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CONGRESSIONAL INVESTIGATIONS AND THEIR EFFECT ON SUBSEQUENT MILITARY PROSECUTIONS

*Michael J. Davidson**

INTRODUCTION

The conduct of the American armed forces is frequently the object of congressional investigations and hearings. Indeed, Congress's first investigation, conducted in 1792, inquired into the military defeat of Major General Arthur St. Clair's expedition against Indian tribes of the Northwest Territories.¹ More recently, senior military officers have testified about the mistreatment of detainees at the Abu Ghraib prison in Iraq.² Judge Advocates³ have

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¹ Richard J. Leon, *Congressional Investigations: Are Partisan Politics Undermining Our Vital Institutions?*, 31 SUFFOLK U.L. REV. 825, 826 (1998). Largely untrained, St. Clair's troops "blundered into an Indian attack," causing much of the force to flee and abandon their wounded "to the scalping knife." RUSSELL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY 91-92* (1967). St. Clair's expedition suffered 632 soldiers killed in action. *Id.* at 92.

² Press Release, U.S. House of Representatives, Comm. On Armed Services, Statement by Chairman Hunter, *Hearings on Abu Ghraib: The Schlesinger Report; and the Kern, Fay, and Jones Report* (Sept. 9, 2004) ("We also heard from three general officers, General Paul Kern, Lieutenant General Anthony Jones, and Major General George Fay, who lent their experience to yet

attempted to obtain testimony given before congressional committees for use at a court-martial, a practice that dates back to at least 1879.⁴

Congressional investigations and hearings provide an effective means for Senators and Representatives to gather information necessary to perform their legislative duties. Further, public hearings provide Congress with the opportunity to inform the public about matters of national interest. Unfortunately, congressional investigations and hearings can interfere with the criminal justice system, especially when Congress grants a witness use immunity and that witness's testimony is either televised or widely reported by the media. This power can be exploited by participating Members of Congress who do not have such laudable motives.⁵

another exhaustive examination of what went wrong with military detainee operations in Iraq.”). *See also* Josh White & Bradley Graham, *Senators Question Absence of Blame in Abuse Report*, WASH. POST, Mar. 11, 2005, at A17 (reporting on testimony of Vice Admiral Church III before the Senate Armed Services Committee); Rowan Scarborough, *Abizaid Blames ‘Broken’ System To Report Abuse*, WASH. TIMES, May 20, 2004, at A20 (reporting on hearings before the Senate Armed Services Committee); Stephen Dinian, *Abuse In Iraq Not Military Policy*, WASH. TIMES, May 12, 2004, at A01 (reporting that Army Major General Antonio Taguba and Air Force Lieutenant General Lance Smith testified before the Senate Armed Services Committee).

³ A “judge advocate” is defined by statute as “(A) an officer of the Judge Advocate General’s Corps of the Army or the Navy; (B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or (C) an officer of the Coast Guard who is designated as a law specialist.” 10 U.S.C. § 801(13) (2000).

⁴ *United States v. Calley*, 46 C.M.R. 1131, 1187 n.22 (A.C.M.R. 1973), *aff’d*, 48 C.M.R. 19, 22 U.S.C.M.A. 534 (C.M.A. 1973) (“One of the earliest attempts to secure testimony given to a congressional committee was made by the judge advocate of a court-martial in 1879.”). A court-martial is a “military court, convened . . . for trying and punishing offenses in violation of the Uniform Code of Military Justice committed by persons subject to the Code, particularly members of the armed forces.” BLACK’S LAW DICTIONARY 354 (6th ed. 1979).

⁵ *See* Leon, *supra* note 1, at 827-28 (asserting generally that a congressional investigation “is a delicate balancing act between a search for truth and the exercise of political power for policy and partisan advantage” and

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The impact of congressional investigations and hearings can be disastrous for subsequent or parallel criminal prosecutions, including those conducted by the military. The post-My Lai court-martial of Staff Sergeant David Mitchell⁶ serves as one historical case in point. Congressional grants of immunity can also make it extremely difficult to bring a subsequent criminal case against an immunized witness, as exemplified by the failed federal prosecutions of Vice Admiral John Poindexter and Lieutenant Colonel Oliver North following the Iran-Contra scandal.⁷ These situations demonstrate that in future cases, congressional investigations and hearings may interfere with the normal progress of the military justice system and may ultimately result in the guilty going unpunished and justice being left undone.

This article provides a general overview of Congress's investigative powers and the limits on those powers, including the rights afforded to witnesses who are called to participate in a congressional investigation or hearing. Focusing on the military, and using the My Lai massacre and the Iran-Contra scandal as historical examples, this article discusses the impact of a

noting specifically that when the Republicans took control of the Senate and House in 1995, many Republicans wanted "payback" for the excesses of previously Democratic controlled congressional investigations). *See also* GENERAL (RET.) TOMMY FRANKS, *AMERICAN SOLDIER* 224 (2004) ("But as I knew from my days as ARCENT commander and my brief tenure as CENTCOM CINC, public congressional hearings had more to do with politics than with exposing facts."); MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 173-74 (1974) (noting how Congressman Gene Cox, on the eve of WWII, wanted to establish a committee to investigate national defense programs in order to "embarrass [President] Roosevelt" and explaining how the Committee on the Conduct of the War, during the Civil War, "wanted to cause trouble for Lincoln, which they succeeded in doing").

⁶ Sergeant Mitchell's court-martial was one of several pursued by the Army following the 1968 massacre of the Vietnamese inhabitants of the hamlet of My Lai, Republic of South Vietnam. *See infra* notes 123-28 and accompanying text.

⁷ The Iran-Contra scandal refers to the illegal diversion of money, from the sale of anti-tank missiles to Iran as part of an effort to release American hostages held in Lebanon, to support the Nicaraguan Contra movement. Four individuals associated with the military were prosecuted as a result of their involvement in this diversion of funds. *See infra* notes 192-93 and accompanying text.

congressional investigation on the government's current ability to prosecute members of the armed forces.

Part I provides an overview of Congress's broad power to conduct investigations and hearings, and the tools it may use to secure testimony and evidence. This section also discusses the limits of Congress's investigative powers, including the rights of witnesses appearing before Congress. Part II addresses a prosecutor's disclosure obligations under the Jencks Act, as mandated by federal case law, and as required by military law. Further, this portion of the article discusses the relationship between these disclosure obligations and evidence acquired by Congressional investigations. Part III discusses Congress's authority to grant immunity during an investigation and the effect of such grant on ongoing and future criminal prosecutions. Part IV examines the current status of common law privileges after a compelled waiver during a congressional investigation.

I. OVERVIEW OF THE CONDUCT OF CONGRESSIONAL INVESTIGATIONS AND HEARINGS

In order to fully appreciate the potential impact of a congressional investigation or hearing on the military justice system, an overview of Congress's investigative powers and limitations is necessary.

A. Inherent Authority and General Limitations

Congress's power to investigate is not enumerated in the Constitution. Rather, the Supreme Court has found that power to be "inherent in the legislative process."⁸ That such power exists is

⁸ *Watkins v. United States*, 354 U.S. 178, 187 (1957). *See also* Leon, *supra* note 1, at 826-27 ("[T]he power of Congress to investigate is not a power that was written into the Constitution by our founding fathers. It is a power that the Supreme Court has nonetheless recognized for over 100 years as a power inherent to the legislative and oversight functions of the Congress."). In *Watkins*, the Court reversed a contempt of Congress conviction of a witness who had refused to answer questions posed by the Subcommittee of Un-American

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based on the rationale that 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.”⁹ The Supreme Court has broadly defined this power to include “inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes[,] . . . and surveys of defects in our social, economical or political system for the purpose of enabling the Congress to remedy them.”¹⁰ Additionally, this power to investigate “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”¹¹ As long as the subject matter of the investigation falls within the broad ambit of Congress’s investigative authority, the courts will not examine the actual motives of investigating committee members.¹²

As a function of its investigative authority, Congress, or a committee acting on its behalf, “may depose witnesses, issue subpoenas, and hold hearings.”¹³ When called upon to review the

Activities Committee, determining that upon the defendant witness’s objection to the pertinency of the questions, the committee chairman failed to provide a meaningful explanation. 354 U.S. at 214-15. The failure to explain the pertinency of the committee’s questions did not provide defendant with “a fair opportunity to determine whether he was within his rights in refusing to answer and his conviction [was] necessarily invalid under the Due Process Clause of the Fifth Amendment.” *Id.* at 215.

⁹ *Eastland v. U.S. Servicemen’s Fund, Inc.*, 421 U.S. 491, 504 (1975) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).

¹⁰ *Watkins*, 354 U.S. at 187.

¹¹ *Id.*

¹² *Id.* at 200. *See also Eastland*, 421 U.S. at 508 (“Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it.”); *United States v. Hintz*, 193 F. Supp. 325, 334 (N.D. Ill. 1961) (“[N]o court can proscribe Congressional inquiries merely because they are alleged to involve . . . improper impelling motives . . .”); *United States v. Icardi*, 140 F. Supp. 383, 388 (D.D.C. 1956) (“[C]ourts will not question the motives of the questioners.”).

¹³ Roberto Iraola, *Self-Incrimination and Congressional Hearings*, 54 MERCER L. REV. 939, 949 (2003). *See also Eastland*, 421 U.S. at 504-05 (involving Congress’s power to issue subpoenas); *United States v. Di Carlo*, 102 F. Supp. 597, 601 (N.D. Ohio 1952) (involving Congress’s “power to conduct

propriety of a subpoena, the court's scope of inquiry is limited to "determining that a committee's inquiry may fairly be deemed within its province."¹⁴ Further, the manner in which Congress elects to conduct its hearings, whether "public or private, and who shall be admitted or invited, are questions committed to the Congress"¹⁵ This congressional discretion also extends to the decision whether or not to permit televised hearings.¹⁶

Although Congress's power to investigate is broad, the courts have cautioned that it is not unlimited.¹⁷ Congressional investigations "must be related to, and in furtherance of, a legitimate task of the Congress."¹⁸ Congress may not conduct hearings merely to punish those being investigated, to facilitate the "personal aggrandizement of the investigators," or to delve into the private affairs of an individual "without justification in terms of the functions of the Congress."¹⁹ As the Supreme Court in *Watkins v. United States* posited, "there is no congressional power to expose for the sake of exposure."²⁰ Further, the authority of an investigating committee or subcommittee is limited to the authority delegated to it by Congress.²¹

investigations" and "compel disclosures of facts pertinent to the inquiry").

¹⁴ *Eastland*, 421 U.S. at 506 (quoting *Tenney v. Bradnove*, 341 U.S. 367, 378 (1951)).

¹⁵ *Hintz*, 193 F. Supp. at 335.

¹⁶ *See id.* (stating that witnesses have no right to refuse to testify because of presence of media); Application of U.S. Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1279-80 (D.D.C. 1973) (holding that the court lacks power to restrict immunity order to testify upon condition that "the witnesses . . . testify only outside the presence of television cameras and radio microphones").

¹⁷ *Watkins v. United States*, 354 U.S. 178, 187 (1957). *See also* *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("Broad as it is, the power [of inquiry] is not, however, without limitations.").

¹⁸ *Watkins*, 354 U.S. at 187.

¹⁹ *Id.* *See* *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927) ("[N]either house is invested with 'general' power to inquire into private affairs . . .").

²⁰ *Watkins*, 354 U.S. at 200.

²¹ *Id.* at 206 ("[T]hese committees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere.").

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Congressional inquiries are also limited by constitutional constraints. Witnesses appearing before Congress enjoy the same constitutional rights as witnesses appearing in any court of law.²² Congress must respect the First Amendment rights of speech, press, religion, political beliefs, and association; it cannot subject a witness to unreasonable searches and seizure in violation of the Fourth Amendment; and Congress cannot force a witness to incriminate himself in violation of the Fifth Amendment.²³

To effectuate its investigative authority, Congress may exercise its contempt power. This power “is the means by which Congress responds to certain acts which obstruct the legislative process in order to punish the contemnor and/or to remove the obstruction.”²⁴ Congress may exercise its contempt power in three different proceedings. First, both the House and Senate possess the inherent power to cite a witness for contempt. Under this procedure, the Sergeant-at-Arms brings the person before the House or Senate, where he or she is tried, and then, if appropriate, imprisoned in the Capitol jail.²⁵ The length of imprisonment is dependent upon the purpose of the incarceration. As punishment, the person can be imprisoned for a fixed period of time; as a compliance measure, the person can only be imprisoned until compliance is achieved, but not longer than the end of the congressional session for purposes of the House.²⁶ Although available to Congress, this process has not been used in more than half a century.²⁷

²² *Id.* at 188 (“[T]he constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action.”).

²³ *Id.*

²⁴ JAY R. SHAMPANSKY, CONGRESS’ CONTEMPT POWER 1 (2003).

²⁵ *Id.* at 2 n.4.

²⁶ *Id.* Incarceration in the Capitol jail may be challenged in court through a writ of *habeas corpus*. *Id.* See also *In the Matter of the Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 n.27 (D.C. Cir. 1981).

²⁷ SHAMPANSKY, *supra* note 24, at x. The process is “considered to be cumbersome and time-consuming for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar.” *Id.* at x.

Second, the Senate possesses a civil contempt power.²⁸ Enacted as part of the Ethics in Government Act of 1978,²⁹ the Senate's civil contempt power envisions a process in which the Senate Legal Counsel applies to the U.S. District Court for the District of Columbia for an order to adhere to a Senate subpoena, after being directed to do so by Senate resolution.³⁰ Refusal to comply with a valid subpoena may result in a summary proceeding for contempt of court and the imposition of sanctions to achieve compliance.³¹ This civil contempt procedure, which does not apply to the House,³² was designed to remedy a perceived shortcoming in Congress's existing contempt power, which did not allow "a witness to challenge judicially the legality of the inquiry or procedures, and then to purge himself of his contempt by testifying if his contentions were not judicially upheld."³³ The civil contempt process, however, does not apply "to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity," unless "the refusal to comply is based on the assertion of a personal privilege or objection" rather than an authorized invocation of a governmental privilege or objection.³⁴

Finally, both the House and Senate may use the criminal contempt procedures codified at sections 192 and 194 of Title 2 of the United States Code. Originally enacted in 1857, section 192 makes it a misdemeanor offense, punishable by a fine not to exceed \$1,000 and imprisonment for a period not to exceed twelve months, for any person summoned to testify or produce papers by

²⁸ 2 U.S.C. §§ 288b, 288d (2005); 28 U.S.C. § 1365 (2005).

²⁹ SHAMPANSKY, *supra* note 24, at 19 n.2 (citing Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 703, 705, 92 Stat. 1877-80 (1978)).

³⁰ *Id.* at 19-20. *See also* 2 U.S.C. §§ 288b(b), 288d(a) (2005); 28 U.S.C. § 1365(a) (2005). Alternatively, the Senate may elect to first seek a judicial declaration as to the validity of the Senate subpoena or order. SHAMPANSKY, *supra* note 24, at 20 n.5; 2 U.S.C. § 288d(a) (2005).

³¹ SHAMPANSKY, *supra* note 24, at 20. *See also* 28 U.S.C. § 1365(b) (2005).

³² In the Matter of the Application of the United States Senate Permanent Subcomm. on Investigations, 655 F.2d 1232, 1238 n.28 (D.C. Cir. 1981).

³³ *Id.* at 1238 (quoting *United States v. Fort*, 443 F.2d 670, 677 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971)) (internal quotations omitted).

³⁴ 28 U.S.C. § 1365(a) (West 2004).

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either House of Congress, who “willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry”³⁵ Section 194 establishes the procedures to bring the matter to the appropriate United States Attorney, “whose duty it shall be to bring the matter before the grand jury for its action.”³⁶ However, it is unclear whether this duty is mandatory or discretionary and whether the U.S. Attorney may exercise its prosecutorial discretion and elect not to pursue a prosecution.³⁷

B. Witness Rights

In terms of witness rights, there are some similarities between a Congressional investigation or hearing and a criminal trial. Like the criminal defendant, a witness appearing before a congressional committee may appear with counsel,³⁸ although the counsel’s role may be a limited one.³⁹ Indeed, counsel may appear with the

³⁵ 2 U.S.C. § 192; SHAMPANSKY, *supra* note 24, at 6. The original legislation was in response to the refusal of a newspaper reporter to answer various questions posed by a select committee. *Id.* at 13 n.1.

³⁶ 2 U.S.C. § 194 (West 1997 and 2004 Supp.). The procedures require: (1) approval by the committee [or subcommittee if appropriate], (2) calling up and reading the committee report on the floor; (3) either (if Congress is in session) House [or Senate] approval of the resolution authorizing the Speaker [or President of the Senate] to certify the report to the U.S. Attorney for prosecution, or (if Congress is not in session) an independent determination by the Speaker [or President of the Senate] to certify the report, [and] (4) certification by the Speaker [or President of the Senate] to the appropriate U.S. Attorney for prosecution.

SHAMPANSKY, *supra* note 24, at 14-15.

³⁷ SHAMPANSKY, *supra* note 24, at 16-17.

³⁸ See, e.g., Susan Schmidt, *Ex-Lobbyist Is Assailed At Hearing*, WASH. POST, Sept. 30, 2004, at A4 (describing how witnesses to a Senate Indian Affairs Committee hearing appeared with legal counsel); OLIVER L. NORTH & WILLIAM NOVAK, *UNDER FIRE: AN AMERICAN STORY* 361 (1991) (stating that during his testimony before a select committee during the Iran-Contra hearings, North frequently consulted with his attorney).

³⁹ See Robert J. Giuffra, *Representing Your Client In a Congressional*

witness at all stages of a congressional investigation.⁴⁰ The unrestricted right to the presence of counsel throughout the entire investigative process is similar to the rights afforded a military defendant in the military justice system, which generally offers more procedural protections than does its federal counterpart.⁴¹

A witness appearing before a congressional committee also has the right to invoke the Fifth Amendment right against self-incrimination and refuse to answer questions or provide evidence.⁴² At least one court has extended a witness's right to invoke the Fifth Amendment in response to questions posed during

Investigation, 4 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 1 (Dec. 1997), available at 4 No. 11 BUSCRIMB 1 (Westlaw), at *3 (“The witness’s counsel normally is a potted plant during the hearings; the active participation of Oliver North’s counsel, Brendan Sullivan, during the Iran-Contra hearings was a very rare exception to this rule. Don’t expect to be able to raise objections to the form—or even to the relevance—of questions.”).

⁴⁰ See *id.* at *2 (“[A] witness’s lawyer can attend a deposition or interview conducted by congressional staff.”).

⁴¹ In the federal system, counsel may not accompany his or her client during an appearance before the grand jury. SUSAN W. BRENNER & GREGORY G. LOCKHART, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 13.9, at 370 (1996 & 1999 Supp.). To consult with an attorney, the witness must first leave the grand jury room. *Id.* In contrast, an “accused” (military defendant) may attend the entire Article 32 hearing—the military’s equivalent of the grand jury—with counsel, present witnesses and evidence, and cross-examine all witnesses. Rule for Courts-Martial 405(f), Manual for Courts-Martial, United States (2002 ed.) [hereinafter MCM].

⁴² *Watkins v. United States*, 354 U.S. 178, 188 (1957) (“Witnesses cannot be compelled to give evidence against themselves.”). See *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (explaining how the Fifth Amendment right against self-incrimination “can be asserted in any proceeding . . .”). See, e.g., Dana Milbank, *Nobody Sings In This 5th Amendment Stretch*, WASH. POST, Mar. 18, 2005, at A12 (noting how former baseball player, when questioned about steroid use by a House committee, “took the Fifth”); Schmidt, *supra* note 38, at A4 (discussing how the witness appearing before a Senate Indian Affairs Committee hearing “turn[ed] aside all questions by invoking his Fifth Amendment right against self-incrimination”); NORTH & NOVAK, *supra* note 38, at 355 (explaining that during the Iran-Contra hearings, Lt. Col. Oliver North declined to answer questions based on his Fifth Amendment right against self-incrimination, until he was granted use immunity).

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a congressional hearing, to questions whose answer may tend to incriminate the witness of state law violations.⁴³

Although some similarities exist, the legal rights of a witness called to testify before a congressional hearing are significantly less than those of a defendant in a criminal trial or court-martial. In a criminal case, it is generally viewed as improper for a prosecutor to force a witness to invoke the Fifth Amendment right against self-incrimination in the presence of the jury in order to create an inference of guilt⁴⁴ and to comment upon that invocation.⁴⁵ In contrast, congressional committees have been known to both force a public invocation and to criticize the witness after doing so.⁴⁶

⁴³ *United States v. Di Carlo*, 102 F. Supp. 597, 606 (N.D. Ohio 1952) (during a congressional investigation of state crimes).

⁴⁴ *Williams v. Gov't of the Virgin Islands*, 271 F. Supp. 2d 696 (V.I. 2003) (explaining how a witness asserted her Fifth Amendment right against self-incrimination “no fewer than 70 times” while under examination by prosecutor). *See Prosecutorial Misconduct*, 91 GEO. L.J. 556, 565 (2003) (“It is improper for a prosecutor to call a third-party witness knowing that the witness will invoke his or her Fifth Amendment privilege against self-incrimination, because the jury might improperly infer guilt from the witness’s silence.”); *cf. United States v. Brown*, 12 F.3d 52, 54 (5th Cir. 1994) (prosecution made a conscious effort to build a case based upon negative inference associated with forced invocation of spousal privilege before a jury warranted reversal and raised “the spectre of prosecutorial misconduct . . .”).

⁴⁵ *United States v. Wharton*, 320 F.3d 526, 538 (5th Cir. 2003) (“A defendant’s Fifth Amendment right to remain silent is well established. A prosecutor is prohibited from commenting directly or indirectly on a defendant’s failure to testify or produce evidence.”); *United States v. Riley*, 47 M.J. 276 (1997) (explaining how an agent’s testimony concerning the accused’s invocation of his right to remain silent violated the Fifth Amendment and Article 31 of the UCMJ). *See United States v. Miller*, 48 M.J. 811, 813 (N-M. Ct. Crim. App. 1998) (“[W]hen an accused is interrogated concerning an offense he is suspected of committing, his pretrial reliance upon his Article 31 . . . rights may not be paraded before a court-martial in order that his guilt may be inferred from his refusal to comment on the charges against him.”) (internal quotation and citation omitted).

⁴⁶ *See, e.g., Schmidt*, *supra* note 38, at A4 (“[E]ndured blistering attacks from senator after senator.”); Greg Hitt, *Senators Vent Frustration at Silence of Enron’s Lay*, WALL ST. J., Feb. 13, 2002, at A3 (noting how, after invoking his Fifth Amendment right against self-incrimination, “Mr. Lay was forced to sit

Generally, a congressional committee will know in advance if a witness intends to invoke his privilege against self-incrimination, but the committee may still subpoena the witness and require him to formally invoke his Fifth Amendment right against self-incrimination.⁴⁷

As with certain high-level government officials or leaders of regulated corporations,⁴⁸ the stigma associated with a public invocation of the right against self-incrimination may add additional practical constraints for an active duty military officer. Many persons, both within⁴⁹ and outside⁵⁰ the military, believe that

through a series of finger-wagging lectures by 20 committee members, many of them frustrated, many mocking”).

⁴⁷ Iraola, *supra* note 13, at 961, 963.

⁴⁸ Giuffra, *supra* note 39, at 1 (“If your client is a senior government official or the head of a heavily regulated corporation, he or she may have little choice but to answer the committee’s questions. Asserting the Fifth Amendment may not be a practical alternative.”).

⁴⁹ During his investigation of the My Lai massacre, Lieutenant General Peers encountered an Army Major who testified for approximately four hours and then unexpectedly invoked his right to remain silent. Peers’s reaction is typical of many career military officers: “This greatly bothered me, as it had never occurred to me that a Regular Army officer would not testify when called to do so by a properly appointed investigating officer. It was beyond the realm of what I considered professional military ethics.” W.R. PEERS, *THE MY LAI INQUIRY* 161 (1979).

⁵⁰ During the Iran-Contra hearings, Senator Warren Rudman was outraged when Lt. Col. North invoked his Fifth Amendment right while in his Marine Corps uniform. WARREN B. RUDMAN, *COMBAT: TWELVE YEARS IN THE U.S. SENATE* 138 (1996) (“[I]t remained a sorry spectacle to see it invoked by a uniformed marine officer who was sworn to defend his country and uphold its laws.”). Robert McFarlane, a retired Marine Lieutenant Colonel and President Reagan’s National Security Advisor, also found North’s behavior disappointing. ROBERT MCFARLANE & ZOFIA SMARDZ, *SPECIAL TRUST* 349 (1994) (“I had found his behavior disappointing since the scandal had broken—refusing to testify before the Tower Board or the Senate and House intelligence committees, citing the Fifth Amendment, and now demanding immunity before agreeing to appear before the select committees.”). North was also uncomfortable about invoking his Fifth Amendment right against self-incrimination, and did so after being persuaded to do so by his attorneys. NORTH & NOVAK, *supra* note 38, at 355-56. However, at the conclusion of the Iran-Contra prosecutions, McFarlane,

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invoking one's constitutional rights during an investigation constitutes behavior inconsistent with that expected of a professional military officer.

Congressional hearings also differ from criminal trials in that there are no fixed rules of evidence and Congress may determine its own procedural rules for such proceedings.⁵¹ Accordingly, a congressional committee or subcommittee need not permit a witness to cross-examine other witnesses or to call witnesses of his or her own.⁵² Indeed, witnesses are not typically afforded these opportunities.⁵³ Also, a person called before a congressional investigation or hearing does not enjoy many of the legal protections of the criminal defendant. Although no published case has directly addressed the issue, the general consensus is that there exists no legal right to invoke common law privileges during a congressional investigation.⁵⁴ However, committees frequently

who had completely cooperated during the various Iran-Contra investigations, eventually pled "guilty to four misdemeanor counts of unlawfully withholding material information from Congress." MCFARLANE & SMARDZ, *supra* at 359. In contrast, North's convictions for "obstructing Congress, destroying official documents, and accepting an illegal gratuity," were set aside on appeal. *Id.* at 362.

⁵¹ SHAMPANSKY, *supra* note 24, at 29 ("[P]ursuant to art. I, sec. 5, cl. 2 of the Constitution, each House may determine the rules of its own proceedings.").

⁵² *Id.*

⁵³ Iraola, *supra* note 13, at 957 ("[W]itnesses appearing before congressional committees typically are not afforded the opportunity to present evidence or to cross-examine other witnesses who they believe may have defamed them.").

⁵⁴ *Cf.* Eastland v. U.S. Servicemen's Fund, Inc., 421 U.S. 491, 515 (1975) (Marshall, J., Brennan, J., and Stewart, J., concurring) (explaining how, after receiving a subpoena, a witness who "refuses to testify or to produce documents and invokes a pertinent privilege . . . runs the risk that the legislature will cite him for contempt"). *See also* SHAMPANSKY, *supra* note 24, at 29 ("Although there is no court case directly on point, it appears that congressional committees are not legally required to allow a witness to decline to testify on the basis of such a testimonial privilege."); John P. Reilly, *Privilege Claims For The 'Bliley' Documents: Mixed Rulings Imperil Basic Principles*, 69 DEF. COUNS. J. 50, 53 (Jan. 2002) ("But the limited authorities available demonstrate that Congress may lawfully disregard common law claims of attorney-client privilege and compel production of privileged testimony and documents."). Also, during the

observe common law privileges as an exercise of discretion.⁵⁵

Various defenses that may be available in a criminal trial may not be available to a witness appearing before a congressional subcommittee. For example, reliance on the advice of counsel, after a full disclosure of all material facts, serves as a defense to the mens rea element of a crime.⁵⁶ This defense has been expressly recognized by federal,⁵⁷ military⁵⁸ and state courts.⁵⁹ However, it does not serve as a defense to failing to answer a pertinent question posed by a congressional committee.⁶⁰ As early as 1929, in

Iran-Contra hearings, in an exchange with Senator Inouye, Brendan Sullivan, who represented Oliver North, exclaimed: "I know Congress doesn't recognize attorney-client privilege, a husband-and-wife privilege, priest-penitent privilege. I know those things are all out the window." NORTH & NOVAK, *supra* note 38, at 363.

⁵⁵ SHAMPANSKY, *supra* note 24, at 30 ("[T]he decision as to whether or not to allow such a claim of privilege turn[s] on a 'weighing [of] the legislative need for disclosure against possible resulting injury.'" (citation omitted). However, in at least one instance during a 1986 investigation by the House Committee on Foreign Affairs, the committee rejected the assertion of the attorney-client privilege, believing it inapplicable, and cited the witnesses for contempt. *Id.*

⁵⁶ United States v. Traitz, 871 F.2d 368, 382 (3rd Cir. 1989).

⁵⁷ United States v. Poludniak, 657 F.2d 948, 959 (8th Cir. 1981) (advice of counsel "should be considered in determining whether the defendant's actions were willful."). See United States v. Cheek, 3 F.3d 1057, 1061-62 (7th Cir. 1993) (recognizing the defense, but finding that the evidence did not warrant a jury instruction).

⁵⁸ Advice of counsel leads to actions giving rise to obstruction of justice conviction; overturned on basis of ineffective assistance of counsel. United States v. Sorbera, 43 M.J. 818 (A.F. Ct. Crim. App. 1996). See United States v. Jackson, 30 M.J. 687 (A.C.M.R. 1990) (noting that reliance on the advice of counsel as a defense results in a waiver of the attorney-client privilege); *cf.* United States v. Hicks, 52 M.J. 70, 74 (1999) (Sullivan, J., dissenting) (noting how attorney who gave bad advice that lead to court-martial charges "most likely" could have been called as a defense witness on the merits and such evidence "certainly should have been brought out at the sentencing hearing . . .").

⁵⁹ See State v. Jacobson, 697 N.W.2d 610, 616 (Minn. 2005); State v. Ross, 659 N.W.2d 122, 130-31 (Wis. Ct. App. 2003); Commonwealth v. Garrity, 682 N.E.2d 937, 941-42 (Mass. App. Ct. 1997).

⁶⁰ Sinclair v. United States, 279 U.S. 263 (1929), *overruled by* United

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Sinclair v. United States,⁶¹ the Supreme Court held that advice of counsel serves as no defense to a charge of unlawfully refusing to answer a pertinent question by a committee of Congress.⁶² The Court in *Sinclair* reasoned that because “[t]he gist of the offense is the refusal to answer pertinent questions,” and since “[n]o moral turpitude is involved,” all that need be established is the “intentional violation” of the law.⁶³ Further, advice of counsel has been rejected as a defense to failure to respond to a congressional subpoena.⁶⁴

Witnesses may only be required to answer questions “pertinent” to the investigating committee’s authorized area of inquiry.⁶⁵ However, because a witness is potentially liable to criminal prosecution pursuant to 2 U.S.C. § 192, for “refus[ing] to

States v. Gaudin, 515 U.S. 506, 507 (1995); *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961) (“It has been established ever since the *Sinclair* case that reliance upon advice of counsel is no defense to a charge of failing to answer a pertinent question . . .”). In *Gaudin*, the Court overruled *Sinclair*’s holding that a court, rather than a jury, could determine the “pertinency” of a question posed by Congress for purposes of 2 U.S.C. § 192, “making it criminal contempt of Congress to refuse to answer a ‘question pertinent to [a] question under [congressional] inquiry.’” 515 U.S. at 519. In *Gaudin*, the Court held that the “materiality” of an allegedly false statement was to be decided by a jury, rather than by a judge. *Id.* at 506.

⁶¹ 279 U.S. 263 (1929).

⁶² *Id.* at 299. The Court also held that a mistake of law failed to serve as a defense. *Id.*

⁶³ *Id.* *Sinclair* had been convicted of violating 2 U.S.C. § 192, which made it a misdemeanor offense for any “person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry . . .” *Id.* at 284 (quoting 2 U.S.C. §192).

⁶⁴ *Dennis v. United States*, 171 F.2d 986, 991 (D.C. Cir. 1948) (“[H]is failure to respond to the subpoena was the result of his own legal opinion based upon consultation with his unnamed counsel is no defense.”).

⁶⁵ *Watkins v. United States*, 354 U.S. 178, 206 (1957) (“No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a congressional committee’s source of authority.”).

answer any question *pertinent* to the question under inquiry,” such witness must be placed on fair notice as to the parameters of the authorized area of inquiry.⁶⁶ The adequacy of that notice is measured by the same “degree of explicitness and certitude that the Due Process requires in the expression of any element of a criminal offense.”⁶⁷

For purposes of a congressional investigation, notice to the witness may be found in the “authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves”⁶⁸ When the subject matter of the investigation has not been “made to appear with undisputable clarity,” a witness may object to the pertinency of a question and require that the committee “state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto.”⁶⁹ Further, the witness may seek the “connective reasoning” between the question and the subject matter of the investigation.⁷⁰

II. DISCLOSURE OBLIGATIONS UNDER THE JENCKS ACT AND *BRADY V. MARYLAND*

The applicability of the Jencks Act, and to a lesser extent, *Brady v. Maryland* and its progeny, to the military justice system was a significant issue during the courts-martial conducted in the wake of the My Lai massacre. Indeed, in the court-martial of Staff

⁶⁶ *Watkins*, 354 U.S. at 208-09 (explaining that a witness is “entitled to have knowledge of the subject to which the interrogation is deemed pertinent.”). Before a witness may be convicted for failing to answer a pertinent question, the witness’s “awareness of the pertinency of the information” must be contemporaneous with the witness’s refusal to answer the question. *Id.* at 217 (Frankfurter, J., concurring). In a prosecution for violating 2 U.S.C. § 192, “[p]ertinency is an element of the offense,” which must be established by the United States. *United States v. Di Carlo*, 102 F. Supp. 597, 601 (N.D. Ohio 1952).

⁶⁷ *Watkins*, 354 U.S. at 209.

⁶⁸ *Id.*

⁶⁹ *Id.* at 214-15.

⁷⁰ *Id.* at 215.

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Sergeant David Mitchell, the military judge's interpretation of the government's Jencks Act obligations, with regard to evidence in the possession of a congressional subcommittee, proved fatal to the prosecution.⁷¹

Generally, the Jencks Act requires the United States to produce to the defense any statement in its possession of a witness who has testified for the prosecution in a criminal case. The government's disclosure obligation is triggered only after a witness has testified,⁷² and the defense has moved for production of that witness's prior statements.⁷³ The Jencks Act requires that the sought-after statements relate "to the subject matter as to which the witness has testified."⁷⁴ The government's failure to satisfy its Jencks Act obligations may result in a court striking the testimony of a witness or declaring a mistrial.⁷⁵ The requirements of the Jencks Act are contained in Federal Rule of Criminal Procedure 26.2⁷⁶ and, for the military, in Rule for Courts-Martial (R.C.M.) 914.⁷⁷

Another disclosure requirement, the *Brady* obligation, is mandated by case law. In *Brady v. Maryland*,⁷⁸ the Supreme Court required the government to disclose specifically requested

⁷¹ See discussion *infra* Part II.B.

⁷² 18 U.S.C. § 3500(a) (explaining that the government's disclosure obligation is not triggered "until said witness has testified on direct examination in the trial of the case").

⁷³ 18 U.S.C. § 3500(b).

⁷⁴ *Id.*

⁷⁵ 18 U.S.C. § 3500(d).

⁷⁶ 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 436 (3d. ed. 2000).

⁷⁷ See *United States v. Moravec*, No. NMCM 200000202, 2002 WL 31656114, at *4 n.6 (N-M. Ct. Crim. App., Nov. 20, 2002) ("R.C.M. 914, the military equivalent of the Jencks Act."); *United States v. Cook*, No. ACM33615, 2001 WL 85804, at *6 (A.F. Ct. Crim. App., Jan. 29, 2001) (R.C.M. 914 "is based upon the Jencks Act."). The Rules for Courts-Martial "govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities." MCM, *supra* note 41, R.C.M. 101(a).

⁷⁸ 373 U.S. 83 (1963).

exculpatory evidence that is material either to the defendant's guilt or punishment.⁷⁹ The failure to make such a disclosure "violates due process . . . irrespective of the good faith or bad faith of the prosecution."⁸⁰ In *United States v. Agurs*,⁸¹ the Court held that this disclosure duty existed even when no specific request had been made for such evidence.⁸² Further, in *United States v. Bagley*,⁸³ the Court extended the disclosure obligation to include not only exculpatory evidence, but also impeachment evidence.⁸⁴ Significantly, the Court has also imposed an obligation on "the individual prosecutor . . . to learn of any favorable evidence known to the others acting on the government's behalf in the case"⁸⁵

A. My Lai Massacre Courts-Martial

On March 16, 1968, Task Force Barker, a battalion-sized unit from the 11th Infantry Brigade, Americal Division, conducted a search and destroy mission in the vicinity of Son My village, Republic of South Vietnam, which the Americans believed was occupied by the Viet Cong.⁸⁶ Charlie Company⁸⁷ of that Task Force assaulted My Lai, a hamlet of the village, eventually killing between 175-200 Vietnamese civilians, consisting "almost exclusively of old men, women and children."⁸⁸ The killings

⁷⁹ *Id.* at 87.

⁸⁰ *Id.*

⁸¹ 427 U.S. 97 (1976).

⁸² *Id.* at 107.

⁸³ 473 U.S. 667 (1985).

⁸⁴ *Id.* at 676 ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule."). See also *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) ("[T]he Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes").

⁸⁵ *Kyles*, 514 U.S. at 437.

⁸⁶ GUENTER LEWY, *AMERICA IN VIETNAM* 325 (1978).

⁸⁷ Charlie Company, also known as C Company, was a unit consisting of approximately 180 men. MICHAEL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY 41* (2002).

⁸⁸ LEWY, *supra* note 86, at 326. Task Force Barker was responsible for the

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occurred despite the absence of the anticipated Viet Cong unit.⁸⁹ Charlie Company “received no hostile fire from the village.”⁹⁰

The massacre only came to light after a Vietnam veteran, Ronald Ridenhour, wrote various military and civilian officials on March 29, 1969, about reports of misconduct he had received concerning My Lai.⁹¹ The Ridenhour letter caused the Army Chief of Staff, General William Westmoreland, to direct an Army Inspector General (IG) investigation of the incident.⁹² After the IG established that criminal misconduct had occurred, General Westmoreland transferred the investigation to the Army’s Criminal Investigation Division (CID), whose additional investigative efforts ultimately lead to charges being brought against a number of soldiers,⁹³ including one of Charlie Company’s platoon leaders, Lieutenant William Calley.⁹⁴

While the CID investigation was proceeding, General Westmoreland remained concerned about the possibility of a cover-up and the public perception that the Army was not diligently investigating the massacre.⁹⁵ Despite some initial

deaths of approximately 400 Vietnamese. *Id.*

⁸⁹ *Id.* (“[N]o enemy forces were encountered.”).

⁹⁰ *United States v. Calley*, 48 C.M.R. 19, 23 (C.M.A. 1973).

⁹¹ LEWY, *supra* note 86, at 326. *See also* PEERS, *supra* note 49, at 7 (“His letter proved to be the key to uncovering the tragedy, and had he not sent it, it is conceivable that the My Lai incident would have remained hidden to this day.”).

⁹² PEERS, *supra* note 49, at 8. Upon receiving the letter, General Westmoreland directed that immediate inquiries be made in Vietnam and when initial reports suggested “something untoward might have happened,” directed an IG investigation. WILLIAM C. WESTMORELAND, *A SOLDIER REPORTS* 375 (1976). Although Westmoreland was Army Chief of Staff at the time Ridenhour reported the incident, the General had been the senior Army commander in Vietnam when the massacre actually occurred. PEERS, *supra* note 49, at 241.

⁹³ Ultimately the CID investigation caused the Army to charge four officers and nine soldiers, of which two officers and three soldiers were eventually brought to trial. WESTMORELAND, *supra* note 92, at 375.

⁹⁴ PEERS, *supra* note 49, at 8, 18 (“[T]he charges against Lieutenant Calley grew out of an investigation by the Criminal Investigation Division”).

⁹⁵ *Id.* at 8-9. *See* WESTMORELAND, *supra* note 92, at 375 (“... possibility that officers of the 11th Brigade and the Americal Division had either covered up the incident or failed to make a comprehensive investigation.”).

resistance from members of the Nixon administration,⁹⁶ Westmoreland and Army Secretary Stanley Resor elected to proceed with an additional formal investigation to be lead by Lieutenant General William R. Peers.⁹⁷ Ultimately this investigative effort became known as the Peers Commission. The Peers Commission produced a detailed report on the massacre that consisted of “some 20,000 pages of testimony from almost 400 witnesses, and, in addition, contained 240 photographs, 119 Army directives and over 100 miscellaneous documents.”⁹⁸ Even the congressional subcommittee conducting a parallel investigation ultimately acknowledged that the report was “very thorough.”⁹⁹ Clearly the Army was capable of investigating the incident.

In addition to the Army’s investigation, Congress elected to launch its own investigation. Although several House and Senate committees sought to conduct the investigation, the task eventually fell to the House Armed Services Committee.¹⁰⁰ On November 26, 1969, the same day that the Army announced the creation of the Peers Commission, Congressman L. Mendel Rivers, Chairman of the House Armed Services Committee initiated its investigation.¹⁰¹ Within a matter of weeks, the Committee received testimony from

⁹⁶ WESTMORELAND, *supra* note 92, at 375 (“When I learned that some members of President Nixon’s administration wanted to whitewash any possible negligence within the chain of command, I threatened through a White House official to exercise my prerogative as a member of the Joint Chiefs of Staff to go personally to the President and object.”); PEERS, *supra* note 49, at 3 n.1 (Westmoreland “encountered considerable resistance from within the Department of Defense, which he strongly suspected had originated in the White House.”).

⁹⁷ WESTMORELAND, *supra* note 92, at 375-76.

⁹⁸ Calley v. Callaway, 519 F.2d 184, 221 (5th Cir. 1975).

⁹⁹ *Id.*

¹⁰⁰ PEERS, *supra* note 49, at 19. See also MICHAEL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MAI LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY 137 (2002) (“[S]everal Senate and House committees vied for the right to investigate the My Lai incident.”).

¹⁰¹ BELKNAP, *supra* note 100, at 137. Representative Rivers had also received a letter from Ridenhour. United States v. Calley, 46 C.M.R. 1131, 1184 (A.C.M.R. 1973), *aff’d* 48 C.M.R. 19 (C.M.A. 1973).

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several individuals in executive session, including Peers who appeared before it to give a background briefing and who also requested that no witnesses be called to testify by that body before the Peers Commission had questioned them.¹⁰² Also called to testify by the Committee was Captain Ernest Medina, the Charlie Company commander during the assault on My Lai.¹⁰³

Subsequently, on December 19, 1969 a subcommittee under the leadership of Representative F. Edward Hebert was formed to investigate My Lai, which initially limited itself to staff interviews of witnesses until it began formal hearings six months later.¹⁰⁴ Almost immediately after being created, however, the Congressional subcommittee sent requests to the Army to arrange for the testimony of witnesses, many of whom had not yet been questioned by Peers.¹⁰⁵ Some of the witnesses Hebert's subcommittee sought to question were either material witnesses or were pending charges.¹⁰⁶

Army Secretary Resor offered to provide the subcommittee with transcripts of testimony taken by the Army and requested that the subcommittee delay its questioning so as not to interfere with the Army's courts-martial and prejudice the rights of the military defendants.¹⁰⁷ In letters to Hebert in December, January and April, Secretary Resor opined "that discharge of our responsibility to execute the laws will be imperiled by such actions as your subcommittee now contemplates."¹⁰⁸ Hebert refused to desist and his subcommittee issued subpoenas compelling testimony, eventually interviewing more than 150 witnesses.¹⁰⁹ Included among those questioned were Captain Medina, Charlie Company commander; Medina's brigade commander, Colonel Oran K.

¹⁰² PEERS, *supra* note 49, at 20. *See also* BELKNAP, *supra* note 100, at 137-38.

¹⁰³ BELKNAP, *supra* note 100, at 137.

¹⁰⁴ PEERS, *supra* note 49, at 22.

¹⁰⁵ BELKNAP, *supra* note 100, at 139.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (internal quotation omitted).

¹⁰⁹ *Id.*

Henderson; and Major General Samuel W. Koster, the Americal Division commander.¹¹⁰ Later, both Medina and Henderson were tried, but acquitted, at their courts-martial.¹¹¹

At the conclusion of the hearings, Secretary Resor requested that witness' transcripts be turned over to the Army, but Hebert refused, citing assurances the subcommittee made to the witnesses that "their testimony would not be disclosed voluntarily to anyone outside the subcommittee."¹¹² Such assurances had been made in order to obtain "frank and complete statements from the witnesses . . ."¹¹³ When the military courts issued subpoenas for the transcripts for use at trial, Hebert again refused, positing that the transcripts would not be released until all courts-martial that might arise from the My Lai massacre were complete.¹¹⁴

The motivation behind Hebert's refusal to release the transcripts has been the subject of dispute. One author opined that "Hebert's subcommittee seemed more interested in discrediting those who had exposed the war crimes committed at My Lai than in ensuring that those responsible for them were punished."¹¹⁵ The subcommittee "badgered" and "grilled" Ronald Haeberle, a former combat photographer, about his failure to report the massacre and his use of photographs from a personal camera.¹¹⁶ When Warrant Officer Hugh Thompson testified, Hebert "interrogated him mercilessly about whether he had ordered his crew to shoot at other American soldiers" and about the citations for medals that Thompson and his crew had received for rescuing Vietnamese civilians from the massacre.¹¹⁷ General Peers characterized the

¹¹⁰ *Id.* at 140.

¹¹¹ PEERS, *supra* note 49, at photo insert.

¹¹² BELKNAP, *supra* note 100, at 142.

¹¹³ *Id.* (internal quotation omitted).

¹¹⁴ *Id.* (Hebert "treated the transcripts as classified documents and refused to allow their release 'until final disposition has been made of all criminal cases now pending which may arise from the My Lai affair.'").

¹¹⁵ *Id.* at 140. The Nixon Administration viewed Hebert as an ally in their effort to discredit Ridenhour. *Id.* at 137.

¹¹⁶ *Id.* at 140-41.

¹¹⁷ *Id.* at 141. A helicopter pilot, Thompson evacuated approximately a

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questioning of Thompson as “more of an inquisition than an investigation.”¹¹⁸ Additionally, Peers reported that at the initial stages of the congressional investigation, Chairman Rivers confidently told him: “You know our boys would never do anything like that.”¹¹⁹

In contrast, Hebert interrupted the questioning of Medina when another subcommittee member, Congressman Stratton, forcefully pressed the former Charlie Company commander about the instructions he had given to his soldiers.¹²⁰ When General Koster’s attorney objected to Stratton’s “rigorous” questioning of the former Americal Division commander, Hebert admonished Stratton “to ask him affirmative questions, without an effort to impeach his testimony.”¹²¹ Additionally, both Rivers and Hebert publicly criticized the Army for pursuing courts-martial against those soldiers involved in the massacre.¹²²

Regardless of the motivation underlying the subcommittee’s position, Hebert’s refusal to release the transcripts affected at least three courts-martial, and in the court-martial of Staff Sergeant David Mitchell, the refusal proved fatal for the prosecution. Mitchell had been a squad leader in Calley’s first platoon during the My Lai incident.¹²³ On October 6, 1970, the court-martial of Sergeant Mitchell began. Shortly thereafter, the military judge ruled in favor of the defense to suppress testimony based on a violation of the Jencks Act.¹²⁴ The military judge determined that because of the Hebert subcommittee’s refusal to release testimony transcripts, no one who testified before that subcommittee would

dozen civilians from My Lai to safety while the massacre was ongoing. PEERS, *supra* note 49, at 71.

¹¹⁸ PEERS, *supra* note 49, at 242.

¹¹⁹ *Id.* at 21.

¹²⁰ BELKNAP, *supra* note 100, at 140.

¹²¹ *Id.* (internal quotation omitted).

¹²² *Id.* at 141-42.

¹²³ United States v. Calley, 46 C.M.R. 1131, 1147 n.14 (A.C.M.R. 1973), *aff’d*, 48 C.M.R. 19 (C.M.A. 1973).

¹²⁴ BELKNAP, *supra* note 100, at 224.

be permitted to testify at Mitchell's court-martial.¹²⁵ With his case now severely hamstrung, the military trial counsel (prosecutor) could call only three of the numerous witnesses that he originally contemplated.¹²⁶ In contrast, Mitchell's lawyer put on a robust defense, calling over twenty witnesses including the accused.¹²⁷ Not surprisingly, the military panel returned a verdict of not guilty.¹²⁸

The second court-martial impacted by Hebert's refusal to release transcripts was that of Sergeant Charles Hutto, which began in January 1971. Hutto had been a machine gunner in Charlie Company's second platoon.¹²⁹ Unlike the military judge in Mitchell's court-martial, however, the court denied the defense's Jencks Act motion.¹³⁰ The defense presented a superior orders defense, buttressed by the testimony of a clinical psychologist who testified that Hutto "lacked the capacity to make a judgment concerning whether [a directive to kill all the people] was legal or illegal."¹³¹ Even without a Jencks Act problem, the Army was unable to obtain a conviction. After deliberating less than two hours, the military jury acquitted Hutto.¹³²

The third, and best known, court-martial affected by the Hebert refusal was that of Lieutenant William Calley. On the day of the May Lai massacre, Calley commanded Charlie Company's first platoon. After an extensive trial, Calley was "convicted of the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to commit murder a child of about 2 years of age."¹³³ On appeal to the Army Court of Military Review, Calley challenged his convictions, in part, based on an alleged

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 224-25.

¹²⁸ *Id.* at 225.

¹²⁹ *Id.* at 65.

¹³⁰ BELKNAP, *supra* note 100, at 225.

¹³¹ *Id.*

¹³² *Id.* at 226.

¹³³ *United States v. Calley*, 48 C.M.R. 19, 21 (C.M.A. 1973).

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violation of the Jencks Act and *Brady* disclosure obligations.¹³⁴

The day after the subcommittee had published its report, and four months prior to the beginning of the Calley court-martial on the merits, the defense filed a motion seeking “production of ‘[a]ll witness testimony and documentary evidence in the custody of the House of Representatives’”¹³⁵ In response to a letter from the trial counsel, Representative Hebert refused to produce testimony and other evidence, positing that because Congress was a separate branch of Government, the subcommittee documents were neither subject to *Brady* nor to the Jencks Act.¹³⁶ The military judge denied the defense motion for discovery, finding that all witness testimony and statements within the Army’s possession had been furnished to the defense and that the Government offered to pay for travel expenses associated with witness interviews.¹³⁷ Without reaching the issue of Jencks Act applicability to Congress, the military judge issued a “precatory order” that sought all “evidence given to the investigating committee by named prosecution witnesses.”¹³⁸ Two months later, the military judge reissued its order to the newly convened Congress with a subpoena, but the material was never released.¹³⁹ Eventually, of the sixteen witnesses

¹³⁴ *United States v. Calley*, 46 C.M.R. 131, 1138, 1184-95 n.14 (A.C.M.R. 1973), *aff’d*, 48 C.M.R. 19, 22 (C.M.A. 1973). The A.C.M.R. is the Army’s intermediate level appellate authority, followed by the U.S. Court of Appeals for the Armed Forces (formerly the U.S. Court of Military Appeals). MCM, *supra* note 41, R.C.M. 1203-1204. The Supreme Court serves as the final appellate court. *Id.* R.C.M. 1205.

¹³⁵ *Calley*, 46 C.M.R. at 1186.

¹³⁶ *Id.* Hebert did provide a witness list of those who had testified. *Id.* Shortly thereafter, the defense expanded its request for production for “all that Congress possessed relative to My Lai,” citing not only *Brady* and the Jencks Act, but also the Constitution, the Uniform Code of Military Justice and the inherent power of the court. *Id.*

¹³⁷ *Id.* at 1186-87.

¹³⁸ *Id.* at 1187. “As directed to the House the order was necessarily precatory; for Judge Kennedy cited therein his recognition of the Constitutional provision that a House may except from publication such part of the journal of its proceedings as in its judgment requires secrecy” *Id.*

¹³⁹ *Id.*

who were called to testify at the Calley court-martial, eleven had been called by the trial counsel (prosecutor) and also testified in executive session before the Hebert subcommittee.¹⁴⁰

Addressing the alleged violation of the Jencks Act, in what the court characterized as a case of first impression,¹⁴¹ the Army Court of Military Review (ACMR) determined that the Act did “not pertain to statements given to the Congress.”¹⁴² The court interpreted the term “United States” in the Jencks Act to refer to the sovereign as prosecutor acting through the executive branch.¹⁴³ In further support of its conclusion that the term “United States” referred only to the executive branch, the court noted that the enforcement mechanism of a defendant’s right to inspect was through a court order, but a court had no authority to order the House to release its records.¹⁴⁴

Finally, the court was concerned that inclusion of the legislative branch within the scope of the Jencks Act would violate the separation of powers doctrine.¹⁴⁵ Here the court reasoned that:

[I]f a committee called all the witnesses before the prosecution commenced criminal litigation, if the committee declined to release the testimony it heard, and if the Jencks Act is held to apply, the effect would be to preclude the prosecution’s proving its case. This would be an inroad of constitutional dimensions upon the executive

¹⁴⁰ *United States v. Calley*, 46 C.M.R. 131, 1138, 1185 (A.C.M.R. 1973), *aff’d*, 48 C.M.R. 19, 22 (C.M.A. 1973).

¹⁴¹ *Id.* at 1191.

¹⁴² *Id.* at 1192.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1192-93. Since at least 1951, military courts have possessed the authority to compel the attendance of civilian witnesses at a court-martial through issuance of a warrant of attachment. *United States v. Hinton*, 21 M.J. 267, 270 (C.M.A. 1986). Failure to appear before a court-martial is a federal offense. *Id.* at 269 (citing 10 U.S.C. § 847). However, these procedures do not apply when a witness cannot be compelled to appear. *Id.* at 271 n.8. The enforceability of a subpoena duces tecum “is in virtually every respect identical to a request for production of a witness.” *United States v. Rodriguez*, 57 M.J. 765, 770 (N-M.Ct. Crim. App. 2002), *aff’d*, 60 M.J. 239 (2004).

¹⁴⁵ *Calley*, 46 C.M.R. at 1193-94.

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and judicial functions.¹⁴⁶

As a precautionary measure, the court also concluded that if the Jencks Act did apply, that any error by the trial court in failing to enforce it was harmless.¹⁴⁷

Since Calley was unsuccessful in exploiting the Jencks Act as grounds for appeal within the military system,¹⁴⁸ Calley sought habeas corpus relief in federal district court.¹⁴⁹ In *Calley v. Callaway*,¹⁵⁰ the district court found Calley's convictions "constitutionally invalid," and ordered his release from military custody.¹⁵¹ As part of its analysis, the court disagreed with the decision of the ACMR that the Jencks Act did not apply to testimony given before a Congressional subcommittee and posited that the testimony of those witnesses who testified before Hebert's subcommittee and at Calley's court-martial should have been stricken.¹⁵² Further, the court reasoned that even if the Jencks Act was inapplicable, "there nevertheless was a clear violation of [Calley's] constitutional right to confrontation and compulsory process resulting from the refusal of the Congress to honor the subpoenas issued by the military judge."¹⁵³

On appeal, the United States Court of Appeals for the Fifth

¹⁴⁶ *Id.* at 1194.

¹⁴⁷ *Id.* at 1195.

¹⁴⁸ The U.S Court of Military Appeals did not address the alleged Jencks Act violation. *See* United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973). Calley's attorneys filed "a massive 422-page petition for review, raising thirty issues," but the court elected to hear only three. BELKNAP, *supra* note 100, at 240.

¹⁴⁹ By the time of the habeas corpus petition, Calley was on parole. *Calley v. Callaway*, 519 F.2d 184, 191 n.5 (5th Cir. 1975). The military panel (jury) sentenced Calley to life, which was reduced to twenty years by the convening authority, and further reduced to ten years by the Secretary of the Army and then released on parole. *Id.* at 190, 91 n.5.

¹⁵⁰ 382 F. Supp. 650 (M.D. Ga. 1974).

¹⁵¹ *Id.* at 712-13.

¹⁵² *Id.* at 700-01. The court also found that Calley was denied his constitutional rights because of the massive pretrial publicity and because the military charges were improper. *Id.* at 650.

¹⁵³ *Id.* at 701.

Circuit reversed.¹⁵⁴ Addressing the subcommittee's refusal to release witness testimony, the court concluded "that there was no denial of due process in the failure to supply the prior testimony, and even if a Jencks Act violation occurred, it does not rise to a level warranting habeas corpus relief."¹⁵⁵ The court noted the Army's liberal discovery procedures, that the defense had been provided with testimony and statements gathered during several investigations, had been granted access to the entire Peers report, and that the defense had been permitted to conduct an independent investigation at government expense.¹⁵⁶ The court pointed out that "[t]he discovery by the defense was so extensive that, of the 13 witnesses appearing before both the Hebert Subcommittee and the court-martial, the defense already possessed at least two prior statements, and often more, from all 13 witnesses save one, for whom they possessed one prior statement."¹⁵⁷ Given these circumstances, the court concluded that it was "impossible" to find a due process violation.¹⁵⁸ The court easily turned aside the argument that the failure to produce testimony from the Hebert hearings violated *Brady*, finding that the defense had failed to establish materiality.¹⁵⁹

B. Current State of Military Law

Calley was the last case in which the applicability of the Jencks Act to the military was addressed in the context of a congressional investigation or hearing. Since *Calley*, however, military jurisprudence has developed sufficiently to resolve future issues of applicability should the issue arise again in the future.

The military justice system employs a liberal system of discovery and disclosure, which is "designed to be broader than in civilian life [and] provide the accused, at a minimum, with the

¹⁵⁴ *Calley*, 519 F.2d at 184.

¹⁵⁵ *Id.* at 220.

¹⁵⁶ *Id.* at 220-21.

¹⁵⁷ *Id.* at 221.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 222.

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disclosure and discovery rights available in federal civilian proceedings.”¹⁶⁰ Article 46 of the Uniform Code of Military Justice, for example, mandates equal access to evidence for both the prosecution and defense.¹⁶¹ Additionally, the courts have held that the Jencks Act applies to the military justice system.¹⁶²

Critical to any analysis of the Government’s obligation to produce testimony or other witness statements in the possession of Congress, is the limitation of 18 U.S.C.A. § 3500(b), and implementing R.C.M. 914(a)(1), that the statement be “in the possession of the United States.”¹⁶³ Since its earlier decision in *Calley*, the ACMR has reaffirmed its position that statements in the possession of the United States for Jencks Act purposes are limited to statements in the possession of prosecutors and those persons acting in an official investigatory capacity.¹⁶⁴

¹⁶⁰ *United States v. Williams*, 50 M.J. 436, 440 (1999). *See also* *United States v. Santos*, 59 M.J. 317, 321 (2004) (“The military justice system provides for broader discovery than required by practice in federal civilian criminal trials.”). For an overview of the modern day military justice system, see generally MICHAEL J. DAVIDSON, *A GUIDE TO MILITARY CRIMINAL LAW* (1999).

¹⁶¹ Uniform Code of Military Justice, 10 U.S.C. § 846, Art. 46 (2002). Article 46, and its implementing RCM 701, afford broader discovery rights “than that required by the Constitution under *Brady v. Maryland* . . . or otherwise available to federal defendants in civilian trials under Federal Rules of Criminal Procedure 12 and 16.” *United States v. Shelton*, 59 M.J. 727, 734 (Army Ct. Crim. App. 2004).

¹⁶² *United States v. Marsh*, 21 M.J. 445, 451 (C.M.A. 1986) (“It is now well-established that the Jencks Act applies to trials by court-martial.”); *United States v. Gomez*, 15 M.J. 954, 962 (A.C.M.R. 1983) (“The Jencks Act applies in the military . . .”). *See* *United States v. Longstreath*, 42 M.J. 806, 818 (N-M.Ct. Crim. App. 1995) (discussing the Government’s obligations under R.C.M. 701(a)(2) and the Jencks Act).

¹⁶³ 18 U.S.C.A. § 3500(b) (West 2000 & Supp. 2004); MCM, *supra* note 41, R.C.M. 914(a)(1).

¹⁶⁴ *United States v. Ali*, 12 M.J. 1018, 1019-20 (A.C.M.R. 1982) (concluding that a company commander has investigative duties and thus the Jencks Act may apply to a statement in his possession). *See also* *United States v. Gomez*, 15 M.J. 954, 964 (A.C.M.R. 1983) (applies only to statements in the possession of those persons “engaged in the prosecutorial function.”).

The ACMR's position is consistent with applicable federal¹⁶⁵ and state¹⁶⁶ case law, including at least one Watergate-era case that interpreted the Act in the context of testimony rendered before a Congressional subcommittee. In *United States v. Ehrlichman*,¹⁶⁷ G. Gordon Liddy moved to strike the testimony of E. Howard Hunt, a prosecution witness who had also testified in executive session before the Subcommittee on Intelligence of the House Armed Services Committee. Liddy's motion was based in part on the Jencks Act because Hunt's congressional testimony had not been produced to the defense.¹⁶⁸ The congressional subcommittee declined to produce the testimony in response to two separate subpoenas that Liddy caused to be issued.¹⁶⁹

The court denied the motion to strike, holding that the Jencks Act was not applicable to the congressional testimony.¹⁷⁰ The court posited: "there is no indication that Congress intended it to encompass its own legislative proceedings held in executive session, and its previous and continued resistance to subpoenas duces tecum argues strongly to the contrary."¹⁷¹ On appeal, the United States Court of Appeals for the District of Columbia avoided the issue of Jencks Act applicability and simply found that Liddy suffered no prejudice by the subcommittee's failure to produce witness transcripts.¹⁷²

Similarly, *Brady* obligations apply to the military justice system, as codified in the Manual for Court-Martial (RCM 701).¹⁷³ In pertinent part, RCM 701 requires "[t]he trial counsel [to]

¹⁶⁵ *United States v. Trevino*, 556 F.2d 1265, 1271 (5th Cir. 1977) ("the prosecutorial division of the government"; "in the hands of the federal prosecutor").

¹⁶⁶ *See, e.g.* *Robinson v. State*, 730 A.2d 181, 186 (Md. 1999) (Maryland, which follows the Jencks Act, defines statements in its possession to those held by "the prosecution or the prosecutorial arm of the government . . .").

¹⁶⁷ 389 F. Supp. 95 (D.D.C. 1974).

¹⁶⁸ *Id.* at 96.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 97.

¹⁷¹ *Id.*

¹⁷² *United States v. Liddy*, 542 F.2d 76, 83 (D.C. Cir. 1976).

¹⁷³ *United States v. Williams*, 50 M.J. 436, 440 (1999).

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disclose to the defense . . . evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment.”¹⁷⁴

With respect to any future dispute involving testimony or other information in Congress’s control, assuming that the sought after testimony were deemed material, the few military courts to have addressed this issue appear to follow a line of analysis similar to that found with the Jencks Act.¹⁷⁵

In *United States v. Williams*, the military court reasoned that a threshold question as to the government’s obligation to produce discoverable information for purposes of R.C.M. 701 and *Brady* “is whether the information at issue was located within the parameters of the files that the prosecution must review for exculpatory material.”¹⁷⁶ Generally, the prosecution must conduct a due diligence search of its own files, files of other participating law enforcement authorities, investigative files of related cases “maintained by an entity ‘closely aligned with the’ prosecution,” and certain other files if “designated in a defense discovery request, that involved a specified type of information within a specified entity.”¹⁷⁷ “To the extent that relevant files are known to be under the control of another governmental entity [e.g. Congress], the prosecution must make that fact known to the defense and engage in ‘good faith efforts’ to obtain the material.”¹⁷⁸ In short, congressional testimony should not be deemed to be in the possession of the government for *Brady* purposes and the government’s obligation is limited to making a good faith effort to obtain it.

This was the position taken by the District Court of the District of Columbia in the case of *United States v. Ehrlichman*.¹⁷⁹ In that

¹⁷⁴ MCM, *supra* note 41, R.C.M. 701(a)(6).

¹⁷⁵ *United States v. Williams*, 50 M.J. 436 (1999). *See United States v. Tillmon*, 1999 WL 1005923, at *3 (A.F. Ct. Crim. App. Oct. 19, 1999).

¹⁷⁶ *Williams*, 50 M.J. at 440.

¹⁷⁷ *Id.* at 441.

¹⁷⁸ *Id.*

¹⁷⁹ 389 F. Supp. 95, 95 (D.D.C. 1974).

case the court held that *Brady* did not apply: “The subpoenaed testimony is not in the possession of the Government within the meaning of that decision, since the Subcommittee is neither an investigative nor a prosecutorial arm of the Executive Branch nor an agency of the Government in any way involved in the offense or related transaction.”¹⁸⁰

III. ANALYSIS OF CONGRESS’S AUTHORITY TO GRANT IMMUNITY AND THE EFFECT OF SUCH A GRANT ON FUTURE OR PARALLEL CRIMINAL PROSECUTIONS

A congressional grant of immunity poses a significant threat to the government’s ability to obtain a conviction against an immunized witness who testifies before a congressional hearing. This is particularly so if the hearing is well publicized, because of the enormous burden placed on prosecutors to establish that they did not benefit from immunized testimony. Indeed, two of the principle defendants in the Iran Contra scandal prosecutions were able to obtain reversals of their convictions because the prosecution was unable to satisfy this standard. Accordingly, this article reviews Congress’s immunity power and the impact grants of immunity can have on the criminal justice system.

A. Overview of Congress’s Authority to Grant Immunity

If two-thirds of its members agree, a congressional committee may grant “use” immunity to a witness.¹⁸¹ However, 18 U.S.C. §

¹⁸⁰ *Id.* at 97. On appeal, the court declined to address the applicability of *Brady* to the Congressional testimony; instead, finding that the failure to produce the transcripts was “harmless beyond a reasonable doubt.” *United States v. Liddy*, 542 F.2d 76, 83 (D.C. Cir. 1976).

¹⁸¹ 18 U.S.C. § 6005(b)(2). *See also* Giuffra, *supra* note 39, at *4; *cf. Senators Join Coverup*, WALL ST. J., June 7, 1996, at A12 (“A two-thirds vote of the Whitewater Committee is needed to grant use immunity . . .”).

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6005 requires that the Attorney General be given notice of the immunity at least ten days before a court order is sought and that the district court issuing the order to testify wait an additional twenty days from the date of request for an order before issuing it.¹⁸² The notice period was intended to give the Department of Justice (DOJ) an opportunity to (1) convince the investigating congressional committee not to grant immunity if DOJ objected to immunity, and (2) insulate DOJ's evidence from any adverse affects of an immunity grant.¹⁸³ Significantly, however, Congress is not bound by DOJ objections to grants of immunity.¹⁸⁴

Once the (sub)committee chairperson communicates the court's order to testify to the witness, that person may no longer invoke his or her Fifth Amendment right against self-incrimination.¹⁸⁵ However, "no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information may be used

Additionally, the House or Senate may approve a grant of immunity by a majority vote. 18 U.S.C. § 6005(b)(1). Use immunity differs significantly from transactional immunity. *See infra* note 187.

¹⁸² 18 U.S.C. § 6005(b)(3), (c). The Department of Justice may waive the 10-day notice requirement. In the *Matter of the Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1236 (D.C. Cir. 1981) (The requirement was "plainly intended to benefit solely the Department of Justice.").

¹⁸³ *Matter of the Application*, 655 F.2d at 1236. *See also* *Application of U.S. Senate Select Comm. on Presidential Campaign Activities*, 361 F. Supp. 1270, 1277 (D.D.C. 1973).

¹⁸⁴ *Application of the U.S. Senate Select Comm.*, 361 F. Supp. at 1276. *See* Jill Abramson, *Huang Offers To Testify Before Senate If Granted Immunity On Fund Charges*, WALL ST. J., July 9, 1997, at A3 (asserting that "the Senate isn't bound by the Justice Department's recommendations on immunity . . .").

¹⁸⁵ 18 U.S.C. § 6002. Even though the district court will have already issued its order to testify, the order is not effective until the witness has indicated a refusal to testify and the order is communicated to the witness by the investigating Congressional committee. *Matter of Application*, 655 F.2d at 1237 & n.21. *See* NORTH & NOVAK, *supra* note 38, at 356 ("To put [use immunity] into effect, I had to begin by publicly and formally claiming my constitutional protections against self-incrimination. Senator Inouye, chairman of the Senate select committee, then spelled out the terms . . .").

against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”¹⁸⁶ This type of immunity is commonly referred to as “testimonial” or “use” immunity.¹⁸⁷

Reviewing the federal immunity statutes, 18 U.S.C. §§ 6001-6005, the Supreme Court in *Kastigar v. United States*,¹⁸⁸ held that the use immunity granted by the statute was “coextensive with the scope of the privilege against self-incrimination”¹⁸⁹ and prohibited “the prosecutorial authorities from using the compelled testimony in any respect . . .”¹⁹⁰ Further, the Court “impose[d] on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”¹⁹¹ The interpretation of *Kastigar*’s requirements by the United States Court of Appeals for the District of Columbia proved an insurmountable burden for the government in the prosecutions following the Iran-Contra scandal.

¹⁸⁶ 18 U.S.C. § 6002. For purposes of this statute, “‘other information’ includes any book, paper, document, record, recording, or other material.” 18 U.S.C. § 6001(2).

¹⁸⁷ Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 415 (1995) (Use immunity “promises only that the government will not use the compelled testimony directly as evidence, and will not use it indirectly as an investigative lead to obtain evidence for a criminal case.”). See also *Matter of the Application*, 655 F.2d at 1234 n.7 (“Rather than barring a subsequent related prosecution [use immunity] acts only to suppress, in any such prosecution, the witness’s testimony and evidence derived directly or indirectly from that testimony.”). In contrast, transactional immunity “precludes prosecution for any transaction or affair about which a witness testifies.” *Id. Accord* MCM, *supra* note 41, R.C.M. 704(a) and Discussion.

¹⁸⁸ 406 U.S. 441 (1972).

¹⁸⁹ *Id.* at 453 (rejecting the argument that transactional immunity was necessary to compel testimony).

¹⁹⁰ *Id.* Examples of prohibited use include “the use of compelled testimony as an ‘investigatory lead’” and “the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.” *Id.* at 460.

¹⁹¹ *Id.* The Court characterized this duty of proof as a “heavy burden.” *Id.* at 461.

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B. Iran-Contra

During the Reagan Administration, anti-tank missiles were sold to Iran as part of an effort to secure the freedom of American hostages held in Lebanon. However, some of the money from the sale of the missiles was then used to support the Nicaraguan Contra movement, in contravention of legal restrictions on prohibiting such support.¹⁹² The resulting scandal, known as Iran-Contra, directly involved at least two active duty officers, Vice Admiral John Poindexter and Lieutenant Colonel Oliver North, and two retired officers, Major General (Ret.) Ricard V. Secord and Lieutenant Colonel (Ret.) Robert C. McFarlane.¹⁹³

Placing a premium on public disclosure to the disadvantage of parallel prosecutorial efforts, the congressional committee investigating Iran-Contra granted immunity to twenty-one witnesses,¹⁹⁴ including Poindexter and North.¹⁹⁵ Use immunity was granted to Poindexter and North over the objections of the Independent Counsel.¹⁹⁶ The committee opted to grant immunity because the Independent Counsel could not guarantee (1) indictments before the committee's term ended, (2) "that the American people would ever hear from the two individuals who knew most about what role President Reagan had played in the

¹⁹² WILLIAM S. COHEN & GEORGE J. MITCHELL, *MEN OF ZEAL, A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS* 1, 11 (1988).

¹⁹³ All Naval Academy graduates, North was an active duty Marine Lieutenant Colonel and Poindexter was on duty as a Vice Admiral; McFarlane had retired from the Marine Corps after twenty years of service. *Id.* at xv, 81. A West Point graduate, Secord had retired as an Air Force Major General. *Id.* at xvi, 68.

¹⁹⁴ *Id.* at 39.

¹⁹⁵ *Id.* at 41. Secord did not invoke his Fifth Amendment privilege against self-incrimination and elected to testify without a grant of immunity. *Id.* at 65. Similarly, McFarlane "neither sought nor received immunity for his testimony, although he was under active investigation by Independent Counsel Walsh." *Id.* at 88. *See also id.* at 39-40 (concerned about "bring[ing] the full story to the public . . ."). *See* RUDMAN, *supra* note 50, at 150 ("whether or not they went to jail was far less important than getting their testimony before the public . . .").

¹⁹⁶ COHEN & MITCHELL, *supra* note 192, at 40-41.

Iran weapons sale and Contra-aid programs,” and (3) that a trial would even occur.¹⁹⁷ However, recognizing the “heavy burden” that a grant of immunity would place on the Independent Counsel’s prosecutorial efforts, the committee agreed to delay seeking immunized testimony in order to permit the Independent Counsel to gather and insulate his evidence, protecting it from the taint of the immunized testimony.¹⁹⁸ Ultimately, the grant of immunity proved catastrophic for the Independent Counsel’s prosecution efforts.

Both North’s and Poindexter’s convictions were overturned, not because of the improper exposure of the prosecutors to immunized testimony, but because of the exposure of various grand jury and trial witnesses to the immunized testimony.¹⁹⁹ In *United States v. North*,²⁰⁰ the United States Court of Appeals for the District of Columbia Circuit viewed the *Kastigar* opinion as requiring a “total ban on use” and explained further that “*Kastigar* is . . . violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of *how or by whom* he was exposed to that compelled testimony.”²⁰¹ Prohibited use occurs “if the immunized testimony influenced the witness’s decision to testify” “even where the witness testifies from personal knowledge”²⁰² Further, the court suggested that improper use occurs when “a witness’s testimony ‘was *motivated by*’” immunized testimony.²⁰³ Finally, the court made it clear that *Kastigar* was not satisfied merely by

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 40-42.

¹⁹⁹ Wright, *supra* note 187, at 425. Indeed, prosecutors avoided exposing themselves to the immunized testimony by canceling newspaper subscriptions and discontinued watching television. *Id.* Additionally, prior to the beginning of the testimony, prosecutors filed completed witness interviews, and trial memoranda of litigation strategy and investigative efforts with the court, and took steps to avoid exposing the grand jury to the immunized testimony. *Id.*

²⁰⁰ 920 F.2d 940 (D.C. Cir. 1990).

²⁰¹ *Id.* at 941-42.

²⁰² *Id.* at 942.

²⁰³ *Id.* In this case, “North’s immunized testimony motivated one witness, Robert C. McFarlane, to expand upon his testimony.” *Id.* at 942 n.1.

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the prosecution “insulating itself from exposure to immunized testimony.”²⁰⁴

Subsequently, in *United States v. Poindexter*,²⁰⁵ the D.C. Circuit emphasized that the Supreme Court in *Kastigar* prohibited *any* use of compelled testimony.²⁰⁶ Further, the court determined that when a witness, who has been exposed to immunized testimony, claims that he or she cannot “segregate the effects of his exposure,” the prosecution does not meet its burden of establishing evidence independent of the immunized testimony “merely by pointing to other statements of the same witness that were not themselves shown to be untainted.”²⁰⁷ Although much of North’s testimony was consistent with his congressional testimony, North’s testimony at his own trial failed to meet the prosecution’s burden even though “North’s testimony related to events he lived through and of which he had personal knowledge without any reference to Poindexter’s testimony.”²⁰⁸ This standard, the dissent argued, permits a witness with a “well-timed case of amnesia” to allege that he cannot separate his pre-exposure knowledge from what he learned from the immunized testimony, and thus presumptively taint his entire testimony.²⁰⁹

The *North* and *Poindexter* decisions create difficult hurdles for prosecutors to surmount when there are high-visibility congressional hearings involving immunized witnesses. In the wake of the *North* decision, dissenting Chief Judge Wald of the Second Circuit opined that the court had “rendered impossible in virtually all cases the prosecution of persons whose immunized

²⁰⁴ *Id.* at 942.

²⁰⁵ 951 F.2d 369 (D.C. Cir. 1992).

²⁰⁶ *Id.* at 373 (citing *Kastigar v. United States*, 406 U.S. at 462 (1972)).

²⁰⁷ *Id.* at 376. In the instant case, North alleged that he could not segregate his own recollections from his exposure to Poindexter’s immunized testimony before the select committee. *Id.* at 375. The trial judge did not believe North, “reject[ing] Colonel North’s statement as ‘totally incredible.’” *Id.* at 389 (Mikva, C.J., dissenting).

²⁰⁸ *Id.* at 389 (Mikva, C.J., dissenting).

²⁰⁹ *Id.* at 390. See Wright, *supra* note 187, at 427 (“[A] hostile witness might intentionally expose himself or herself to the immunized testimony, hoping to make later testimony useless to the prosecution.”).

testimony is of such national significance as to be the subject of congressional hearings and media coverage.”²¹⁰ The *North* and *Poindexter* decisions are particularly significant because, within the federal system, “the D.C. Circuit is the appeals court most likely to hear challenges to prosecutions in the wake of congressional grants of immunity”²¹¹ Accordingly, as a result of the *North* and *Poindexter* opinions, Congress has been less inclined to grant immunity.²¹²

C. The Effect of Congressional Immunity on the Military Justice System

If a congressional committee were to immunize a military witness, the military justice system would necessarily be required to honor the associated witness protections.²¹³ Because military courts are not bound by decisions of the D.C. Circuit in *North* and *Poindexter*, the scope of those protections would be determined by military, rather than federal law. However, the military justice system has generally elected to follow these two precedents.

The military’s immunity procedures, contained in R.C.M. 704,

²¹⁰ *United States v. North*, 920 F.2d 940, 951-52 (2d. Cir. 1990).

²¹¹ *Wright*, *supra* note 187, at 419 (this is because “most of the executive branch officials testifying before Congress (at least those witnesses valuable enough to merit immunity) will live and work in Washington.”). *Id.* at 419 n.49.

²¹² *Giuffra*, *supra* note 39, at *2 (“The decisions of the U.S. Court of Appeals for the District of Columbia reversing the convictions of Mr. North and Mr. Poindexter have made it less likely that congressional committees will vote to grant immunity.”); *Wright*, *supra* note 187, at 431 (“Anecdotal evidence suggests that the *North* and *Poindexter* decisions have discouraged congressional committees from using immunities in particular cases”); *cf.* *Abramson*, *supra* note 184 (“several senators on the panel [investigating campaign finance irregularities] have expressed unease about creating impediments to subsequent prosecutions,” noting the effect of immunity grants from the Iran-Contra hearings).

²¹³ *See United States v. Allen*, 59 M.J. 478, 482 (2004) (“A grant of immunity by one jurisdiction within the federal structure, such as a State, provides equivalent protections against use of the information by other jurisdictions, such as another State or the Federal Government.”).

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are consistent with the federal practice.²¹⁴ Compliant with *Kastigar*, military law prohibits the prosecution from using compelled testimony against an immunized service member,²¹⁵ except for perjury, false swearing, false statements, and the refusal to obey an order to testify.²¹⁶ Significantly, the military follows those federal courts that have extended *Kastigar*'s use prohibition to "include non-evidentiary use such as the decision to prosecute."²¹⁷ Further, following the precedent established by *North*, military case law prohibits the Government from using "the testimony of a witness which was influenced by the immunized testimony."²¹⁸

As with federal prosecutors, military trial counsel bears the "heavy burden" of establishing "non-use of immunized testimony."²¹⁹ The United States must "show that it has not used in any way for the prosecution of that person the person's statements, testimony, or information derived from them."²²⁰ The immunized

²¹⁴ See *United States v. Mapes*, 59 M.J. 60, 66 (2003) (noting that the military's immunity procedure is "[c]onsistent with [the] federal practice . . ."); *United States v. Olivero*, 39 M.J. 246, 250 (C.M.A. 1994) ("R.C.M. 704(b) is based on 18 U.S.C. § 6002.").

²¹⁵ *Mapes*, 59 M.J. at 67.

²¹⁶ See MCM, *supra* note 41, R.C.M. 704(b)(1) & (2); Mil. R. Evid. 301(c)(1). See *Olivero*, 39 M.J. at 250 (perjury). Similarly, in the federal system, an immunized witness may still be prosecuted for perjury or making false statements before a congressional committee. See *Giuffra*, *supra* note 39, at *3. In the military, a service member may also be subject to court-martial for the failure to obey an order to testify after being immunized. MCM, *supra* note 41, R.C.M. 704(b)(1).

²¹⁷ *Mapes*, 59 M.J. at 67. See also *Olivero*, 39 M.J. at 249; *United States v. Allen*, 59 M.J. 478, 482 (C.A.A.F. 2004) ("may not rely upon or use immunized testimony in making the decision to prosecute.").

²¹⁸ *Mapes*, 59 M.J. at 67. See also *United States v. Youngman*, 48 M.J. 123, 127 (1998).

²¹⁹ *Mapes*, 59 M.J. at 67-68. See also MCM, *supra* note 41, R.C.M. 704(a), Discussion ("heavy burden").

²²⁰ MCM, *supra* note 41, R.C.M. 704(a), Discussion. See also *Allen*, 59 M.J. at 482 ("The burden is upon the Government in such a case to demonstrate 'by a preponderance of the evidence, that the prosecutorial decision was untainted by the immunized testimony.'").

witness, and the United States, “should be left ‘in substantially the same position as if the witness had claimed [the] privilege [against self-incrimination].’”²²¹

Traditionally, prosecutors have attempted to meet their burden by “canning” or recording testimony of important witnesses prior to receipt of immunized testimony or other evidence.²²² This may be difficult when such witnesses have not yet been identified, refuse to be interviewed, or invoke their Fifth Amendment rights to silence or against self-incrimination.²²³ The problem is aggravated when immunized witnesses participate in media intensive investigations or cases, including high-profile congressional investigations.²²⁴

Military prosecutors will have a particularly difficult time controlling witnesses’ exposure to immunized witnesses appearing before congressional investigations that are televised or otherwise extensively covered by the media. Assuming that the military could, or would, order key military witnesses not to expose themselves to television or newspapers, implementation of such an order would prove problematic. Exposure could be either inadvertent or prove necessary for co-accused to assist themselves in preparation of a defense. Further, military commanders could not order key civilian witnesses to avoid watching television, read the newspapers, or expose themselves to other media forms. Finally, the potential for an obstruction of justice charge against civilian or military witnesses who deliberately exposed themselves to immunized testimony as a means of regulating witness exposure is uncertain at best. Such cases are difficult to prove,²²⁵ and, for civilian witnesses, the military would suffer the additional burden

²²¹ *Allen*, 59 M.J. at 482.

²²² *Wright*, *supra* note 187, at 426.

²²³ *Id.*

²²⁴ *Id.* at 427.

²²⁵ “[I]t would be most difficult for a prosecutor to prove that the defendant witness exposed himself or herself to the testimony with the purpose of obstructing the criminal proceedings. Most witnesses will have many legitimate reasons, including the curiosity shared by most citizens, for listening to the congressional testimony.” *Id.*

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of having to convince the DOJ to prosecute the case.

IV. THE STATUS OF COMMON LAW PRIVILEGES AFTER COMPELLED
WAIVER DURING A CONGRESSIONAL INVESTIGATION

As discussed in Part I, Congress is not bound by common law privileges and may compel both testimony and evidence over privilege objections. The legal status of otherwise privileged material in subsequent criminal proceedings remains uncertain. Recent cigarette product liability cases illustrates this area of legal uncertainty.

The litigation involved several state lawsuits against the cigarette industry for recovery of Medicaid costs attributed by the states to the effects of cigarette smoking, and a concomitant effort seeking federal legislation that would facilitate a nation-wide settlement of the litigation.²²⁶ While many of these lawsuits were progressing, Chairman Bailey of the House Committee on Commerce issued subpoenas to the tobacco companies, which were complied with after the companies were notified that the Committee would overrule any assertion of privilege.²²⁷ At least one law firm received a letter from Chairman Bailey in which he threatened to initiate contempt proceedings if the documents were not produced.²²⁸ The companies asserted that many of these documents sought by Congress were subject to the attorney-client privilege and to the protections of the work product doctrine.²²⁹ However, a Minnesota state court had previously determined that the same documents were either not privileged, or were subject to the crime fraud exception.²³⁰ Subsequently, the Committee “released the documents to the press and the public via the

²²⁶ *Commonwealth v. Philip Morris, Inc.*, No. 957378J, 1998 WL 1248003, at *1 (Mass. Super. July 30, 1998).

²²⁷ *Id.* at *1-2. *See also* Reilly, *supra* note 54.

²²⁸ Reilly, *supra* note 54, at 51.

²²⁹ *Id.* at 50.

²³⁰ *Id.* at 51 (citing *State of Minnesota v. Phillip Morris Inc.*, 1998 WL 257214 (Minn. Dist. Ct.)).

Internet.”²³¹ The Minnesota case settled and plaintiffs moved for disclosure of the documents, which the court permitted.²³²

In at least twenty-six cases, plaintiffs sought court determinations that the tobacco companies had waived their claim to asserting a privilege over these documents.²³³ Nineteen courts found a waiver; seven courts did not.²³⁴ Of the nineteen courts finding a waiver, ten courts expressly relied on the document production in response to the Congressional subpoena, but “[s]even courts expressly rejected waiver on this ground”²³⁵

In *Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris, Inc.*,²³⁶ the court determined that the defendants waived any privilege by virtue of the Minnesota state court consent decree and by producing the documents to Congress.²³⁷ With regard to the production of documents in response to the congressional subpoena, the court posited that “a party must do more than merely object to Congress’s ruling. Instead, a party must risk standing in contempt of Congress.”²³⁸ In the instant case, the court found that the defendants “did not exhaust all remedies available for maintaining a claim of privilege,” such as meeting with the Chairman or other committee members, filing a legal memorandum containing the factual and legal basis for their privilege assertion, submitting a privilege log, or requesting a hearing.²³⁹

In comparison, in *International Union of Operating Engineers*,

²³¹ *Philip Morris, Inc.*, 1998 WL 1248003, at *2. See Reilly, *supra* note 54, at 50.

²³² Reilly, *supra* note 54, at 51. Over defendants’ privilege claims, the Minnesota appellate system affirmed the trial judge’s disclosure authorization. *Id.* The consent judgment contained a provision permitting “plaintiffs in that case [to] ‘seek court approval’ to place privileged documents in a public document depository.” *Id.*

²³³ *Id.* at 55.

²³⁴ *Id.*

²³⁵ *Id.* at 56.

²³⁶ 35 F. Supp. 2d 582 (N.D. Ohio 1999).

²³⁷ *Id.* at 594, 596.

²³⁸ *Id.* at 595.

²³⁹ *Id.*

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Local No. 132, Health and Welfare Fund v. Phillip Morris Inc.,²⁴⁰ a Magistrate Judge rejected plaintiff's argument that disclosure to Congress pursuant to Chairman Bailey's subpoena waived defendants' attorney-client privilege over such documents. The Magistrate Judge first noted "[a]s an initial matter, the involuntary or compelled production of privileged or protected documents does not waive otherwise applicable claims of privilege or protection so long as the privilege holder objects and takes reasonable steps to protect its claims of privilege and protection."²⁴¹ Reviewing the same facts as did the court in *Iron Workers*, the Magistrate Judge determined that defendants "took the reasonable steps required to prevent their compliance from resulting in a waiver."²⁴² Further, defendants were "not required to stand in contempt" to preserve the privilege claims.²⁴³

The sparse military case law that exists would appear to allow the invocation of common law privileges, and preclude the admission of otherwise privileged information at courts-martial, when a congressional committee forces disclosure of privileged information. As a general rule, a grant of immunity does not automatically result in a waiver of common law privileges, particularly the attorney-client privilege.²⁴⁴ Further, the compelled waiver of the attorney-client privilege in one proceeding has been held not to effect the ability to invoke the privilege in a subsequent proceeding.²⁴⁵

²⁴⁰ No. CIV.A. 3:97-0708, 1999 WL 33659387 (S.D. W. Va. June 28, 1999) (Hogg, M.J.).

²⁴¹ *Id.* at *5 (citing *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992)); *Shields v. Sturm Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989).

²⁴² *Id.* at *7.

²⁴³ *Id.*

²⁴⁴ *United States v. Vanderbilt*, 58 M.J. 725 (N-M. Ct. Crim. App. 2003) (citing *United States v. Brunious*, 49 C.M.R. 102, 104 (N.M.C.M.R. 1974)). *See also United States v. Fair*, 10 C.M.R. 19, 26, 2 U.S.C.M.A. 521, 538 (C.M.A. 1953) (grant of immunity from prosecution did not preclude soldier from invoking attorney-client privilege).

²⁴⁵ *See United States v. Romano*, 43 M.J. 523 (A.F. Ct. Crim. App. 1995), *rev'd*, 46 M.J. 269 (1997); MCM, *supra* note 41, Mil. R. Evid. 510(b) ("Unless testifying voluntarily concerning a privileged matter or communication, an

In *United States v. Romano*, a female airman, who was alleged to have fraternized with the accused officer, testified at his court-martial pursuant to a grant of immunity.²⁴⁶ During cross-examination, Airman Mucci was asked about a statement she had made to her attorney in which she denied dating the accused, Lieutenant Romano.²⁴⁷ The statement had been made by Mucci while testifying as a government witness during an unrelated Article 32 hearing involving a different defendant.²⁴⁸ Following an objection by the military prosecutor, the trial judge sustained the objection, concluding that Mucci had not voluntarily waived her attorney-client privilege during the earlier proceeding because she had testified under a grant of immunity and denied defense counsel's request to cross-examine Mucci about the statement.²⁴⁹

On appeal, the court agreed with the trial judge, positing that "compelled testimony resulting from a grant of testimonial immunity at an Article 32 [hearing] is not a voluntary waiver."²⁵⁰ The appellate court relied on Military Rule of Evidence 510(b), which provides in relevant part: "[A]n accused who testifies [o]n . . . her own behalf . . . under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which . . . she may be entitled pertaining to the confidential matter or communication."²⁵¹

accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication.").

²⁴⁶ *Romano*, 43 M.J. at 526.

²⁴⁷ *Id.* at 528.

²⁴⁸ *Id.* at 525-26. An Article 32 hearing is a pretrial investigation of charges against a military accused (defendant). It is loosely analogous to a grand jury proceeding. See 10 U.S.C. § 832. Unlike a grand jury, the accused may appear with counsel, cross-examine witnesses and present his own evidence. *Id.*

²⁴⁹ *Romano*, 46 M.J. at 272.

²⁵⁰ *Id.* at 274.

²⁵¹ *Id.* (quoting Mil. R. Evid. 510(b)). However, the court left unresolved the possibility that "[t]he defense's constitutional right to produce evidence under the compulsory process clause may overcome the attorney-client privilege." *Id.*

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CONCLUSION

Congress enjoys both the right and duty to conduct investigations into matters within its legislative sphere. Further, it is a key participant in bringing matters of national significance to the attention of the American public. When investigating matters that involve individual criminal misconduct, however, Congress's rights and responsibilities may adversely impact the Executive Branch's ability to prosecute such misconduct. This impact is most keenly felt by the criminal justice system when Congress grants a witness use immunity and that witness's testimony is either televised or widely reported by the media. The immunity granted to Admiral Poindexter and Lieutenant Colonel North during the Iran-Contra investigation stands as a stark reminder of the potentially devastating effect immunity grants can have on subsequent or parallel prosecution efforts.

The armed forces are frequently the object of Congressional inquiry. Further, as exemplified by the Congressional investigations into the My Lai massacre and the Iran-Contra scandal, active duty members of the military are occasionally the object of Congressional scrutiny. As with its federal counterpart, the military justice system is similarly affected by congressional investigations and grants of immunity.

Since Iran-Contra, Congress has exhibited an increased reluctance to granting immunity, wisely balancing its investigatory desires against the needs of the criminal justice system.²⁵² In the future, as long as the Department of Defense shows that it is capable of conducting thorough and credible investigations of individual misconduct within its ranks—as it did following My Lai and Abu Ghraib²⁵³—Congress should continue to stay its hand and

²⁵² See Wright, *supra* note 187 (“Anecdotal evidence suggests that the North and Poindexter decisions have discouraged congressional committees from using immunities in particular cases . . .”).

²⁵³ See THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORTS OF THE INDEPENDENT PANEL AND THE PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ (ed. Steven Strasser, 2004) (containing Major General George R. Fay's report entitled “Investigation Of The Abu Ghraib Detention Facility And 205th”).

permit the military to investigate and, if appropriate, bring to justice those individual service members who have engaged in criminal misconduct.²⁵⁴

Military Intelligence Brigade”); Bradley Graham & Thomas E. Ricks, *Leadership Failure Is Blamed In Abuse*, WASH. POST, May 12, 2004, at A1, A19 (investigation conducted by Army Major General Antonio Taguba, consisting of some 6,000 pages, “drew praise from members of both parties for a thorough and objective inquiry into the mistreatment”). See also Josh White & R. Jeffrey Smith, *Abuse Review Exonerates Policy*, WASH. POST, Mar. 10, 2005, at A16 (“Pentagon’s widest-ranging examination of prisoner abuse . . .”). But cf. Josh White, *Rights Groups Reject Prison Abuse Findings*, WASH. POST, Apr. 24, 2005, at A20 (Human rights group “assailed the Army’s findings that top generals in Iraq should bear no official responsibility for abuse at the Abu Ghraib prison . . .”); Michael Hirsch & John Barry, *The Abu Ghraib Scandal Cover-up?*, NEWSWEEK, June 7, 2004, at 35 (critics charge “that the current probes are still too limited to bring full accountability”); White & Graham, *supra* note 2, at A17 (“Senators expressed dismay . . . that no senior military or civilian Pentagon officials have been held accountable for the policy and command failures that led to detainee abuse in Iraq and Afghanistan . . .”).

²⁵⁴ In the wake of the Abu Ghraib detainee abuse scandal, the Army has successfully prosecuted several soldiers for related misconduct. See *Graner Verdict May Alter Davis Defense*, ASBURY PARK PRESS (New Jersey), Jan. 17, 2005, at A6 (Army jury rejects superior orders defense, convicts Army Specialist of five charges and sentences him to ten years in jail); Douglas Jehl, *G.I. In Abu Ghraib Abuse Is Spared Time In Jail*, N.Y. TIMES, Nov. 3, 2004, at A15 (Army Private “pleaded guilty to a single charge of dereliction of duty . . .”); Jackie Spinner, *MP Gets 8 Years For Iraq Abuse*, WASH. POST, Oct. 22, 2004 (Army Staff Sergeant, “the highest-ranking of eight soldiers charged with abusing detainees at Abu Ghraib prison, was sentenced to eight years in prison . . .”); Jackie Spinner, *Soldier Pleads Guilty To Prisoner Abuse*, WASH. POST, Sept. 12, 2004, at A24 (Army Specialist “pleaded guilty to two charges of conspiracy and maltreatment of detainees at the prison”); Sharon Behn, *Soldier Guilty Of Abuse At Iraq Prison*, WASH. TIMES, May 20, 2004, at A1 (Army Specialist found guilty of four counts of abuse and sentenced to a year in jail). In addition to courts-martial, the Army administratively punished several officers. See Josh White, *General Demoted, But Cleared In Abuse Probe*, WASH. POST, May 6, 2005, at A8; Thom Shanker & Dexter Filkins, *Army Punishes 7 With Reprimands For Prison Abuse*, N.Y. TIMES, May 4, 2004. Other branches of the military have also taken action for misconduct against detainees or prisoners. See e.g., *A Roll Call of Recent Abuse Cases*, WASH. POST, Jan. 16, 2005, at A9 (two Marines convicted of prisoner abuse-related charges at Camp Whitehorse, Iraq); *SEAL Acquitted in Prisoner’s Death*, WASH. POST, Dec. 21, 2004, at A9

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(one SEAL acquitted, but another determined to have assaulted a prisoner during Captain's Mast, a nonjudicial proceeding); Swell Chan, *Marine Sergeant To Face Court-Martial In Abuse*, WASH. POST, June 12, 2004, at A18 (two Marines convicted and two more pending charges for giving electric shocks to an Iraqi prisoner at a temporary detention facility).