements statute, might clarify the scope of the terms “investigation” and “review” for purposes of that law. *Id.* at S11605, H11138. An “investigation” or “review” must be within the jurisdiction of the committee or subcommittee. *Id.* at S11605.

## Perjury<sup>65</sup>

**Elements of the offense.** A comprehensive analysis of the application of the perjury statute<sup>66</sup> to statements in legislative branch proceedings is beyond the scope of this report.<sup>67</sup> However, it may be useful to consider several questions that could arise in regard to the applicability of the perjury statute to a false statement made in a congressional staff deposition.<sup>68</sup>

The Supreme Court observed in *United States v. Debrow* that, in a prosecution under the perjury statute, the essential elements are “(1) an oath authorized by law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a

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<sup>65</sup>See Doyle, *Perjury Under Federal Law: A Brief Overview*, CRS Report 98-808 (Sept. 24, 1998).

<sup>66</sup>Section 1621 of Title 18, U.S. Code, provides in pertinent part:

Whoever—(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true ... is guilty of perjury ....

Perjurious testimony given in Washington, D.C., may be prosecuted under either the general federal perjury statute, set forth above, or under a provision of the District of Columbia Code (22 D.C. Code § 2511). See *Meyers v. United States*, 171 F.2d 800 (D.C.Cir.)(applying forerunner of present District of Columbia perjury statute), *cert. denied*, 336 U.S. 912 (1948).

The same basic elements must be established in a prosecution under the federal and the District of Columbia perjury provisions. See Grabow, *supra* note 8, § 3.5[a][1] at p. 100. Other provisions of the District of Columbia Code prohibit false swearing (22 D.C. Code § 2513) and false statements (22 D.C. Code § 2514), but both of these statutes apply only to written statements, and the latter provision applies only to statements to an instrumentality of the District government.

<sup>67</sup>For an overview of the perjury statute as applied to congressional investigations, see Grabow, *supra* note 8, § 3.5.

<sup>68</sup>Some of these issues are explored in *United States v. Weissman*, 1996 U.S. Dist. LEXIS 19125 (S.D.N.Y. Dec. 19, 1996)(denying motion to dismiss indictment), which may have been the first prosecution under § 1621 for statements made in a congressional staff deposition. Following a jury trial, the defendant in *Weissman* was convicted of two counts of perjury, including one based on statements made in a staff deposition and one based on statements in a subsequent related committee hearing. *United States v. Weissman*, 22 F. Supp. 2d 187 (S.D.N.Y. 1998)(applying Sentencing Guidelines), *aff'd*, 1999 U.S. App. LEXIS 26534 (2<sup>nd</sup> Cir. Oct. 21, 1999). After a preliminary investigation into whether former White House deputy chief-of-staff Harold Ickes committed perjury in a deposition before the Senate Governmental Affairs Committee in the course of that panel’s probe of fundraising in the 1996 election campaign (*Washington Post*, Sept. 2, 1998, at p. A1; see also S. Rep. 105-167, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1998)), Attorney General Reno decided not to seek the appointment of an independent counsel. *Washington Post*, Jan. 30, 1999, at p. A1.



false statement willfully made as to facts material to the hearing.”<sup>69</sup> There would appear to be no particular difficulty in satisfying the third element in the context of a congressional staff deposition, and accordingly the focus here is on the first two elements.<sup>70</sup>

**Authorization for oath.** It perhaps should be emphasized that perjury, unlike the false statements statute and the obstruction provision, would apply only where the statement in question is made under oath. There appears to be no statute which expressly authorizes the administration of an oath in the course of congressional staff depositions. Nevertheless, at least three possible sources of the required authorization for the oath might be considered. Unfortunately, case law provides an insufficient basis for definitive answers to various questions that might be raised in regard to these possible sources for the authorization.

(1) There is a general statutory provision permitting a local notary public to administer an oath for purposes authorized or required under federal law.<sup>71</sup> Does this provision constitute sufficient authorization for administration of an oath in staff depositions, or does it only render a local notary public competent to administer an oath?<sup>72</sup> (2) The House and Senate have authorized staff depositions in resolutions establishing select investigating committees or providing for particular investigations by standing committees.<sup>73</sup> Would such a resolution, if it specifies that a deposition is to be given under oath, suffice as the authorization for the oath?<sup>74</sup> (3) Supreme Court

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<sup>69</sup>346 U.S. 374, 376 (1953), *quoted with approval in United States v. Hvass*, 355 U.S. 570, 574 (1958).

<sup>70</sup>Following *United States v. Gaudin*, 515 U.S. 506 (1995), it appears that both materiality and the competency of the tribunal under § 1621 are essential elements that must be decided by the jury.

<sup>71</sup>Under 5 U.S.C. § 2903(c), “an oath authorized or required under the laws of the United States may be administered by ... (2) an individual authorized by local law to administer oaths in the state, district, or territory or possession of the United States where the oath is administered.”

<sup>72</sup>Caselaw indicates that the requirement of legal authorization for the oath (see *Debrow*, 346 U.S. at 377; *United States v. Morehead*, 243 U.S. 607 (1917)) is distinct from the issue of the authority of the person or officer who administers the oath (see *Morehead*; *United States v. Yoshida*, 727 F.2d 822, 823 (9<sup>th</sup> Cir. 1983); *Smith v. United States*, 363 F.2d 143, 144 (5<sup>th</sup> Cir. 1966), *cert. denied*, 393 U.S. 941 (1968)).

<sup>73</sup>See examples cited in notes 16 and 17, *supra*.

<sup>74</sup>The Supreme Court in *United States v. Hvass*, 355 U.S. 570, 575 (1958), suggested that authorization for an oath need not be found in a statute but might be found instead in “Rules and Regulations which have been lawfully authorized and have a clear legislative base [citations omitted], and also decisional law.” The Court in *Hvass* ruled that the perjury statute applied to a statement at a judicial hearing, held pursuant to a local rule of a federal district court, which rule was clearly authorized by statutory provisions. See also *Chrysler v. Brown*, 441 U.S. 281, 295 (1979) (“properly promulgated, substantive agency regulations have the ‘force and effect of law’”).

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rulings have viewed Congress' investigatory power, including "enforcing process," as being inherent in the Constitution's grant of legislative power.<sup>75</sup> Would such judicial decisions provide the authorization for administration of an oath?<sup>76</sup>

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<sup>74</sup>(...continued)

Is a House or Senate resolution a "rule" within the meaning of *Hvass*? If so, does Congress' rulemaking authority under Art. I, § 5, cl. 2, of the Constitution, which is the "supreme Law of the Land" (Art. IV, § 2), provide lawful authorization, as required by *Hvass*, for the adoption of the rule, notwithstanding the fact that there is no statutory authorization for such a congressional rule? Would the Court today find that a House or Senate resolution provides authorization for an oath, notwithstanding its ruling in *INS v. Chadha*, 462 U.S. 919, 952 (1983), that changes in "the legal rights [and] duties ... of persons ... outside the legislative branch" must be enacted by statute? Would such a resolution come within the exception to *Chadha*, *id.* at 955 n.21, which recognizes the right of each House, by simple resolution, to make rules governing its proceedings? Would such a resolution, establishing procedures to assure that information received by Congress is truthful, be deemed, like Congress' subpoena power to compel the disclosure of information, to be outside the bounds of the *Chadha* holding? See *Ameron v. United States Army Corps of Engineers*, 809 F.2d 979, 992 (3<sup>rd</sup> Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988). Even if a House or Senate resolution providing for receipt of deposition testimony under oath would constitute a "rule" under *Hvass*, would that case sanction a resolution providing for receipt of deposition testimony by staff, rather than by Members?

In *United States v. Weissman*, 1996 U.S. Dist. LEXIS 19125 (S.D.N.Y. Dec. 19, 1996), the defendant was indicted for, *inter alia*, perjurious statements made in a deposition before staff of the Permanent Subcommittee on Investigations (PSI) of the Senate Committee on Governmental Affairs. The *Weissman* court held that the administration of an oath for a staff deposition could be authorized by committee or subcommittee rules adopted pursuant to a Senate resolution, and also held that such a resolution could permit committees or subcommittees "to reference local law in determining how an oath may be administered." *Id.* at \*37. PSI rule 9.3 provided that, for purposes of staff depositions, witnesses were to be "examined upon oath administered by an individual authorized by local law to administer oaths."

The *Weissman* court rejected a *Chadha* argument that Senate rules could not authorize an oath for purposes of § 1621, finding that *Chadha* did not preclude the Senate from adopting rules concerning the receipt of testimony. 1996 U.S. Dist. LEXIS 19125, at \*42.

<sup>75</sup>*McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). See also *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

<sup>76</sup>*Dicta* in *Hvass* suggests that decisional law might provide the authorization for an oath. 355 U.S. at 575. The *Hvass dicta* on this point is supported by a citation to what also appears to be *dicta* in *Glickstein v. United States*, 222 U.S. 139, 141 (1911), that the power to compel testimony includes the sanction of an oath. Reasoning from *Glickstein* and *Hvass*, it might be argued that, because case law recognizes Congress' authority to compel testimony, authorization for an oath is to be inferred. Assuming, *arguendo*, the validity of this line of reasoning, does decisional law authorizing an oath in congressional proceedings include staff depositions or is such authorization limited to hearings and other proceedings attended by Members? In *Weissman*, 1996 U.S. Dist. LEXIS 19125, at \*41, the court adopted the *Hvass-Glickstein* argument and found that case law, when considered together with pertinent committee or subcommittee rules adopted pursuant to a Senate resolution, could authorize

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**Competent tribunal.** In *Christoffel v. United States*, a prosecution for perjury at a committee hearing, the Supreme Court held that, for a congressional committee to be a competent tribunal within the meaning of the perjury statute, a quorum must be “actually and physically present” at the time a perjurious statement is made.<sup>77</sup> The Court in that case recognized Congress’ authority to determine in its rules the competency of a tribunal to take testimony,<sup>78</sup> and the House<sup>79</sup> and Senate<sup>80</sup> both generally authorize committees to establish reduced quorum provisions for the taking of testimony at hearings attended by Members.

Can the House and Senate, under their rulemaking power, render committee staff a “competent tribunal” for purposes of the perjury statute? In a recent district court ruling, it was determined that committee staff constituted a competent tribunal where staff depositions had been authorized by a Senate resolution.<sup>81</sup>

Is there a way of satisfying the “competent tribunal” requirement if committee staff are not deemed competent under § 1621? As discussed above, it may be possible to satisfy the quorum requirement under the criminal contempt statute by establishing a procedure for questioning by staff alone, but having a Member rule (perhaps by telephone) on any objections raised by the witness.<sup>82</sup> It is possible to have a Member present at a critical time for purposes of a contempt citation since the witness’ objection can alert committee staff to the need for a Member’s presence. But a witness on the verge of committing perjury is unlikely to provide a similar warning that it is time to have a Member present to hear the false material statement.<sup>83</sup>

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<sup>76</sup>(...continued)  
a staff deposition.

<sup>77</sup>338 U.S. 84, 89 (1949). See also *id.* at 90. It was insufficient that a quorum was present when the committee convened. For a discussion of the quorum issue in regard to the applicability of the contempt sanction, see text accompanying notes 31-36, *supra*.

<sup>78</sup>338 U.S. at 88-89. In affirming a conviction for perjury before a subcommittee of the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, the court in *United States v. Moran*, 194 F.2d 623, 627 (2<sup>nd</sup> Cir. 1952), rejected the defendant’s argument that the subcommittee was not a competent tribunal because only one committee member was present. The resolution establishing the committee authorized the committee to provide for a quorum of less than a majority of members for taking sworn testimony and the committee, in turn, authorized the chairman to appoint a subcommittee consisting of one or more Senators, of whom one member would be a quorum for the purpose of taking testimony.

<sup>79</sup>House Rule XI, cl. 2(h).

<sup>80</sup>Senate Rule XXVI, cl. 7(a)(2).

<sup>81</sup>*United States v. Weissman*, 1996 U.S. Dist. LEXIS 19125, at \*16 (S.D.N.Y. Dec. 19, 1996)(denying motion to dismiss indictment alleging, *inter alia*, perjury committed in staff deposition).

<sup>82</sup>See *supra* notes 31-36 and accompanying text.

<sup>83</sup>In one case, it was held that a single Member of a committee did not constitute a competent tribunal to take a deposition pursuant to a House resolution granting deposition authority because the deposition was not authorized in accordance with the procedure outlined in the

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Another issue that has arisen in regard to the “competent tribunal” requirement is whether that requirement is satisfied when a committee, to bolster a potential prosecution, recalls a witness in an attempt to elicit testimony inconsistent with his prior testimony. The courts have ruled that, if a committee questions a witness “for the purpose of establishing or solidifying the basis of a perjury indictment,” rather than to “obtain facts in aid of legislation,” then the committee is not acting as a competent tribunal.<sup>84</sup> A committee might also be held to be an incompetent tribunal if it were to call a witness to testify at a hearing for the purpose of highlighting inconsistencies with statements he had made in a deposition, thereby providing a basis for a perjury prosecution.<sup>85</sup>

## Contempt

It might perhaps be argued that making false statements amounts to a refusal to answer and therefore could be punished as a contempt. False swearing before a judicial tribunal has been held to be insufficient to constitute contempt<sup>86</sup> except where the purpose of the false statement is to obstruct justice.<sup>87</sup> On the basis of such an obstruction theory, it might be possible to punish a false statement to a congressional committee under the inherent contempt power<sup>88</sup> or perhaps even under the criminal contempt of Congress statute. In a few cases, defendants have pleaded guilty to a

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<sup>83</sup>(...continued)

committee’s rules. *United States v. Galifianakis*, Crim. No. 79-0179 (D.D.C. Aug. 3, 1979). Deposition authority had been granted to the House Committee on Standards of Official Conduct by H.Res. 252, 95th Cong. Section 7 of the Committee Resolution Defining Scope and Procedures for Korean Investigation, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977), as amended Feb. 8, 1977, provided that no deposition was to be taken unless authorized by a majority of the Members voting, a majority being present. The deposition in question, which was given voluntarily, was not authorized in accordance with § 7, but was taken at the request of committee staff.

<sup>84</sup>*United States v. Clarridge*, 811 F. Supp. 697, 708 (D.D.C. 1992), citing *United States v. Cross*, 170 F. Supp. 303 (D.D.C. 1959) and *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956).

<sup>85</sup>The defendant moved to dismiss the indictment in *Weissman*, claiming that the Senate Permanent Subcommittee on Investigations was not a competent tribunal because some of the questioning at a hearing focussed on subjects addressed in the defendant’s previous deposition before subcommittee staff. The court, in a pre-trial ruling that followed the basic principles established in *Cross* and *Icardi*, denied the motion but permitted the defendant to renew it after development of the evidentiary record at trial. 1996 U.S. Dist. LEXIS 19125, at \*17.

<sup>86</sup>*Ex parte Hudgings*, 249 U.S. 378 (1919). See also *In re Michael*, 326 U.S. 224 (1945).

<sup>87</sup>*Jones v. Clinton*, 36 F. Supp. 2d 1118, 1130, 1131 (E.D. Ark. 1999) (holding President in civil contempt because his deposition testimony in civil suit was intentionally false); *United States v. Brown*, 116 F.2d 455 (7<sup>th</sup> Cir. 1940).

<sup>88</sup>See *Journey v. MacCracken*, 294 U.S. 125, 150 n.7 (1935)(listing instances in which witnesses before the House of Commons who were found guilty of lying before investigating committees were imprisoned, apparently as an exercise of the contempt power).

misdemeanor charge of criminal contempt rather than stand trial for perjury, making false statements, or obstructing a congressional investigation, which are felonies.<sup>89</sup>

## Conclusion

Staff depositions can play an important role in a congressional investigation, permitting witnesses to be interviewed at length without the need for Members to devote substantial amounts of time to the gathering of information. Depositions have been authorized by the House and Senate in a number of major recent probes. However, questions may arise concerning the ability to enforce a subpoena for a staff deposition by means of contempt sanctions and the application to such a deposition of statutes that prohibit false statements.

It appears that a good argument could be made that the criminal contempt statute (2 U.S.C. § 192) would be applicable to a failure to comply with a subpoena for a staff deposition or failure to respond to questions at a deposition, at least if the committee has adopted rules of procedure providing for involvement of a Member if a witness raises an objection and refuses to answer.

A witness who makes a false statement in a deposition given before committee staff might be prosecuted under various statutory provisions, including 18 U.S.C. § 1001 (false statements), § 1505 (obstruction of investigation), or § 1621 (perjury). Of course, a prosecution under the perjury statute would be possible only if the witness was placed under oath. In resolutions adopted in recent years authorizing depositions, the House and Senate often have provided for the taking of such depositions under oath, arguably indicating that, in the view of Congress, statements at such depositions could be subject to a perjury prosecution. Although judicial decisions afford an inadequate basis for a definitive determination as to whether all of the elements of the perjury statute could be satisfied in a prosecution of a witness for a statement made in a staff deposition,<sup>90</sup> administration of an oath puts a witness on notice of the significance attached by the committee to his deposition.

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<sup>89</sup>For example, threatened with a perjury prosecution for statements he made during his confirmation hearing as Attorney General, Richard Kleindienst pleaded guilty to 2 U.S.C. § 192, “admitting that he had refused to answer fully and accurately certain questions put to him” during the hearing. Hamilton, *The Power to Probe* 74 (1976). More recently, Iran-Contra figures Elliot Abrams, Alan Fiers, and Robert McFarlane pleaded guilty to misdemeanor charges of withholding information from Congress. See *Independent Counsel Report*, *supra* note 54, Vol. II at 1-2.

<sup>90</sup>While the decision of the district court in *United States v. Weissman*, 1996 U.S. Dist. LEXIS 19125 (S.D.N.Y. Dec. 19, 1996), does not definitively resolve all questions concerning the application of § 1621 in a case based on false sworn statements in a congressional staff deposition, the ruling does suggest that that statute may be employed by a prosecutor in such a case.