

NLWJC- Kagan

Counsel - Box 008 - Folder 003

Subpoena - Executive Official



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

FAX COVER SHEET

TO:

Elena Kagan

FAX NO.

456-1647

FROM:

JOE GRAUPENSPERGER

PHONE NO.

202/514-3951

DATE:

7/9

OF PAGES:

3

(INCLUDING COVER)

COMMENTS:

Attached is a proposed revision of
our compromise language for §4 of
S. 1734. Also attached is Paul Colburn's
e-mail explaining request from Senate
staff. Levin and Specter plan to
circulate substitute for S. 1734 on
Friday, so we would need to give them
notice of any concerns ASAP. Thanks.

Date: Tuesday, July 9, 1996 2:57 pm
From: SMO02(COLBORNP)
Subject: Senate subpoena enforcement action

Joe: Senate staffer Elise Bean just called to say they've met with Morgan Frankel and they propose to modify our suggested fix as set forth in the enclosed (new matter underlined; deleted matter struckout). The changes do not affect the substance (the concepts were implicit in our draft) and are fine with OLC. Please run them past Elena Kagin. Their plan is to submit the language to Committee members this Friday and vote on the language next Thursday.

-- Paul

cc: Faith

P.S. Elise volunteered that they'd be happy to make it clear in the legislative language that they intend maximum flexibility on the question of authorization of an assertion of a governmental privilege or objection and they are not seeking to impose any new procedures.

"This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Executive Branch of the Federal Government acting within his or her official capacity, except that the section shall apply if the refusal to comply is based on the assertion of a personal privilege or objection other personal legal position and is not based on a governmental privilege or objection the assertion of which has been authorized by the executive branch."



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6/13

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2 (INCLUDING COVER)

COMMENTS:

Attached is OLC's draft change to
§ 4 of S. 1734. Please let me
know if you have any comments.

THE WHITE HOUSE
WASHINGTON

Schiffman/Colburn

staff ↓ from Levin/Specker

↓
no interest in getting into
inter-brocker conflicts

—
concerns only re pers privilege —
Tashed OCC's help in drafting

—
—
Aspects of pers priv
limits

No implication of step of
power concerns/principles.

There's
a
manip
take for
months

— if no div, go forward
w/ other language
brocker

THE WHITE HOUSE
WASHINGTON

Use Crupenburger
Faith Purton (OCA)

Paul Colburn

Timing?

Pretty quickly.

Draft - suggested

DRAFT OLC FIX LANGUAGE FOR SEC. 1365(a) of S. 1734

The following language would be substituted for section 4 of S. 1734:

"This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Executive Branch of the Federal Government acting within his or her official capacity, **except that the section shall apply if the refusal to comply is based on the assertion of a purely personal privilege or other personal legal position.**"

Discussion

The language in bold has been drafted to address concerns expressed by Senate staff: that the current statutory language may be interpreted to allow government employees to assert personal privileges or other personal legal positions to justify non-compliance with Senate subpoenas and then take advantage of the exemption from Senate enforcement authority that was established to keep out of the courts disputes between the executive and legislative branches over the assertion of governmental privileges or other governmental legal positions.

The Senate concern first arose during the Iran/Contra hearings, when Oliver North resisted a Senate subpoena by asserting his personal 5th Amendment privilege and personally challenging the authority of the committee. The Senate did not attempt enforcement action against North because it was concerned that North could persuade the court that there was no jurisdiction because he had been subpoenaed in his official capacity. The Senate Ethics Committee also faced this problem when Senator Packwood resisted its subpoena. Senate Legal Counsel staff has indicated that this problem with the statute has influenced their advice to various committees over the years concerning their options in enforcing compliance with subpoenas to government employees.

The change to the statute is narrowly drafted to address only the specific, personal legal positions issue raised by Senate staff. It should not alter the relationship or procedures concerning the interaction between the two branches concerning governmental legal positions.



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Orrin G. Hatch
 Chairman
 Committee on the Judiciary
 United States Senate
 Washington, D.C. 20510

Waiting for Tom

Dear Chairman Hatch:

Set forth below are responses to questions posed in writing to Deputy Assistant Attorney Robert S. Litt by yourself and other Senators following his appearance on behalf of the Department of Justice at the May 14, 1996, hearing of the Judiciary Committee on "False Statements after Hubbard". The responses address the questions that were transmitted in your letter of May 21, 1996, with the exception of a non-Hubbard-related question from Senator Grassley as to which substantially more time is needed to gather the information necessary for an accurate reply. We will respond to this question separately as soon as we are able, but rather than await that information we are communicating our answers to all the other questions so that the Committee might better be in a position to act, if it wishes, on the Hubbard legislation that was the subject of the hearing.

Questions from Senator Hatch

1. Did the line of lower court cases establishing the so-called judicial function exception survive Hubbard?

ANSWER:

The case law establishing the judicial function exception did not survive the Supreme Court's opinion in Hubbard. The Supreme Court held that the courts are not a department or agency of the United States, and thus false statements submitted to the courts are not covered by 18 U.S.C. § 1001. Given that broad holding, there is no place for a judicial function exception under the current law.

The portions of Justice Stevens's opinion regarding the judicial function exception that are cited in your question are not part of the Court's opinion, and were joined by only two other justices. In the portion of Justice Stevens's opinion that

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was joined by the majority of the Court, Justice Stevens noted the following:

"[A] straightforward interpretation of the text of § 1001, with special emphasis on the words 'department or agency,' would seem to lead inexorably to the conclusion that there is no need for any judicial function exception because the reach of the statute simply does not extend to courts." Hubbard v. United States, 115 S.Ct. 1754, 1758 (1995).

Justices Scalia and Kennedy concurred with Justice Stevens's result, but refused to join in much of his discussion of the judicial function exception. Their concurrence points out that the judicial function exception has "no basis in the text of the statute." Hubbard, 115 S.Ct. at 1766 (Scalia, J. concurring).

All of the discussion of the judicial function exception in Hubbard was based upon the language of section 1001 as currently written, and would have little or no impact on the meaning of a newly drafted provision that includes a judicial function exception.

2. If Congress were to include in the recrafted statute an explicit judicial function exception, or a legislative function exception, what impact would this have on claims of similar exemptions for statements to the executive branch when it acts in an adjudicatory or legislative capacity, as under the Administrative Procedure Act, for example?

ANSWER:

The enactment of an explicit judicial or legislative function exception without the enactment of any similar exception for the executive branch would make clear to the courts that no such exception applies for false statements submitted to the executive branch, regardless of the capacity or manner in which the executive branch was acting. The Department of Justice believes that the exception should be limited to the judicial branch so that all false statements submitted to the executive and legislative branches may be prosecuted under 18 U.S.C. § 1001.

3. Do you believe there is a need for Congress to address other doctrines, such as the so-called "exculpatory no" doctrine as it redrafts section 1001?

ANSWER:

Although the Department of Justice does not agree with the exculpatory no doctrine that has been developed by some courts, we do not favor including a provision regarding the

exculpatory no in the current amendment of section 1001 for two reasons.

First, we do not see the exculpatory no defense as a significant barrier to law enforcement at this time. The United States Attorney's Manual acknowledges the exculpatory no doctrine, but instructs Federal prosecutors to construe this defense narrowly, so that we can continue to prosecute individuals for "affirmative, discursive and voluntary" statements that are false. See U.S.A.M. § 9-42-160 (Bluesheet February 12, 1996). We are increasingly successful in persuading the courts to confine the doctrine narrowly or to eliminate it altogether. See, e.g., United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994) (en banc); United States v. McMaster, 54 F.3d 1224 (6th Cir. 1995).

Second, we are concerned that the exculpatory no doctrine is a particularly sensitive area of law because it is frequently tied by the courts to the Fifth Amendment privilege against self-incrimination. We disagree that the exculpatory no defense is required by the Fifth Amendment, but we are concerned that an attempt to address the exculpatory no in the present amendment will delay the needed revision of Section 1001 because of the sensitivity of those perceived Fifth Amendment concerns.

Questions from Senator Specter

1. What is the position of the Department of Justice on a "legislative function" exception to 18 U.S.C. § 1001 to parallel the "judicial function" exception?

ANSWER:

The Department of Justice is opposed to including a legislative function exception in section 1001 for three reasons.

First, Congress engages in a wide variety of activity in carrying out its duties, including investigations, fact-finding, constituent service, and legislative activity. It would be extremely difficult to define and separate those areas of Congress's activity that would be subject to the protection of section 1001 from those that would not. That task would be particularly difficult in the context of a criminal statute, which must provide clear notice of which activity is prohibited.

Second, the primary function of Congress is quite different from the Federal courts, where the adversarial process of resolving conflicts between

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specific parties helps to provide safeguards for the integrity of information that is submitted, and at the same time creates a special need for an exception so as not to chill legitimate advocacy.

Finally, section 1001 applied to false statements submitted to the legislature for at least 40 years prior to Hubbard, and we do not see evidence that it chilled the submission of information to Congress or otherwise adversely affected the legislative process.

2. Does the Department of Justice believe that the bill needs to codify the "judicial function" exception?

ANSWER:

The highest priority of the Department of Justice in this area is to achieve an amendment of section 1001 following the Supreme Court's decision in Hubbard so that unsworn false statements made to any of the three branches of the Federal government may once again be prosecuted. At the same time, the Department of Justice agrees with the principle of protecting vigorous advocacy in the Federal courts, and we understand that there are very strong concerns that underlay the courts' creation of the judicial function exception. Accordingly, we believe that the enactment of a properly limited judicial function exception will help achieve the central goal of restoring the application of section 1001 to all three branches of the Federal government.

Questions from Senator Leahy

1. Even without amending section 1001 to cover the Congress, other statutes, such as perjury, false claims and obstruction of justice statutes (18 U.S.C. §§ 1621, 1623, 1505), penalize some of the same conduct. While there is an overlap, what conduct would be covered by the proposed amendment in S.1734 to section 1001 that is not covered by the other statutes?

ANSWER:

The amended false statement statute will provide the Department of Justice with a greater ability to prosecute the submission of false and fraudulent statements and documents to Congress, and thereby provide greater protection for the integrity of information submitted to Congress. The other criminal provisions that are listed in your question have a variety of additional requirements that do not apply under section 1001.

For example, the perjury statute requires that the witness be placed under oath before a competent tribunal, and the

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obstruction of justice provisions generally require that a formal proceeding be pending. These provisions would not cover the submission of an unsworn statement or any fraudulent document to a Senator or committee outside the context of a formal hearing or investigation. The false statement statute would reach this conduct.

Similarly, the false claims statute, 18 U.S.C. § 287, is limited to the submission of false or fraudulent claims upon the government. False statements and documents that are submitted to Congress but that are not part of such a claim are not covered by section 287. This includes, for example, information and documents that are submitted to the Senate by other government officials in which those officials make no claim for government funds.

An amended section 1001 is equally necessary to reach unsworn false statements or documents submitted to the judiciary, such as false letters to probation officers. We believe that all of this conduct should be punished.

2. Would the proposed amendments in S.1734 ensure that material information relayed either orally or in writing to staff on behalf of the Senate is subject to the false statement prohibitions of section 1001?

ANSWER:

If the amendment contained in S.1734 were enacted, the Department of Justice could prosecute a person for submitting an oral or written false statement of fact to a Senate staff member. As with any false statement prosecution, however, we must be able to show that the false statement was made knowingly and willfully, and that it was material to a matter within the jurisdiction of the department or agency to which the statement was submitted.

3. Unlike subpoenas against natural persons or state officials, under 28 U.S.C. § 1365(a), Senate subpoenas against federal agencies are not enforceable in court. Nevertheless, on occasion, such as the Ruby Ridge hearings concluded last year, the Department of Justice insists on receiving a subpoena before producing documents. Under what circumstances does the Justice Department require service of a subpoena before producing documents to a Senate Committee or Subcommittee?

ANSWER:

As we advised you in response to your follow-up questions in connection with the Ruby Ridge hearings, the Department believes that properly authorized Senate subpoenas have

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legal effect, regardless of whether they are judicially enforceable. Our experience has been, however, that congressional information needs and executive branch confidentiality interests can almost always be satisfied during the course of the informal accommodation process that has been developed in the interaction between the two branches in the course of congressional oversight. It is a relatively rare circumstance when the accommodation process fails to resolve a dispute and a subpoena is issued.

4. Should the gap in current law relating to the judicial enforceability of Senate subpoenas be eliminated? If not, could you explain why?

ANSWER:

The Department is opposed to legislation authorizing the Senate or its committees to seek judicial enforcement of subpoenas against the executive branch. We believe that disputes in this area should be resolved between the two branches and not brought before the courts. The existence of judicial enforcement authority would tend to undercut the accommodation process referred to in the response to question 3 and alter the balance in the relationship between the legislative and executive branches in this sensitive area.

5. S. 1734 would require that a refusal to comply with a Senate subpoena by an officer or employee of the Federal government acting in his or her official capacity be directed by the head of the agency based upon clearly articulated governmental privileges. Would this amendment modify current practice and, if so, could you explain how?

ANSWER:

Under longstanding executive branch procedures, executive privilege may not be asserted against Congress without the specific authorization of the President. Thus, the amendment would not change current practice with respect to assertion of executive privilege. However, non-compliance with a congressional subpoena may also rest on a basis other than executive privilege. For example, compliance may be prohibited by law in certain circumstances, such as where disclosure of information is prohibited by the grand jury secrecy requirement of Rule 6(e) of the Federal Rules of Criminal Procedure. More fundamentally, we are concerned that an amendment like that proposed by S. 1734 would make more formal the interaction in this area between the legislative and executive branches, and inappropriately involve the judicial branch, to the detriment of the

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accommodation process that has served the political branches so well.

I hope the foregoing is useful to you and the Committee.

Sincerely,

Andrew Foia
Assistant Attorney General

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

LRM NO: 4709

FILE NO: 2304

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Ronald JONES 395-3386
 Office of Management and Budget
 Fax Number: 395-3109
 Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: 6-13-96 (Date)
Elena Kagan (Name)
WH Council's Office (Agency)
456-7594 (Telephone)

SUBJECT: JUSTICE Qs and As RE: S1734, False Statement Penalties Restoration Act

The following is the response of our agency to your request for views on the above-captioned subject:

- Concur
- No Objection
- No Comment
- See proposed edits on pages _____
- Other: _____
- FAX RETURN of _____ pages, attached to this response sheet

E X E C U T I V E O F F I C E O F T H E P R E S I D E

14-Jun-1996 08:39am

TO: (See Below)

FROM: Ronald E. Jones
 Office of Mgmt and Budget, LRD

SUBJECT: Comments on DOJ Q/As

Unless I hear otherwise by noon today, June 14, 1996, I will assume you have no objection to LRM-4709 (dated 6/12), which requested comments on draft Justice Department Q/As following its testimony on S. 1734, the False Statements Penalties Restoration Act.

If you need another copy of the LRM, intend to comment but need more time, or have provided comments that I may have overlooked, please let me know by answering this fax/E-mail.

Thanks,

Ron Jones
395-3386

Distribution:

TO: Elena Kagan
TO: Tracey E. Thornton
TO: Stephen C. Warnath
TO: Robert G. Damus
TO: Charles S. Konigsberg
TO: Alice E. Shuffield

To Elena

THE WHITE HOUSE

WASHINGTON
June 14, 1996

MEMORANDUM FOR JACK QUINN, KATHY WALLMAN, JANE SHERBURNE

FROM: ELENA KAGAN *EK*

SUBJECT: S. 1734

Attached is an OLC proposal to amend S. 1734 -- a bill I previously have discussed with Jane and Kathy.

As you know, current law (see 28 USC 1365(a), attached) protects officers or employees of the federal government, when acting within their official capacity, from judicial enforcement of Senate subpoenas.

Section 4 of S. 1734 (also attached) limits this protection to cases where the "head of the department or agency employing the officer or employee has directed the officer or employee not to comply with the subpoena or order and identified the Executive Branch privilege or objection underlying such direction."

The Justice Department registered its objections to Section 4 in testimony on S. 1734 given a few weeks ago. The Department further articulated this position in the Q&A I showed Kathy and Jane yesterday.

Following the testimony, Richard Schiffrin met with staff members for Senators Specter and Levin to discuss Section 4. The attached proposal is designed to address the Senators' concerns without infringing on executive power. Its effect is to withdraw protection from federal officials claiming not a governmental, but a personal (e.g., Fifth Amendment), privilege.

I agree with OLC that this is appropriate: Assertions of personal privilege do not implicate the separation-of-powers principles that make judicial enforcement of Senate subpoenas against executive officials so troubling. Moreover, if we provide no alternative of this kind, Congress will probably pass the current version of S. 1734, which does compromise these principles. (The bill, as it stands, has broad bipartisan support.) If anyone disagrees, please let me know.

KW
Sum's h, think,
OK
KW

DRAFT FIX LANGUAGE FOR 28 U.S.C. § 1365(a)

The following language would be substituted for section 4 of S. 1734:

"This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Executive Branch of the Federal Government acting within his or her official capacity, except that the section shall apply if the refusal to comply is based on the assertion of a personal privilege or other personal legal position."

Discussion

The language in bold has been drafted to address concerns expressed by Senate staff: that the current statutory language may be interpreted to allow government employees to assert personal privileges or other personal legal positions to justify non-compliance with Senate subpoenas and then take advantage of the exemption from Senate enforcement authority that was established to keep out of the courts disputes between the executive and legislative branches over the assertion of governmental privileges or other governmental legal positions.

The Senate concern first arose during the Iran/Contra hearings, when Oliver North resisted a Senate subpoena by asserting his personal 5th Amendment privilege and personally challenging the authority of the committee. The Senate did not attempt enforcement action against North because it was concerned that North could persuade the court that there was no jurisdiction because he had been subpoenaed in his official capacity. Senate Legal Counsel staff has indicated that this problem with the statute has influenced their advice to various committees over the years concerning their options in enforcing compliance with subpoenas to government employees.

The change to the statute is narrowly drafted to address only the specific, personal legal positions issue raised by Senate staff. It should not alter the relationship or procedures concerning the interaction between the two branches concerning governmental legal positions. Under the amended statute, executive branch official subpoenaed in their official capacity would be exempt from a Senate enforcement action unless the Senate establishes that their refusal to comply with the subpoena is based on the assertion of a personal privilege or other personal legal position.

104TH CONGRESS
2D SESSION

S. 1734

To prohibit false statements to Congress, to clarify congressional authority to obtain truthful testimony, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 8, 1996

Mr. SPECTER (for himself, Mr. LEVIN, Mr. STEVENS, Mr. NUNN, Mr. COHEN, Mr. INOUE, Mr. JEFFORDS, Mr. LEAHY, and Mr. KOHL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To prohibit false statements to Congress, to clarify congressional authority to obtain truthful testimony, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "False Statements Pen-
5 alty Restoration Act".

6 **SEC. 2. RESTORING FALSE STATEMENTS PROHIBITION.**

7 Section 1001 of title 18, United States Code, is
8 amended to read as follows:

1 **“§ 1001. Statements or entries generally**

2 **“(a) PROHIBITED CONDUCT.—**

3 **“(1) IN GENERAL.—**A person shall be punished
4 under subsection (b) if, in any matter within the ju-
5 risdiction of the executive, legislative, or judicial
6 branch of the United States Government, or any de-
7 partment, agency, committee, subcommittee, or of-
8 fice thereof, that person knowingly and willfully—

9 **“(A)** falsifies, conceals, or covers up, by
10 any trick, scheme, or device, a material fact;

11 **“(B)** makes any materially false, fictitious,
12 or fraudulent statement or representation; or

13 **“(C)** makes or uses any false writing or
14 document, knowing that the document contains
15 any materially false, fictitious, or fraudulent
16 statement or entry.

17 **“(2) APPLICABILITY.—**This section shall not
18 apply to statements, representations, writings, or
19 documents submitted to a court in connection with
20 the performance of an adjudicative function.

21 **“(b) PENALTIES.—**A person who violates this section
22 shall be fined under this title, imprisoned for not more
23 than 5 years, or both.”.

1 **SEC. 3. CLARIFYING PROHIBITION ON OBSTRUCTING**
2 **CONGRESS.**

3 Section 1515 of title 18, United States Code, is
4 amended—

5 (1) by redesignating subsection (b) as sub-
6 section (c); and

7 (2) by inserting after subsection (a) the follow-
8 ing new subsection:

9 “(b) As used in section 1505, the term ‘corruptly’
10 means acting with an improper purpose, personally or by
11 influencing another, including, but not limited to, making
12 a false or misleading statement, or withholding, conceal-
13 ing, altering, or destroying a document or other informa-
14 tion.”

15 **SEC. 4. ENFORCING SENATE SUBPOENA.**

16 Section 1365(a) of title 28, United States Code, is
17 amended in the second sentence, by striking “Federal
18 Government acting within his official capacity” and insert-
19 ing “Executive Branch of the Federal Government acting
20 within his or her official capacity, if the head of the de-
21 partment or agency employing the officer or employee has
22 directed the officer or employee not to comply with the
23 subpoena or order and identified the Executive Branch
24 privilege or objection underlying such direction”.

4

1 **SEC. 5. COMPELLING TRUTHFUL TESTIMONY FROM IMMUNIZED WITNESS.**
2

3 Section 6005 of title 18, United States Code, is
4 amended--

5 (1) in subsection (a), by inserting "or ancillary
6 to" after "any proceeding before"; and

7 (2) in subsection (b)--

8 (A) in paragraphs (1) and (2), by inserting
9 "or ancillary to" after "a proceeding before"
10 each place it appears; and

11 (B) in paragraph (3), by inserting a period
12 at the end.

- O

28 § 1364

DISTRICT COURTS—JURISDICTION Part 4

Ch. 85 SENATE ACTIONS

Codifications

Two other sections 1364 were renumbered sections 1365 and 1366 of this title.

Amendments

1987 Amendments. Subsec. (a). Pub.L. 100-204 added "or was at the time of the tortious act or omission," following "individual, who is".

1982 Amendments. Subsec. (a). Pub.L. 97-241 substituted "within the meaning of section 2(3) of the Diplomatic Relations Act (22 U.S.C. 254a(3))" for "as defined in the Vienna Convention on Diplomatic Relations".

Effective Dates

1987 Acts. Section 138(b) of Pub.L. 100-204 provided that: "The amendment

made by subsection (a) [amending subsection (a) of this section] shall apply to the first tortious act or omission occurring after the date of enactment of this Act [Dec. 22, 1987]."

1982 Acts. Amendment by Pub.L. 97-241 effective Oct. 1, 1982, see section 204 of Pub.L. 97-241, set out as a note under section 4301 of Title 22, Foreign Relations and Intercourse.

1978 Acts. Section effective at the end of the 90 day period beginning on Sept. 30, 1978, see section 9 of Pub.L. 95-393, set out as a note under section 254a of Title 22, Foreign Relations and Intercourse.

LIBRARY REFERENCES

American Digest System

Jurisdiction of district court generally and jurisdiction of cases involving aliens or foreign sovereigns, see Federal Courts ¶192.10, 973 et seq.

Encyclopedias

Jurisdiction of district court generally and jurisdiction of cases involving aliens or foreign sovereigns, see C.J.S. Federal Courts §§ 53, 54, 308 et seq.

Law Reviews

Navigating the shores of "use" immunity and secret international enterprises in major congressional investigations: Lessons of the Iran-Contra affair. George W. Van Cleve and Charles Tisler, 55 Mo.L.Rev. 43 (1990).

WESTLAW ELECTRONIC RESEARCH

Federal courts cases: 170bk[add key number]. See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Retroactive effect 1

1. Retroactive effect

This section, which creates a direct cause of action against those who insure members of diplomatic missions, which

eliminates the insurer's defense that insurer was immune from suit, and which confers exclusive and original jurisdiction upon the federal district courts, does not apply retroactively. Windsor v. State Farm Ins. Co., D.C.D.C.1981, 509 F.Supp. 342.

§ 1365. Senate actions

(a) The United States District Court for the District of Columbia shall have original jurisdiction, without regard to the amount in controversy, over any civil action brought by the Senate or any authorized committee or subcommittee of the Senate to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpoena or order issued by the Senate or committee or subcommittee of the

Senate to any entity acting or authority of State law or to any tion of documents or other materi any deposition or interrogatory or nation thereof. This section shall to secure a declaratory judgment prevent a threatened refusal to c issued to an officer or employee within his official capacity.

(b) Upon application by the S or subcommittee of the Senate, th to an entity or person refusing, or ing to refuse or not to comply wi or committee or subcommittee of person to comply forthwith. Any order of the district court issued by such court to be a contempt th be commenced by an order to sh entity or person refusing or failin be held in contempt of court. ried by the court and shall be s sanctions imposed as a result of to compel obedience to the orde action or contempt proceeding r wherein the entity or party refus ing to refuse or not to comply, r found, and subpoenas for witness proceeding may run into any of shall confer upon such court ju otherwise the issuance or effe Senate or any committee or subc modify, suspend, terminate, or An action, contempt proceedin pursuant to this section shall no the Senate at the end of a Congt subcommittee of the Senate certifies to the court that it n documents, answers, or testimo

[(c) Repealed. Pub.L. 98-6 1984, 98 Stat. 3359]

(d) The Senate or any comn commencing and prosecuting a under this section may be repr neys as the Senate may design.

DICTION Part 4

Ch. 85 SENATE ACTIONS

28 § 1365

(a) [amending sub-
in] shall apply to the
omission occurring
in the text of this Act

amendment by Pub.L.
102-182, see section
1, set out as a note
of Title 22, Foreign
Affairs, and Inter-

effective at the end
beginning on Sept.
9 of Pub.L. 95-393,
under section 254a of
the Statutes at Large and Inter-

cases involving aliens or
other persons, see
§ 1365.

cases involving aliens or
other persons, see
§ 1365 et seq.

International enterprises in
Iran-Contraband affair.
§ 1365 (1990).

cases of this volume.

cases involving the defense that in-
fringe on the original jurisdiction
of the courts, does not
apply. *Windsor v. State*,
101 F.3d 509 (D.C. 1997).

cases involving the amount in
damages payable by the
Senate or any
committee or subcommittee
to enforce, to
prevent, or to
bring about, any subpoena
issued by the
committee of the

Senate to any entity acting or purporting to act under color or authority of State law or to any natural person to secure the production of documents or other materials of any kind or the answering of any deposition or interrogatory or to secure testimony or any combination thereof. This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity.

(b) Upon application by the Senate or any authorized committee or subcommittee of the Senate, the district court shall issue an order to an entity or person refusing, or failing to comply with, or threatening to refuse or not to comply with, a subpoena or order of the Senate or committee or subcommittee of the Senate requiring such entity or person to comply forthwith. Any refusal or failure to obey a lawful order of the district court issued pursuant to this section may be held by such court to be a contempt thereof. A contempt proceeding shall be commenced by an order to show cause before the court why the entity or person refusing or failing to obey the court order should not be held in contempt of court. Such contempt proceeding shall be tried by the court and shall be summary in manner. The purpose of sanctions imposed as a result of such contempt proceeding shall be to compel obedience to the order of the court. Process in any such action or contempt proceeding may be served in any judicial district wherein the entity or party refusing, or failing to comply, or threatening to refuse or not to comply, resides, transacts business, or may be found, and subpoenas for witnesses who are required to attend such proceeding may run into any other district. Nothing in this section shall confer upon such court jurisdiction to affect by injunction or otherwise the issuance or effect of any subpoena or order of the Senate or any committee or subcommittee of the Senate or to review, modify, suspend, terminate, or set aside any such subpoena or order. An action, contempt proceeding, or sanction brought or imposed pursuant to this section shall not abate upon adjournment sine die by the Senate at the end of a Congress if the Senate or the committee or subcommittee of the Senate which issued the subpoena or order certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment.

[(c) Repealed. Pub.L. 98-620, Title IV, § 402(29)(D), Nov. 8, 1984, 98 Stat. 3359]

(d) The Senate or any committee or subcommittee of the Senate commencing and prosecuting a civil action or contempt proceeding under this section may be represented in such action by such attorneys as the Senate may designate.

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(e) A civil action commenced or prosecuted under this section may not be authorized pursuant to the Standing Order of the Senate "authorizing suits by Senate Committees" (S. Jour. 572, May 28, 1928).

(f) For the purposes of this section the term "committee" includes standing, select, or special committees of the Senate established by law or resolution.

(Added Pub.L. 95-521, Title VII, § 705(f)(1), Oct. 26, 1978, 92 Stat. 1879, § 1364, and amended Pub.L. 98-620, Title IV, § 402(29)(D), Nov. 8, 1984, 98 Stat. 3359; renumbered § 1365, Pub.L. 99-336, § 6(a)(1)(B), June 19, 1986, 100 Stat. 638.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1978 Acts. Senate Report Nos. 95-170 and 95-273 and House Conference Report No. 95-1756, see 1978 U.S. Code Cong. and Adm. News, p. 4216.

1984 Acts. House Report No. 98-1062, see 1984 U.S. Code Cong. and Adm. News, p. 5708.

1986 Acts. House Report No. 99-423, see 1986 U.S. Code Cong. and Adm. News, p. 1545.

Amendments

1984 Amendments. Subsec. (c). Pub.L. 98-620, § 402(29)(D), struck out subsec. (c), which provided that in any civil action or contempt proceeding brought pursuant to this section, the court had to assign the action or proceed-

ing for hearing at the earliest practicable date and cause the action or proceeding in every way to be expedited, and that any appeal or petition for review from any order or judgment in such action or proceeding had to be expedited in the same manner.

Effective Dates

1984 Acts. Amendment by Pub.L. 98-620 not to apply to cases pending on Nov. 8, 1984, see section 403 of Pub.L. 98-620, set out as a note under section 1657 of this title.

1978 Acts. Section effective Jan. 3, 1979, see section 717 of Pub.L. 95-521, set out as a note under section 286 of Title 2, The Congress.

CROSS REFERENCES

Office of Senate Fair Employment Practices deemed senate committee for purposes of this section, see 2 USCA § 1207.

Senate legal counsel authority to bring civil action to enforce subpoena or order issued by Senate or committee in any court with jurisdiction, see 2 USCA § 288d.

LIBRARY REFERENCES

American Digest System

Jurisdiction of federal district courts in general, see Federal Courts ¶973 et seq.

Encyclopedias

Jurisdiction of federal district courts in general, see C.J.S. Federal Courts § 308 et seq.

Law Reviews

Navigating the shores of "use" immunity and secret international enterprises in major congressional investigations: Lessons of the Iran-Contra affair. George W. Van Cleve and Charles Tlefer, 55 Mo.L.Rev. 43 (1990).

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1. Constitutionality

Civil enforcement mechanism of t
section under which defendant was cit
for civil contempt for failure to test
before Senate Subcommittee under gra
of immunity, was not unconstitutional.
Application of U.S. Senate Perman
Subcommittee on Investigations, 198
653 F.2d 1232, 211 U.S.App.D.C. 2, c
Sorari denied 102 S.Ct. 641, 454 U.
1084, 70 L.Ed.2d 619.

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or Acts of Congress

For the purposes of this chap
States or Acts of Congress do no
to the District of Columbia.

(Added Pub.L. 91-358, Title I, §
§ 1363; renumbered § 1364, Pub.L.
2456; renumbered § 1366, Pub.L.
Stat. 639.)

HISTORICAL AN

Revision Notes and Legislative Repor
1978 Acts. House Report No. 95-165
see 1978 U.S. Code Cong. and Adm.
News, p. 5477.

1986 Acts. House Report No. 99-42
see 1986 U.S. Code Cong. and Adm.
News, p. 1545.

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§ 1362. Indian tribes

LIBRARY REFERENCES

Law Reviews

Cooperative agreements: Government-to-government relations to foster reservation business development. Joel H. Mack and Gwyn Goodson Timms, 20 Pepparing L.Rev. 1290 (1993).

Doing business with Indians and the three States: Secretarial approval, sovereign immunity, and subject matter jurisdiction. William V. Vetter, 36 Ariz.L.Rev. 169 (1994).

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12. — Miscellaneous tribes or bands

District court did not clearly err by finding that group of Indian families was not federally recognized tribe, for purpose of statute providing that district courts shall have original jurisdiction of civil actions brought by Indian tribe or band with governing body duly recognized by Secretary of the Interior, where no statute or treaty identified group as federally recognized tribe, group's original and amended articles of incorporation and bylaws were not adopted pursuant to statute governing formal organization of Indian tribe, group was not registered in Federal Register as recognized Indian tribe, and group lacked historical unity. Pit River Home and Agr. Co-op. Ass'n v. U.S., C.A.9 (Cal.) 1994, 20 F.2d 1088.

17. — Fishing and gaming

District court had subject matter jurisdiction to hear tribal claim that power company was tortiously interfering with its treaty fishing rights, as United States courts have subject matter jurisdiction to hear any tribal claim for protection of rights created by United States treaty. Nez Perce Tribe v. Idaho Power Co., D.Idaho 1994, 847 F.Supp. 791.

18. — Gambling

Forest County Potawatomi Community of Wisconsin v. Doyle, W.D.Wis.1992, 803 F.Supp. 1526, [main volume] appeal dismissed 7 F.2d 238.

§ 1365. Senate actions

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3. Scope of subpoena—Generally

In determining proper scope of legislative subpoena, district court may only inquire as to whether documents sought by subpoena are not plainly incompetent or irrelevant to any lawful purpose of requesting body in discharge of its duties. Senate Select Committee on Ethics v.

Packwood, D.D.C.1994, 845 F.Supp. 17, stay denied 114 S.Ct. 1036, 127 L.Ed.2d 530.

4. — Breadth

Because Senate Ethics Committee possessed power to investigate allegations of misconduct against senator, and senator's personal diaries contained entries pertinent to inquiry, subpoena seeking diaries was not impermissibly broad, even though diaries could prove compromising to senator in respects Committee had not yet foreseen. Senate Select Committee on Ethics v. Packwood, D.D.C.1994, 845 F.Supp. 17, stay denied 114 S.Ct. 1036, 127 L.Ed.2d 530.

JUDICIARY—PROCEDURE

§ 1367. Supplemental jurisdiction

Civil rights for women for gender violence and supplemental jurisdiction USCA 8:1993.

Law Reviews

A discussion about qualified immunity in A. Schwartz, 212 N.Y.L.J. 3 (Not Case against supplemental jurisdiction: A constitutional, statutory, analysis. Susan Block-Lieb, 62 L.Rev. 721 (1994).

Defining the parameters of supplemental jurisdiction after 28 U.S.C. § 1367. L.Rev. 891 (1994).

Federal court jurisdiction over agreements. Kirk Teska, 30 Trial 1394.

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Auxiliary jurisdiction distinguished Federal party 23

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1. Construction

Psychiatrist's allegation of violation process clause of the Federal Constitution provided original federal question jurisdiction that federal district court could exercise supplemental jurisdiction over all other claims were so related that they formed part of same case or controversy and thus properly removed to federal court if that case involved state claims not covered by ERISA civil enforcement section because psychiatrist, alleging that he was deceptive to preferred provider panels, was not participant nor beneficiary. Zanig, Cross and Blue Shield of Michigan (Mich.) 1996, 52 F.2d 1395.

Statute dealing with supplemental jurisdiction of federal courts codified doctrines of independent jurisdiction as they exist under the United States Supreme Court's decision, and principal purpose of the statute make it clear that, in federal question supplemental jurisdiction is proper. F.D.I.C. v. Deloitte & Touche, E.I. 884 F.Supp. 1166.

2. Construction with other laws

Relation between adversary proceeding exclusively on state law and bankruptcy proceeding out of which adversary proceeding is functionally identical to that supplemental proceeding and federal which it is supplementary; thus, same should apply to question whether an circumstances to retain supplemental jurisdiction claim when main claim (bankruptcy proceeding itself) is resolved. Chapman Motors, Inc., C.A.7 (Ill.) 1996, 65 F.2d