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To Call Or Not To Call: Compelling Witnesses To Appear Before Congress

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TO CALL OR NOT TO CALL: COMPELLING WITNESSES TO APPEAR BEFORE CONGRESS

*Daniel Curbelo Zeidman**

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INTRODUCTION

On May 22, 2013, Lois Lerner, director of the IRS tax-exempt organizations division, appeared before the House of Representatives Committee on Oversight and Government Reform (Oversight Committee).¹ Lerner was called to testify about the IRS's alleged targeting of conservative groups seeking 501(c)(4) tax-exempt status.² Oversight Committee Chairman Representative Darrell Issa³ issued a subpoena compelling Lerner to come before the Committee, despite being informed through her counsel that she would assert her Fifth Amendment right against self-incrimination.⁴ In a letter dated May 20, 2013 to Chairman Issa, Lerner's attorney explained that she would invoke her Fifth Amendment right because the Department of Justice was simultaneously conducting a criminal investigation on the alleged targeting of conservative groups by the IRS.⁵ The letter requested that Lerner be excused from the hearing and asserted that she "has

1. *The IRS: Targeting Americans for Their Political Beliefs: Hearing before H. Comm. on Oversight and Gov't Reform*, 113th Cong. 22 (2013) [hereinafter *2013 Oversight Committee Hearing*] (statement of Lois Lerner, Director of Exempt Organizations, Internal Revenue Service), available at <http://oversight.house.gov/wp-content/uploads/2014/02/2013-05-22-Ser.-No.-113-33-FC-The-IRS-Targeting-Americans-for-Their-Pol-Beliefs.pdf>. The allegation that the IRS engaged in heightened scrutiny of conservative organizations seeking tax-exempt status caused a national uproar. See, e.g., Chelsea J. Carter et al., 'Angry' Obama Announces IRS Leader's Ouster After Conservatives Targeted, CNN (May 16, 2013), <http://www.cnn.com/2013/05/15/politics/irs-conservative-targeting/>.

2. *2013 Oversight Committee Hearing*, supra note 1, at 22 (statement of Lois Lerner, Director of Exempt Organizations, Internal Revenue Service).

3. Republican member of Congress representing California's 49th congressional district and Chair of the House Committee on Oversight and Government Reform.

4. Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. On Oversight & Gov't Reform (May 20, 2013).

5. *Id.*

not committed any crimes or made any misrepresentation but under the circumstances she has no choice but to take this course.”⁶

Notwithstanding the request to be excused from the hearing, Chairman Issa compelled Lerner to appear before the Oversight Committee “because of, among other reasons, the possibility that she will waive or choose not to assert the privilege.”⁷ On the day of the televised hearing, before invoking her Fifth Amendment right, Lerner read aloud a brief opening statement that proclaimed in general terms her innocence of any wrongdoing.⁸ In response, Chairman Issa and Oversight Committee Republicans argued that by offering an opening statement Lerner had waived her Fifth Amendment privilege and should be subject to questioning by the Oversight Committee.⁹ An exchange between Congressman Trey Gowdy¹⁰ and Oversight Committee Ranking Member Elijah Cummings¹¹ summarized the dispute:

Mr. Gowdy: Mr. Issa, Mr. Cummings just said we should run this like a courtroom, and I agree with him. She just testified. She just waived her Fifth Amendment right to privilege. You don’t get to tell your side of the story and then not be subjected to cross examination. That’s not the way it works. She waived her right of Fifth Amendment privilege by issuing an opening statement. She ought to stay in here and answer our questions

Mr. Cummings: Mr. Chairman, . . . first of all, with all respect for my good friend Mr. Gowdy, I said I would like to see it run like a

6. *Id.*

7. Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to William W. Taylor, III, Zuckerman Spaeder LLP (May 21, 2013).

8. *2013 Oversight Committee Hearing, supra* note 1, at 22 (statement of Lois Lerner, Director of Exempt Organizations, Internal Revenue Service) (“I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee. And while I would very much like to answer the committee’s questions today, I’ve been advised by my counsel to assert my constitutional right not to testify or answer questions related to the subject matter of this hearing. After very careful consideration, I have decided to follow my counsel’s advice and not testify or answer any of the questions today. Because I’m asserting my right not to testify, I know that some people will assume that I’ve done something wrong. I have not.”).

9. *Id.* at 23–24.

10. Republican member of Congress representing South Carolina’s fourth congressional district.

11. Democratic member of Congress representing Maryland’s seventh congressional district and Ranking Member of the House Committee on Oversight and Government Reform.

federal court. Unfortunately, this is not a federal court, and she does have a right, and I think . . . we have to adhere to that.¹²

Still, Lerner refused to answer any questions, and eventually Chairman Issa recessed the hearing and allowed Lerner to leave.¹³

On June 28, 2013, just over a month after the initial hearing, the Oversight Committee voted that “Lerner’s self-selected, and entirely voluntary, opening statement constituted a waiver of her Fifth Amendment privilege against self-incrimination because a witness may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.”¹⁴ Additionally, in response to Lerner’s testimony, Congressman Mo Brooks¹⁵ introduced legislation on June 20, 2013 to “terminate any Federal employee who refuses to answer questions or gives false testimony in a congressional hearing.”¹⁶

Despite voting that Lerner had waived her right to remain silent and passing a resolution and introducing legislation that would automatically terminate any federal employee who declined to answer questions at a congressional hearing, the Oversight Committee was not yet done with Lerner. On March 5, 2014, Chairman Issa compelled Lerner to reappear before the Oversight Committee¹⁷ despite again being informed by counsel that Lerner would not answer questions pursuant to her Fifth Amendment right.¹⁸ At the hearing, Lerner once more declined to answer questions from the Committee.¹⁹ This time, in response to Lerner’s decision to

12. *2013 Oversight Committee Hearing*, *supra* note 1, at 23.

13. *Id.* at 24. The damage to Lerner was already done. She subsequently retired on September 13, 2013. See John D. McKinnon, *Lois Lerner, at Center of IRS Investigation, Retires*, Wall St. J., Sept. 23, 2013, <http://online.wsj.com/news/articles/SB10001424052702304713704579093461064758006>.

14. Resolution of the Committee on Oversight and Government Reform, 113th Cong. (2013), available at <http://oversight.house.gov/wp-content/uploads/2013/06/Resolution-of-the-Committee-on-Oversight-and-Government-Reform-6-28-131.pdf>.

15. Republican member of Congress representing Alabama’s fifth congressional district.

16. H.R. 2458, 113th Cong. (2013).

17. *The IRS: Targeting Americans for Their Political Beliefs before H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (2014) [hereinafter *2014 Oversight Committee Hearing*].

18. Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Feb. 26, 2014) (on file with the House Committee on Oversight and Government Reform).

19. *2014 Oversight Committee Hearing*, *supra* note 17.

invoke her constitutional right, the Oversight Committee voted to hold her in criminal contempt of Congress.²⁰

Roughly one month later, the House of Representatives held Lerner in contempt by a vote of 231 to 187.²¹ The Resolution holding Lerner in contempt, House Resolution 574, directed the Speaker of the House of Representatives to certify the Oversight Committee's report regarding Lerner's refusal to testify before the Committee to the U.S. Attorney for the District of Columbia.²² It also directed the U.S. Attorney to "take all appropriate action to enforce the subpoena."²³ If Lerner is found guilty under the current criminal contempt statute, she faces a fine of up to \$100,000 and imprisonment for up to one year.²⁴

Tension between the individual right against self-incrimination and Congress's investigative role is not new. When political scandals arise, legislators are quick to conduct public and high-profile investigations and to subpoena the actors involved to testify and explain their actions.²⁵ For example, the Fifth Amendment played a prominent role during the McCarthy era when Congress investigated

20. Josh Hicks, *House Committee Votes to Hold Ex-IRS Official Lois Lerner in Contempt*, WASH. POST, Apr. 10, 2014, <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/04/10/house-committee-votes-to-hold-ex-irs-official-lois-lerner-in-contempt-of-congress/>.

21. H.R. Res. 574, 113th Cong. (2014). The vote split along partisan lines with only six Democrats voting in favor of the resolution and no Republicans voting against it. See Ed O'Keefe, *House Votes to Hold Lois Lerner in Contempt of Congress*, WASH. POST, May 7, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/05/07/house-votes-to-hold-lois-lerner-in-contempt-of-congress/>.

22. H.R. Res. 574.

23. *Id.*

24. 2 U.S.C. § 192 (2012) ("Every 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 joint committee established by a joint or concurrent resolution of the two Houses of Congress, 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, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.").

25. This phenomenon is not limited to Congress. For example, the tension presented itself following revelations that New Jersey Governor Chris Christie's staff members and political appointees had intentionally closed multiple lanes at a toll plaza entrance on the George Washington Bridge as political retribution against Fort Lee Mayor Mark Sokolic. In the midst of numerous state and federal hearings and investigations, several people involved have asserted their Fifth Amendment rights. See, e.g., David W. Chen & William K. Rashbaum, *Former Aide to Christie Invokes Fifth Amendment Right*, N.Y. TIMES, Feb. 3, 2014, <http://www.nytimes.com/2014/02/04/nyregion/former-aide-to-christie-invokes-fifth-amendment.html>.

alleged communist infiltration in American society²⁶ and during the Iran-Contra affair investigation that shook the Reagan presidency.²⁷ In both instances, Congress engaged in high-profile, public investigations and was confronted with witnesses who asserted their Fifth Amendment rights and declined to answer questions. Yet, despite the persistent conflict between individual rights and Congress's investigative powers, there is no definitive standard to guide or control situations where members of Congress wish to compel a witness to appear before a congressional committee when counsel informs them that the witness will invoke his or her Fifth Amendment right to remain silent.

Given the recurring ethical and constitutional issues involved, the District of Columbia Bar (D.C. Bar) has offered one approach to address this divisive subject in the form of an advisory ethics opinion.²⁸ D.C. Legal Ethics Opinion 358 (Opinion 358) provides that "a violation [of the rules of ethics] occurs only where the summons [of a witness who intends to assert his or her Fifth Amendment right] serves no substantial purpose 'other than to embarrass, delay, or burden' the witness."²⁹ In other words, according to the D.C. Bar's advisory analysis, a lawyer may call a witness to appear even if he or she knows the witness will refuse to answer questions, so long as the lawyer's intent is not solely to pillory the witness.³⁰

In light of the ever-growing partisanship in Washington³¹ and the increasing politicization of congressional investigations,³² the tension

26. See, e.g., *Emspak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955).

27. See, e.g., *Iran-Contra Hearings: Sharp Words on Immunity*, N.Y. TIMES, July 14, 1987, <http://www.nytimes.com/1987/07/14/world/iran-contra-hearings-sharp-words-on-immunity.html>.

28. See generally Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 314 (2002) (explaining that "in many jurisdictions the ethics opinion will be purely advisory").

29. D.C. Bar Legal Ethics Op. 358 (2011) (quoting D.C. Bar Legal Ethics Op. 31 (1977)).

30. *Id.*

31. See, e.g., Drew Desilver, *Partisan Polarization, in Congress and Among Public, Is Greater Than Ever*, PEW RES. CENTER, July 17, 2013, <http://www.pewresearch.org/fact-tank/2013/07/17/partisan-polarization-in-congress-and-among-public-is-greater-than-ever/>. This increased polarization is also apparent from other congressional investigations into hot button issues such as the attack on the American embassy in Benghazi and the Bureau of Alcohol, Tobacco and Firearms operation "Fast and Furious" fiasco. See Keith Boykin, *Grandstanding and Hype*, N.Y. TIMES, May 19, 2013, <http://www.nytimes.com/roomfordebate/2013/05/08/are-congressional-hearings-serious-investigations-or-just-party-politics/grandstanding-and-hype>; Ernesto Londoño & Karen DeYoung, *At Benghazi Hearing, State Dept.*

between individual Fifth Amendment rights and Congress's investigative mandate is likely to recur with prominence and increased acrimony in the future. Without a clear standard to determine when to compel individuals to appear in person and assert their constitutional rights, lawmakers will be left making ad hoc decisions. This result raises significant ethical, constitutional, and legislative policy concerns.

This Note provides a detailed analysis of whether members of Congress should be able to compel a witness to appear before a committee when the individual has stated that he or she will invoke the right against self-incrimination.³³ Part I of this Note discusses the Fifth Amendment privilege against self-incrimination, Congress's broad investigative authority, and the tension that arises between the two. Part II analyzes three possible approaches to address situations when individuals inform congressional committees beforehand that they will invoke their right against self-incrimination: (1) excuse the witness from appearing before the committee, (2) compel the witness to appear before the committee and invoke the Fifth Amendment privilege live and in-person, and (3) compel the witness to appear before the committee unless the sole purpose of calling the witness is to shame or pillory him or her. Finally, Part III explains why members of Congress should excuse a witness who has formally expressed through counsel that he or she will assert a valid privilege against self-incrimination. Such an approach would establish a proper, ethical balance between Congress's investigative power and the individual constitutional right against self-incrimination.

Officials Challenge Administration Review of Attacks, WASH. POST, May 8, 2013, http://www.washingtonpost.com/world/national-security/house-committee-holds-hearing-on-benghazi-attacks/2013/05/08/639da672-b7ea-11e2-b94c-b684dda07add_story.html.

32. See Boykin, *supra* note 31.

33. According to the Congressional Research Service, 156 members of the House of Representatives and fifty-five Senators in the 113th Congress are attorneys. JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 113TH CONGRESS: A PROFILE 3 (2014), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%260BL%2BR%5CC%3F%0A>. Nearly forty percent of Congress is comprised of lawyers. See *id.* Further, the rules, regulations, and guidelines that regulate attorneys should inform the behavior of all members, as Congress is the law-making branch of the government.

I. THE TENSION BETWEEN THE INDIVIDUAL FIFTH AMENDMENT
RIGHT AGAINST SELF-INCRIMINATION AND CONGRESS'S
INVESTIGATIVE AUTHORITY

Congress has conducted investigations since America's inception, even though the Constitution contains no explicit language granting Congress such power. The first congressional investigation began in 1792, just three years after the Constitution's ratification, when the House of Representatives established a committee to investigate General Arthur St. Clair's defeat by American Indians at the Battle of the Wabash.³⁴ A seven-member special committee was formed to investigate the cause of the army's defeat by the combined forces of the Miami, Shawnee, and Delaware Indian Tribes.³⁵ During the debate on the Floor of the House of Representatives, it is clear that no member of Congress questioned the House's inherent authority to investigate.³⁶ Precedent to conduct such an inquiry was also readily available in both the British Parliament and the American colonies' legislatures.³⁷ For over a century, Congress continued to investigate issues as it saw fit, with minimal involvement or supervision by the judiciary.³⁸

In the 1920s, the Supreme Court formally recognized Congress's power to engage in oversight and conduct investigations necessary to carry out its legislative functions.³⁹ Subsequent cases reaffirmed the expansive breadth of Congress's investigative power.⁴⁰ The Court in *Watkins v. United States* observed, more specifically, that Congress's investigative power "comprehends probes into departments of the

34. See Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2458–60 (2002). By a vote of forty-four to ten, Congress adopted a resolution which appointed a committee to investigate the army's defeat and empowered it "to call for such persons, papers, and records, as may be necessary to assist their inquiries." *Id.* at 2459.

35. *Id.*

36. *Id.*

37. See M. Nelson McGeary, *Congressional Investigations: Historical Development*, 18 U. CHI. L. REV. 425, 425 (1951).

38. *Id.*

39. *Sinclair v. United States*, 279 U.S. 263, 291 (1929) (noting "the power of inquiry is an essential and appropriate auxiliary to the legislative function"); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (recognizing Congress's authority to conduct investigations to effectively legislate).

40. *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 504–05 (1975); *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) ("In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.").

Federal Government to expose corruption, inefficiency or waste,”⁴¹ and referred further to “the power of the Congress to inquire into and to publicize corruption, maladministration or inefficiency in agencies of government.”⁴² The Court has consistently recognized that Congress has broad authority to investigate when it is acting to further legitimate legislative ends or is overseeing the federal government.

While Congress has expansive oversight authority, its power is not unlimited.⁴³ It must be exercised pursuant to and in aid of Congress’s legislative function, and not “to expose the private affairs of individuals without justification in terms of the functions of Congress . . . [and] must be related to, and in furtherance of, a legitimate task of the Congress.”⁴⁴ Courts have held that a committee lacks legislative purpose if it appears to be performing a legislative trial instead of conducting an investigation to further its legislative purpose.⁴⁵ For example, in *United States v. Icardi*, the District Court for the District of Columbia dismissed the perjury charge against a defendant because the congressional subcommittee that questioned the defendant was not acting as a “competent tribunal”⁴⁶ at the time. The court explained that to act as a competent tribunal, a committee must be “pursuing a bona fide legislative purpose when it secures the testimony of any witness.”⁴⁷ Because the court in *Icardi* determined that the subcommittee was not acting pursuant to a legitimate legislative purpose, but was instead conducting a “legislative trial,” it granted the defendant’s motion to dismiss the charges.⁴⁸ Although cases such as *Icardi* highlight the limit to Congress’s ability to investigate, when Congress is acting as a competent tribunal, it enjoys broad authority to obtain information it deems relevant to its inquiry.⁴⁹

41. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

42. *Id.* at 200 n.33.

43. *Id.* at 187.

44. *Id.*

45. *See* *United States v. Icardi*, 140 F. Supp. 383, 388 (D.D.C. 1956); *see also* *United States v. Cross*, 170 F. Supp. 303, 306 (D.D.C. 1959) (“[W]hen a duly constituted investigative committee questions a witness solely for a purpose other than to elicit facts in aid of legislation, that committee steps outside its authority and no longer acts as a competent tribunal.”).

46. *Icardi*, 140 F. Supp. at 388.

47. *Id.*

48. *Id.* at 388–89.

49. *See, e.g., McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (upholding Congress’s power to issue subpoenas).

A key component of Congress's investigative power is its authority to subpoena witnesses.⁵⁰ The Supreme Court explained that Congress's subpoena power is necessary because, "mere requests for such information often are unavailing, and . . . information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."⁵¹ Similar to its general investigative power, Congress may issue subpoenas so long as they further a valid legislative purpose and are not mere "fishing expeditions."⁵² The Court in *Watkins* noted that subpoenaed information that is "unrelated to any legislative purpose" must yield to the individual right to privacy.⁵³ While the subpoena power is a critical tool for Congress's investigative efforts, it is not the only way Congress can obtain information from recalcitrant sources.⁵⁴

Congress also has the power to hold individuals who obstruct the legislative process in contempt.⁵⁵ The contempt power may be wielded in three distinct ways.⁵⁶ First, Congress has the ability to employ its constitutional authority to detain and imprison an individual until he or she complies with congressional demands.⁵⁷ Second, pursuant to the criminal contempt statute,⁵⁸ Congress can certify a contempt citation to the executive branch for the criminal prosecution of the contemnor.⁵⁹ Since 1935, Congress has primarily utilized criminal contempt when dealing with noncompliant

50. *Id.*

51. *Id.*

52. *Watkins v. United States*, 354 U.S. 178, 198 (1957); *Fed. Trade Comm'n v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924) (noting that "[i]t is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up").

53. *Watkins*, 354 U.S. at 198.

54. Congress can find individuals in contempt for obstructing the legislative process. *See* 2 U.S.C. §§ 192, 194 (2012).

55. 2 U.S.C. §§ 192, 194; *see generally* TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE, CONGRESSIONAL RESEARCH SERVICE 1 (2014), *available at* <https://www.fas.org/sgp/crs/misc/RL34097.pdf>.

56. GARVEY & DOLAN, *supra* note 55, at 1.

57. *Id.* In 1795, the House of Representatives adopted a resolution holding Robert Randall, an American businessman, in contempt for attempting to bribe members of Congress. *See* O'Neill, *supra* note 34, at 2462. Upon adoption of the resolution, Randall was arrested and placed in the custody of the Sergeant-at-Arms until he petitioned the House for forgiveness. *See id.* The Court explicitly affirmed Congress's inherent contempt power in *Anderson v. Dunn*, 19 U.S. 204, 233 (1821).

58. 2 U.S.C. §§ 192, 194.

59. GARVEY & DOLAN, *supra* note 55, at 1.

witnesses.⁶⁰ Lastly, Congress can seek civil judgment from a federal court declaring that the contemnor must comply with the subpoena.⁶¹

Congress passed its first statute enabling criminal contempt by the legislative body in 1857, and the statute still exists in the modern day.⁶² The current criminal contempt statute provides that a witness is guilty of a misdemeanor and may be imprisoned for up to one year and fined up to \$100,000 if he or she fails to testify or produce documents as ordered pursuant to a subpoena.⁶³ The Supreme Court found that Congress's contempt power is a natural outgrowth of its investigative power because without such an enforcement mechanism Congress would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."⁶⁴

In the 1950s, Congress's investigative power came into direct conflict for the first time with the rights of individuals to assert their privilege against self-incrimination when subpoenaed to appear before, or provide documents to, a congressional committee.⁶⁵ During this period, anticommunist paranoia prompted Congress to hold numerous congressional hearings on the alleged communist infiltration of American society and government.⁶⁶ These hearings were primarily convened by the House Committee on Un-American Activities and the Senator Joseph McCarthy-run Senate Permanent Subcommittee on Investigations.⁶⁷ To avoid becoming embroiled in

60. MORTON ROSENBERG, THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING: A PRIMER ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 16 (2009), available at <http://www.constitutionproject.org/wp-content/uploads/2012/09/175.pdf>. (noting "this burden may be extremely difficult to meet").

61. See GARVEY & DOLAN, *supra* note 55, at 1, 23–34. The Senate has existing statutory authority to enforce subpoenas through civil contempt. See 2 U.S.C. §§ 288b(b), 288d (2012). While the House of Representatives lacks explicit statutory authority to pursue civil contempt, the House appears able to authorize a committee to seek civil enforcement of a subpoena in federal court. See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 65 (D.D.C. 2008). In *Miers*, the U.S. District Court for the District of Columbia found that the House Committee on the Judiciary could properly seek enforcement of its subpoenas in federal court because the House had authorized the Judiciary Committee to seek civil enforcement action to compel compliance with its subpoenas in that instance. *Id.* at 70–71.

62. Act of Jan. 24, 1857, ch. 19, §3, 11 Stat. 156 (1857). The constitutionality of the statute was upheld in *In re Chapman*, 166 U.S. 661, 171 (1897).

63. 2 U.S.C. § 192 (2012).

64. *Anderson v. Dunn*, 19 U.S. 204, 228 (1821).

65. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself").

66. See generally Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387 (2005).

67. *Id.*

these investigations and having their reputations ruined by being publicly accused of supporting communism, many witnesses began to invoke their constitutional right against self-incrimination.⁶⁸ Notably, the critical question that arose as individuals began to assert their constitutional rights in these congressional hearings was not whether the privilege applied in the congressional context, but whether the individuals had properly invoked their rights.⁶⁹

On its face, the Fifth Amendment speaks to “criminal trials.” Nonetheless, the privilege has traditionally been understood as applying to Congress.⁷⁰ In the 1950’s, the Supreme Court reinforced this understanding in *Quinn v. United States*⁷¹ and *Emspak v. United States*.⁷² In *Quinn* and *Emspak* the Supreme Court addressed the issue of whether an individual testifying before a congressional committee had actually asserted his or her privilege against self-incrimination.⁷³ Implicit in the Court’s analysis in these cases was the understanding that the right against self-incrimination can apply in the congressional context so long as the individual properly asserts the privilege.⁷⁴

In *Quinn*, the defendant, Quinn, was convicted of contempt for refusing to answer when asked whether he was a member of the communist party, citing vaguely to his rights under the First and Fifth Amendment.⁷⁵ Quinn was sentenced to a term of six months in jail and a \$500 fine.⁷⁶ The Court of Appeals for the District of Columbia Circuit reversed Quinn’s conviction, and the Supreme Court affirmed the appellate court’s holding.⁷⁷ Although Quinn’s objections were imprecise and not specific to his Fifth Amendment right against self-

68. Stanley H. Friedelbaum, *Advances and Departures in the Criminal Law of the States: A Selective Critique*, 69 ALB. L. REV. 489 (2006).

69. See O’Neill, *supra* note 34, at 2514–15.

70. James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1138 n.123 (2007) (explaining that “[d]uring the nineteenth century, the privilege was invoked on several occasions in response to congressional inquiries, including by Presidents Jackson and Grant”).

71. *Quinn v. United States*, 349 U.S. 155, 162 (1955).

72. *Emspak v. United States*, 349 U.S. 190, 194 (1955).

73. *Quinn*, 349 U.S. at 162; *Emspak*, 349 U.S. at 194.

74. *Quinn*, 349 U.S. at 162 (“In the instant case petitioner was convicted for refusing to answer the committee’s question as to his alleged membership in the Communist Party. Clearly an answer to the question might have tended to incriminate him. As a consequence, petitioner was entitled to claim the privilege. The principal issue here is whether or not he did.”); *Emspak*, 349 U.S. at 194.

75. *Quinn*, 349 U.S. at 157–58.

76. *Id.* at 159.

77. *Id.* at 160, 170.

incrimination, the Court found that his words were adequate to have invoked the privilege.⁷⁸ By holding that there is “no ritualistic formula . . . necessary in order to invoke the privilege,” the Court emphasized the breadth and importance of Fifth Amendment rights.⁷⁹ According to the Court, all that is required to claim such a cherished and fundamental protection is a statement uttered in a way that a committee may “reasonably be expected to understand as an attempt to invoke the privilege.”⁸⁰

In *Emspak v. United States*, the companion case to *Quinn*, the Supreme Court addressed the same issue of whether the defendant had adequately asserted his Fifth Amendment privilege before Congress.⁸¹ In *Emspak*, the defendant refused to answer certain questions and stated, “I think it is my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the first amendment, supplemented by the fifth.”⁸² As in *Quinn*, the Court in *Emspak* restated that an individual does not need to assert a specific phrase or combination of words to invoke the right against self-incrimination.⁸³ Thus, the Court in *Emspak*, as well as *Quinn*, clearly recognized that individuals can invoke their Fifth Amendment right before congressional investigations.

Over time, after the Supreme Court recognized that the right against self-incrimination applies to congressional investigations and witnesses continued to invoke their rights, society and Congress came to view the Fifth Amendment unfavorably.⁸⁴ From a societal perspective, the Fifth Amendment privilege was seen as the refuge of scoundrels and an escape hatch for the guilty.⁸⁵ During the McCarthy era, “the term ‘Fifth Amendment Communist’ came into fashion, designating witnesses who, faced with answering potentially

78. *Id.* at 164.

79. *Id.*

80. *Id.* at 163. Contrast this liberal interpretation of what constitutes an effective invocation of a witness’s privilege against self-incrimination with a defendant’s attempt to invoke his right to silence in the context of a law enforcement interrogation pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the Court held that to effectively invoke his right to silence, the defendant must do so unambiguously and unequivocally. *Id.* at 381.

81. *Quinn*, 349 U.S. at 194.

82. *Id.* at 202.

83. *Id.* at 194.

84. See Friedelbaum, *supra* note 68, at 508; O’Neill, *supra* note 34, at 2515.

85. See Friedelbaum, *supra* note 68, at 508 (“The constitutional safeguard, long recognized among the bulwarks of human liberty, came to be regarded in the popular idiom as a spurious defense by those who sought to conceal spurious acts.”).

incriminating congressional questions, refused to answer.”⁸⁶ Even then-President Dwight Eisenhower went so far as to remark, “I must say I probably share the common reaction if a man has to go to the Fifth Amendment, there must be something he doesn’t want to tell.”⁸⁷ From a congressional standpoint, the Fifth Amendment privilege became a significant impediment to obtaining witness testimony. This obstacle led to the passage of the Immunity Act of 1954, which gave Congress the power to compel incriminating testimony in exchange for immunizing the witness from criminal prosecution.⁸⁸

Despite the new version of immunity, the conflict between the Fifth Amendment and Congress’s investigatory power was far from over. The type of immunity authorized by the Immunity Act of 1954 was similar to early statutes that conferred “transactional” immunity upon the witness.⁸⁹ Transactional immunity insulated the witness from criminal prosecution based on “any fact or act touching which he shall be required to testify before either House of Congress” while under a grant of immunity.⁹⁰ Because of its sweeping scope, transactional immunity came to be known as the “immunity bath,” and was anathema to federal prosecutors who were conducting criminal probes at the same time Congress was investigating.⁹¹ Further, transactional immunity created an incentive for individuals to confess to unrelated crimes while they were granted immunity to avoid prosecution for their other offenses.⁹² For example, in 1862, Congressman James F. Wilson⁹³ noted, “every day persons are offering to testify before the investigating committees of the House in order to bring themselves within the pardoning power of the Act of

86. O’Neill, *supra* note 34, at 2515.

87. Daniel H. Pollitt, *The Fifth Amendment Plea Before Congressional Committees Investigating Subversion: Motives and Justifiable Presumptions—A Survey of 120 Witnesses*, 106 U. PA. L. REV. 1117, 1117 (1958).

88. The Immunity Act of 1954, ch. 769, 68 Stat. 745; see Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1576–77 (1963). The Immunity Act of 1954 was upheld by the Supreme Court in *Ullmann v. United States*, 350 U.S. 422, 436 (1956).

89. Jerome A. Murphy, *The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity*, 51 MD. L. REV. 1011, 1015 (1992). Congress passed the first federal immunity statute in 1857. See Act of Jan. 24, 1857, ch. 19, 11 Stat. 155, 156. This statute granted transactional immunity to any witnesses testifying before Congress. *Id.* The statute provided extensive protections for any witness testifying before Congress under a grant of immunity.

90. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155, 156.

91. Murphy, *supra* note 89, at 1015.

92. *Id.* at 1015 n.34.

93. Republican member of Congress representing Iowa’s first congressional district from 1861 through 1869.

1857 [the transactional immunity statute].”⁹⁴ These concerns with the transaction immunity’s broad reach eventually led Congress to revise its approach.

In 1970 Congress passed the Organized Crime Control Act, which established a more limited form of immunity known as “use” or “derivative use” immunity.⁹⁵ Use immunity provides that the testimony a witness gives and the information derived from it cannot be used against the person in a subsequent criminal proceeding.⁹⁶ However, an individual may be convicted of the crime based on information obtained independently by the prosecution.⁹⁷ This type of immunity was upheld by the Supreme Court two years after its passage in *Kastigar v. United States*.⁹⁸ In *Kastigar*, the government obtained a court order “directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 U.S.C. §§ 6002, 6003.”⁹⁹ The witnesses in question appeared before the grand jury but refused to answer questions, asserting their privilege against self-incrimination.¹⁰⁰ The witnesses were then brought before the District Court for the Central District of California and found in contempt.¹⁰¹ The case eventually made its way to the Supreme Court, and the Court affirmed the decision to hold the witnesses in contempt.¹⁰² The Supreme Court explained that the “immunity from use and derivative use [under 18 U.S.C. § 6002] is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.”¹⁰³ In other words, because the prosecution cannot use information revealed when an immunized witness testifies—unless the information was independently obtained—use immunity does not violate an individual’s right against compelled self-incrimination.¹⁰⁴

94. CONG. GLOBE, 37th Cong., 2d Sess. 364, 364 (1862).

95. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 926 (codified in sections of 18 U.S.C. §§ 6001–05 (1988)).

96. See MORTON ROSENBERG, CONG. RESEARCH SERV., 95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE, AND PROCEDURE OF CONGRESSIONAL OVERSIGHT 8 (1995).

97. *Id.*

98. 406 U.S. 441, 462 (1972) (finding use and derivative use immunity as adequate protection of the Fifth Amendment right against self-incrimination).

99. *Id.* at 442.

100. *Id.*

101. *Id.*

102. *Id.* at 462.

103. *Id.* at 453.

104. *Id.*

This legislative approach has still not resolved the conundrum of whether members of Congress should compel an individual to appear before a committee to invoke the right against self-incrimination. If a witness is prosecuted after giving immunized testimony, the prosecution has the burden of showing that the charges were not based on the witness's testimony or evidence derived therefrom.¹⁰⁵ Establishing that the prosecution grew out of independent evidence has proven in practice to be a heavy burden for the prosecution to overcome.¹⁰⁶

The Iran-Contra scandal during the Reagan presidency demonstrates the difficulty of prosecuting an individual after he or she has given use-immunized testimony.¹⁰⁷ This inquiry involved a congressional investigation into whether the Reagan Administration sold weapons to Iran and used the proceeds to fund anti-communist rebels in Nicaragua.¹⁰⁸ High-ranking officials, including Lieutenant Colonel Oliver North, were given use immunity, and testified before Congress in a publicly televised hearing.¹⁰⁹ Simultaneously, the Special Division of the United States Court of Appeals for the District of Columbia Circuit Court appointed an independent counsel to investigate any criminal wrongdoing in the affair.¹¹⁰

Subsequent to providing his testimony, Lieutenant North was convicted on conspiracy and obstruction charges.¹¹¹ The Court of Appeals for the District of Columbia reversed Lieutenant North's conviction and remanded the case on the basis that the conviction was obtained in reliance on immunized testimony.¹¹² The court of appeals reached this conclusion even though the prosecution had taken "extraordinary" steps to avoid relying on Lieutenant North's statements, including submitting sealed evidence packets to the

105. *Kastigar*, 406 U.S. at 460 (explaining that granting immunity "imposes 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")

106. *Id.* at 461–62 (explaining that "[o]ne raising a claim under this [use immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources"); see also ROSENBERG, *supra* note 60, at 13 (noting "this burden may be extremely difficult to meet").

107. See Murphy, *supra*, note 89, at 1035–37.

108. *Id.* at 1035.

109. *Id.* at 1036.

110. *Id.* at 1035.

111. *Id.* at 1037.

112. *United States v. North*, 910 F.2d 843, 852 (D.C. Cir.) (per curiam), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam).

district court.¹¹³ Upon remand, the prosecution dismissed the case because it could not meet its burden of showing that all of the evidence it proposed to use was derived from legitimate independent sources.¹¹⁴ The failed prosecution of Lieutenant North epitomizes the heavy burden the prosecution must overcome to successfully prosecute a high-profile case where the witness has been granted use immunity.

In light of this extensive history, the question remains: what can a member of Congress do when he or she wishes to question a witness but the witness intends to invoke the privilege against self-incrimination, and granting the witness immunity may serve as a de facto bar to any potential criminal prosecution? The popular current approach for Congress, as in Lois Lerner's case, is to compel witness testimony without offering any form of immunity.¹¹⁵ This tactic can readily devolve into public shaming because the witness is forced to assert her right to remain silent and refuse to answer questions in full view of television cameras and the press.¹¹⁶ Further, technological developments, such as congressional committee websites that live-stream the hearings, ensure that the witness's assertion of her constitutional rights is subject to endless electronic airings via websites such as YouTube.¹¹⁷ Therefore, to establish a more ethical and appropriate approach to situations where a witness refuses to answer questions based on a valid claim of Fifth Amendment privilege, Congress should look to other analogous circumstances for guidance.

113. See ROSENBERG, *supra*, note 60, at 13.

114. *Id.*

115. See Gregory Korte, *Lois Lerner Wants Immunity in Exchange for IRS Testimony*, USA TODAY, Feb. 26, 2014, <http://www.usatoday.com/story/news/politics/2014/02/26/lois-lerner-wants-immunity-in-exchange-for-irs-testimony/5834321/>.

116. *Id.* Lerner's attorney noted that compelling her to appear before Congress when the committee knew she would invoke the Fifth Amendment "accomplishes nothing and needlessly embarrasses the witness." *Id.*

117. For example, the House Oversight Committee provides video access to recordings of its hearings and business meetings, including both hearings where Lerner was present. *The IRS: Targeting Americans for Their Political Beliefs*, COMMITTEE ON OVERSIGHT & GOV'T REFORM (Mar. 5, 2014), <http://oversight.house.gov/hearing/irs-targeting-americans-political-beliefs/#>.

II. THREE APPROACHES TO BALANCING THE WITNESS'S PRIVILEGE AGAINST SELF-INCRIMINATION WITH OTHER COMPELLING INTERESTS IN DIFFERENT LEGAL CONTEXTS

Currently, there is no universal, binding standard to determine whether to compel an individual to appear before a congressional committee when the individual intends to invoke the right against self-incrimination. To develop such a standard and balance Congress's investigatory authority with the individual constitutional right against self-incrimination, it is prudent to examine how the Fifth Amendment has been addressed in other legal contexts. Congressional investigations are hardly the only arena where witnesses assert their privilege against self-incrimination. In the criminal context, when a witness intends to invoke his or her Fifth Amendment right, prosecutors are counseled against compelling the witness to testify,¹¹⁸ and defendants are often barred from calling the witness.¹¹⁹ In the civil arena, an attorney is allowed to compel a witness to testify, regardless of whether the witness intends to invoke the right against self-incrimination.¹²⁰ Finally, the D.C. Bar has issued an advisory Ethics Opinion finding it ethically permissible to compel a witness to appear so long as the sole purpose is not to pillory the individual.¹²¹

A. Excusing the Witness from Appearing

During congressional hearings, a witness's Fifth Amendment right is pitted against Congress's investigative mandate and legislative function.¹²² In criminal cases, on the other hand, the individual's right to be free from self-incrimination can clash with the prosecution's efforts to prove the charges against the defendant and with the defendant's Sixth Amendment confrontation and compulsory process rights. However, in both the congressional and criminal contexts, one party may seek to compel a witness to testify despite the witness's

118. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1993) ("A prosecutor should not call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify.").

119. See, e.g., *Alford v. United States*, 282 U.S. 687, 689 (1931).

120. See generally *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (noting that an individual can be called to testify in a civil proceeding even if that individual intends to invoke his or her Fifth Amendment right).

121. D.C. Bar Legal Ethics Comm., Op. 358 (2011).

122. *Watkins v. United States*, 354 U.S. 178, 198 (1957) ("Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task.").

intention to invoke the Fifth Amendment. It is therefore instructive to consider how these conflicting interests are balanced in the framework of a criminal prosecution.

1. *Prosecution Calling a Witness Who Will Take the Fifth*

In a recurring scenario, the prosecution subpoenas a witness to testify and learns that the witness intends to invoke his or her privilege against self-incrimination.¹²³ Nevertheless, the prosecution often would prefer to call the witness to testify and have him assert his Fifth Amendment right in the jury's presence. In that situation, the defendant is rendered unable to cross-examine the witness, because the witness's Fifth Amendment right against self-incrimination trumps the defendant's Sixth Amendment confrontation right.¹²⁴ Further, this leaves the jury to speculate to the detriment of the accused about what the witness was afraid to admit.¹²⁵

In *Namet v. United States*, the Supreme Court considered whether it was improper for the prosecution to call a witness to invoke his Fifth Amendment right in front of the jury.¹²⁶ The defendant in *Namet* challenged his conviction for violating federal wagering tax laws after the prosecution knowingly called two witnesses to testify who both intended to claim their privilege against self-incrimination.¹²⁷ The Court described two situations where calling such a witness could merit reversal: (1) where the prosecutor intentionally tries to prove his case from the inferences that arise when a witness asserts his privilege against self-incrimination,¹²⁸ and (2) when the witness's invocation aids the prosecution's case.¹²⁹ Based on the facts in *Namet*, the Court upheld the defendant's conviction, because it found that there was no prosecutorial misconduct.¹³⁰ The Court further explained that the invocations of privilege were not "of such significance in the trial that they constituted reversible error

123. *See, e.g.*, *Douglas v. Alabama*, 380 U.S. 415, 420 (1965); *Namet v. United States*, 373 U.S. 179, 186–87 (1963).

124. *See, e.g.*, *United States v. Gullett*, 713 F.2d 1203, 1208 (6th Cir. 1983) (holding "the defendant's right to discredit a prosecution witness on cross-examination cannot overcome the witness' privilege against self-incrimination").

125. *See, e.g.*, *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959).

126. *Namet*, 373 U.S. at 186–87.

127. *Id.* at 180.

128. *Id.* at 186.

129. *Id.* at 187.

130. *Id.* at 189.

even in the absence of prosecutorial misconduct.”¹³¹ Despite upholding *Namet*’s conviction, the Court clearly expressed concern with a defendant facing unfair prejudice when a witness’s refusal to answer adds “critical weight to the prosecution’s case in a form not subject to cross-examination.”¹³²

The Court reaffirmed the *Namet* approach in *Douglas v. Alabama*.¹³³ In *Douglas*, the defendant was convicted of assault with intent to murder.¹³⁴ During the trial, while questioning a witness who was asserting his right against self-incrimination, the prosecutor read a document alleged to be a confession signed by the witness that implicated the defendant.¹³⁵ The Court overturned the conviction, holding that an individual’s Sixth Amendment right is violated if the “inferences from a witness’s refusal to answer added critical weight to the prosecution’s case.”¹³⁶ Thus, the Court reversed judgment in the defendant’s favor because the denial of the right to cross examine was not “a mere minor lapse” but played a fundamental role in the case against *Douglas*.¹³⁷ In light of this holding, the prosecution in a criminal case must carefully balance the benefit of calling a witness who intends to invoke the right against self-incrimination with the risk of jeopardizing the prosecution.¹³⁸

While the Court has wrestled with the constitutional question of when, if ever, to allow the prosecution to call a witness it knows will assert his Fifth Amendment rights, the ethical standard that guides attorney action is clear. American Bar Association Standard 3-5.7(c) (Standard 3-5.7(c)) provides that, “[a] prosecutor should not call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify.”¹³⁹ The plain language of Standard 3-5.7(c) unequivocally urges the prosecution not to bring a witness who will exercise his or her right not to testify before a jury.¹⁴⁰

131. *Id.*

132. *Id.* at 187.

133. *Douglas v. Alabama*, 380 U.S. 415, 420 (1965).

134. *Id.* at 416.

135. *Id.* at 416–17.

136. *Id.* at 420 (quoting *Namet*, 373 U.S. at 187).

137. *Id.*

138. *Id.*

139. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1993).

140. *Id.* The Court has consistently expressed a preference for statutory interpretation that adheres to the law’s plain meaning. *See, e.g.*, *United States v. Mo. Pac. R. Co.*, 278 U.S. 269, 279 (1929) (explaining “where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final

The Standard also clearly states that when a prosecutor knows a witness will legitimately invoke the right not to testify, the prosecutor “should not call” the witness.¹⁴¹ Further, Standard 3-5.7(c) is entitled to substantial deference even though it is not a binding rule.¹⁴²

The interpretation of Standard 3-5.7(c) as a blanket prohibition on compelling witnesses to invoke their Fifth Amendment rights is bolstered through comparison with a previous version of the standard. The 1971 version of Standard 3-5.7(c) read, “[a] prosecutor should not call a witness who the prosecutor knows will claim a valid privilege not to testify for the purpose of impressing upon the jury the fact of the claim of privilege.”¹⁴³ The new version of Standard 3-5.7(c) no longer makes the “purpose” for calling the witness dispositive or even considers why the witness is called.¹⁴⁴ Instead, prosecutors are now admonished not to call a witness in the presence of the jury if they are aware that the witness will invoke valid Fifth Amendment rights.¹⁴⁵

The Commentary to Standard 3-5.7(c) lends further support to this interpretation. The Commentary states, “[i]f the prosecutor is informed in advance that the witness will claim a privilege and wishes to contest the claim, the matter should be treated without the presence of the jury and a ruling obtained.”¹⁴⁶ Even in contesting the witness’s claim of Fifth Amendment privilege, the prosecutor should

expression of the meaning intended”). While Standard 3-5.7(c) is not legislation, the same principles of interpretation are instructive.

141. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1993).

142. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1 (1993) (noting the “standards are intended to be used as a guide to professional conduct and performance”). In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court explained that Agency “rulings, interpretations, and opinions . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Id.* at 140. Similar to those of federal agencies, the ABA Standards should be given a significant deference because of the ABA’s expertise. *Id.* at 138 (explaining that the judgments of the Advisor of the Fair Labor Standards Act are persuasive because of the Advisor’s “considerable experience”).

143. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1971).

144. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1993).

145. *Id.*; *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.”).

146. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) cmt. at 105 (1993).

not raise this challenge in front of the jury.¹⁴⁷ This reflects the strong preference for preventing an individual who seeks to assert his or her Fifth Amendment rights from being compelled to do so publicly and in front of a jury.¹⁴⁸ Based on the plain language, history, and commentary to Standard 3-5.7(c), it is apparent that the ethical standard counsels the prosecution against calling a witness to assert his or her right against compelled self-incrimination.

2. *Defense Calling or Questioning a Witness Who Will Take or Already Has Asserted the Fifth Amendment Privilege*

The propriety and constitutionality of requiring a witness to invoke his rights in the jury's presence must be viewed through a different lens when it is the defendant who seeks to call the witness. In criminal cases, the Sixth Amendment gives the accused the right to confront the witnesses against him and to present evidence on his behalf.¹⁴⁹ On the other hand, the Fifth Amendment affords witnesses the right to refuse to testify in order to avoid self-incrimination.¹⁵⁰ Thus, there are two competing individual constitutional rights implicated when considering whether a defendant may call a witness who will assert his or her Fifth Amendment right.

The Court resolved this conflict by, in effect, exalting the Fifth Amendment in the landmark case *Alford v. United States*. In *Alford*, the defendant, Alford, was convicted of mail fraud.¹⁵¹ At trial, Alford was denied the ability to question a witness regarding where he lived.¹⁵² The defense sought to question the witness about his address to establish that the witness was currently in federal custody and show that his incriminating testimony against Alford was biased.¹⁵³ The district court denied the defense's request to question the witness, and Alford was eventually convicted.¹⁵⁴ Alford appealed his conviction,

147. See *id.*; see also Michael J. Davidson, *Congressional Investigations and Their Effect on Subsequent Military Process*, 14 J.L. & POL'Y 281, 291 (2006).

148. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) cmt. at 105 (1993).

149. U.S. CONST. amend. VI.

150. U.S. CONST. amend. V.

151. *Alford v. United States*, 282 U.S. 687, 688 (1931).

152. *Id.* at 688–89.

153. *Id.* at 689–90, 693 (explaining “[t]he purpose obviously was . . . to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution”).

154. *Id.* at 688.

and the Supreme Court reversed, holding that “no obligation is imposed on the court . . . to protect a witness from being discredited on cross-examination.”¹⁵⁵ However the Court limited its holding by explaining that where a defendant “attempt[s] invasion of [the witness’s] constitutional protection from self incrimination . . . [t]here is a duty to protect [the witness] from questions which go beyond the bonds of proper cross-examination merely to harass, annoy or humiliate him.”¹⁵⁶ In other words, the Court held that a witness’s assertion of the privilege against self-incrimination under the Fifth Amendment can trump the defendant’s Sixth Amendment rights.¹⁵⁷ *Alford* illustrates the Court’s view of the depth, breadth, and importance of the invocation of Fifth Amendment rights.

Although a witness cannot be compelled to testify on the basis of the defendant’s Sixth Amendment rights, the question remains whether the defendant can force the witness to invoke his or her Fifth Amendment rights in front of the jury. In general, the same rule that binds the prosecution applies to the accused; the defendant may not call a witness simply to have the witness invoke his privilege against self-incrimination in front of the jury.¹⁵⁸ For example, the First Circuit in *United States v. Santiago*,¹⁵⁹ the Fourth Circuit in *United States v. Branch*,¹⁶⁰ and the D.C. Circuit in *Bowles v. United States*,¹⁶¹ have all concluded that the defense cannot call a witness to testify solely to compel them to assert their Fifth Amendment right in front of the jury.

The First Circuit, in *Santiago*, held that the defendant could not force two witnesses who planned to invoke their right against self-incrimination to testify.¹⁶² The defendant in *Santiago* challenged his

155. *Id.* at 694.

156. *Id.*

157. *See id.*

158. *See, e.g.*, *United States v. Santiago*, 566 F.3d 65, 70 (1st Cir. 2009); *United States v. Branch*, 537 F.3d 328, 342 (4th Cir. 2008); *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970); *see also*, Terrence Kerwin, Comment, *Compulsory Process and the Right to Present a Defense: Why a Criminal Defendant Should Have the Ability to Force a Witness Who Will “Take the Fifth” to Do So in Front of the Jury*, 112 PENN. ST. L. REV. 659, 670 (2007) (arguing that a criminal defendant should have the ability to call the witness in front of the jury); Diana Luka-Hopson, Note, *The Existing Conflict Between the Defendant’s Right of Confrontation and the Witness’s Right to Avoid Self-Incrimination: A Constitutional Dilemma*, 38 CATH. U. L. REV. 245, 268 (1988).

159. 566 F.3d at 70.

160. 537 F.3d at 342.

161. 439 F.2d at 542.

162. 566 F.3d at 68, 70.

conviction for drug trafficking, arguing that he was denied his confrontation rights because he was not allowed to call two witnesses for questioning.¹⁶³ While recognizing that the defendant had a right to present a complete defense, the First Circuit held that the defendant “was not . . . entitled to call the witnesses merely to have them assert their privilege before the jury.”¹⁶⁴ The First Circuit explained its holding by noting that “[b]ecause a jury may not draw any legitimate inferences from a witness’ decision to exercise his Fifth Amendment privilege, . . . neither the prosecution nor the defense may call a witness to the stand simply to compel him to invoke the privilege against self-incrimination.”¹⁶⁵

In *Branch*, the Fourth Circuit also affirmed the denial of the defendant’s request to call a witness whom the district court knew would invoke his Fifth Amendment privilege.¹⁶⁶ In this case, the defendant, Branch, was convicted of possession and distribution of cocaine base and illegal possession of a firearm.¹⁶⁷ During trial, Branch sought to call a witness, Johnson, arguing that it was “necessary because the jury could have concluded that Johnson, not Branch, owned the cocaine base and firearm found in the Mercedes.”¹⁶⁸ The district court did not allow Branch to call Johnson to the stand, and the Fourth Circuit upheld the district court’s decision. The Fourth Circuit explained that “placing Johnson on the stand solely to invoke his Fifth Amendment privilege would lead to ‘unfair prejudice’ in the form of both unwarranted speculation by the jury and the government’s inability to cross-examine Johnson.”¹⁶⁹ The Fourth Circuit also noted that “any inferences that the jury might have drawn from Johnson’s privilege assertion would have been only minimally probative—and likely improper—in any event.”¹⁷⁰

Similarly, in *Bowles*, the D.C. Circuit held that the defense could not call a witness to testify if the witness indicated that he would assert his right against self-incrimination.¹⁷¹ In *Bowles*, the defendant, Bowles, was convicted of first degree murder and assault with intent

163. *Id.* at 68.

164. *Id.* at 70.

165. *Id.* (quoting *United States v. Rivas-Macias*, 537 F.3d 1271, 1275 n.3 (10th Cir. 2008)).

166. *United States v. Branch*, 537 F.3d 328, 342 (4th Cir. 2008).

167. *Id.* at 331.

168. *Id.* at 342.

169. *Id.*

170. *Id.*

171. *Bowles v. United States*, 439 F.2d 536, 541 (D.C. Cir. 1970).

to rob.¹⁷² The district court refused to allow the defense to call a witness to the stand after ascertaining that the witness would decline to answer questions pursuant to his right against self-incrimination.¹⁷³ Bowles appealed his conviction, arguing the district court wrongly prevented him from calling the witness. In affirming the district court's decision, the D.C. Circuit began by noting, "[i]t is well settled that the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense."¹⁷⁴ Following this conclusion, the court explained, "[a]n obvious corollary . . . is the rule that a witness should not be put on the stand for the purpose of having him exercise his privilege before the jury."¹⁷⁵ The court came to this conclusion based on the concern that allowing the defense to call a witness under such circumstances "would only invite the jury to make an improper inference."¹⁷⁶ Accordingly, the *Bowles* court upheld the district court's decision to prevent the defendant from calling the witness.¹⁷⁷

Thus, in the criminal prosecution context, courts and ethical standards side with the Fifth Amendment even when balancing it against the state's interest in prosecuting individuals and the defendant's Sixth Amendment rights of confrontation and compulsory process. As demonstrated by the Supreme Court as well as multiple Circuit Courts of Appeals, courts are disinclined to allow the prosecution or the defense to call witnesses who intend to invoke their privilege against self-incrimination.¹⁷⁸ This result reflects the importance of the individual right against self-incrimination, even to the legal profession,¹⁷⁹ and flows naturally from the recognition that

172. *Id.* at 537.

173. *Id.* at 541.

174. *Id.*

175. *Id.* at 542.

176. *Id.*

177. *Id.* at 541.

178. *See, e.g.,* *Namet v. United States*, 373 U.S. 179, 187 (1963) (acknowledging that theoretically there is a concern that compelling a witness to invoke his or her Fifth Amendment right will unfairly affect the jury); *United States v. Santiago*, 566 F.3d 65, 70 (1st Cir. 2009); *United States v. Branch*, 537 F.3d 328, 342 (4th Cir. 2008); *Bowles*, 439 F.2d at 542; ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1993).

179. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (expressly protecting a witness from being called to testify when they have a valid claim to the Fifth Amendment right against self-incrimination).

jurors might wrongly draw inferences from the witness's failure to answer questions.¹⁸⁰

B. Compelling the Witness to Appear and Invoke the Fifth Amendment Privilege

Although the explicit language of the Fifth Amendment refers to criminal proceedings,¹⁸¹ the Supreme Court has extended its protection to any proceeding, including civil cases.¹⁸² The right of the individual witness to avoid making incriminating statements may conflict with the general overarching public policy of ensuring the parties receive fairness and justice.¹⁸³ To balance these competing interests, in civil proceedings and federal court, an individual may assert his or her constitutional right, but the factfinder can draw a negative inference based on this decision.¹⁸⁴ In other words, while a witness can invoke the Fifth Amendment in civil proceedings, a factfinder may make inferences based on the refusal to answer certain questions.¹⁸⁵

In *McCarthy v. Arndstein*, debtor Arndstein was adjudged an involuntary bankrupt and was subpoenaed to appear before a special commissioner to examine his assets.¹⁸⁶ During questioning, Arndstein, citing his Fifth Amendment privilege, refused to answer certain questions which tended to incriminate him and was eventually held in contempt.¹⁸⁷ On appeal, the Supreme Court held that Arndstein was entitled to decline to answer certain questions pursuant to his right against self-incrimination.¹⁸⁸ Thus, the Court enabled witnesses to assert their Fifth Amendment rights in civil

180. *Bowles*, 439 F.2d at 541.

181. The Fifth Amendment states “[n]o person . . . shall be compelled in any *criminal case* to be a witness against himself.” U.S. CONST. amend. V (emphasis added).

182. *See McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding that “[t]he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used”).

183. *See, e.g., Alford v. United States*, 282 U.S. 687, 692, 694 (1931) (considering the ability to cross-examine the witness as part of the right to a fair trial, but nevertheless holding that the Fifth Amendment right trumps).

184. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (describing “the prevailing rule” that in civil actions, adverse inferences can be drawn when a witness refuses to testify pursuant to his or her Fifth Amendment privilege).

185. *Id.*

186. *McCarthy*, 266 U.S. at 38.

187. *Id.*

188. *Id.* at 40.

proceedings.¹⁸⁹ The Court's reasoning in *Arndstein* is explicitly expanded in *Kastigar v. United States*, which held that privilege applies "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicative" where the witness reasonably believes that the information sought could be used against him or her in a subsequent proceeding.¹⁹⁰

While the Court in *McCarthy* extended the Fifth Amendment protection beyond criminal proceedings, invoking the right against self-incrimination does not come without costs.¹⁹¹ For instance, in *Baxter v. Palmigiano*, Palmigiano, an incarcerated individual in the Rhode Island Adult Correction Institution, challenged the prison's disciplinary hearing process as unconstitutional.¹⁹² The prison's policy allowed individuals to assert their Fifth Amendment right, but this silence could be used against them.¹⁹³ The Supreme Court upheld the prison's approach, explaining, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."¹⁹⁴ The Court emphasized that the negative inference was justified because the disciplinary hearing was not a criminal proceeding and therefore the stakes were lower.¹⁹⁵

After *Baxter*, in federal court, a party can comment on the witness's assertion of his or her rights and ask the factfinder to draw a negative inference from this silence, such as that the witness engaged in improper or wrongful conduct.¹⁹⁶ The Supreme Court's holding in *Baxter* is particularly relevant to the question of whether a party can call a witness who intends to take the Fifth.¹⁹⁷ Federal courts allow a party to call a witness to testify and assert his or her Fifth Amendment right.¹⁹⁸ As a natural corollary to this rule, a party must first be able to compel the witness's testimony in the presence of the

189. *Id.*

190. *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972).

191. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

192. *Id.* at 313.

193. *Id.* at 318.

194. *Id.*

195. *Id.* at 318–19.

196. *Id.* Notably, many states do not permit adverse inferences in this context. *See, e.g., Fuller v. Super. Ct. of L.A. Cnty.*, 87 Cal. App. 4th 299, 311 (2001) (balancing concerns of fairness and right against self-incrimination without explicitly supporting the permission of adverse inferences).

197. *See Baxter*, 425 U.S. at 318.

198. *Id.*

factfinder.¹⁹⁹ If the witness is not compelled to testify, then there is no way for a factfinder to draw any inference from the witness. It follows that in civil cases, a party may compel a witness to actually appear and assert his or her privilege against self-incrimination.²⁰⁰ The civil approach of allowing witnesses to be compelled to assert their Fifth Amendment privilege has proven influential in determining whether individuals should be compelled to appear before Congress.²⁰¹

C. Compelling the Witness to Appear Unless the Sole Purpose for Requiring the Witness to Appear is to Pillory or Humiliate

In the congressional context, the D.C. Bar has offered advisory guidance on the narrower issue of the congressional staff lawyer's ethical duty.²⁰² Specifically, the D.C. Bar addressed whether a congressional staff lawyer violates his or her ethical duties by compelling a witness to appear before a committee when the witness intends to assert the right to remain silent.²⁰³ In two ethics opinions, the D.C. Bar has attempted to find equilibrium between the individual constitutional right against self-incrimination²⁰⁴ and Congress's need to conduct oversight and investigations in

199. See, e.g., *id.* (noting the Fifth Amendment right is not a complete bar to calling a witness to testify particularly with the adverse inference rule). As with adverse inferences, many states take a different view and do not permit witnesses to be called to testify when a party has advance knowledge that the witness will refuse to answer questions. See, e.g., *People v. Frierson*, 53 Cal.3d 730, 743 (Cal. 1991) (calling a witness a lawyer knows will invoke the Fifth Amendment can only serve to "invite the jury to make an improper inference" and waste the court's time). On occasion, even a federal court will refuse to permit a witness to testify when it is aware that the witness will assert a Fifth Amendment privilege. See, e.g., *Arredondo v. Ortiz*, 365 F.3d 778, 781 (9th Cir. 2004).

200. See generally Nancy C. Wear, *Taking the 5th: How to Pierce the Testimonial Shield*, ABA BUSINESS LAW SECTION (May/June 2000), <http://apps.americanbar.org/buslaw/blt/blt00may-shield.html> (discussing how to depose an individual who plans to assert the right against self-incrimination clearly implying counsel's ability to call that witness to testify).

201. See D.C. Bar Legal Ethics Comm., Op. 358 (2011) (discussing *Baxter* in determining "whether it is proper for a congressional committee whose chairman, staff and several members are attorneys to require a witness who is a 'target' of a pending grand jury investigation to appear at televised hearings to be questioned when the committee has been notified in advance that the witness will exercise his constitutional privilege not to answer any questions").

202. See *id.*; D.C. Bar Legal Ethics Comm., Op. 31 (1977).

203. D.C. Bar Legal Ethics Comm., Op. 358 (2011); D.C. Bar Legal Ethics Comm., Op. 31 (1977).

204. See *Watkins v. United States*, 354 U.S. 178, 198 (1957) (noting subpoenaed information that is "unrelated to any legislative purpose" must yield to the individual right to privacy).

furtherance of its legislative role.²⁰⁵ While the opinions offer insight into this issue, they remain non-binding advisory opinions, like all ethics opinions.²⁰⁶ Further, the opinions only directly apply to staff attorneys acting in their capacities as lawyers because “[i]t is not within our province to pass upon the proprietary conduct by congressmen, who may or may not be lawyers, but are acting in any event as congressman.”²⁰⁷ Despite its limited scope and advisory nature, the D.C. Bar has offered helpful insight into the issue of whether witnesses should be compelled to appear before Congress to assert their Fifth Amendment rights.

In 1977, the D.C. Bar first addressed this issue in D.C. Legal Ethics Opinion 31 (Opinion 31).²⁰⁸ In Opinion 31, the D.C. Bar advised on:

[W]hether it is proper for a congressional committee whose chairman, staff and several members are attorneys to require a witness who is a ‘target’ of a pending grand jury investigation to appear at televised hearings to be questioned when the committee has been notified in advance that the witness will exercise his constitutional privilege not to answer any questions.”²⁰⁹

The Opinion began by noting that regardless of the publicity and potential damage to a witness’s reputation, “[i]t is not per se improper for an attorney acting as counsel for a congressional committee to cause a witness to be summoned in furtherance of a legitimate legislative function of Congress.”²¹⁰ Opinion 31 recognized that, when Congress is acting pursuant to a legitimate legislative function, it may be appropriate to require a witness to appear before a committee.²¹¹

After determining that there may be instances where it is ethical to compel a witness to appear before a congressional committee, Opinion 31 acknowledged that when a person intends to invoke his or her Fifth Amendment right, “no information will be obtained and the sole effect of the summons will be to pillory the witness.”²¹² In such situations, Opinion 31 explained that the witness should not be

205. *See* *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (recognizing Congress’s authority to conduct investigations because “[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”).

206. *See* D.C. Bar Legal Ethics Comm., Op. 31 (1977).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *See id.*

212. *Id.*

compelled to appear.²¹³ Notably, Opinion 31 cites to ABA Standard 3-5.7(c) as a source of support for its conclusion, which as discussed above, counsels prosecutors against compelling witnesses to appear before the jury to claim their Fifth Amendment privilege.²¹⁴ The D.C. Bar summarized its view by stating, “it appears clear that the conduct described in the inquiry [compelling a witness to appear where no information will be obtained because the witness will invoke his or her constitutional right] is improper.”²¹⁵

In January 2011, the D.C. Bar was asked to vacate Opinion 31, and, in response, it promulgated Opinion 358.²¹⁶ While the D.C. Bar “decline[d] [the] request to vacate Opinion 31,”²¹⁷ it did clarify its opinion and, in the process, revised Opinion 31. Opinion 358 began by restating that Opinion 31 “does *not* establish a *per se* rule that compelling a witness to testify before a congressional committee when it is known in advance that the witness will invoke the Fifth Amendment privilege violates the ethics rules.”²¹⁸ This initial statement is a near verbatim recitation of the D.C. Bar’s determination in Opinion 31.²¹⁹

After this initial reaffirmation, Opinion 358 explained that “an attorney violates the ethics rules only when he knows that summoning a witness to appear (1) will provide no information to the committee and (2) is intended merely to degrade the witness.”²²⁰ Unless both conditions are met, an attorney can compel the witness to appear without violating an ethical duty.²²¹ This reformulation holds that it is ethical for an attorney to call a witness even if the sole intent is to degrade him or her, so long as the witness will provide some information to the committee.²²² Similarly, even if an attorney believes that the witness will not provide any information to the committee, the attorney can still compel the witness to appear publicly so long as the attorney’s sole intent is not to degrade the witness.²²³ This reformulation affords attorneys a great deal of

213. *Id.*

214. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1993).

215. *See* D.C. Bar Legal Ethics Comm., Op. 31 (1977).

216. D.C. Bar Legal Ethics Comm., Op. 358 (2011).

217. *Id.*

218. *Id.*

219. *See* D.C. Bar Legal Ethics Comm., Op. 31 (1977).

220. D.C. Bar Legal Ethics Comm., Op. 358 (2011).

221. *See id.*

222. *See id.*

223. *See id.*

latitude in calling witnesses to appear publicly before congressional committees to invoke their constitutional rights.²²⁴ Opinion 358 therefore makes it easier for attorneys to compel witnesses to invoke their Fifth Amendment rights before Congress while acting in accordance with the D.C. Bar's advisory ethical guidelines.²²⁵

Further, Opinion 358's broad understanding of what constitutes a "legitimate purpose" for calling a witness will encourage attorneys to compel witnesses to publicly claim the right against self-incrimination.²²⁶ Specifically, Opinion 358 asserts that requiring a witness to appear before a congressional committee to determine whether the individual will in fact invoke the right against self-incrimination is a legitimate reason to bring a witness before Congress in a public setting.²²⁷ The D.C. Bar went on to explain that calling a witness to make such a determination is a legitimate reason for calling a witness, but it is not exclusive.²²⁸ This conclusion empowers an attorney to always be able to compel an individual to appear before Congress because there is no way to unequivocally determine whether a witness will invoke the right against self-incrimination before he or she actually does so.²²⁹

The permissive language in Opinion 358 is a stark departure from Opinion 31.²³⁰ Opinion 31 explained that "[t]here is certainly no need to have the test of claim of privilege take place in a televised open hearing with the resultant inevitable prejudicial publicity for the witness."²³¹ Opinion 31 continued, "[i]nsofar as the attorney has some question whether the witness will in fact claim his privilege if called, this question can be resolved by calling the witness in an executive session."²³² Whereas Opinion 31 explicitly urged against compelling an individual to publicly assert his or her Fifth Amendment right, Opinion 358 determined that testing the claim of privilege in a public hearing is a legitimate purpose for calling a witness.²³³ Therefore, the

224. *See id.*

225. *See id.*

226. *See id.*

227. *Id.*

228. *See id.* (stating "[w]e do not read the Opinion to mean, however, that the only legitimate purpose for calling a witness is to determine whether he will assert the privilege").

229. *See* D.C. Bar Legal Ethics Comm., Op. 358 (2011).

230. *See id.*

231. D.C. Bar Legal Ethics Comm., Op. 31 (1977).

232. *Id.*

233. *See* D.C. Bar Legal Ethics Comm., Op. 358 (2011); D.C. Bar Legal Ethics Comm., Op. 31 (1977).

approach outlined in Opinion 358 expands the situations where a lawyer can compel an individual to appear before Congress to publicly assert his or her constitutional rights while adhering to the D.C. Bar's ethics opinion.²³⁴ While Opinion 358 is not compulsory, it remains a persuasive ethics opinion that broadly condones compelling witnesses to appear before Congress to assert the right against self-incrimination.²³⁵

III. HOW TO BALANCE THE RIGHT AGAINST SELF- INCRIMINATION WITH CONGRESS'S LEGISLATIVE POWER: DO NOT COMPEL WITNESS TESTIMONY

To ethically and effectively find equilibrium between these competing interests, members of Congress should follow the approach taken in criminal litigation and not compel witness testimony once counsel has informed Congress that the witness will assert his or her Fifth Amendment right.²³⁶ Implementing such an approach would not require legislative action or judicial holdings. Instead, both chambers of Congress would simply have to adopt their own rules prohibiting compelled attendance when a witness informs Congress that he or she will claim a valid right against self-incrimination.²³⁷ This approach properly reflects the spirit of the ethics opinions, balances the individual Fifth Amendment privilege with Congress's legislative interests, and ensures that Congress obtains accurate and reliable information to aid in the legislative process. Conversely, compelling a witness to testify and allowing a

234. See D.C. Bar Legal Ethics Comm., Op. 358 (2011).

235. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1 (1993) (noting the "standards are intended to be used as a guide to professional conduct and performance").

236. This proposal assumes that the witness intends to invoke a valid Fifth Amendment claim. A congressional committee can review a witness's assertion of privilege to determine its validity, but the witness is not required to provide exact specificity. In judicial proceedings, the Supreme Court has advised, "[t]o sustain the privilege, it need only be evident, from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

237. The Senate changes its Standing Rules through simple resolutions, which can be adopted by a Senate majority. See RICHARD S. BETH, CONG. RESEARCH SERV., R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES 1-2 (2013), available at <http://www.fas.org/sgp/crs/misc/R42929.pdf>. Similarly, the House of Representatives adopts its rules by passing simple resolutions with a majority vote. See WM. HOLMES BROWN ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 838 (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf>.

negative inference to be drawn from silence is inconsistent with ethical opinions, undermines the Fifth Amendment, and will result in legislation based on speculation. Similarly, allowing witnesses to be called so long as the sole purpose of compelling the witness is not to pillory him or her is the functional equivalent of the civil approach and implicates the same ethical, constitutional, and policy concerns inherent in the civil context.

A. Ethical Reasons Not to Compel Public Assertion of Fifth Amendment Right

Members of Congress should follow the approach utilized in criminal litigation because congressional oversight, with its increasingly adversarial approach in high-profile investigations, has effectively become a means of public legislative trial.²³⁸ Further, congressional hearings often spur criminal investigations.²³⁹ As James Hamilton, partner with Bingham McCutchen LLP, Robert F. Muse, partner with Mitchell & Mezines, and Kevin R. Amer, attorney with the U.S. Department of Justice, explain in their article analyzing congressional investigations:

Prosecutors read the newspapers and watch television. A comment from the chairman that the witness may have violated criminal law is difficult to ignore and prosecutors have been known to initiate investigations based on concerns expressed by the committee. And, ongoing criminal investigations have been reshaped by the testimony of congressional witnesses.²⁴⁰

Because of the interrelated nature between criminal prosecutions and congressional hearings, the ethical rules that govern criminal prosecutions should also be applied to congressional hearings. In fact, in issuing its initial ethical opinion regarding whether individuals should be compelled to appear publicly to assert the right to remain silent, the D.C. Bar relied on the legal and ethical standards that apply in criminal proceedings.²⁴¹

238. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-16 (1980) (noting that the activities of a legislature may assume the characteristics of an adversary proceeding); D.C. Bar Legal Ethics Comm., Op. 31 (1977) (analogizing congressional investigations to criminal proceedings).

239. See James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1171-72 (2007).

240. *Id.*

241. See D.C. Bar Legal Ethics Comm., Op. 31 (1977). The Opinion cited to ABA Standard 3-5.7(c), Standard 3-3.6(e), and cases that held that summoning a witness in such circumstances constituted prosecutorial misconduct and potentially required

If congressional oversight hearings are treated like criminal proceedings, Standard 3-5.7(c) should guide members of Congress when deciding whether to bring a witness before the committee.²⁴² As discussed in Part II, Standard 3-5.7(c) counsels the prosecution against calling a witness in the presence of the jury when the prosecutor knows the witness will claim a valid privilege against testifying.²⁴³ In the congressional hearing context, Standard 3-5.7(c) would advise members of Congress—who act as the prosecutor as well as the judge and jury during hearings—against calling witnesses to appear before a committee.²⁴⁴ In congressional hearings, members of Congress act as the prosecution by determining what issues to investigate and bring before the committee. They also act as the judge because they control the hearing’s procedure. Additionally, they act as the jury because they make the ultimate findings of fact through reports and legislation.

Applying Standard 3-5.7(c) to Congress would mean that once a witness informs the committee that he or she will invoke a valid claim of Fifth Amendment privilege, the witness will not be compelled to appear before the committee in a public hearing. For example, as soon as the House Oversight Committee was informed that Lerner intended to invoke her Fifth Amendment right, it should not have compelled her presence at a public hearing. This is not to say that the Committee would be prohibited from using alternative methods—such as urging her to appear before the committee or requesting written testimony—to try to obtain the relevant information or convince her to testify. It simply precludes requiring her to appear at a public congressional hearing. Following Standard 3-5.7(c)’s guidance in the congressional context would thereby create a clear and easily applicable standard for determining whether to require a witness to testify.²⁴⁵

reversal of criminal convictions. *See, e.g.*, *United States v. Coppola*, 479 F.2d 1153 (10th Cir. 1959); *San Fratello v. United States*, 340 F.2d 560 (3d. Cir. 1959).

242. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1993).

243. *Id.* Similarly, ABA Standard 3-3.6(e) asserts, “[t]he prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he or she will exercise the constitutional privilege not to testify.” ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.6(e) (1993).

244. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(c) (1993).

245. *See id.*

Further, Model Rule of Professional Responsibility 4.4 (Rule 4.4) lends additional support to applying Standard 3-5.7(c) to Congress.²⁴⁶ Rule 4.4 counsels against compelling witness testimony when the witness intends to assert his or her right against self-incrimination.²⁴⁷ Rule 4.4 advises further that “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”²⁴⁸ D.C. Bar’s discussion in Opinion 31 supports the conclusion that requiring a witness to invoke the Fifth Amendment privilege before a panel of members of Congress as well as reporters, video cameras, and the public has no other substantial purpose beyond pillorying the individual.²⁴⁹ Opinion 31 noted that once an individual expresses an intent to invoke a valid Fifth Amendment claim, the committee will obtain no information from the witness.²⁵⁰ The Opinion continues to explain that, in this situation, there is no need to test the claim of privilege in an open hearing because of “the resultant inevitable prejudicial publicity for the witness.”²⁵¹ Therefore, because calling a witness to invoke the Fifth Amendment will yield no information and will harm the witness because of the negative publicity, the primary purpose behind calling a witness in this context is to pillory him or her.²⁵²

The Lois Lerner controversy serves as a clear example of such harm to an individual.²⁵³ Lerner was forced to appear before the Oversight Committee on two separate occasions, despite stating that she intended to invoke her constitutional right and then actually doing so.²⁵⁴ Before both hearings—but particularly after her first compelled appearance—there was no realistic possibility that Lerner would provide the committee with any useful information, because she had already stated through her attorney that she would not

246. See MODEL RULES OF PROF’L CONDUCT R. 4.4 (2013).

247. *Id.*

248. *Id.*

249. See D.C. Bar Legal Ethics Comm., Op. 31 (1977).

250. See *id.*

251. *Id.*

252. See *id.*

253. See generally Josh Hicks, *Central Figure in IRS Tea Party Controversy Resigns*, WASH. POST, Sept. 23, 2013, http://www.washingtonpost.com/politics/federal-government/central-figure-in-irs-tea-party-controversy-resigns/2013/09/23/db0d3d28-248a-11e3-b75d-5b7f66349852_story.html.

254. See generally Mark Memmott, *Ex-IRS Official Invokes 5th Amendment Again, Then Things Get Hot*, NPR (Mar. 05, 2014, 11:42 AM ET), <http://www.npr.org/blogs/thetwo-way/2014/03/05/286231779/ex-irs-official-invokes-5th-amendment-again-then-things-get-hot>.

answer questions. It seems indisputable that the primary (if not sole) purpose of compelling Lerner to appear was to publicly embarrass her and thereby win political points.²⁵⁵ This runs counter to both the spirit and plain language of Rule 4.4, which discourages using tactics of obtaining evidence that have no substantial purpose beyond embarrassing a third party.²⁵⁶ It is also inconsistent with Opinion 31 and Opinion 358, which both counsel against calling witnesses merely to pillory them.²⁵⁷

The Comment to Rule 4.4 bolsters the case against compelling witness testimony.²⁵⁸ The Comment states that “a lawyer may not disregard the rights of third persons.”²⁵⁹ Compelling a witness to appear to assert his or her right against self-incrimination in a public congressional hearing clearly conveys an indifference to, if not disdain for, the Fifth Amendment. For example, Congressman Jack Brooks’s²⁶⁰ questioning of Lieutenant North during the Iran-Contra congressional hearing clearly demonstrated such “disregard” for the Fifth Amendment. In that hearing, Congressman Brooks said to Lieutenant North, “[y]ou’ve stated, numerous times during the past few days, that you didn’t think you’d broken laws and you may not have. In any case, . . . if you felt so strongly that you hadn’t, I had a little difficulty understanding your reluctance to testify without immunity.”²⁶¹ This type of questioning reflects a sense that the Fifth Amendment is “a spurious defense by those who sought to conceal spurious acts.”²⁶² It reveals a general disregard for the Fifth Amendment as a foundational constitutional right. Accordingly, pursuant to the Comment to Rule 4.4, witnesses should not be

255. See, e.g., Jonathan Weisman, *Some Republicans See I.R.S. Troubles as Means to a Big Goal: Tax Overhaul*, N.Y. TIMES, June 3, 2013, <http://www.nytimes.com/2013/06/04/us/politics/some-republicans-see-irs-scandal-yielding-tax-reform.html> (reporting that some “Republicans see the cloud around the I.R.S. in the light of raw politics and how much damage it can do to President Obama”).

256. See MODEL RULES OF PROF’L CONDUCT R. 4.4 (2013).

257. See D.C. Bar Legal Ethics Comm., Op. 358 (2011); D.C. Bar Legal Ethics Comm., Op. 31 (1977).

258. See MODEL RULES OF PROF’L CONDUCT R. 4.4 cmt. 1.

259. *Id.*

260. See generally Douglas Martin, *Jack Brooks, Former Texas Congressman, Dies at 89*, N.Y. TIMES, Dec. 5, 2012, http://www.nytimes.com/2012/12/06/us/politics/jack-brooks-former-texas-congressman-dies-at-89.html?_r=0. Jack Brooks was a member of Congress representing East Texas from 1967–1995.

261. *Iran-Contra Hearings: Sharp Words on Immunity*, N.Y. TIMES, July 14, 1987, <http://www.nytimes.com/1987/07/14/world/iran-contra-hearings-sharp-words-on-immunity.html>.

262. Friedelbaum, *supra* note 68, at 508.

compelled to testify merely to assert their constitutional right because doing so actually serves to denigrate the individual's right.

Further, congressional hearings also implicate the individual desire to be free from public shaming and humiliation.²⁶³ In *Emspak* and *Quinn*, the Supreme Court recognized the harsh impact on an individual forced to assert his Fifth Amendment rights in a public, investigative setting.²⁶⁴ In fact, the government candidly argued in those cases that the witness failed to invoke his Fifth Amendment rights because he deliberately phrased his objections in equivocal ways “to obtain the benefit of the privilege without invoking the *popular opprobrium* which often attends to its exercise.”²⁶⁵ The Court also acknowledged the harsh price often paid when someone asserts his or her Fifth Amendment rights by referring to the potential “stigma” that attaches to Fifth Amendment invocation.²⁶⁶ Similarly, Justice Douglas trenchantly observed in his dissent in *United States v. Welden*:

There was a time when a committee, knowing that a witness would not answer a question by reason of the Fifth Amendment, would not put the question to him. Today, witnesses who invoke the Fifth Amendment at the threshold have been minutely examined, apparently to see how many times they can be forced to invoke it. Hearings have indeed often become a spectacle . . . But the more I see of the awesome power of government to ruin people, to drive them from public life, to brand them forever as undesirable, the deeper I feel that protective measures are needed.²⁶⁷

Justice Douglas's comments are made all the more powerful considering that he expressed these concerns at a time before the

263. See *Quinn v. United States*, 349 U.S. 155, 164 (1955); *Emspak v. United States*, 349 U.S. 190, 195 (1955).

264. See *Quinn*, 349 U.S. 155; *Emspak*, 349 U.S. 190.

265. *Emspak*, 349 U.S. at 202 n.9 (emphasis added).

266. *Id.* at 195. The Court held that the fear of “opprobrium” and the possibility that a witness would less than clearly articulate his privilege against self-incrimination should actually make congressional committee members more ready to recognize “veiled” claims of privilege. *Id.* at 195, 202 n.9.

267. 377 U.S. 95, 118, 123 (1964) (Douglas, J., dissenting) (upholding the conviction of a defendant, despite being granted immunity to testify before Congress pursuant to the Act of February 25, 1903). A recent example of the kind of “spectacle” bemoaned by Justice Douglas was the interrogation of Enron executive Ken Lay after he asserted his Fifth Amendment privilege. See Greg Hitt, *Lay Refuses to Answer Questions of Frustrated Senate Committee*, WALL ST. J., Feb. 13, 2002, <http://online.wsj.com/news/articles/SB1013532303399399160> (noting how, after invoking his Fifth Amendment right against self-incrimination, “Mr. Lay was forced to sit through a series of finger-wagging lectures by 20 committee members, many of them frustrated, many mocking”).

Internet enabled individuals around the world to view congressional hearings instantly and repeatedly. Considering the Comment to Rule 4.4 and the Court's concern for the potential shaming effect of compelling public testimony, members of Congress should decline to require witnesses to invoke their Fifth Amendment rights in public hearings.

Although the D.C. Bar attempted to strike a fair balance between these competing interests in adopting Opinion 358, Congress should not follow the approach described in Opinion 358 because it is inconsistent with Opinion 31, as well as Standard 3-5.7(c), and Rule 4.4. Opinion 358 is at odds with these other relevant opinions because it effectively allows a member of Congress to compel any witness to appear before a committee so long as the sole purpose of compelling the witness is not to pillory him or her.²⁶⁸ Further, Opinion 358 provides that one legitimate reason for compelling a witness is to determine whether the witness will actually assert his or her right.²⁶⁹ This determination will always allow a committee to force a witness to appear before the committee because the only way to definitively prove that a witness will invoke the right against self-incrimination is by forcing the witness to do so publicly. Put simply, Opinion 358 grants near-universal authority to compel testimony, which is in conflict with the other relevant ethical opinions. As noted above, Opinion 31, Standard 3-5.7(c), and Rule 4.4 strongly discourage requiring an individual to appear merely to assert his or her constitutional right. Accordingly, Opinion 358's excessively permissive language should not be followed by members of Congress.

B. Constitutional Reasons That Congress Should Not Be Able to Compel Public Assertion of Fifth Amendment Rights

In balancing the competing interests implicated in compelling testimony, the individual's constitutional right should outweigh Congress's general interest in conducting investigations for two reasons. First, allowing witnesses to be forced to publicly assert their constitutional right against self-incrimination fails to give proper deference to the Fifth Amendment.²⁷⁰ Second, and relatedly, it undermines the Fifth Amendment's legitimacy.²⁷¹ Accordingly, a witness should not be compelled to invoke a valid claim of Fifth

268. D.C. Bar Legal Ethics Comm., Op. 358 (2011).

269. *Id.*

270. *Quinn*, 349 U.S. at 162.

271. *See id.* at 161-62; *see also* *Watkins v. United States*, 354 U.S. 178, 197-98 (1957).

Amendment privilege before Congress in a public hearing because of the detrimental and delegitimizing effect it will have on a fundamental constitutional right.

Members of Congress should not be permitted to require individuals to assert their Fifth Amendment rights in public, because it is antithetical to the basic principle of preventing self-incrimination enshrined in the constitutional right. The Supreme Court described this right as “a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions.”²⁷² Additionally, in *Quinn*, the Court explained that “the Self-Incrimination Clause ‘must be accorded liberal construction in favor of the right it was intended to secure.’”²⁷³ In light of the Court’s characterization of the right as a precious protection against tyranny and the Court’s recognition that it should be liberally interpreted, this constitutional bulwark should be prioritized over Congress’s general investigative role.²⁷⁴ Therefore, to uphold the right, members of Congress should not force individuals to testify merely to assert their privilege.

Furthermore, forcing individuals to assert their Fifth Amendment right delegitimizes the constitutional prohibition against self-incrimination. The Court in *Quinn* expressed that, “[t]o apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose.”²⁷⁵ By calling witnesses to appear in public hearings simply to assert their constitutional rights in front of the cameras breeds the exact type of begrudging disrespect the Court warned against in *Quinn*.²⁷⁶ In fact, Congress’s practice of compelling individuals to appear at congressional hearings in the 1950s is what led to the rise of the pejorative “Fifth Amendment Communist.”²⁷⁷ To stop breeding distaste for a cherished constitutional right, Congress should cease its practice of compelling witness testimony once a witness expresses intent to invoke the right against self-incrimination. As the Court explained, “[i]t is precisely at such times—when the privilege is under attack by those who wrongly conceive of it as merely a shield for the

272. *Quinn*, 349 U.S. at 162 (quoting *Twining v. New Jersey*, 211 U.S. 78, 91 (1908)).

273. *Id.* (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

274. *See id.*

275. *Id.*

276. *Id.*

277. O’Neill, *supra* note 34, at 2515.

guilty—that governmental bodies must be most scrupulous in protecting its exercise.”²⁷⁸

C. Legislative Policy Reasons Not to Compel Public Assertion of Fifth Amendment Rights

Congress should also not be permitted to compel witnesses to publicly assert their right to remain silent because it does not further the legislative process. Congress has broad authority to conduct investigations pursuant to its legislative power.²⁷⁹ However, as the Court explained in *Watkins*:

There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . [n]or is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself, it must be related to, and in furtherance of, a legitimate task of the Congress.²⁸⁰

Similarly, in *McGrain v. Daugherty*, the Court emphasized that “[a] legislative body cannot legislate wisely or effectively in the absence of information.”²⁸¹

As former Senator J. William Fulbright explained, “a congressional investigation is primarily a search for information which it believed is needed in order to solve a governmental problem.”²⁸² However, when Congress compels an individual to appear before a congressional committee to merely assert his or her right against self-incrimination, it receives no information.²⁸³ The committee obtains nothing beyond the witness’s declination to answer questions. This effort does not further the legislative process, because the only information it provides is inferential. Legislating based on inference is ineffective policy-making that is frowned upon by members of Congress.²⁸⁴ For example, during the first oversight hearing involving Lerner, Chairman Issa stated that Lerner’s “assertion is not to be viewed or

278. *Quinn*, 349 U.S. at 164; *see also* *Watkins v. United States*, 354 U.S. 178, 197–98 (1957) (stating that “[a]buses of the investigative process may imperceptibly lead to abridgment of protected freedoms”).

279. *See, e.g., Watkins*, 354 U.S. at 187.

280. *Id.*

281. 273 U.S. 135, 175 (1927).

282. J.W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 440 (1951).

283. *See generally* D.C. Bar Legal Ethics Comm., Op. 31 (1977).

284. *See 2013 Oversight Committee Hearing, supra* note 1, at 24 (2013) (expressing the general sense of the Oversight Committee that the witness’s silence would not be used to draw conclusions about agency actions).

used during this hearing to make any determination, plus or minus, as to actions that were taken [by the IRS].”²⁸⁵ Other members of the committee, particularly Ranking Member Cummings, expressed strong support for Chairman Issa’s statement.²⁸⁶ This rare moment of bipartisanship serves to reinforce the notion that a witness’s silence does not further the legislative purpose.²⁸⁷

D. Alternatives to Gather Relevant Information When a Witness Claims Fifth Amendment Rights During a Congressional Hearing

Precluding compelled public assertions of the privilege against self-incrimination does not mean that Congress can do nothing if it determines that the only way to obtain critical information is by compelling an individual’s testimony. In such an instance, Congress has already established a mechanism by which it can get this information—granting immunity. As discussed in Part I, pursuant to 18 U.S.C. §§ 6002, 6005, Congress may grant immunity to an individual with “a majority of the House or Senate or by a two-thirds vote of the full committee seeking the order.”²⁸⁸ Instead of forcing witnesses to appear before Congress to assert their right to remain silent, granting immunity would enable a congressional committee to obtain information that would aid its investigation. As Congress has already established the mechanism by which it grants immunity, it is reasonable to believe that Congress will be able to easily immunize witnesses who may possess relevant information but have expressed an intent to assert the Fifth Amendment privilege.

Although granting immunity does present a challenge when the Department of Justice (DOJ) is engaged in a simultaneous investigation, this challenge is not insurmountable.²⁸⁹ Congress should work with the DOJ to decide whether to grant an individual immunity despite the detrimental effect the immunity may have on any potential criminal prosecution. In fact, such coordination is mandated in the immunity statute, as the Attorney General must be notified at least ten days before the request for immunity order is issued.²⁹⁰ Additionally, the Attorney General can request a twenty-

285. *Id.*

286. *See id.*

287. *See id.*

288. GARVEY & DOLAN, *supra* note 55, at 67 (paraphrasing 18 U.S.C. § 6005(a) (2012)).

289. *See* ROSENBERG, *supra* note 60, at 13.

290. 18 U.S.C. § 6005(b) (2012).

day delay in issuing the order.²⁹¹ These requirements should facilitate coordination between Congress and the DOJ and prevent scenarios such as the Oliver North failed prosecution from occurring in the future.

Even if Congress is unable to develop an effective working relationship with the DOJ on the issue of immunity, it can still balance these two interests.²⁹² One commentator has suggested that Congress should only grant immunity when “the demands of a national crisis may justify sacrificing the criminal prosecution of those involved . . . to uncover and publicize the truth.”²⁹³ In other instances where there is less urgency, a more deliberate criminal prosecution can be undertaken.²⁹⁴ This approach seems to offer an effective solution that will ensure that Congress can obtain critical information when appropriate without unnecessarily hampering law enforcement efforts.

It is also important to note that while the holdings in the cases prosecuting Lieutenant North²⁹⁵ and naval officer Poindexter²⁹⁶ during the Iran-Contra scandal have made it more difficult for prosecutors to secure the convictions of individuals who have received immunity, Congress has nevertheless continued to grant immunity to witnesses.²⁹⁷ In fact, as recently as 2008, the House of Representatives Committee on the Judiciary (“Judiciary Committee”) granted immunity for witnesses to testify in hearings regarding the forced resignations of nine U.S. Attorneys.²⁹⁸ The Judiciary Committee voted thirty-two to six in favor of granting immunity to former DOJ staffer Monica Goodling after she informed the committee of her intent to invoke her Fifth Amendment privilege.²⁹⁹ Instead of compelling Goodling to appear before Congress merely to assert her

291. *Id.* § 6005(c).

292. Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Hous. L. Rev. 1, 9 (1988) (“The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance.”).

293. ROSENBERG, *supra* note 60, at 13.

294. *See id.*

295. *See* United States v. North, 910 F.2d 843, 852 (D.C. Cir. 1990) (per curiam), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam).

296. *See* United States v. Poindexter, 951 F.2d 369, 397 (D.C. Cir. 1991).

297. *See* ROSENBERG, *supra* note 60, at 13.

298. *Id.* at 14.

299. *See* Klaus Marre, *House Judiciary Panel Grants Immunity to Goodling*, HILL (Apr. 25, 2007, 1:09 PM), <https://thehill.com/homenews/news/11696-house-judiciary-panel-grants-immunity-to-goodling>.

right against self-incrimination, the Judiciary Committee granted her immunity and then issued a subpoena to compel her testimony and the production of documents.³⁰⁰ Goodling subsequently testified before the Judiciary Committee and offered information that assisted the congressional investigation.³⁰¹ In this way, the Judiciary Committee was able to actually gather information for its investigation without subjecting the witness to needless public shaming.³⁰² This approach—which avoids the inherent issues associated with calling a witness to assert the Fifth Amendment and ensures that Congress will obtain information—is a viable alternative solution in instances where a witness will invoke the right to remain silent.

Another way to balance individual constitutional rights with Congress's legislative power is to compel the witness to appear at a closed executive session before the congressional committee.³⁰³ This approach will ensure that the individual actually asserts his or her right in front of Congress. On the other hand, granting immunity remains a preferable approach because it enables Congress to obtain information it seeks. Unlike an assertion of the right against self-incrimination, granting immunity compels the individual to answer Congress's questions and provides Congress with the information it seeks to further its investigative and legislative goals. As the ABA Model Code of Professional Responsibility explains, "[t]he primary business of a legislative body is to enact laws rather than to adjudicate controversies."³⁰⁴ Accordingly, when the information a witness may possess is sufficiently important, Congress should grant the person immunity to obtain the information instead of calling the witness to a

300. See CQ Transcripts Wire, *Goodling Testifies Before the House Judiciary Committee*, WASH. POST, May 23, 2007, http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling_testimony_052307.html.

301. See *generally id.* Judiciary Committee Chairman John Conyers even explained that granting immunity and compelling Goodling to appear before Congress:

[A]re steps that I did not take likely [sic], but only after consultation with the ranking member, Lamar Smith, and my colleagues on both sides of the aisle with the Justice Department. I believe that this [subpoena] is an important and necessary step to help us get to the bottom of the U.S. attorney matter and other concerns regarding possible improperly politicalization [sic] of the Justice Department.

Id.

302. See *generally id.*

303. See D.C. Bar Legal Ethics Comm., Op. 31 (1977).

304. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-16 (1980).

closed session to test the individual's resolve in asserting his or her constitutional right.

CONCLUSION

Congressional investigations face legitimate challenges when confronted with witnesses who may possess important information but are unwilling to appear before a committee to testify because the information will tend to incriminate them. In balancing these competing interests, Congress should embrace the approach taken in Standard 3-5.7(c), which explicitly counsels against calling a witness in a criminal prosecution when the prosecutor knows the witness will claim a valid privilege not to testify. This approach is consistent with the true spirit of the ethical rules. It also properly places the individual right against self-incrimination above Congress's oversight power and will ensure that Congress makes its legislative decisions based on facts and not speculation driven by witness silence.