THE WHITE HOUSE

WASHINGTON

November 10, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: PETER D. KEISLER PDK

SUBJECT: Power of Congressional Committees to Issue and Enforce Subpoenas After Final Adjournment

You asked me to examine whether a committee of Congress has the authority to issue and enforce a subpoena after the final session of the Congress has adjourned sine die. I have concluded that committees do have the power to issue subpoenas under such circumstances, but that the only practical means of enforcing a subpoena against an official of the Executive branch -- civil contempt proceedings -- would require a vote by the full chamber.

Issuance of Post-Adjournment Subpoenas: The power to compel testimony and the production of documents is possessed by the Congress as a whole, which has the authority to establish procedures governing its exercise. This power can be delegated by Congress to its committees, and both Houses have adopted internal rules authorizing their committees to issue post-adjournment subpoenas.

Rule XI, cl. 2(m)(1) of the Rules of the House of Representatives states:

> For the purpose of carrying out any of its functions and duties . . . any committee, or any subcommittee thereof, is authorized . . . (A) to sit and act at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, and to hold such hearings, and (B) to require, by subpoena or otherwise, the attendance and testimony of such books, records, correspondence, memorandums, papers, and documents as it deems necessary.

(The language of the corresponding Senate Rule is identical to the House Rule in all relevant respects. See Rule XXVI of the Senate Rules.)

This rule is not entirely free from ambiguity, since the provision allowing the Committee to "sit and act" after adjournment is separated from the provision authorizing subpoenas. I believe, however, that the most plausible reading of the Rule is that the issuance of a subpoena is also permitted during that time, since the committees, which are permitted to "act" after adjournments, are authorized to issue subpoenas as they "deem[] necessary."

This conclusion is buttressed by two other provisions. Rule XI, cl. 1(b) of the Rules of the House of Representatives states in pertinent part:

> Each committee is authorized at any time to conduct such investigations and studies as it may consider necessary or appropriate in the exercise of its responsibilities . . . .

(emphasis added) In addition, there are statutory provisions granting special congressional bodies such as the Joint Committee on Congressional Operations and the House Commission on Congressional Mailing Standards the power to issue subpoenas, and most provide that these bodies are authorized:

> to sit and act at such places and times during the sessions, recesses, and adjourned periods of Congress, to require by subpena [sic] or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths and affirmations, to take such testimony, to procure such printing and binding, and to make such expenditures, as [they] deem[] advisable.

2 U.S.C. § 413 (1982). If such provisions are read to forbid any of the listed activities other than "sitting" and "acting" once Congress has adjourned, then committees are forbidden from making expenditures after adjournment. This would be a nonsensical interpretation, because then the committees would be unable to "sit and act" as well.

Although the House and Senate Rules authorize the issuance of subpoenas by committees during periods of adjournment, it might be argued that such authorization does not extend to the period of time between the adjournment sine die of the second session of a Congress and the convening of the first session of the next Congress. That adjournment, it could be suggested, ends the existence and authority of that particular Congress, and since the committees' powers are wholly derivative of that authority, those powers are ended as well. Cf. In re Beef Industry Antitrust Litigation, 589 F.2d 786, 787-88 (5th Cir. 1979) ("Congressional committees are themselves the offspring of Congress; . . . they do not have an unlimited commission merely by virtue of their creation and existence to ferret out evil or to uncover inequity.")

It is clear, however, that Congress' authority does not terminate upon final adjournment. In Barnes v. Kline, 759 F.2d 21, 37 n.29 (D.C. Cir. 1985), a Court of Appeals panel stated:

> Congressional practice conforms to the modern understanding under the Twentieth Amendment that the Houses of Congress constitutionally exist from January 3 of each odd-numbered year through January 3 of the next odd-numbered year, regardless whether the houses are sitting or in adjournment. Thus, even when the houses are not in session, they can

exchange messages and have bills enrolled, signed, and presented to the President.

Accordingly, when the House adopts the motion for adjournment sine die at the end of its term, it often approves a second resolution authorizing the Speaker to "accept resignations, appoint commissions, boards and committees authorized by law or by the House notwithstanding sine die adjournment." If the Congress' power terminated at final adjournment, it could not so authorize the Speaker. This practice, therefore, reflects the continuing authority of an adjourned Congress. (I note in this regard that in a memorandum dated December 30, 1982, from the Office of Legal Counsel on "Approval and Disapproval of Bills by the President after sine die Adjournment of the Congress," then-Assistant Attorney General Theodore Olson distinguished in his discussion between adjournment and termination, e.g., "After the sine die adjournment of the 91st Congress on January 2, 1971, and its termination on January 3, 1971, President Nixon approved bills as late as January 13, 1971.")

I conclude, therefore, that a Congress has the power to authorize the issuance of subpoenas by committees in the period of time between final adjournment sine die and the convening on January 3 of its successor Congress, and that both houses have in fact so authorized their committees in the internal rules.

Enforcement of Post-Adjournment Subpoenas: There are four vehicles for enforcement of a Congressional subpoena:

(1) a civil suit under 2 U.S.C. § 288d seeking enforcement of the subpoena or declaration of its validity;

(2) referral to the United States Attorney under 2 U.S.C. §§ 192 and 194 for prosecution for criminal contempt;

(3) arrest by the Sergeant-at-Arms pursuant to Congress's inherent contempt power; and

(4) invocation of the provisions of the Independent Counsel Act, 28 U.S.C. § 591.

The latter two options can be quickly dismissed. A House of Congress could theoretically instruct the Sergeant-at-Arms to arrest a recalcitrant executive branch official and detain him in the Capitol guardroom. Congress has used this power only sparingly, however, and not since 1932. Moreover, it would require a vote of the House or Senate itself, not simply of one of the committees. In contrast, committee members could request that the Attorney General name an Independent Counsel under 28 U.S.C. § 591 to investigate possible contempt charges, but then it is up to the Attorney General to determine whether further investigation or prosecution is in fact warranted.

That leaves as alternatives (1) the filing of a civil suit and (2) referral to a United States Attorney for criminal prosecution. The filing of a civil suit requires a vote by the full chamber. With respect to the Senate, this is mandated by statute. See 2 U.S.C. § 288b(b) (1982) ("The Counsel shall bring a civil action to enforce a subpoena of the Senate or a committee or subcommittee of the Senate under section 705 only when directed to do so by the adoption of a resolution by the Senate.") With respect to the House, the same House Rule which delegates to committees and subcommittees the authority to issue subpoenas expressly reserves to the full House the discretion to take enforcement action. See Rule XI, cl. 2(m)(2)(B), Rules of the House of Representatives ("Compliance with any subpoena issued by a committee or subcommittee . . . may be enforced only as authorized or directed by the House."). There is no statutory House counterpart to 2 U.S.C. § 288b(b), the provision which requires that the Senate as a whole approve the filing of a civil suit. Neither, however, has there been any delegation made to committees to exercise the authority to bring suit on their own, and, in the absence of such a delegation, no such authority can exist. */

A referral to a United States attorney for criminal prosecutions, however, may be made while Congress is not in session. Under 2 U.S.C. § 194, when the Congress is not in session a committee may report to the President of the Senate or the Speaker of the House the failure of a witness to testify or produce documents, and "it shall be the duty" of the President of the Senate or the Speaker of the House then to certify a "statement of facts" to the appropriate United States Attorney, "whose duty it shall be to bring the matter before the grand jury for its action." Despite the mandatory language in section 194, the Office of Legal Counsel concluded in 1984 that the United States Attorney is not required to prosecute an executive branch official who is carrying out the President's instruction to assert executive privilege. This conclusion rested on three prongs: (1) the need to

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*/ The only conceivable delegation has been to the Speaker. 2 U.S.C. § 281b lists the functions of the House Office of the Legislative Counsel, which include:

> At the direction of the Speaker to perform on behalf of the House of Representatives any legal services which are within the capabilities of the Office and the performance of which would not be inconsistent with the provisions of [this section].

However, this provision only allows the Office of the Legislative Counsel to file suit "on behalf of" the House, and, when read in conjunction with the House Rules, would seem to foreclose the possibility of a Speaker directing that a civil suit be filed to enforce a subpoena unless there was first a vote by the full House approving such action.

preserve traditional prosecutorial discretion; (2) the legislative history of section 194 and the history of its implementation which suggest that Congress did not intend the statute to apply in such situations; and (3) the substantial constitutional questions that would be raised by any other interpretation. See "Whether the United States Attorney Must Prosecute or Refer to a Grand Jury a Citation for Contempt of Congress Concerning Executive Branch Official Who Has Asserted a Claim of Executive Privilege on Behalf of the President of the United States." (May 30, 1984).

In conclusion, I believe the only enforcement actions available to a congressional committee, as opposed to a convened House, to be (1) requesting the Attorney General to appoint an independent counsel, and (2) referral of the controversy to the United States Attorney for criminal prosecution. In both cases, the Executive branch official to whom the matter is referred may exercise his discretion not to seek further investigation or prosecution if the facts do not so warrant.