False Statements Research (18 USC §1001)

CITE REPORT OF THE IC, In re THEODORE B. OYLER AND ROBERT M. PERRY, AT 155-58 (DEC. 27 1989)

§1001 — § 1621 CASE

X Brontsen v US 409 US 352 (1973) — CTS APPLY TEST IN § 1001

[?ER MUST FINDING OF INTENT → Brontsen 409 US 352, 359]

① FAILURE OF ?er TO BE PRESENT/FOLLOW-UP → RESULT IN FAVOR OF WITNESS
X US v LICHTE 782 F2D 367, 373-76 (2D CIR 1986)
X US v EDDY 737 F2D 564, 567-72 (6TH CIR 1984)
US v COWLEY 720 F2D 1037, 1042-44 (9TH CIR 1983)

② IF ? IS UNCLEAR, FOCUS ON HOW WITNESS UNDERSTOOD ? ~
FOCUS IS ON IF WITNESS HAD KNOWLEDGE AT TIME WAS MADE FALSE.
X US v EDDY 737 F2D 564, 569 (6TH CIR 1984)
US v WAHL 371 F2D 398, 400 (6TH CIR 1967)

③ Brontsen, § 1621 CASE, STD ~~TEST~~ USED TO PROSECUTE PER § 1001
US v FERN 696 F2D 1269, 1275-76 (11TH CIR 1983)
US v POUTRE 646 F2D 685, 687-88 (1ST CIR 1980)
US v VESAAS 586 F2D 101, 104 (8TH CIR 1978)
US v MANDANICI 729 F2D 914, 921 (2D CIR 1984) (DICTUM)

④ BE CAREFUL IN APPLYING Brontsen STD ~ SPECIAL SENSITIVITY
IE. → CONG HEARING IS NOT IDEAL FORUM FOR INTERVIEW ?ING
MORRISON APT AT 158
X US v EHRLICHMAN 379 F SUPP 291, 292 (DDC 1974)

⑤ UNDER § 1623, RECANTING FALSEHOOD ~~(???)~~ NOT A DEFENSE. — COMPLETE.
US v NORRIS 300 US 564, 574 (CRIME DONE AFTER MADE STMT)
US v OLIVER 154 F SUPP 727, 738 (RECANTING REMARKS ADMN TO SHOW LACK OF AGREEMENT INTENT)

⑥ MUST READ Q + A IN CONTEXT OF WHOLE TESTIMONY
VAN LIEW v US 321 F2D 674, 678 (5TH CIR 1963)
FOTIE v US 137 F2D 831, 842 (8TH CIR 1943)

⑦ MUST BE PROOF BEYOND REASONABLE DOUBT, KNOWINGLY & WILLFULLY,
MADE [illegible] INTENT TO MISLEAD
X US v LANGE 528 F2D 1280, 1288 (5TH CIR 1976)
X FREIDUS v US 223 F2D 598, 601 (DC CIR 1955)

(1) §1001 ELEMENTS → ① STMT, ② JURISDICTION OF AGENCY TO WHOM MADE, ③ FALSE OR FRAUDULENT STMT, ④ MADE KNOWINGLY & WILLFULLY, ⑤ MATERIAL STMT

US v JOHNSON 937 F2D 392, 396 (8TH CIR 1991)
US v NOTARANTONIO 758 F2D 777, 785 (1ST CIR 1985)
US v WEINBERGER 1992 WL 294877, *4 (DDC 1992)

(2) LOOK TO D's UNDERSTANDING OF ?, EVEN IF P's ARE REASONABLE
X US v D1060 320 F2D 898, 905 (2D CIR 1963)
US v LAMMOREE 215 F2D 847, 957-59 (DC CIR 1955)
US v MILTON 8 F3D 39, 45-46 (DC CIR 1993)
CHAPIN v US 515 F2D 1274, 1280 (DC CIR 1985)
US v WINTER 782 F2D 367, 372 (2D CIR 1986)

(3) P HAS BOP TO NEGATIVE THE REASONABLE INTERP'S MAKING D'S STMT CORRECT
~~320 F2D, 907~~
X US v D1060 320 F2D 898, 907 (2D CIR 1963)

(4) MUST BE MATERIAL UNDERSTANDING D'S ? OR ? AGREEMENT FOR 1001
US v LAMMOREE ~~215 F2D 847~~,
127 FSUPP AT 410
US v PHILLIPS 828 F2D 1010, 1015 (3D CIR 1987)

(5) CAN'T USE 1001 IF STMT IS LITERALLY TRUE
BRONSTON 409 US 352 (1973)
MILTON 8 F3D AT 45 (TEST APPLIES TO 1001)
CHAPIN 515 F2D AT 1280 (SAME)

(6) IF ? IS VAGUE / AMBIGUOUS, AS MAY 1001 N/A
US v PHILLIPS 828 F2D ~~AT~~ 1010, 1015 (3D CIR 1987)
US v JOHNSON 937 F2D 392, 399 (8TH CIR 1991)
US v VESAAS 586 F2D 101, 104 (8TH CIR 1978)
US v UTAH 371 F2D 398, 400 (10TH CIR 1967)

(7) MUST BE MADE W/ KNOWLEDGE OF FALSITY — NOT MISTAKE OR ACCIDENT
US v WEST 666 F2D 16, 20 n.2 (2D CIR 1981)
US v [illegible] 630 F2D [illegible] (5TH CIR 1980)
US v LEO 941 F2D 181, 200 (3D CIR 1991) — CONSISTENT EXPERT TO SUPPLEMENT TESTIMONY

(9) 1001 DOES NOT MEAN NON-DISCLOSURE

X US v. Lehder 550 F2D 206, 212 (5TH CIR 1977)

~~US v. WOODWARD~~

MUST BE AFFIRMATIVE ACT BY WHICH MATERIAL FACT IS CONCEALED.

X US v. WOODWARD 469 US 105, 108 (1985)

✓ US v. SHANNON 836 F2D 1125 (8TH CIR 1988)

(10) PROSECUTION CONCEDES

US v. Horn 910 FED R-43, 882 (DC CIR 1990)

US v. PEINDEXTER 725 F SUPP 13, 26 (DDC 1989)

PETER MENELL, THE UNDERLYING CRIME OF CRIME TO CONCEAL: ESTABLISHING REFORM OF THE RULE OF LAW, 86 NW U L. REV 177 (1992)

9434S1KXDZ

① COPY 18 USC 1001

② DEVITT § 37.10 – KEVIN F O'MALLEY
FED JURY PRACTICE & INSTR

× 31 ACCR 539 – FALSE STMTS 1994

③ OMISSION ×300 F2D 67 (9TH CIR 1962)
×BAUSEMAN v US 926 F2D 1285

DEVITT § 24.08

× US v IRWIN 654 F2D 671, 676 (10TH CIR 1981)
× US v MCCARTHY 422 F2D 160, 162 (2D CIR)

× US v AARONS 718 F2D 188
× US v MATTOX 689 F2D 531

-- DRAFT 2/29/95 --

MEMORANDUM

TO: Alex Azar

FROM: Rajeev Duggal

DATE: ~~February 29, 1995~~ 3/1

RE: Research Regarding 18 U.S.C. § 1001

KS: SEEMS TO BE NICE CASE THAT BROADLY IS N/A TO CONGRESS CONTEXT ERROR (NORMAL MATTERS).

Summary

You have requested preliminary research regarding the issue of whether or not an official of the Executive Branch who has made false statements and has concealed information in a Congressional oversight hearing is prosecutable under 18 U.S.C. § 1001. What follows are the preliminary results of that research. As you will see, substantial additional research will be required before charging decisions are made.

Discussion

Section 1001, the false statements statute, states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001. There are three distinct offenses that fall within Section 1001: 1) concealing a material fact; 2) making a false statement; and 3) making or using a false writing or document. See id.; Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal § 37.00, at 411 (4th ed. 1990); Jennifer L. Kraft & David A. Sadoff, Ninth Survey of White Collar Crime, False Statements, 31 Am. Crim. L. Rev. 539, 540 (1994).

In order to convict a defendant under Section 1001 for making a false statement or writing or concealing a material fact, it must be proven that 1) the defendant knowingly and willfully; 2) made a false statementor writing or by trick, scheme, or device concealed a fact, ; 3) that was material; 4) in any matter within the jurisdiction of a department of the United States. United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir.), cert. denied, 474 U.S. 825

(1985) (concealing fact case); Freidus v. United States, 223 F.2d 598, 601 (D.C. Cir. 1955) (false statement case); United States v. Weinberger, Crim. A. No. 92-235, 1992 WL 294877, at *4 (D.D.C. Sept. 29, 1992) (false statement case); United States v. Dale, 782 F. Supp. 615, 626 (D.D.C. 1991) (concealing fact case).

a. Knowing and Willful False Statement

In a false statement or writing case, it must be shown that the defendant "had the specific intent to make a false or fraudulent statement." United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976). This is established if the statement or writing is "untrue when made, and known at the time to be untrue by the person making it." United States v. Milton, 8 F.3d 39, 46 (D.C. Cir. 1993) (quoting jury instruction). The jury makes this determination of falsity by "considering the [statement] in context and taking into account the setting in which it appeared and the purpose for which it was used." Id. at 45. The jury must "determine how the defendant construed the question or answer and . . . decide, in that light, whether the defendant knowingly gave a false answer." Id. at 46.

b. Knowing and Willful Concealment of Fact

In a concealment case, it must be shown that the defendant 1) had a duty to disclose the fact and 2) used a "trick, scheme, or device" in concealing the fact.[1]

"It [is] incumbent on the Government to prove that the defendant had a duty to disclose the material facts at the time he was alleged to have concealed them." United States v. Irwin, 654 F.2d 671, 678 (10th Cir. 1981); United States v. Mattox, 689 F.2d 531, 533 (5th Cir. 1982) ("Silence may be falsity when it misleads, particularly if there is a duty to speak."). Under 2 U.S.C. § 192, it is clear that a summoned witness has a duty to disclose facts inquired of in a Congressional hearing.

In the absence of a Congressional summons, it may nevertheless be possible to establish that a duty to disclose exists as to an Executive Branch official testifying in a Congressional oversight hearing by virtue of the official's requirement to report to Congress. For example, the Thrift Depositor Oversight Protection Board, which includes the CEO of the RTC, is required to appear before the House and Senate Banking Committees. 12 U.S.C. § 1441a(k)(6)(A) (requiring semiannual appearance). As such, it may be possible that such a requirement to appear implies a duty to disclose. Additional research is required as to this issue.

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[1] One who makes a knowing failure to disclose a material fact is as culpable as one who makes a false statement. See United States v. McCarthy, 422 F.2d 160, 162 (2d Cir. 1970) ("Leaving a blank is equivalent to an answer of 'none' or a statement that there are no facts required to be reported.")

In order to satisfy the "trick, scheme, or device" requirement, it must be shown that there was an "affirmative act" by which means a material fact was concealed. United States v. London, 550 F.2d 206, 212-13 (5th Cir. 1977). "The mere omission of failing truthfully to disclose a material fact, which is simply the negative aspect of the affirmative act of falsely stating the same material fact, does not make out an offense under the conceal or cover up clause of section 1001." Id. at 213-14. "Rather the latter clause of section 1001 requires the government to prove something more [--] that the material fact was affirmatively concealed by ruse or artifice, by scheme or device." Id. at 214.

However, "a person's deliberate failure to disclose to the government material facts, in the face of a duty to disclose such facts, constitutes an 'affirmative act' within the contemplation of the statute." United States v. Dale, 782 F. Supp. 615, 626 (D.D.C. 1991) (Penn, J., citing no authority). Thus, this situation is distinguishable from "passive failure to disclose" or "mere silence in the face of an unasked question." Id. "The case law is clear that the deliberate failure to disclose material facts in the face of a specific duty to disclose such information constitutes a violation of the concealment provision of section 1001." Id.

c. Applicability of Brontson: Whether or Not Nonresponsive Answers Can Constitute Concealment of Material Facts Under Section 1001

The issue here relates to the difference between questioning in a congressional setting versus an adversarial trial setting. In Brontson, a perjury case, the Court held that the perjury statute was to be strictly construed such that if a witness 1) speaks the literal truth or 2) is nonresponsive to a question and thereby succeeds in concealing certain facts, the witness is not culpable for perjury. Brontson v. United States, 409 U.S. 352, 360 (1973). "The burden is on the questioner to pin the witness down to the specific object to the questioner's inquiry." Id. "Unresponsive answers are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Id. at 362.

The Court reasoned that "[i]t is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." Id. at 358-59. That is so because "[i]t should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so; or that a debtor may be embarrassed at his plight and yield information reluctantly." Id. at 358.

This Brontson line of thought -- that the questioner has a high burden that inures to the benefit of the witness -- has been extended by some courts to section 1001 cases. The issue is whether or not this extension is proper or whether Brontson should be limited to perjury or false statements cases occurring in an adversarial trial context or whether it should

be extended to all cases falling within those statutes, including concealment cases[2]

If Brontson applies not only to the false statements prong of section 1001 but also to the concealment aspect, little would be left of concealment as a separate and distinct offense under section 1001. Substantial additional research must be conducted on this issue.

d. Materiality

The materiality determination is a matter of law to be determined by the courts. United States v. Hansen, 772 F.2d 940, 950 (D.C. Cir. 1985) (Scalia, J.) (concealment case).[3] The test for materiality is whether the statement "has a natural tendency to influence or was capable of influencing, the decision of the tribunal in making a particular determination." Id. at 948. Proof of actual reliance on the statement is not necessary. Id. As such, "a lie influencing the possibility that an investigation might commence" stands in the same posture under section 1001 as "a lie distorting an investigation already in progress." Id.[4]

From the language of the statute, it is clear that the "materiality" element is not repeated in the second and third prongs. However, it is clear that the courts have read the materiality element in to each clause. See United States v. Notarantonio, 758 F.2d 777, 785 (1st Cir. 1985).

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[2] The D.C. Circuit accepted the Brontson defense that a literally true response is non-prosecutable in a false statements case. United States v. Milton, 8 F.3d 39, 45 (D.C. Cir. 1993).

[3] Some Circuits hold that materiality is an issue for the jury.

[4] In Swaim, the court couched its language in terms of concealment as well as false statements:

> The charge of materiality requires only that the fraud in question have a natural tendency to influence, or be capable of affecting or influencing, a government function. The alleged concealment or misrepresentation need not have influenced the actions of the government agency, and the government agents need not have been actually deceived.
>
> The Government does not have to show actual reliance on false statements or documentation. A statement is material even if it is ignored or never read by the agency receiving the misstatement. The concealment must simply have the capacity to impair or pervert the functioning of a government agency.

United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir. 1985).

e. Statements to Congress

The false statement or concealed fact must relate to a matter within the jurisdiction of a department of the United States. Although "Congress" does not come squarely within the definition of an "agency" or "department," the Supreme Court has held that the term "department" was meant to describe the executive, legislative, and judicial branches of government. United States v. Bramblett, 348 U.S. 503, 509 (1955). As such a congressional committee is a department for section 1001 purposes. United States v. Poindexter, 951 F.2d 369, 387 (D.C. Cir. 1991) (section 1001 applied to false statements made by Poindexter to members of House Intelligence Committee); United States v. Hansen, 772 F.2d 940, 943-44 (D.C. Cir. 1985) (forms submitted by congressman to House Committee as required by Ethics in Government Act involve "matter within the jurisdiction of a department.") In addition, section 1001 is applicable to "statements that were not under oath and were not stenographically transcribed." Poindexter, 951 F.2d at 387-88 (section 1001 applies to private discussions between Poindexter and Congressmen; problems of proof in such situations (one person's word against another) are issues for sufficiency of evidence not substantive law).

In Hubbard, the Supreme Court is currently being asked to limit the reach of section 1001 solely to executive agencies. The outcome of Hubbard would significantly limit the applicability of section 1001 in the context of unsworn Executive testimony before Congressional oversight committees.

Conclusion

If you have any questions, please let me know.

press.[420]/ He described himself -- as the one who discussed the needs of the Committee with the Department -- as deeply shocked when he learned that documents had been withheld secretly.[421]/

Document production to the Committee was not completed until 1985.

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[420]/ Parker, Mar. 10, 1986, memo at 1; ul. 24, 1986, Department was aware of the Committee's his ealings with the Executive Branch. A March 1(Connell to Attorney General Smith stated

> We must remember t airman Rodino will be professional, he will be looking to the larger issues and will have concerns about the institutions involved. . . . [W]e must remember this is our best House forum. This Committee is the appropriate forum to discuss all issues.

McConnell memo reprinted in HJC Rept. at 2387-88.

Similarly, Olson recognized in a May 25, 1984, memorandum to Associate Attorney General Lowell Jensen that, "The Committee has, indeed, avoided conducting its inquiry in the public limelight and we have been and are grateful for its sense of responsibility." HJC Rept. at 2541.

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IV. ANALYSIS

A. INTRODUCTION

We have determined that there is insufficient credible evidence on which to conclude that Mr. Olson knowingly and intentionally testified falsely on March 10, 1983, or in his editing of the transcript, or that his testimony obstructed the Judiciary Committee's inquiry. In addition, a prosecution of Mr. Olson based on his testimony would confront certain legal obstacles which would, at a minimum, cloud the prospects for success. We have further concluded that there is no evidence that Mr. Olson was engaged in a conspiracy to obstruct the Committee's inquiry.

We have also determined that there is insufficient credible and admissible evidence on which to prosecute Mr. Perry for perjury in connection with his December 3, 1982, testimony before the Dingell Subcommittee and that some at least of the questions to which he is claimed to have given false answers were of questionable materiality to the legislative and oversight exercise in which the Subcommittee was engaged.

We begin with a discussion of some of the preliminary legal issues concerning a possible prosecution under § 1001 or § 1505, then turn to factual and legal issues raised under those sections by Mr. Olson's testimony and to a brief consideration of whether there is any evidence of his participation in a conspiracy.

Finally, we examine Mr. Perry's conduct.

B. PRELIMINARY ISSUES

Mr. Olson raised a number of questions regarding the nature of the Judiciary Committee's proceeding. Principally these questions involved the relatively informal procedural context in which Mr. Olson's testimony was given. He was not subpoenaed; he was not placed under oath; and there was no formal Committee vote to commence an investigation or inquiry. Mr. Olson contended that this lack of procedural formality was fatal in various ways to the application of either 18 U.S.C. § 1001[422/] or 18 U.S.C. § 1505.[423/]

422/ Section 1001 provides in relevant part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . conceals . . . a material fact, or . . . makes any false . . . statements shall be fined not more than $10,000 or imprisoned not more than five years, or both.

423/ Section 1505 provides, inter alia:

> Whoever corruptly, or by threats of force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by . . . any committee of either House . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both.

1. The Jurisdiction Of The Subcommittee

Mr. Olson urged that the Monopolies Subcommittee lacked subject matter jurisdiction to conduct the inquiry into the role of the Department of Justice in the EPA documents controversy and hence that § 1001 was inapplicable. While the full Judiciary Committee undoubtedly had oversight jurisdiction of the Department of Justice,424/ Mr. Olson argued that the EPA matter could not be, or at any rate was not, properly delegated to the Subcommittee.

Section 1001 punishes only those false statements made "in any matter within the jurisdiction of any department or agency of the United States."425/ It is true that under the rules of the Judiciary Committee, the Monopolies Subcommittee's enumerated jurisdictional spheres were limited to "Antitrust, Judgeships, Bankruptcy, [and] Economic Regulation generally." Rule VI(a), House Committee on the Judiciary, 98th Cong. (1983). But the Subcommittee was also empowered to deal with "other appropriate matters as referred by the Chairman, and relevant oversight."

424/ The Judiciary Committee had general oversight responsibility for the Department of Justice. House Rule X, cl. 2(m) and note, 98th Cong. In the exercise of this responsibility, the Committee was empowered to conduct such investigations and studies as it considered necessary or appropriate. House Rule XI (1)(b), 98th Cong.

425/ It is clear that legislative bodies such as the Judiciary Committee are "department[s] or agenc[ies] of the United States" for purposes of § 1001. See United States v. Bramblett, 348 U.S. 503, 509 (1955); United States v. Hansen, 772 F.2d 940, 943 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986); United States v. Diggs, 613 F.2d 988, 999 n.64 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980).

Id.[426/] Moreover, Rule VII authorized the Subcommittee to "hold hearings, receive evidence, and report to the full Committee on all matters referred to it or under its jurisdiction." (Emphasis added.)

Read together, these rules gave the Chairman broad and flexible authority to refer particular legislative and oversight matters to the Subcommittee, and there is no reason to conclude that the delegation of the aspect of Department of Justice oversight at issue was beyond the scope of the Chairman's power. Nor do the rules of the House or of the Committee specify any particular mechanism by which a referral to a subcommittee is to be accomplished. Oral referral of legislative or oversight matters to subcommittees is both permissible and common.

Cases cited by Mr. Olson requiring legislative bodies to adhere to their own rules where applicable are thus inapposite. In Gojack v. United States, 384 U.S. 702 (1966), for example, the Supreme Court overturned a contempt conviction where the House Un-American Activities Committee had ignored its own rule requiring a majority vote for the initiation of a "major investigation." See also, e.g., Yellin v. United States, 374

426/ House Rule X, cl. 2, 98th Cong., required the Judiciary Committee, as a standing committee of more than 20 members, either to establish an oversight subcommittee or to require its standing subcommittees to assist in carrying out its oversight responsibilities. The Judiciary Committee had no oversight subcommittee and hence made use of the standing subcommittees for this purpose. Much of the Committee's oversight of the Department took place during the annual budget reauthorization process, which provided the setting in which Mr. Olson testified. House Rule XI, cl. 1(a)(1), 98th Cong., empowered the Committee to confer on its subcommittees, with exceptions not here relevant, the powers which the Committee itself could exercise.

U.S. 109, 114 (1963); Christoffel v. United States, 338 U.S. 84, 89-90 (1949). There is no comparable suggestion here that the Judiciary Committee or the Subcommittee failed to follow any internal rule in the delegation of the subject matter of the inquiry to the Subcommittee for purposes of the hearing in which Mr. Olson testified.

The Supreme Court has said that "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001." Bryson v. United States, 396 U.S. 64, 70 (1969). See also United States v. Rodgers, 466 U.S. 475, 480 (1984). We conclude that the matter was properly delegated to the Subcommittee.

2. The Existence Of "An Inquiry Or Investigation" And The Problem Of Materiality

There are, however, other more troublesome questions raised by the lack of formality with which the Committee initiated and conducted the EPA inquiry.

At the outset, we note that while some dissenting minority Members of the Committee claimed that the procedure was designed to exclude minority party participation,427/ the Committee's preference for relative informality was in the circumstances entirely understandable. The inquiry was undertaken on the heels of an abrasive confrontation between the legislative and executive branches, which had major partisan overtones and which

427/ Minority dissent in HJC Rept. at 731-33, 754-55.

resulted in the resignation of the Administrator of EPA. Chairman Rodino acted at the behest of the leadership of the House and of the Chairmen of the two Committees which had been denied access to the controversial documents. According to the Committee's General Counsel, Alan Parker, the point of the exercise was not to fuel the flames of controversy or to assess blame, but to find out what had gone wrong and perhaps to offer suggestions as to how such constitutional contretemps could be avoided in the future. Department of Justice officials acknowledged that the Judiciary Committee had a well-deserved reputation for non-partisan professionalism and fairness in the conduct of investigations and agreed with Committee staffers that it had developed a good working relationship with the Department based upon mutual respect and appreciation of the institutional interests of both branches.428/ In this context, Mr. Parker said, Chairman Rodino deliberately avoided formal Committee votes and the use of the term "investigation" as likely to be counterproductive and to exacerbate existing political tensions.429/

Nonetheless, the fact that there was never a formal resolution of either the full Committee or the Subcommittee authorizing and defining the scope of the EPA inquiry is potentially significant in at least two ways: (1) the existence

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428/ It was considered important by many, for example, that Mr. Parker himself had served both as General Counsel to the Committee and as Assistant Attorney General for Legislative Affairs. Olson, Aug. 17, 1988, memo at 26.

429/ Parker, Jul. 24, 1986, memo at 2.

of an "inquiry or investigation" is a predicate for the application of § 1505's prohibition of obstruction; and (2) the materiality of an allegedly false statement is an essential element of an offense under § 1001, which is often tested in congressional cases by reference to the terms of the resolution authorizing or directing the investigation or inquiry.

a. "Inquiry Or Investigation"

Section 1505 makes it a crime to obstruct or endeavor to obstruct "the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by . . . any committee of either House." Mr. Olson questioned whether the hearing at which he testified was part of an "inquiry or investigation" by the Committee or the Subcommittee. He proffered a sharp distinction between oversight proceedings and inquiries or investigations and urged that the latter required a higher degree of formality in their initiation.

Neither the statute nor the case law affords any definition of either "inquiry" or "investigation." Section 1505, however, also prohibits obstruction of "the due and proper administration of the law under which any proceeding is being had before any department or agency of the United States," and judicial decisions afford the term "proceeding" a broad common-sense definition. See United States v. Browning, 572 F.2d 720, 724 (10th Cir. 1978); United States v. Fruchtman, 421 F.2d 1019, 1021 (6th Cir.), cert. denied, 400 U.S. 849 (1970); Rice v.

United States, 356 F.2d 709, 712-15 (8th Cir. 1966); United States v. Batten, 226 F. Supp. 492, 493-94 (D.D.C. 1964), cert. denied, 380 U.S. 912 (1965). As the Eighth Circuit put it:

> "Proceeding" is a comprehensive term meaning . . . a particular step or series of steps adopted for accomplishing something. This is the dictionary definition as well as the meaning of the term in common parlance. . . . [I]t would be absurd to hold that Congress meant to proscribe interference with the administrative process only after a . . . proceeding had reached a certain formal stage. . . . Congress clearly intended to punish any obstruction . . . at any stage of the proceeding, be it adjudicative or investigative. Congress did not limit the term "proceeding" as used in § 1505 to only those acts committed after a formal stage was reached, and we cannot so limit the term.

Rice, 356 F.2d at 712 (footnote omitted).430/

Adoption of this approach leads to the conclusion that the Subcommittee hearing was part of an "inquiry" by the Committee into the Department's role in the EPA documents controversy. No rule of the House or of the Judiciary Committee required any particular level of formality for the initiation of an "inquiry."431/ Nor does common practice support the sharp

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430/ The courts have taken a similar view with respect to the pendency of grand jury proceedings for the purpose of applying 18 U.S.C. § 1503. See United States v. Vesich, 724 F.2d 451, 454-55 (5th Cir. 1984); United States v. Walasek, 527 F.2d 676, 678 (3d Cir. 1975); United States v. Fineman, 434 F. Supp. 197, 202 (E.D. Pa. 1977), aff'd mem., 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978); cf. Shimon v. United States, 352 F.2d 449, 450-51 (D.C. Cir. 1965).

431/ House Rule XI, cl. 2(k), 98th Cong., specified certain procedural rules for formal investigative committee hearings, and these rules governed subcommittee hearings "insofar as applicable," House Rule XI, cl. 1(a)(1), 98th Cong. These rules were not observed in connection with the March 10 hearing, and we consider the implications of this fact at pp. 151-54, infra. The failure to apply these rules goes in our view to the question whether the Subcommittee was engaged in the "due and proper

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cleavage between oversight and "inquiry" suggested by Mr. Olson. Mr. Parker stated that if such a line exists, it is often blurred and that "inquiries" or "investigations" frequently arise out of or partake of the oversight function.432/ Certainly the Committee staff understood that they were engaged in an "inquiry" prior to March 10, 1983, and that the hearing on that date was a part of that "inquiry."433/ From the Department's perspective, Chairman Rodino's letters of February 24, 1983, and March 2, 1983, to the Attorney General certainly constituted notice as a practical matter that the Committee was inquiring into the Department's performance with respect to the executive privilege claim. Mr. Olson did not dispute that he knew in advance of the Subcommittee hearing both that the Committee was looking into the EPA matter and that he would be questioned at the hearing about the activities of the Office of Legal Counsel in connection with it.434/ The Chairman's searching document request had been received well in advance of the hearing, and Mr. Olson had been instructed after high-level internal discussions to avoid making any binding commitments regarding the scope of the Department's response to that request.

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exercise" of the power of inquiry, and not to the question whether an "investigation or inquiry" had been initiated at all.

432/ Parker, Jul. 24, 1986, memo at 2.

433/ Id. at 1-2.

434/ Indeed, Mr. McConnell's letter of March 8, 1988, to Chairman Rodino, which Mr. Olson helped to draft, expressly acknowledged that "the March 10 hearing will provide you an opportunity to seek additional information" regarding the Department's role in the EPA documents controversy. HJC Rept. at 2951.

In our view the Committee clearly had before March 10, 1983, undertaken an "inquiry" into the Department's role in the EPA documents controversy -- albeit at that stage an informal one -- and the Department and Mr. Olson were on fair and adequate notice of that fact. It would thwart the plain purpose of the statute to conclude that the relatively preliminary and informal stage of the proceedings constituted a license to engage in knowing and willful acts of obstruction.

b. Materiality

A "material falsification" is an essential element of a crime under § 1001. E.g., Freidus v. United States, 223 F.2d 598, 601 (D.C. Cir. 1955). In cases involving convictions for contempt of Congress under 2 U.S.C. § 192 for refusing to answer questions posed by congressional committees, the Supreme Court has enforced the materiality requirement with meticulous care, see, e.g., Russell v. United States, 369 U.S. 749, 755-56 (1962), and has tested materiality by reference to the resolutions authorizing the committees' investigations, see, e.g., Watkins v. United States, 354 U.S. 178, 201-04 (1957); United States v. Rumely, 345 U.S. 41, 44-45 (1953). Indeed, in one case the Court found the lack of an authorizing resolution fatal to the committee's effort to hold a recalcitrant witness in contempt. See Gojack v. United States, 384 U.S. 702 (1966). Relying on these cases, Mr. Olson contended that the Committee's failure to take a formal vote to initiate the EPA inquiry and to establish

the bounds of that inquiry rendered it impossible to determine whether the questions posed to him by the Subcommittee Members were material to the investigation which had been authorized and hence barred prosecution under § 1001.

Mr. Olson's argument is not a frivolous one. There are, however, countervailing arguments of considerable weight. To begin with, the contempt of Congress cases are distinguishable. They charged not the giving of false testimony, but the refusal to testify at all, based upon challenges to the committees' power to inquire -- challenges which inevitably thrust the question of materiality to the fore. Under § 1001, by contrast, the witness has by hypothesis bypassed his materiality challenge and chosen instead to testify falsely. While the materiality issue technically is not waived thereby, the posture of such a witness with respect to the materiality issue is far less appealing than that of the witness who preserves his integrity and raises his challenge to the power of inquiry directly.435/ Perhaps for this

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435/ Cf. Bryson v. United States, 396 U.S. 64, 68-72 (1969), and Dennis v. United States, 384 U.S. 855, 867 (1966), where the Supreme Court held that a defendant charged with violating § 1001 could not challenge the constitutionality of the statute which required him to file the statement which was alleged to be false. The Court stated:

> it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions -- lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a

(footnote continued)

reason, the decisions dealing with questions of "materiality" under § 1001 plainly apply a more relaxed standard than those arising under § 192. The test for materiality under § 1001

> involves only the capability of influencing an agency's governmental functions, i.e., does the statement have a "natural tendency to influence or is it capable of influencing agency decision?"

United States v. Popow, 821 F.2d 483, 488 (8th Cir. 1987) (emphasis in original). Accord, e.g., United States v. Corsino, 812 F.2d 26, 30-31 (1st Cir. 1987); Weinstock v. United States, 231 F.2d 699, 701-02 (D.C. Cir. 1956).

> The alleged concealment or misrepresentation need not have influenced the actions of the Government agency, and the Government agents need not have been actually deceived.

Corsino, 812 F.2d at 30, quoting United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976).

Moreover, in most if not all of the Supreme Court's major § 192 cases, the intensified scrutiny of the questions of materiality and authorization took place in the context of an effort to avoid the much more difficult and politically charged question whether the Constitution -- specifically the First Amendment -- imposed any limitations on the congressional power of inquiry. This consideration is absent in § 1001 cases generally, and there certainly has been no claim here that the investigation or any question posed by the Subcommittee Members invaded any constitutional right of Mr. Olson.

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falsehood.

Bryson, 396 U.S. at 72.

Furthermore, authorizing resolutions have been treated as important by the courts because they provide notice of the inquiry and serve to define its scope. In effect, they afford due process to the target of the inquiry. However, Chairman Rodino's letters of February 24, 1983, and March 2, 1983, arguably fulfilled these functions. If, as we have concluded above, no formal vote was necessary to authorize or initiate the inquiry, the Chairman's letters would seem adequate for these purposes, unless they were unclear or ambiguous in some way which affected the Department's or Mr. Olson's ability to respond. But Mr. Olson has never claimed -- as, in our view, he could not -- that he was uncertain as to the existence of the Committee's inquiry or that, on any possible view of the scope of the inquiry, any of the subject matters about which Members of the Subcommittee inquired at the hearing was immaterial.

We think that the better view is that the Chairman's letters adequately established the scope of the inquiry and that the questions posed at the hearing were material on any reading of those letters.

3. "Due And Proper Exercise Of The Power Of Inquiry"

Finally, Mr. Olson questioned whether the Subcommittee's informal hearing procedures constituted the "due and proper exercise of the power of inquiry"--an essential prerequisite to a finding of obstruction under § 1505. Specifically, he contended

that House Rule XI, cl. 2(k), 98th Cong., required (a) that he be supplied with a copy of the Committee's rules and of the clause itself; (b) that the Chairman deliver an opening statement delineating the subject matter of the investigation; and (c) that he be informed of his right to appear with counsel.

While the matter is again not entirely free from doubt, we are of the view that Mr. Olson's arguments are not well taken. Clause 2(k) was adopted in 1955 in response to criticisms about the treatment of citizens in congressional hearings. It applies by its terms to formal investigative hearings, which usually involve subpoenas and the administration of oaths. The Subcommittee, we have concluded, was conducting a less formal inquiry, one which grew out of the Committee's oversight function. In the exercise of this function, Mr. Parker said, the Committee had traditionally avoided such formalities, which the Chairman considered unseemly in the case of high Justice Department officials, who were expected to cooperate with Committee oversight inquiries without being subpoenaed and to be truthful without being placed under oath.436/

Nor does it seem likely that the Committee's failure to proceed under clause 2(k) had any practical impact on Mr. Olson. While the Chairman made no opening statement, Mr. Olson was aware of his letters to the Attorney General, which had detailed the nature and scope of the Committee's inquiry.437/ Mr. Olson knew

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436/ Parker, Jul. 24, 1986, memo at 2.

437/ The Department anticipated questioning at the hearing on the EPA documents controversy. See pp. 104-05, supra.

that he would be questioned about document production in response to the Committee's request and about the role of the Office of Legal Counsel in the EPA executive privilege controversy. Mr. Olson, it is true, was not tendered a copy of the rules of the Judiciary Committee when he was invited to testify, but the Department dealt with the Committee and its subcommittees on a regular basis -- including frequent testimony by high ranking Department officials --and Mr. Olson discussed the Committee's inquiry with Robert McConnell, the Assistant Attorney General for Legislative Affairs, who was intimately familiar with the Committee and its rules and procedures. Similarly, Mr. Olson was not explicitly advised of his right to appear with counsel, and he was not represented at the hearing by private counsel. Mr. Olson, however, was both a high law enforcement official and an experienced lawyer, and he was accompanied at the hearing by several other highly-placed Justice Department lawyers. In any event, Mr. Olson has not suggested that the hearing procedure or any of the questions posed invaded any of his constitutional or other rights.

We think a court is unlikely to hold on these facts that § 1505 is inapplicable simply because the Committee was not proceeding under Rule XI, cl. 2(k), especially where the necessary implication of such a holding would be that a high government official could engage in willful acts of obstruction with impunity any time a congressional committee chose to proceed in an inquiry without the confrontational trappings of a formal investigation.

We have thus concluded that the Committee's lack of formality in procedure would not preclude a prosecution of Mr. Olson for either making a false statement or obstruction of the Committee's inquiry, if the evidence justifying such a prosecution existed. However, the informality of the proceedings raised a number of legal questions, and the cumulative impact of the various issues could well prove troubling to a court reviewing a conviction. The Committee's effort to dampen the fires of partisan controversy and to avoid further unnecessary confrontation was commendable. That effort was obviously undertaken without any thought of possible future criminal prosecution. Nonetheless, it did give rise to procedural ambiguities which could have created some problems if a prosecution had been attempted.

C. ANALYSIS OF ISSUES UNDER 18 U.S.C. § 1001

Any prosecution under § 1001, as interpreted by the courts, would require proof beyond a reasonable doubt that Mr. Olson knowingly and willfully made a material false statement on a matter properly within the jurisdiction of the Subcommittee with the specific intent to mislead the Subcommittee. See, e.g., United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976) (specific intent to deceive required); Freidus v. United States, 223 F.2d 598, 601 (D.C. Cir. 1955) (false statement must be material to the matter within the agency's jurisdiction). In addition, at least where the allegedly false statements are made in the context of interrogation, the law arguably requires considerable precision in the questioning and a demonstration that under no circumstances could the answer, however potentially misleading, be deemed literally true.

1. The Standard For Determining Falsity

The seminal case in this area is Bronston v. United States, 409 U.S. 352 (1973). In that case a witness in a corporate bankruptcy proceeding -- the president of the bankrupt corporation -- testified under examination by counsel for a creditor as follows:

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.

409 U.S. at 354. The government claimed that the answer to the second question constituted perjury, since the witness had had a personal bank account in Geneva for a period of five years. The lower courts had found falsity by implying from the unresponsive answer a denial that he had any personal Swiss bank account. The Supreme Court, however, unanimously reversed the perjury conviction, holding that an answer to a question, no matter how potentially misleading, is not perjury if it is merely unresponsive and is on its face literally true. The witness in Bronston had told the truth about the company's account in Zurich and had thereby merely avoided answering the question about his own account. The Court placed a heavy responsibility upon the interrogator "to flush out the whole truth with the tools of adversary examination." Id. at 359.

> Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. . . . It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark . . . .

Id. at 358-59. The Court expressly held irrelevant any supposed intention by the witness to mislead his interrogator. Id. at 359-61. And while the Court stated that it was not relying on any arguable ambiguity in the question, id. at 356-57, its emphasis on the responsibility of the interrogator and the defense of literal truth leads ineluctably to close analysis of the "fit" between question and answer in any perjury case.

The teaching of Bronston seems to be that all doubts, especially those created by the failure of the interrogator to be precise or to ask the right follow-up question, are to be resolved in favor of the witness. See, e.g., United States v. Lighte, 782 F.2d 367, 373-76 (2d Cir. 1986); United States v. Eddy, 737 F.2d 564, 567-72 (6th Cir. 1984); United States v. Cowley, 720 F.2d 1037, 1042-44 (9th Cir. 1983). Moreover, where the question is claimed to be unclear, what is important is how the witness, not the interrogator, reasonably understood the question, for the essence of the offense is the witness' knowledge that his answer is false. See, e.g., Eddy, 737 F.2d at 569; Cowley, 720 F.2d at 1043; United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967).

Bronston, of course, was a prosecution for perjury under 18 U.S.C. § 1621. However, though the Supreme Court has not considered the question, courts of appeals have applied the Bronston standard to prosecutions for the making of false statements under § 1001. See, e.g., United States v. Fern, 696 F.2d 1269, 1275-76 (11th Cir. 1983); United States v. Poutre, 646 F.2d 685, 687-88 (1st Cir. 1980); United States v. Vesaas, 586

F.2d 101, 104 (8th Cir. 1978); United States v. Mandanici, 729 F.2d 914, 921 (2d Cir. 1984) (dictum). Application of that standard in the present case in our view effectively precludes the prospect of a successful prosecution under § 1001.

Before analyzing the critical questions and answers in light of the Bronston standard, we pause to take notice of the setting in which the testimony was given. Generally speaking, a congressional committee hearing provides a less than ideal forum for in-depth exploration of particular historical facts or tight follow-up questions of the sort envisioned by the Court in Bronston. Time is normally at a premium, and consideration of more than one broad topic with more than one witness must often be accomplished in a single morning session, which may be interrupted for floor votes or other legislative demands. Each congressional questioner is typically limited to a brief time for the interrogation of each witness, making careful pursuit of ambiguity and evasion yet more difficult. Nor can busy legislators focusing for perhaps the first time on a particular topic realistically be expected to frame questions with the precision which courts demand of well-prepared cross-examiners. And the broadly political concerns of both interrogators and witnesses frequently color the dialogue and render the attainment of precision even less likely. Finally, such hearings unquestionably at times become heated and partisan in a way which makes it difficult for witnesses either to keep their composure or to consider the questions posed in a reflective way.

Mr. Olson contended in this regard that he was faced with a hostile and partisan panel of interrogators who hurled loaded questions at him and interrupted his efforts to respond, and hence that it would be unfair to apply § 1001 to his testimony at all.

There can be no doubt that the exchanges at the March 10 hearing were sometimes heated and acrimonious. It is difficult to apportion blame for that situation, however. Admittedly, some Members were at best skeptical and at worst overtly hostile in their treatment of Mr. Olson. One cannot, on the other hand, fairly characterize Mr. Olson as a helpful or cooperative witness. Moreover, as an experienced litigator with a fairly clear view of the positions he had to protect, Mr. Olson often gave as good as he got. He does not seem to have been intimidated or overwhelmed by his interrogators. The less than ideal conditions under which Mr. Olson was questioned, however, plainly call for the resolution of any doubt in favor of applying the Bronston standard and for special sensitivity in the application of that standard. Cf. United States v. Ehrlichman, 379 F. Supp. 291, 292 (D.D.C. 1974).

2. Issues Posed By Mr. Olson's Transcript Revisions

We had to determine what importance to place on the corrections Olson made to his transcript during his review. The Committee's cover letter to Olson, accompanying the transcript

sent to him for review, directed that only typographical and grammatical changes be made, consistent with the congressional practice of allowing witnesses and Members to edit transcripts of verbatim exchanges to make them more readable or intelligible. Olson, of course, went beyond typographical and grammatical editing and changed substance. Were we to ignore those changes, since they were not contemplated by the process? Or should the amended answers be the focus of our inquiry since, to the extent they changed substance, they could be argued to represent a good-faith effort to provide additional information and clarity?

Changes aimed at clarity and completeness are clearly unobjectionable. But revisions which alter substance acknowledge failures in the original answers and impede the Subcommittee's ability to explore substantive additions through follow-up questions. While a good case can be made both practically and legally for rejecting attempts to rectify known falsehoods in the editing process,438/ reasonable jurors, confronted with an attempt to clear up a misunderstanding through transcript revisions, would in all likelihood be disinclined to convict if the attempted clarification was adequate to redress the original misstatement.

438/ For example, while 18 U.S.C. § 1623, dealing with grand jury and court testimony, permits a witness to recant falsehoods in the course of the same proceeding, the closest perjury analog to § 1001, 18 U.S.C. § 1621, contains no provision for avoiding prosecution by recantation. Under § 1621, the crime is complete when the false statement is made, United States v. Norris, 300 U.S. 564, 574 (1937), and recantation is relevant, if at all, only to show inferentially a lack of perjurious intent, United States v. Giller, 154 F. Supp. 727, 730 (S.D.N.Y. 1957).

We determined that, with a single arguable exception, Olson's statements were literally true -- both in the original testimony and as edited. We therefore analyzed the editing solely to ensure that it was not designed to mislead.

3. Mr. Olson's Testimony And § 1001

The two major areas of controversy in Mr. Olson's testimony involved (1) the asserted willingness of EPA to turn over the documents without invoking executive privilege, and (2) the completeness of the Department's document production to the Judiciary Committee prior to the March 10 hearing. Indeed, the Attorney General's application to the Special Division for the appointment of an independent counsel was limited to these two areas of testimony. The Committee in its Report, however, complained of a total of six answers by Mr. Olson. The other four were (a) Mr. Olson's assertion of unanimity within the Executive Branch in support of the executive privilege claim; (2) his denial of personal knowledge of whether the President personally reviewed the withheld EPA documents; (3) his statement that he was unsure whether OLC had furnished written advice to the Civil Division in connection with the lawsuit against the House; and (4) his denial that OLC had prepared options papers respecting the executive privilege claim.

We concluded that the answer concerning Executive Branch unanimity was so closely connected to that on EPA willingness that it was fairly encompassed within the scope of the Attorney

General's application and the appointing order. Similarly, the answers concerning written advice to the Civil Division and the preparation of options papers are part and parcel of an assessment of Mr. Olson's testimony respecting document production to the Judiciary Committee. Accordingly, we have reviewed the evidence with respect to the truthfulness of those answers.

However, Mr. Olson's testimony concerning presidential review of the withheld documents falls outside either rubric of the Attorney General's application, and we have accordingly determined that it is beyond our mandate to examine its truthfulness standing alone.439/

a. EPA Willingness

Congressman Seiberling asked Mr. Olson the following question and received the ensuing answer.440/

> Q: Mr. Olson, the question of whether EPA wanted to turn over the documents at some point before the decision was actually made to do so, and who advised them not to, is a very important one. And I'd like to ask you whether, to your knowledge, at any time EPA did indicate its

439/ Arguably, we could look to any portion of Mr. Olson's testimony to help determine whether he acted in concert with others to obstruct the Committee's inquiry. As explained below, we have determined that there is no evidence that Mr. Olson took part in such a conspiracy. And we cannot see how the answer on presidential review could in any way have furthered the aims of such a conspiracy.

440/ In each citation from the transcript, Olson's editing is reflected by bracketing those portions of his original testimony which he deleted during his review of the transcript and underscoring material he added.

willingness to turn over the documents during the course of your consideration of the Subcommittee's request.

A: [I don't] They may have, but I do not expressly recall having been told that by anybody associated with EPA. I did read the newspapers, and it seemed to be that [through that] that sentiment seemed to be being expressed, especially in the last week or two. But that's all [I know] that I can expressly recall relative, particularly, to the final decision which was made to claim a privilege relative to these documents.441/

There is no doubt that individuals at EPA, including the Administrator, could be described as "willing" -- under certain circumstances -- to turn over the Superfund documents. There is also substantial evidence that Olson had some knowledge of these views at some point. That begins, rather than ends, the analysis, however.

(i.) The Question

Congressman Seiberling was plainly correct in characterizing the issue of EPA willingness as a "very important one," and his question on the surface seems straightforward enough. It is thus no criticism of Mr. Seiberling -- who after all had not been intimately involved in the events surrounding the claim of executive privilege -- to note that, in light of the complex events which actually transpired, the question was open to several possible interpretations.

441/ OIC doc. # 801405, at 97.

The first, and probably most significant, problem with the question is what is meant by "EPA . . . indicat[ing] its willingness to turn over the documents." Does the reference to "EPA," for example, focus upon the formally expressed view of the agency, or the privately held views of the Administrator, or the political and tactical concerns of some members of her staff? Does "willingness to turn over the documents" mean (a) a readiness to deliver the documents without any form of protection -- confidentiality agreements or limitations on distribution or dissemination, for example -- for any "enforcement sensitive" information they contained, (b) a readiness to permit limited access to some or all of the documents under conditions adequate to secure their continued confidentiality, or (c) a desire to avoid the political controversy inevitably associated with an invocation of executive privilege?

The narrowest interpretation of Mr. Seiberling's question is that "willingness" meant a readiness on the part of the agency to produce the documents without any protections to safeguard their "enforcement sensitivity," such as confidentiality agreements or limitations on the copying or circulation of documents -- in effect, an abandonment of the view that there was any need to protect any of the information in the documents. This appears to be the interpretation adopted by Mr. Olson.442/ Under Bronston

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442/ See Letter from Olson's counsel to Alexia Morrison (Jun. 20, 1986), at 43-44, 79-84; Letter from Olson's counsel to John C. Keeney (Mar. 31, 1986), at 12-17.

we must respect this reading of the question unless it is patently unreasonable. In our view it is not, and accordingly, it has been the focus of our factual analysis of EPA willingness.

Another area of difficulty with the question is the uncertainty of its time frame. What did the phrase "during the course of your consideration of the Subcommittee's request" mean? Did it refer solely to the period prior to the initial October 25 recommendation of executive privilege to the President and his unused October 26 directive that the privilege be asserted? Or was the claim under "consideration" until the President's final directive on November 30? Or did the Department's "consideration of the Subcommittee's request" continue up to the time that the privilege claim collapsed?443/

Mr. Olson stated that he interpreted Mr. Seiberling's question to encompass the period up to the "ultimate" authorization of a claim of privilege on November 30, 1982.444/ Again, we are unable to conclude that this was an unreasonable reading of the question.

Finally, the question inquired whether, to Mr. Olson's knowledge, willingness to turn over the documents was indicated by "EPA." Mr. Olson's answer was explicitly couched, however, in

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443/ In his first sentence, Mr. Seiberling referred to any "point before the decision was actually made to [turn over the documents]." This could be viewed as intending to encompass the entire period from the first request until the days immediately before Olson's testimony, when it was decided that the documents would be produced. That first sentence, however, is a prefatory statement by the Congressman, and his actual question, contained in his second sentence, suggests a narrower time focus.

444/ Olson, Aug. 17, 1988, memo at 16.

terms of what he was "told . . . by anybody associated with EPA." In the absence of a follow-up question, we must, under Bronston, accept Mr. Olson's narrowing of the question and assess the truthfulness of his answer on its own terms.

In sum, in evaluating whether Olson's answer to Mr. Seiberling's question was false, we viewed him as required to state truthfully whether:

(1) during the period between mid-September and November 30, 1982,

(2) anyone at EPA personally told him

(3) that EPA was willing to produce the documents in question

(4) without any agreement to or provision for protecting their contents.

(ii.) The Answer

Especially in light of the ambiguities lurking in the question, Mr. Olson's answer would seem to be literally true within the Bronston standard. In the first place, the answer is closely pegged to Mr. Olson's recollection in the Spring of 1983, and there is no basis for concluding that his recollection was anything other than what he said it was. See United States v. Clizer, 464 F.2d 121,125 (9th Cir.), cert. denied, 409 U.S. 1086 (1972). Indeed, Mr. Olson's recollection as expressed in his answer seems to be in accord with the evidence.

The earliest evidence that Olson was aware of some willingness on EPA's part comes from Sherrie Cooksey's notes of the October 1, 1982, meeting at the Department in preparation for that afternoon's meeting between EPA and the Levitas Subcommittee. Her notes contain the statement, "agency is much more inclined to transmit all docs." There is some question whether Olson was present at this meeting.445/ Even if Olson was present, neither the notes nor any of the participants in the meeting suggest that EPA expressed a willingness at this point to deliver all documents unconditionally.

Critical to the EPA willingness question were the October 7 and 8, 1982, discussions between Perry and Simms, Perry and Barrett, and Barrett and Olson. Barrett said Perry told him that EPA saw no reason not to produce the documents. Simms said that Perry told him the same thing and that he told Olson about it. The subject came up again between Simms and Olson several times, when Simms alerted and subsequently reminded Olson of his concern that Perry had perjured himself on December 3, 1982, on this very issue.

More persuasive evidence of Olson's knowledge that Perry told Barrett EPA was willing to produce the documents is contained in Dinkins' notes of October 12, 1982. She believed,

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445/ Olson had some recollection of the meeting, Olson, Aug. 17, 1988, memo at 21-22, and Regnery, another attendee, prepared a memorandum of the meeting listing Olson as present, HJC Rept. at 922. Cooksey, however, believed based on her notes of the meeting that, if Olson was there at all, he arrived after the discussion concerning EPA's inclination to transmit the documents to Congress. Cooksey, Aug. 4, 1988, memo at 2.

as did Olson,446/ that these notes were taken by her during a briefing he gave her that day, upon her return from a weekend at home in Houston. Her notes, referring to Perry, state "He said willing at EPA and DOJ wouldn't." The next entry, "Is irresp. because is the whole Exec. Br." apparently reflects Olson's comment that EPA's position on the document question was not controlling of the Executive Branch's position.447/ While these notes clearly evidence knowledge by Olson of some level of willingness on the part of some at EPA -- and even of Olson's readiness to overrule EPA's willingness, if necessary -- they do not establish that the willingness was unconditional, and they do not indicate where Olson obtained his knowledge.

We were unable to establish that Olson obtained his understanding of Perry's expression of willingness from "anybody associated with EPA." Perry's phone log for October 8, 1982, reflects a 2:15 p.m. call to Olson which is checked as "completed." Neither Perry nor Olson, however, had any recollection that Perry told Olson during that telephone call of any EPA willingness to produce the documents.448/

Thus we are without evidence that Olson was told by "anybody associated with EPA" of that agency's willingness to produce the documents.

446/ Olson, Aug. 17, 1988, memo at 19. Olson, however, had no recollection of the conversation with Dinkins. Id.

447/ See p. 50, supra.

448/ Olson, Aug. 17, 1988, memo at 20; Perry, Nov. 20, 1986, memo at 7, 16.

Notes of the October 15, 1982, meeting at the Department suggest both that Olson was present (Dinkins' notes list "Ted" as a participant) and that concern was expressed about EPA's cooperation on the documents issue (Ramsey's notes state "EPA must be on board at all levels = not go behind our back to staff etc."). Exploration of these entries with meeting participants, however, revealed that the "behind our backs" reference grew out of a discussion of Rita Lavelle's transmission of documents to Dingell the day before and reflected a concern with lack of coordination, not willingness, at EPA.449/

On October 21, 1982, Olson conducted a meeting respecting the Dingell subpoena. Certain participants recalled that Olson commissioned either Brown or Yamada at the meeting to check with the Administrator and Perry -- who was out of town -- to ensure their concurrence in the executive privilege claim. Yamada did not recall being asked to ensure Burford's and/or Perry's concurrence. No one, however, recalled any followup on the issue. Olson was thus not certain of the Administrator's and/or Perry's support on October 21.450/ Such uncertainty would not

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449/

HJC Rept. at 983-84.

450/ There is some evidence to suggest that the Department may later have received some additional information concerning the Administrator's position. Ramsey's notes of a meeting with EPA representatives on the following day, October 22, 1982, contain (footnote continued)

render his March 10 testimony on the topic false, given our interpretation of the issues involved in his answer.451/

Administrator Burford and Olson met face-to-face for the first time on November 1, 1982. Ms. Burford expressed considerable discomfort about the invocation of executive privilege at that meeting, but no one in attendance at the meeting told us that Ms. Burford said she was willing to produce the documents unconditionally. Ultimately she turned to Deputy White House Counsel Hauser, who was also in attendance, and asked if the President wanted to claim the privilege. Hauser replied that the President did. Administrator Burford thereupon abandoned her reservations and agreed to assert the privilege.452/

(footnote continued from previous page)
the entry: "if executive makes a decision, EPA will go along." HJC Rept. at 1002. Indeed, when Olson and Burford finally spoke on November 1, 1982, the Administrator said that she would do what the President wished. Thus, it appears at least possible that the entry in Ramsey's October 22 notes reflects that someone had spoken to Burford and told Ramsey her views. Burford was, however, out of town at the time and could not explicitly recall telephone discussions with her staff. Burford, Aug. 26, 1988, memo at 3, 5-7.

451/ Uncertainty could, however, be very troublesome in the context of the last line of his October 25 memorandum to the President, which stated, "The Administrator concurs . . . ." We considered whether that sentence was, itself, a falsehood, but concluded it was not. Olson's reliance on the totality of the circumstances does not appear unreasonable. Certainly no one told him that the Administrator did not concur, and a draft of the memorandum containing the statement was circulated to officials at EPA, who never raised any question about it.

452/ See p. 65, supra. The Judiciary Committee expressed concern that the initial decision to invoke executive privilege might have been the result of a desire on the part of those in the
(footnote continued)

Moreover, Ms. Burford did not suggest in her interviews with us that her reservations on the subject of executive privilege betokened an unconditional willingness to turn over the documents. She readily acknowledged that her desire to produce the documents was predicated on the assumption that the Subcommittee would agree to protections for the contents of the documents. Thus, her statements at the November 1 meeting support Olson's testimony that no one at EPA told him the agency was willing to produce the documents prior to the time that executive privilege was invoked.453/

There is some evidence of EPA expressions of willingness to produce the documents rather than claim executive privilege after November 1. The Administrator, after her November 6 or 7 conversation with Interior Secretary Watt, tried to avoid personally invoking executive privilege and to place the burden

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Department devoted to an expansive view of executive power to create a "test case" on executive privilege without real regard to the need to protect any specific information in the documents at issue. There is little question that the atmosphere at the Department in the early 1980s was generally more receptive to claims of executive privilege than at other times in recent history.

Ultimately, in our view, the "test case" question was irrelevant to our inquiry. Only if Olson had acted from a motive to conceal Executive Branch wrongdoing or had sought to invoke the privilege in the absence of a good faith belief that it was applicable -- of which we found no evidence -- would it have cast his later actions in a suspicious light.

453/ We looked for -- but failed to find -- evidence that would support an inference that the failure on November 1 to disclose the five-day-old presidential directive to Ms. Burford was a result of Olson's recognition that his statement about Burford's concurrence was without support in fact.

on the Department or the White House. She expressed her concerns to Perry, who in turn told Simms. Simms informed Hauser and Olson.454/ These protestations, however, do not undermine the truthfulness of Olson's willingness testimony. Olson did not receive word of the Administrator's position from "anybody associated with EPA"; even Ms. Burford agreed that her position did not contemplate unconditional production; and in light of her statement on November 1 that she was willing to go along with the privilege claim, Olson, Simms and others viewed her subsequent expressions of discomfort simply as signs of unwillingness to take the political heat resulting from the claim.455/

Indeed, Simms stated that no one at EPA or the Department ever told him that there was not substantial justification for the assertion of executive privilege to protect the Superfund documents.456/

Mr. Olson told us that in preparing to testify on March 10 he anticipated difficulty because of press reports in the preceding two weeks of statements by Mrs. Burford that she was opposed to the privilege claim.457/ That focus was understandable. By all accounts, those statements expressed considerably stronger opposition to the claim than any previously

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454/ Perry, Mar. 20, 1986, memo at 3-4, and Nov. 20, 1986, memo at 16-17; HJC Report at 180-1, 1195-6, 1206-8; Simms Mar. 11, 1986, memo at 3.

455/ See Letter from Olson's counsel to Alexia Morrison (Jun. 20, 1986), at 83-84; Letter from Olson's counsel to John C. Keeney (Mar. 31, 1986), at 18; pp. 67-68, supra.

456/ Simms, Jul. 15, 1986, memo at 14.

457/ Olson, Aug. 17, 1988, memo at 15-16.

heard by or reported to Olson. Accordingly, his attempt to distinguish in his answer between what he had been told previously and what he "read in the newspapers . . . in the last week or two" was legitimate. During his August 17, 1988, interview, Olson acknowledged he was responding to the recent press reports in his answer, when he concluded with "that's all I know."458/ He also told us that, looking back to the 1982 authorizations of privilege, he never thought Ms. Burford would say in 1983 that executive privilege had been all the Department's idea.459/

In sum, there was evidence that a number of individuals within EPA, including the Administrator and high-ranking members of her staff, were unenthusiastic from the beginning about the prospect of an executive privilege fight. We have found no one, however, who advocated simply turning over to the requesting subcommittees raw investigative or enforcement files without adequate safeguards of confidentiality -- safeguards which were never agreed upon and thus were certainly not in place before the invocation of the privilege. And the agency's formal position, as expressed by the Administrator in her November 1, 1982, meeting with Mr. Olson and Deputy White House Counsel Richard Hauser, was that it agreed with the invocation of the privilege. Arguably that statement alone, which was never retracted by Ms. Burford before she asserted the privilege, is enough to render Olson's testimony on willingness truthful. Moreover, Mr. Olson's

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458/ Id. at 16.

459/ Id. at 15.

edited answer, by its reference to "the final decision which was made to claim a privilege relative to these documents," clarified the time frame to which the answer applied.460/ EPA did not change its position -- nor did the Administrator express a different view to Mr. Olson in private -- prior to the time that the final decision to invoke the privilege was made.

Thus we are unable to conclude that Olson's answer was false with respect to the period prior to November 30, 1982, the time frame which he said he understood the question to encompass.461/

460/ Olson said he did not insert "final decision" in his answer during editing to change its meaning. He was not sure why he inserted that language, but did not believe it was intended to distinguish between the October 26 and November 30 decisions. Olson, Aug. 17, 1988, memo at 16.

461/ According to information in the Committee's report, Ms. Burford spoke just before she testified on December 2, 1982 with several members of the Levitas Subcommittee in the Public Works Committee's minority lounge. She is reported to have said that, had it been her decision, the documents would have been turned over but that the Department prevented her. HJC Rept. at 224. It is unclear whether Olson was even present when these remarks were made. Both he and Burford told the Committee they did not believe he was present. Id.

But even if we could establish that Olson heard Ms. Burford make on this occasion the remarks attributed to her by the Committee's report, that would not contradict Olson's testimony regarding EPA's willingness to turn over the documents, in light of his interpretation of Congressman Seiberling's question, since Burford did not on that occasion express unconditional willingness to turn over the documents and since the event took place after the November 30 presidential decision to invoke executive privilege.

Moreover, even if Congressman Seiberling's question were deemed to encompass "consideration" of the claim up to and including the actual assertions of privilege by Ms. Burford during her testimony on December 2 and 14, 1982, there is no evidence that Ms. Burford expressed unconditional willingness during this period to Olson or anyone else. Indeed, Simms recalled that in one meeting in December, Burford and Olson engaged in a heated exchange, at the conclusion of which,

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We take no position on the question whether Mr. Olson, in order to avoid misleading the Subcommittee, ought to have volunteered additional information about the private views of individuals, including the Administrator. His answer is, however, in our view not subject to criminal prosecution under § 1001.

b. Unanimity

During his testimony, Olson had the following colloquy with Congressman Brooks:

> Mr. Brooks. Fine.
>
> Now the press accounts have said that the Department of Justice, not the EPA, really demanded that the documents be withheld. Now The New York Times, on the fourth day of March, quotes Mrs. Burford and said she told aides, quoted by Phil Shavacoff [sic], who is not a poor writer, he's a good one -- He said Mrs. Burford told the aides that the President failed to follow her advice because he was getting poor guidance from his White House staff and the Justice Department.
>
> They go on in that article to point out that she told her aides she had counseled the President the only way to handle it was to give Congress the information that they wanted, not to withhold anything.
>
> A Republic [sic] member of Congress, Guy V. Molinari of Staten Island, the ranking Republican on the House Public Works Investigation Subcommittee, said in a telephone interview that he knew -- quote -- "for a fact" -- unquote -- that Mrs. Burford was ready to turn over requested documents to the Subcommittee about two months ago but had

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according to Simms, Olson asked Burford whether, in her capacity as Administrator of EPA, she thought the claim was the right thing to do, and he recalled Burford answering affirmatively. Simms, Jul. 15, 1986, memo at 14.

been overruled by -- quote -- "a combination of Justice folks and somebody in the White House."

Now in another article, the same continuation. You're quoting somebody in The Washington Post of the 5th, by two authors, the story on her fighting to save her job, if you recall that story.

They are quoting one of the people down in the EPA, and they said that they thought it was deplorable, the fact situation about the Justice backing around. They said the Justice Department instigated this whole matter, and they quote these folks as saying they're the ones that came up with the idea of claiming executive privilege, they talked the President into it, they suckered Burford into it. I think it's incredible that they're suddenly worried about wearing two hats.

I might add that perhaps they have two heads and need two hats. [Laughter.]

And I notice that that's what they say. Now what do you say about that?

Did the Justice Department encourage, demand that the EPA withhold those documents, allegedly for some Presidential reasons?

Mr. Olson. Let me answer it this way if I may, Mr. Brooks.

I [haven't] have not read all of those accounts, and [frequently those accounts, and I think] some of the ones that you're referring to [are] involve people [that] who did not speak for attribution. [on the record with respect to those accounts.]

The New York Times story that you referred to first -- and I'm not questioning the integrity of the reporter in any way -- talks in terms of what the Administrator had said to her aides. I'm not sure whether she said that to the reporter, or whether the aides were quoting or characterizing what she had said, or what. And so I'd rather not respond necessarily in terms of what might be hearsay published in the newspaper.

I will respond to your question though.

Mr. Brooks. Let me give you one additional thought. Her testimony in the Senate -- and I don't have it in front of me now, but my impression of that testimony was that she offered to give the information to the Congress.

Mr. Olson. I [don't] do not believe -- and I may be wrong, and I [don't] do not have the testimony, and I [didn't] did not see it and I [haven't] have not read it[.] , but I am not personally aware
[I don't believe] that at that time she offered to give the information to the Congress. Let me go back to the beginning, though, because I think that's what your question is about.

Mr. Brooks. Right.

Mr. Olson. It is my understanding, based upon everything that I was involved in -- and I [don't] do not have any information that would lead me to a contrary conclusion, and I believe this to be absolutely correct -- that the people that --

Mr. Brooks. I wouldn't think you would speak otherwise. Surely you don't --

Mr. Olson. I know that. I'm simply adding that because I believe that --

Mr. Brooks. We didn't swear you in, but we do believe that you--

Mr. Olson. I['m] am simply adding that [unnecessary] perhaps unnecessary emphasis because there have been so many conflicting reports on so many different subjects relative to this entire matter.
-- that the people that were involved in the enforcement process at EPA from the enforcement level through the policy level through the Administrator, and at the Land and Natural Resources Division at the Department of Justice, and in my office, and the other people at the Department of Justice that were involved in the matter, and the Office of the Counsel to the President, and the President, all agreed that this was a proper occasion for the invocation of the

> executive privilege, that it was [in the best interests of the] something necessitated by Constitution and the manner in which the Constitution assigns the enforcement of law to the Executive Branch, and it was in the best interest of the enforcement process at that time.
>
> Whether other people or some people in that process may have changed their mind later because of developments or allegations or because it became uncomfortable, I [don't] do not know. But--462/

We conclude that prosecution of Olson on the basis of his testimony in response to Congressman Brooks' questions is not warranted because, at the least, the testimony is literally true under Bronston and is not misleading.463/

The subcommittee subpoenas obviously posed a serious and complex question with legal and political ramifications for EPA's enforcement program and for the Department's future dealings with Capitol Hill. Not surprisingly, given the magnitude of the issue, EPA and Department officials had exhaustive and sometimes spirited discussions during the decisionmaking process that led to Olson's advice to the President. In these internal and interagency discussions, Olson heard different points of view as the Executive Branch developed its response to the Subcommittee subpoenas. There was, however, no suggestion from anyone involved in the process that the documents did not contain

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462/ OIC doc. # 801405, at 83-87.

463/ Obviously, Olson's testimony about EPA's willingness to turn over the documents raises many of the same questions as his testimony about unanimity in the Executive Branch, since there is evidence that not everyone at EPA was at all times in agreement with every aspect of the claim. There is, however, no need to repeat what has already been said about Olson's testimony concerning EPA's willingness.

information which was legitimately sensitive in that, if released, it could compromise EPA's ongoing Superfund enforcement program, particularly litigation initiated by EPA pursuant to the Superfund law.

In substance, Congressman Brooks asked Olson whether it was true, as recent press accounts had suggested, that Ms. Burford had been an unwilling participant in the executive privilege claim who, but for the Department, would have given the Superfund documents to the Subcommittees. Olson answered, in substance, that it was not true and that, while some of the people involved in the claim might have since changed their minds, they had at one time all agreed on the necessity for it.

The question was not specific as to time, and we cannot say that it was unreasonable for Olson to interpret the question, as he apparently did, to refer to the time at which the Administrator asserted executive privilege before the Subcommittees in December 1982. See Bronston, 403 U.S. at 359. With the question read in that way, Olson's testimony comports with the facts.

Whatever questions may have been raised and whatever disagreements of varying degrees of significance may have been aired as the Executive Branch considered how to respond to the subpoenas, by the time the Executive Branch deliberative process was complete, a consensus had been reached. EPA and the Lands Division had determined that the subpoenaed documents were indeed enforcement sensitive; the Department had determined that the claim was legally viable; and the White House had made the

necessary political decision. Ultimately, of course, the decision was the President's. But by late November 1982, there was, as Olson testified, agreement that the claim was necessary among the components of the Executive Branch making recommendations to the President. The discussions which led to that agreement were normal, healthy parts of the deliberative process, which do not contradict Olson's testimony that by the end of that process, there was agreement on the need for the claim.

c. Document Production

At the outset of the March 10 hearing, Chairman Rodino posed the following question to Olson and received the indicated answer.

> Q: Mr. Olson, I wrote to the Attorney General on March 2nd concerning some documents that related to the on-going question to EPA on the withholding of certain documents. At that time the letter requested any documents related to the advice OLC furnished on the withholding of subpoenaed documents, the Department's civil action against the House of Representatives, and the possible conflicts of interest.
>
> I am going to assume from the letter that I received in response that all of the relevant documents have been provided, and the Department is not withholding any documents from the Committee.
>
> Is that correct?
>
> A: Well, Mr. Chairman, we tried to provide everything that we have finalized that pertains to the advice that we have given. Most of those documents [are published] have been made available publicly.
>
> I [didn't] did not include handwritten notes of my own. [I make xerox] Nor did I include copies of cases and [make] marginal notes. [in the margin.] There are scraps

> of paper probably everywhere. [I'm] I am not sure that [we've] we have included everything. [We've] We have included everything that we think is relevant to the questions that [you've] you have asked and to the formal advice that we've given.
>
> I might also add --464/

At this point, Olson's response was interrupted by a question concerning relevance from Chairman Rodino.

(i.) The Question

Mr. Rodino's letters of February 24 and March 2 had presented the Department with an extensive and comprehensive document request. The Department responded with a partial document production, accompanied by a letter from Robert McConnell, on March 8. The McConnell letter indicated that the Department was at that point providing only publicly available documents. The apparent premise of the Chairman's question -- that "all of the relevant documents have been provided" -- is thus arguably inconsistent with the McConnell letter of March 8, and had certainly been dispelled before Mr. Olson's testimony was finished.

Moreover, the question made reference to "relevant" documents. While the inclusion of a general term such as "relevant" does not by itself import a fatal ambiguity in a question, see, e.g., United States v. Chapin, 515 F.2d 1274, 1279-80 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975) ("express an interest"); United States v. Ceccerelli, 350 F. Supp. 475, 478

464/ OIC doc. # 801405, at 63.

(W.D. Pa. 1972) ("regular"), it creates both a legitimate basis for disagreement between interrogator and respondent over the meaning of the question and the danger that the nature of that disagreement may be hidden by the use of the same general term in the answer.

Chairman Rodino's question also made reference to "documents related to the advice OLC furnished" with respect to three topics. While the term "advice" may appear on the surface to be clear enough, it takes on a range of possible meanings when applied to an office such as OLC, which is in the business of giving legal advice to various governmental entities. Does it refer only to the kind of formal, written advice which is issued by OLC as binding within the Executive Branch on questions of the powers, duties and interrelations of different bodies? Or does it encompass any informal cautionary or tactical advice which may be offered within or without the Department by the head of the office or members of its staff?

(ii.) The Answer

Mr. Olson's answer to the Chairman's question was by far the most troubling aspect of his testimony. It is indisputable that there was no attempt by the Department "to provide everything that we have that pertains to the advice that we have given." While we heard claims from certain witnesses that congressional requests for documents are frequently answered in the first instance by providing only publicly available data, no witness

claimed that the Department had evaluated all responsive material and attempted to deliver "everything [the Department had] that pertain[ed] to the advice . . . given." To the contrary, all available evidence shows that no decision had been reached at the Department concerning the types of nonpublic documents that would be made available to the Committee and that there was considerable reluctance at the Department to supply some of that material. Olson was specifically directed the previous day by the Department's highest officials not to commit himself -- one way or the other -- about what the Department would or would not produce. To describe the Department's conduct to that point as an attempt "to provide everything" was disingenuous and misleading, especially in light of the references to "scraps of paper" and "copies of cases," which suggested that the remaining material was of limited significance.

On the other hand, it was evident both from the totality of Mr. Olson's immediate response to the Chairman's question and from the remainder of his testimony -- as well as Mr. McConnell's letter of March 8 -- that the Committee had not received all the documents sought by the February 24 and March 2 letters. The quoted question and Mr. Olson's answer must both be read in the context of the prior exchange of correspondence between the Chairman and the Department and of the totality of Mr. Olson's testimony before the Subcommittee. See, e.g., Van Liew v. United States, 321 F.2d 674, 678 (5th Cir. 1963); Fotie v. United States, 137 F.2d 831, 842 (8th Cir. 1943). Indeed, it was agreed

during the hearing that the Committee staff and responsible Department officials would negotiate further about the scope of document production.465/

Thus, while the first sentence of the answer is troubling for the reasons outlined above, Olson qualified his initial statement by saying, "I am not sure that we have included everything." No doubt this statement was, under Bronston, literally true, though a more candid statement would have been, "I am sure we have not included everything." Nevertheless, this caveat goes some distance toward remedying Olson's initial misstatement. Again, his reference to "scraps of paper probably everywhere" provided some notice that there were many documents that had not been produced, although characterizing the volume of unproduced material as "scraps" -- which Olson did repeatedly -- was less than forthcoming.

Olson told us that he was trying to convey to the Committee that the documents produced prior to his testimony were simply the beginning of the production process and that no one could "assume" from the transmittal letters that they were receiving everything.466/ There undoubtedly were more direct, effective means of accomplishing that end; however, no one has -- or reasonably could have -- alleged that the Committee thought it had full production as a result of Olson's testimony. Indeed, the Committee continued to pursue document production issues through other channels with the Department. Accordingly, we have

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465/ OIC doc. # 801405, at 70, 112-14.

466/ Olson, Aug. 17, 1988, memo at 8-9.

concluded that the assertion that the Department had tried to produce everything relevant to its advice did not constitute a prosecutable misstatement.

There is, however, a second respect in which Mr. Olson's answer to Chairman Rodino's initial question was arguably false. It omitted reference to his October 25, 1982, memorandum to the President containing the original recommendation to assert executive privilege. That memorandum was the definitive document "that pertain[ed] to the advice" the Department gave with respect to executive privilege. No new memorandum was prepared for the President in connection with the November 30, 1982, recommendation. Failure either to produce that memorandum before March 10, or to disclose its existence in response to Chairman Rodino's question, gave us great concern.

Analysis of the impact of this omission involves reference to Mr. Olson's editorial changes to the transcript. Olson made two substantive changes to his answer during the editing process. He modified his answer to encompass only "finalized" documents, and he changed his reference to advice to encompass only "formal" advice.

The addition of the word "finalized" materially limited the response to exclude most documents about which the Department might be expected to have been concerned -- internal deliberative notes and drafts. Olson told us that he believed he added the

term for precision, and he defined it to encompass all documents as to which the deliberative process had been completed and an official's name appeared at the bottom.467/

"Formal" in common parlance may seem to mean the same thing as Olson's definition of "finalized." In OLC parlance, however, it was said by him to mean more. According to Olson, that office's "formal" legal opinions have a certain format which includes the signature of the OLC head or the Deputy Attorney General.468/ By that definition, any intra-departmental documents not containing "formal" OLC advice would be excluded from Olson's revised answer.

However, as he himself acknowledged,469/ neither addition to Olson's testimony would exclude the October 25 memorandum from the compass of the question.

Olson, moreover, had a substantial apparent motive to conceal that document in March 1983. His memorandum contained at least two statements called into question by subsequent events. First, Olson advised the President that the documents subject to the executive privilege claim Olson was recommending contained no "evidence of unlawful conduct by a government agency or government officials," and it strongly implied that the documents did "not reflect misconduct of any sort by any administration

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467/ Olson, Aug. 17, 1988, memo at 9.

468/ Id. at 9-10. Malson recalled that several months after Olson's testimony she, Simms and Peterson discussed "abstractly" if advice is advice before it is encompassed in a formal opinion. Peterson thought not. Malson, Feb. 29, 1988, memo at 16.

469/ Olson, Aug. 17, 1988, memo at 10.

officials." Second, he stated that the Administrator of EPA concurred in the recommendation that executive privilege be asserted. While it is impossible to prove that Olson knew either statement was false on October 25, 1982 -- indeed, we find to the contrary -- both had been substantially undermined by March 10, 1983.

On the "misconduct" question, a number of the documents covered by Olson's October 25 recommendation had been produced to the requesting Subcommittees in the interim because they contained evidence of possible political manipulation of Superfund enforcement actions. Rita Lavelle, who had exercised supervisory authority over the Superfund program, had been fired from her position, and a criminal investigation of her activities was underway at the Department.

And on the concurrence issue, the Administrator had been widely quoted in the press during the weeks that preceded Olson's testimony as saying she disagreed with the assertion of executive privilege over the Superfund documents. Indeed, Olson's answer to Congressman Seiberling's question demonstrated that he had "read the newspapers . . . in the last week or two" and that "that sentiment [that EPA wanted to turn over the documents] seemed to be being expressed."

Obviously, Olson had reason to attempt to conceal the October 25 memorandum from congressional -- or other public -- scrutiny. He had -- albeit innocently -- misled the President about a privilege claim that had proved embarrassing to the administration.

Olson's response to the charge that he concealed the memorandum by his answer to Rodino's question was simple. He said he forgot about it.[470/] As unappealing as this explanation may appear in the harsh glare and isolation of issues that the matter received in retrospect, we have been unable to develop evidence to support a contrary conclusion, and we are somewhat sympathetic to the defense of his position Olson presented on August 17, 1988.

Olson told us he was less than comfortable at having to testify without a decision on what position the Department would take on document production. He knew the session would be difficult, focusing in this regard particularly on the press reports of the previous weeks concerning Ms. Burford's disagreement with the executive privilege claim. He told us that he feared that equivocation or ambiguity in his answers on document production would anger the Committee further, and he would have preferred that the Department arrive at a conclusion on production and allow him to articulate it.[471/] Olson believed that he may have urged the latter approach within the Department, but that the Attorney General, guided by his Deputy Schmults, decided on the non-committal approach.[472/] In this context, Olson discounted the importance of his October 25 memo on the grounds (a) that it was hurriedly prepared, (b) that it was never reviewed by the Attorney General, and (c) that it was never

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470/ Olson, Aug. 17, 1988, memo at 8, 10.

471/ Id. at 6.

472/ Id.

actually implemented and was overtaken by the subsequent claim authorized on November 30.473/ Moreover, Olson did not recall being told at the time that the President signed the directive that accompanied his October 25 memo.474/

While the issue is not entirely clear, Olson's asserted failure to recall the memorandum on March 10 takes on credibility in light of the memorandum's swift disappearance from the process and his understandable discomfort with -- and hence intense focus on -- the large outlines of the Department's position on document production. It is also bolstered by the fact that the October 25 memorandum was produced to the Committee in the first round of document production. We therefore conclude that there is not sufficient evidence that Mr. Olson knew that his answer might be false on this ground.475/

473/ Id. at 13. Olson's minimization of the importance of the October 25 memorandum received inferential support from Attorney General Smith, who told us (a) that he was out of the country when it was prepared and sent to the President and had no recollection of being contacted about it at the time, and (b) that the memorandum was not used or discussed in connection with the November 30, 1982, executive privilege claim. Smith, Jul. 21, 1988, memo at 3-4, 23.

474/ Olson, Aug. 17, 1988, memo at 14.

475/ The Committee was also greatly concerned by Olson's failure in his answer to disclose the four memoranda he wrote to the Civil Division concerning the lawsuit against the House. Again, Olson said he did not have these memos in mind when he testified on March 10, id. at 8, but he took the position that they were excluded by his edited answers, id. at 10. These memoranda, even if deemed "final," were clearly not "formal" advice, as Olson used that term. They dealt with matters technically outside OLC's purview and were not binding upon anyone. They were an informal expression of Olson's views on the pending litigation. As such they were excluded from the scope of the question by the terms of Olson's answer, as amended. See Olson, Aug. 17, 1988, memo at 10-11.

d. Written Advice To The Civil Division

During his testimony, Olson was asked the following questions and gave the following answers:

> Mr. Seiberling: All right. Now, what advice did your office provide with respect to the civil action by the Administration against the House of Representatives? Did you advise that that civil action be initiated?
>
> Mr. Olson: I agreed with the decision to initiate a civil action. I gave a great deal of advice--As I say, it's very difficult to separate it out on a line-by-line basis. But we consulted with the people that were involved in the filing of that litigation and the points and authorities that were filed in connection with motions involved in the litigation.
>
> Mr. Seiberling: Was that advice in writing?
>
> Mr. Olson: I'm not sure[.] ,I believe that some of it was.476/

Between December 20, 1982, and January 7, 1983, OLC sent four memoranda, signed by Olson, to the Civil Division concerning the lawsuit. All four memoranda discussed the conduct of various aspects of the case.477/

In December 1984 Olson told the Committee staff that "at the time he answered the question, he was not sure if OLC had provided advice to the Criminal [sic] Division in writing."478/ Olson stated that "he did not remember the memoranda at the time

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476/ OIC doc. # 801405, at 98.

477/ Four Olson memos to the Civil Division, reprinted in HJC Rept. at 1444-5, 1537-8, 1547-56, 1573-5.

478/ HJC Rept. at 619.

of the hearing",[479] and later wrote to the staff:

> Understandably, I would hope, my powers of recall during the hearing were not perfect. For example, as we discussed, I did not recall one way or the other whether I had provided written or just oral advice to the Civil Division of the Department about the litigation over the privilege issue.[480]

In interviews with the FBI during Public Integrity's preliminary inquiry and with us, Olson gave substantially the same explanation.[481]

We conclude that Olson's statement in the revised transcript that he believed some of OLC's advice to the Civil Division was in writing was literally true.[482] Reasonably interpreted, Congressman Seiberling's question was simply whether OLC put its advice to the Civil Division in writing. Olson's corrected

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[479] Id.

[480] HJC Rept. at 2631.

[481] Olson, Mar. 18, 1986, memo at 12; Olson, Aug. 17, 1988, memo at 10-11. Olson told us during his August 17, 1988, interview, that he could not recall whether his insertion of the word "formal" in his initial response to Chairman Rodino was intended to exclude the four memoranda to the Civil Division. Id. at 11.

[482] The Committee noted that there was circumstantial evidence suggesting that Olson's uncorrected testimony "was not an accurate rendition of his state of mind at the time of the hearing." HJC Rept. at 618. The last memo was dated just two months before Olson's testimony; Olson himself wrote at least one of the four memos; Olson was involved in the civil litigation; and Olson recalled other events without difficulty. But none of this circumstantial evidence, we think, rises to the required level of proof beyond a reasonable doubt that Olson actually recalled the memoranda when he testified. And Malson told us that Olson talked "ad nauseam" to McGrath about issues in the lawsuit and that the four memos in question here were a mere "drop in the bucket" compared to the total number of communications between Olson and McGrath entailing advice or opinion. Malson, Feb. 29, 1988, memo at 12. Thus we conclude that even Olson's uncorrected answer was not demonstrably false beyond a reasonable doubt.

testimony responded, albeit with some qualification,[483] in the affirmative, and this corrected testimony comported with the facts. There is therefore no basis for a prosecution for a false statement with regard to this aspect of Olson's testimony.[484]

e. Options Papers

During Olson's testimony, the following colloquy occurred between him and Congressman Hughes.

> Mr. Hughes: Let me be more specific so you can answer it perhaps.
> With regard to some of the documents you turned over bearing on executive privilege, there obviously were alternatives, discussions reduced to writing on the various options. Now, have they been turned over as well as the document that represents the final recommendation or decision?
>
> Mr. Olson: We did not prepare option papers, if that's what your question is. Every draft, in a sense, presents options,

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[483] We are puzzled by Olson's qualification in his editing correction: "I'm not sure. I believe some of it was." OIC doc. # 801405, at 98 (emphasis added). By the time he made his correction, Olson was in a position to check Department files and obtain definitive information if he had not by then been reminded of or remembered the four memoranda. But under Bronston, it was the Subcommittee's responsibility to pursue the issue, perhaps by recalling him or requesting written clarification. See 409 U.S. at 360. Moreover, even if the correction was intentionally misleading, it would not be prosecutable under Bronston. 409 U.S. at 359.

[484] It is important also to note that the four memoranda were made available to the Committee staff by the Department shortly after Olson testified. While this would not, as a technical matter, affect the falsity of the testimony, it does in our view bear on the question of intent. It seems highly unlikely that Olson would lie to protect the four memoranda and then acquiesce quietly in their production a few weeks later.

> every discussion presents options. That's why I have difficulty with the basic question[s].
>
> But I don't know of any option papers or anything of that nature.[485]

At no time during the interbranch controversy over the Superfund documents did OLC produce any options papers.[486] In January 1983, however, the Department formed a working group composed of representatives from its components which were involved in the matter. In February, that group drafted a number of options papers dealing with various avenues open to the Department in the wake of the dismissal of the lawsuit against the House. Olson was not a member of the working group[487] but at least one of its options papers included Olson's name on its routing list.[488]

Olson told the Committee that he had understood Congressman Hughes' question to refer to options papers regarding OLC's legal advice on executive privilege because it had been preceded by several other questions concerning that advice.[489] That was, in fact, the precise focus of Congressman Hughes' question. The options papers about which he inquired were those "with regard to

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485/ OIC doc. # 801405, at 106.

486/ We understand "options papers" to mean documents prepared for discussion purposes and listing alternative courses of action with regard to an issue. No one has suggested that there is any confusion over the term.

487/ Larry Simms, Olson's deputy, was OLC's representative to the working group.

488/ See p. 92, supra.

489/ HJC Rept. at 635.

. . . documents . . . bearing on executive privilege." There were no such option papers, and Olson's answer was thus entirely truthful and not in any respect misleading.

D. ANALYSIS OF ISSUES UNDER 18 U.S.C. § 1505

The question remains whether Mr. Olson might be subject to prosecution for his testimony under 18 U.S.C. § 1505, even if the testimony survived the Bronston test for falsity.490/

1. The Law

18 U.S.C. § 1505 provides in relevant part:

> Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress --
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> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

There is no doubt that the rendering of false or evasive testimony is punishable under § 1505. This is true whether the testimony is oral, United States v. Alo, 439 F.2d 751, 754 (2d Cir.), cert. denied, 404 U.S. 850 (1971), or contained in

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490/ The Bronston literal truth defense is not available to a defendant in a prosecution under 18 U.S.C. § 1505 for false or evasive testimony. United States v. Browning, 630 F.2d 694, 699-700 (10th Cir. 1980), cert. denied, 451 U.S. 988 (1981).

submitted false documents, United States v. Lavelle, 751 F.2d 1266, 1270 n.3 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985); United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976).

The courts have perceived, however, a difference between the gravamen of the perjury-false statement crimes punished by §§ 1001, 1621 and 1623, on the one hand, and that of the obstruction offenses punished by §§ 1503 and 1505, on the other. See, e.g., United States v. Langella, 776 F.2d 1078, 1081-82 (2d Cir. 1985). For example, in rejecting an argument that prosecution under § 1505 undermined the traditional "two-witness rule" for perjury, the Second Circuit stated:

> It is true, that to convict [the defendant] the jury had to conclude that he was lying when he professed loss of memory, but the gist of his offense was not the falsehood of his statements, but the deliberate concealment of his knowledge. . . . [His] profession of forgetfulness was not so much false testimony as a refusal to testify at all.

United States v. Alo, 439 F.2d at 754. The courts have thus said that obstruction as defined in §§ 1503 and 1505 encompasses both false testimony and testimony which is merely evasive but is given for the purpose of concealing the witness's actual knowledge. See United States v. Langella, 776 F.2d at 1081; United States v. Perkins, 748 F.2d 1519, 1527-28 (11th Cir. 1984); United States v. Griffin, 589 F.2d 200, 204 (5th Cir.) cert. denied, 444 U.S. 825 (1979); United States v. Cohn, 452 F.2d 881, 884 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972);

United States v. Caron, 551 F. Supp. 662, 667 n.6 (E.D. Va. 1982), aff'd mem., 722 F.2d 739 (4th Cir. 1983), cert. denied, 465 U.S. 1103 (1984).

The courts have, however, recognized the awkward fit between these two groups of statutes. The elements of perjury can become meaningless if the obstruction statutes punish testimony which is not demonstrably false but merely evasive. Accordingly, the courts have required -- in obstruction cases predicated upon testimony, whether false or evasive -- a showing that the proceeding was actually obstructed, as opposed to a mere "endeavor" to obstruct. See Perkins, 748 F.2d at 1528; Griffin, 589 F.2d at 205; Caron, 551 F. Supp. at 668-69.491/

In addition, § 1505 requires proof beyond a reasonable doubt that Mr. Olson had the requisite criminal intent to obstruct the Committee's inquiry. "Under § 1503 and § 1505 the word 'corruptly' has been given a broad and all-inclusive meaning: both sections have been held to encompass obstruction in the absence of force or threats." United States v. Browning, 630 F.2d at 701 (citation omitted). "Corruptly" has been held to

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491/ Actually, the historical basis for this additional requirement was that § 1503 was originally a contempt statute, and it had been held by the Supreme Court that contempt cannot be invoked to avoid proof of all the elements of perjury or to deny someone properly accused of perjury his right to jury trial. See In re Michael, 326 U.S. 224 (1945); Griffin, 589 F.2d at 205. Perkins, Griffin and Caron, cited in text, are cases involving § 1503. Alo, a § 1505 case, did not discuss whether the statute required that the obstruction be successful, though the opinion seems to assume actual obstruction occurred in that case. 439 F.2d at 753-54. We view the three cases in the text -- each of which was subsequent to Alo -- to have established success as a requirement for § 1505 as well as § 1503, there being no reason to distinguish between the two statutes on this issue.

require intent to frustrate the investigation, United States v. Alo, 439 F.2d at 753. Another court has said that "corruptly" requires proof of an "improper motive, a bad and evil purpose." United States v. Abrams, 427 F.2d at 90. Consequently, obstruction of a congressional inquiry under § 1505 is a specific intent crime requiring the government to prove that Mr. Olson knowingly did an act which the law forbids or knowingly failed to do an act which the law requires, purposely intending to violate the law. United States v. Haldeman, 559 F.2d 31, 114 n. 226 (D.C. Cir. 1976).

2. Mr. Olson's Testimony

Based on our analysis of the questions and answers, we are of the view that the testimony, while not overly helpful, was not, in most instances at least, designed to conceal Mr. Olson's actual knowledge on critical points. In any event, it clearly cannot be said in our view that the testimony actually obstructed the Committee's inquiry.492/

The most troubling of Mr. Olson's answers in this regard was his response to Chairman Rodino's initial inquiry about the completeness of the Department's document production to the Judiciary Committee. As noted above, we found that answer disingenuous and misleading, even accepting Mr. Olson's

492/ Actual obstruction would not have to be shown, of course, in a prosecution for obstruction based on acts other than Mr. Olson's testimony. But there is little if any evidence that Mr. Olson was involved significantly in the dealings between the Department and the Committee after his testimony.

explanation that he forgot about his October 25 memorandum to the President. The impression conveyed by Olson's claim that the Department tried to provide a complete response to the Committee's request, save for "scraps of paper" and "copies of cases," was woefully inaccurate, as later events proved.

In Mr. Olson's defense, it can be said that he was acting under frustrating constraints imposed by his superiors at the Department. He was under orders from the Attorney General and the Deputy Attorney General to avoid making any commitments with respect to the production of any category of documents and to refrain from disclosing his draft memoranda on the constitutionality of the congressional contempt statute. And he evidently felt unable to disclose the nature of his marching orders to the Committee, though it is not clear whether he was ordered not to or decided on his own that a candid statement of the Department's position on document production would be badly received by the Committee.

The fact that Mr. Olson was acting under the orders of his superiors would not, in our view, negate the existence of the "corrupt" intent required by the statute.493/ But we need not resolve that question, since it is clear that the Committee's inquiry was not obstructed by Mr. Olson's answer to the Chairman's document production question. It was obvious from this answer and others that the Committee did not have all the documents, even if the use of phrases such as "scraps of paper"

493/ Olson told us he never intended to mislead the Committee, albeit, he said, looking back he might have done things differently. Olson, Aug. 17, 1988, memo at 31.

unfairly minimized the nature and quantity of the withheld material. Mr. Olson agreed that discussions at the staff level about further document production should take place. And the Attorney General, appearing before the full Committee only five days later, promised full cooperation on the document question. As Committee General Counsel Parker acknowledged, Mr. Olson's testimony on this issue was of no importance after the commitment made by Attorney General Smith. And, of course, much-expanded document production in fact ensued, in the course of which both the October 25 memorandum to the President and the four OLC memoranda to the Civil Division were promptly disclosed.

Our conclusion that Mr. Olson's answer resulted in no actual obstruction of the Committee's inquiry might well be different if we were of the view that the answer was designed to conceal the handwritten notes which were later withheld from the Department's production. The withholding of those notes without notice to the Committee at least arguably did obstruct the Committee's inquiry. At a minimum, it delayed a satisfactory resolution of that inquiry for well over a year.

It seems clear, however, that Mr. Olson's testimony was not given for the purpose of concealing those documents. There is no evidence that the decision to withhold the handwritten notes was made before Mr. Olson testified; indeed, the evidence seems to show that that decision was not made until later.494/ And even if Mr. Schmults had already decided to withhold the notes and that decision formed the basis of his instruction to Mr. Olson to

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494/ See pp. 117-25, supra.

make no commitments on document production, Mr. Olson is simply not chargeable with intentionally concealing the existence of such documents. He volunteered in response to the Chairman's question that he had not produced his own handwritten notes.

Thus we are unable to conclude that Mr. Olson's response to the Chairman's initial question obstructed the Judiciary Committee's inquiry.

The case is even weaker with respect to the remainder of Mr. Olson's testimony about document production by the Department. He did not deny that OLC had provided written advice to the Civil Division with respect to the suit against the House; indeed, Congressman Seiberling, after hearing Mr. Olson's answer to his question, requested that if there were any written advice, the Department provide it to the Committee.[495/] While Mr. Olson made no commitment on the spot,[496/] the four memoranda were provided shortly thereafter. And, as we have noted earlier, there was nothing even arguably false, misleading or evasive about Mr. Olson's answer to Congressman Hughes' question about option papers.

On the question of EPA willingness, we have concluded above that Mr. Olson's answer to Mr. Seiberling's question, while not volunteering a lot of information, was truthful and not misleading. We thus do not believe it could be shown to be evasive within the meaning of the cases construing § 1505, or that Mr. Olson possessed any "corrupt" intent in answering as he

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495/ OIC doc. # 801405, at 98.

496/ Id. at 99.

did. And the answer certainly did not obstruct the Committee's inquiry. It neither concealed any potential sources of contrary information nor prevented the Committee from turning to the obvious additional witnesses on the question of willingness at EPA, the Department and the White House.

Thus we conclude that no prosecution of Mr. Olson under § 1505 can be justified.

E. CONSPIRACY

It remains to consider whether Mr. Olson was part of a conspiracy involving senior Department of Justice officials to obstruct the Judiciary Committee's inquiry into the Department's role in the EPA documents controversy. The question of conspiracy arises naturally from the unhappy course of the Department's dealings with the Committee from the outset of the inquiry. The letters of March 8 and 9 to Chairman Rodino over Mr. McConnell's signature plainly sought to fend off the Committee's searching document request. Mr. Olson's testimony on the subject of document production shed no additional light on the subject. Moreover, while the Attorney General apparently promised unfettered access to the Department's documents, and Alan Parker was assured that the Committee would see everything, decisions were made to withhold the handwritten notes which held the key to understanding the Department's course of conduct in the EPA dispute and a draft chronology of the dispute prepared in the Lands Division, which might well have saved the Committee

time and effort and helped to focus its inquiry. A further decision was made not to disclose the existence and withholding of the notes and chronology, thus pretermitting any effort by the Committee to gain access to those documents. The concealment of the notes and the chronology arguably obstructed, and certainly substantially delayed, the successful completion of the Committee's inquiry. And there were enough people involved in this course of conduct to give rise to the question whether they acted in concert to obstruct the Committee's inquiry.

For this reason, among others, we sought referral of related matters which would have permitted us, inter alia, to attempt to resolve the conspiracy question. Attorney General Meese refused our request for those referrals and opposed it when we subsequently presented it to the Special Division. The Division ruled that the Attorney General's refusal was not subject to review and thus denied our request, but held that the original grant of jurisdiction was broad enough to permit us to investigate whether Mr. Olson participated in a conspiracy to obstruct the Committee's inquiry. We have undertaken that more limited inquiry and have concluded that there is no evidence that he took part in such a conspiracy.

1. The Law

The federal conspiracy statute, 18 U.S.C. § 371, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

> purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The essence of the offense of conspiracy is an agreement between two or more persons to commit an offense, accompanied by an overt act by one or more of the conspirators to effect the object of the conspiracy. United States v. Falcone, 311 U.S. 205, 210 (1940). The courts have also required a showing of specific intent both to enter the agreement and to commit the substantive offense. E.g., United States v. Drougas, 748 F.2d 8, 15 (1st Cir. 1984); United States v. Haldeman, 559 F.2d 31, 112 n. 223 (D.C. Cir. 1976). Thus there are three essential elements to the crime, each of which must be proved beyond a reasonable doubt: (1) the agreement, (2) the overt act in furtherance of its object, and (3) specific intent.

While the agreement must be proved beyond a reasonable doubt, it need not be a formal affair whose details are specifically worked out among the conspirators. Indeed, it need not even be explicit. A tacit agreement will suffice if the conspirators knew of and intended to achieve the illegal object. Direct Sales Co. v. United States, 319 U.S. 703, 709-14 (1943). Moreover, it is not essential that each conspirator specifically agree with, or even be aware of, each other conspirator or know the part to be played by each. Blumenthal v. United States, 332 U.S. 539, 557-59 (1947). A single agreement may encompass two or more illegal objects. Braverman v. United States, 317 U.S. 49, 54 (1942).

In the present context, it would have to be proved beyond a reasonable doubt that Mr. Olson entered into an agreement with one or more other persons with the intent either to make false statements to the Committee in violation of 18 U.S.C. § 1001 or to obstruct the Committee's inquiry in violation of 18 U.S.C. § 1505, or both, and that one of the persons committed an overt act in furtherance of the agreement's aims.497/ The giving of testimony which was deliberately evasive, though not actually false, could constitute an overt act in furtherance of a conspiracy to violate § 1505. Cf. United States v. Langella, 776 F.2d 1078, 1081 (2d Cir.), cert. denied, 475 U.S. 1019 (1985); United States v. Perkins, 748 F.2d 1519, 1527-28 (11th Cir. 1984). Unlike the offense of obstruction, it is not necessary to a conspiracy charge that the Committee have actually been misled by Olson's testimony, or, for that matter, that the object of the conspiracy have been achieved. United States v. Bayer, 331 U.S. 532 (1947).

2. The Evidence

The focal point of any inquiry into the existence of a conspiracy to obstruct the Committee's inquiry must be the undisclosed withholding of the handwritten notes and the chronology. The withheld materials were plainly within the

497/ Courts have sustained conspiracy charges where the objects were the making of false statements under § 1001, e.g., United States v. Richmond, 700 F.2d 1183 (8th Cir. 1983), and obstruction of justice, e.g., United States v. Minkoff, 137 F.2d 402 (2d Cir. 1943) (prosecuted under former 18 U.S.C. § 241, the predecessor statute to the current 18 U.S.C. §§ 1503, 1505).

compass of Chairman Rodino's document request, and they contained information critical to any assessment of the Department's role in the EPA documents controversy. Regardless whether their withholding could be justified on some ground, such as the attorney-client privilege, the work-product doctrine or some deliberative process privilege, there could not be in our view any justification for the failure to inform the Committee of the existence of the withheld documents. Only if fair disclosure is made of claims of privilege can the party seeking information be in a position to challenge the legal validity of the decision to withhold.

We have found no evidence, however, that Mr. Olson took part in any concerted effort to conceal the notes and chronology from the Committee. To the contrary, while Mr. Olson plainly supported the decision to withhold these materials, he also appears to have advocated immediate disclosure to the Committee of their existence. He told us that he believed Mr. Schmults had told the Committee staff of the withholding of the notes, an impression which he shared with virtually all other senior Department officials. His behavior was also inconsistent in other respects with the notion that he was part of a conspiracy to obstruct the Committee's inquiry by secretly withholding documents. As noted above, he more than once volunteered references in his March 10 testimony to handwritten notes of his own which had not been produced. And the documents which he arguably had a personal motive to conceal -- the October 25 memorandum and the four memoranda to the Civil Division -- were produced to the Committee

by OLC in the first round of the post-March 10 document review. Finally, Mr. Olson's participation in the Department's activities vis-a-vis the Committee was extremely limited after March 10. He did attend one meeting with Alan Parker to discuss document production in April 1983. Parker described him in that meeting as an open advocate of limited disclosure to the Committee.[498/] After that Mr. Olson largely faded from the scene of the Committee's inquiry.

We thus conclude that there is no evidence that Mr. Olson was part of a conspiracy to obstruct the Committee's inquiry.

F. THE PERRY TESTIMONY

1. The Referral Under § 594(e)

As EPA's general counsel, chief enforcement officer, and principal liaison with the Department during the executive privilege controversy, Perry was at a minimum a significant potential witness in our investigation of Olson. Perry, however, was already under investigation by the Department for possible perjury during his December 1982 testimony before the Dingell Subcommittee. We asked the Department in June 1986 whether our planned contact with Perry would be harmful to its investigation. The Department advised us that it had investigated and closed all aspects of its investigation but one: whether Perry had

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498/ Parker, Sep. 9, 1986, memo at 4.

testified falsely before the Subcommittee concerning the conversations he had on October 7 and 8, 1982 with the Department and the Dingell Subcommittee staff.

Perry's testimony, particularly that concerning EPA's willingness to turn over the Superfund documents to Congress, was of interest to us because of its obvious overlap with issues raised by Olson's testimony on that same issue. We therefore believed it necessary to explore, from the unique perspective of this investigation, Perry's December 1982 testimony, with particular emphasis on any discussions which Perry, or his staff, may have had with Olson, or his staff, concerning EPA's willingness to turn over the Superfund documents to Congress. Perry's status as a potential defendant in the Department's investigation, however, complicated his status as a witness in this matter. Unification of dealings with Perry under one prosecutor would eliminate the obvious problems inherent in having related investigations conducted by different prosecutors. On November 14, 1986, therefore, we wrote to the Attorney General requesting, among other things, that he refer the Department's criminal investigation of Perry's testimony to us as a "related matter" to the Olson investigation, pursuant to 28 U.S.C. § 594(e). On December 17, 1986, the Attorney General made the requested referral.

2. The Law

a. Elements Of Perjury Under 18 U.S.C. § 1621

The federal perjury statute applicable in the circumstances under which Perry testified before the Dingell Subcommittee, 18 U.S.C. § 1621,[499] provides, in pertinent part:

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

In United States v. Debrow, 346 U.S. 374, 376 (1953), the Supreme Court set out the elements of the crime of perjury under § 1621.

> The essential elements of the crime of perjury as defined in 18 U.S.C.A. § 1621 are: (1) an oath authorized by a law of the U.S., (2) taken before

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499/ There is another federal perjury statute: 18 U.S.C. § 1623. While its "substantive elements . . . are the same" as those of § 1621, United States v. Kahn, 472 F.2d 272, 283 (2d Cir.), cert. denied, 411 U.S. 982 (1973), § 1623 applies only to testimony taken in, or ancillary to, court or grand jury proceedings. There is no corroboration requirement in prosecutions for perjury brought under § 1623. United States v. Diggs, 560 F.2d 266, 269 (7th Cir.), cert. denied, 434 U.S. 925 (1977); United States v. Patrick, 542 F.2d 381, 384 n.3 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

> a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing.500/

Under § 1621, perjury occurs when a person lawfully under oath before a competent tribunal "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true." United States v. Lattimore, 127 F. Supp. 405, 408 (D.D.C. 1955), aff'd, 232 F.2d 334 (1955). Since there is no question as to either the competency of the Dingell

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500/ In order to obtain a conviction, we would be required to prove each of these elements beyond a reasonable doubt. See Curley v. United States, 160 F.2d 229 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947).

Some corroboration would also be required under the so-called "two witness" rule which, despite its misleading sobriquet, actually requires the testimony of only one witness, plus corroboration.

> In proving the crime of perjury [under § 1621], the uncorroborated testimony of a single witness is not sufficient to establish the falsity of the statement of a defendant under oath.

United States v. Haldeman, 559 F.2d 31, 97 n. 185 (D.C. Cir. 1976), citing Hammer v. United States, 271 U.S. 620, 626 (1926); see Weiler v. United States, 323 U.S. 606, 609 (1945). But there is no requirement that a second witness actually testify to the falsity of a defendant's statement. Weiler, 323 U.S. at 610; see also United States v. Weiner, 479 F.2d 923, 926 (2d Cir. 1973); Young v. United States, 212 F.2d 236, 241 (D.C. Cir. 1954). The testimony of a single witness is sufficient to establish falsity provided that there is independent evidence to corroborate it. See United States v. Haldeman, 559 F.2d at 97 n. 185. "'Independent' evidence in this context means evidence coming from a source other than that of the direct testimony." United States v. Diggs, 560 F.2d at 270 (citations omitted). The independent corroborating evidence may take any form, such as admissions by the defendant or documentary evidence. There is no specific quantum of corroboration required, but it may not consist of a single witness' affirmation of his own testimony. United States v. Haldeman, 559 F.2d at 98. As always, the credibility of the corroboration is a jury matter. Weiler v. United States, 323 U.S. at 610.

Subcommittee[501/] or its authority to administer oaths,[502/] we discuss only the elements of falsity, willfulness, and materiality.

b. False Testimony And Willfulness

False testimony is, of course, essential to proof of perjury under § 1621.[503/] But it is not enough that the testimony in question be objectively at odds with the facts. The crime of perjury also has a "subjective" element in that the defendant must also believe, when he gives it, that his testimony is

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501/ Conviction under § 1621 requires an oath taken "before a competent tribunal." A congressional committee or subcommittee is competent within the meaning of § 1621 if it is (1) duly constituted and (2) engaged in a legislative function. See United States v. Reinecke, 524 F.2d 435, 437, (D.C. Cir. 1975); Young v. United States, 212 F.2d at 239-40; United States v. Icardi, 140 F. Supp. 383, 388, (D.D.C. 1956). For purposes of § 1621, a congressional committee is duly constituted if a quorum is present, United States v. Reinecke, 524 F.2d at 437, citing Christoffel v. United States, 338 U.S. 84 (1949), and it is performing a proper legislative function. See United States v. Cross, 170 F. Supp. 303, 305 (D.D.C. 1956). All congressional committees are legally presumed to be both duly constituted and engaged in a proper legislative function. See United States v. Icardi, 140 F. Supp. at 386. When Perry testified, the Subcommittee was duly constituted, a quorum was present, and the Subcommittee was engaged in proper legislative fact-finding with regard to the Superfund law. The Subcommittee was therefore a "competent tribunal" within the meaning of § 1621.

502/ 2 U.S.C. § 191 authorizes chairmen of congressional committees to administer oaths at hearings.

503/ In Bronston v. United States, 409 U.S. 352 (1973), which we have already discussed at some length, see pp. 155-59, supra, the Supreme Court held that only factually inaccurate testimony, knowingly and wilfully given, will support a perjury conviction under § 1621. The section does not reach literally true answers, even if they are unresponsive or intentionally misleading. 409 U.S. at 359-60.

untrue. See United States v. Winter, 348 F.2d 204, 210 (2d Cir. 1965), cert. denied, 382 U.S. 955 (1965); United States v. Lattimore, 127 F. Supp. at 409.504/ Thus, even factually inaccurate testimony does not constitute perjury under § 1621, if the witness believed, when he gave it, that his testimony was true. See United States v. Haldeman, 559 F.2d at 102; United States v. Chapin, 515 F.2d at 1280.505/ Of course, whether or not the witness believed his testimony to be true, at the time he gave it, is a jury question. See Young v. United States, 212 F.2d at 241.506/

504/ The text of the statute refers to "any material matter which [the defendant] does not believe to be true."

505/ Among the circumstances which may give rise to factually inaccurate testimony, which the witness nonetheless believes to be true, are "surprise, confusion, inadvertence, honest mistake of facts, carelessness, or negligence." United States v. Haldeman, 559 F.2d at 102.

506/ Inferences from circumstantial evidence are properly drawn in a perjury case. United States v. Davis, 562 F.2d 681, 688 (D.C. Cir. 1977). As this Circuit has noted,

> perjury cases, like all criminal cases, are susceptible to proof by circumstantial evidence, and in fact are peculiarly likely to be proven in this manner because one of the elements of the crime is that the defendant knew his statement was false when he made it.

United States v. Chapin, 515 F.2d at 1280.

c. Materiality Under § 1621 In A Congressional Investigation

Even a knowingly and willfully made false statement cannot, however, constitute perjury under § 1621 unless it is also material. Id. at 240 n. 15. This Circuit has said that the test for materiality under § 1621 is

> whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made.

United States v. Moore, 613 F.2d 1029, 1038 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980), quoting Weinstock v. United States, 231 F.2d 699, 701-02 (D.C. Cir. 1956) (emphasis added).507/ Under this test, not every statement made before a congressional committee or subcommittee is necessarily material for purposes of a criminal prosecution under § 1621. Only those

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507/ In Weinstock, a case involving perjury before Congress, this Circuit noted that materiality and relevance are often confused and offered some guidance.

> 'Material' when used in respect to evidence is often confused with 'relevant', but the two terms have wholly different meanings. To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e. reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material.

Weinstock v. United States, 231 F.2d at 701.

which could influence a committee's or subcommittee's conclusion "on subjects which might be legitimately under investigation," Icardi v. United States, 140 F. Supp. at 389, are material.508/

Clearly, Congress has broad investigative authority in connection with its legislative function. Quinn v. United States, 349 U.S. 155, 160-61 (1955).

> There are, however, limitations upon the investigative power of the legislature which must be considered in any determination of materiality.

Icardi v. United States, 140 F. Supp. at 388. In general, Congress may seek only facts which "aid in legislation." Id. Its investigative power

> cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights . . . .

Quinn v. United States, 349 U.S. at 161. Thus congressional testimony is material within the meaning of § 1621 if it is given in response to questions which are legitimately part of the legislative fact-finding process and which do not otherwise exceed Congress' legislative fact-finding authority. But

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508/. Although as we noted earlier, congressional investigations are presumptively legitimate, "any presumption in a criminal case may be controverted by adequate evidence to the contrary." United States v. Cross, 170 F. Supp. at 306. And, of course, even if an investigation is in furtherance of a proper legislative function, every question asked during its course may not be.

> answers responsive to questions which are not asked for the purpose of eliciting facts in aid of legislation, even though pertinent, are not 'material' to the authorized investigation . . . .

United States v. Cross, 170 F. Supp. at 306 (emphasis in original). And, since such testimony is not material, it will not support a perjury indictment under § 1621. As this Circuit has held,

> [a] perjury indictment may not be found on false testimony in response to questions which are not asked for the purpose of eliciting facts material to the committee's investigation, that is, facts sought in aid of the legislative purpose.

Id. at 310.

3. Analysis Of Perry's Testimony

We turn now to an analysis of whether the facts and circumstances of Perry's December 1982 testimony before the Dingell Subcommittee warrant prosecution for perjury under § 1621 or for any other violation of federal criminal law.509/ We conclude that prosecution of Perry for any part of his December 1982 testimony before the Subcommittee is unwarranted because the

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509/ Section 1621 would be the appropriate vehicle for a prosecution of Perry based on his testimony before the Subcommittee, if the evidence warranted. We have considered the possibilities that Perry's testimony obstructed the investigation in violation of 18 U.S.C. § 1505 or that it was part of a conspiracy to do so in violation of 18 U.S.C. § 371, but have rejected both. There is no evidence that the testimony either obstructed the investigation in any significant way or was given in furtherance of some criminal agreement with others.

evidence is not sufficient to obtain and sustain a conviction. Since our reasoning is not identical with regard to each of Perry's three testimonial statements, we discuss them separately.

a. EPA Willingness To Turn Over The Documents

During his testimony, Perry stated repeatedly that he did not recall telling Barrett during their October 8, 1982 conversation that nothing in the subpoenaed documents warranted EPA's withholding them from the Subcommittee. The direct evidence that Perry did make such a statement to Barrett consists exclusively of Barrett's prospective testimony to that effect.510/ In addition, there is some corroborative evidence consisting of a contemporaneous letter signed by Chairman Dingell to Perry, Simms' prospective testimony that Perry had, at about the same time, made a similar statement to him, and Simms'

510/ Assuming that Perry said the words reported by Barrett, their real meaning is open to some interpretation in the context of the interbranch dispute over the Superfund documents. A number of EPA witnesses have told us that statements of EPA's willingness to turn over the documents reflected the view, prevalent at EPA at the time, that they could be safely turned over with adequate confidentiality safeguards, but did not mean that the documents could be turned over to Congress willy-nilly. Burford, Jul. 11, 1986, memo at 2; Aug. 24, 1988, memo at 4 and 11. Thus, Perry's alleged statement to Barrett may have been meant to convey nothing more than a willingness to reach a negotiated disposition of the issue.

Indeed, Perry said that this is precisely what he communicated to Barrett on more than one occasion. Perry, Nov. 20, 1986, memo at 8-9. While we have generally accorded Perry's account little weight, we note it in this context in light of the unanimous agreement among EPA witnesses that no one expressed a willingness to produce the documents unconditionally.

memorandum to that effect, made some two months later. The available corroborating evidence is, however, either probably inadmissible or of little probative value.

Chairman Dingell's contemporaneous letter to Perry is inadmissible as corroboration, since it consists plainly of hearsay repetition of Barrett's version of his conversation with Perry.511/ Simms' prospective testimony and memorandum -- since they bear on what Perry said to Simms, not to Barrett -- offer such weak and attenuated corroboration that they might not be admissible.512/ But even if Simms' testimony were admitted, a jury could reasonably conclude that Simms' testimony and memorandum about what Perry told him are insufficient as corroboration of what Perry told Barrett.

511/ We have considered the possibility that Barrett himself was the actual author of the Chairman's October 8 letter, but it would still be inadmissible in that case, since Barrett cannot provide corroboration for himself. See note 500, supra. Moreover, even if the letter were admissible, the unexplained omission from it of any reference to Perry's second conversation with Barrett on October 8, 1982 casts doubt on its reliability as a complete and accurate record of what transpired between Barrett and Perry on that day. In turn, Barrett's testimony itself would be impeachable through this unexplained omission in the otherwise purportedly accurate memorialization.

512/ The ultimate determination of the credibility of the corroborating evidence is "an exclusive function of the jury." United States v. Diggs, 560 F.2d at 270. But the

> corroboration must be by proof of independent and material facts and circumstances tending directly to corroborate the testimony of the witness for the prosecution, and must be of a strong character, and not merely corroboration in slight particulars.

Cook v. United States, 26 App. D.C. 427, 430 (1906) (emphasis added).

The case against Perry therefore comes down in all probability to Barrett's uncorroborated testimony which is not legally sufficient.513/

Moreover, Perry's alleged statement is of questionable materiality. The Dingell Subcommittee was holding legislative and oversight hearings on the Superfund law. Perry's testimony was therefore material only insofar as it provided the Subcommittee with information which could influence its decision on the need for amended or additional Superfund legislation.514/ How Perry's testimony -- about exactly what he said or did not say to Barrett -- could have done that is not apparent.

In his opening statement, Chairman Dingell said that the Subcommittee's inquiry had focused "on the administration and implementation of the Superfund Act," and cited Rules X and XI of the House of Representatives as jurisdictional authority.515/ Rule X gives the Committee 516/ jurisdiction over public health,

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513/ It is also worth noting that Kim Pearson was in Perry's office during both his conversations with Barrett on October 8 and overheard Perry's end of those conversations. Pearson corroborated Perry's denial that he told Barrett EPA saw no reason to withhold the documents. See note 97, supra.

514/ Materiality is not a jury question. United States v. Howard, 560 F.2d 281, 284 (7th Cir. 1981).

515/ Perry tr., p. 2. In assessing materiality within the context of a prosecution under § 1621 for perjury before Congress, some courts have looked to the resolution, pursuant to which a committee or subcommittee was proceeding, to define the scope and limits of its inquiry. See, e.g., United States v. Icardi, 140 F. Supp. at 385. In the absence of such a resolution in this case, we have turned to the Chairman's opening statement.

516/ We conclude that the Committee on Energy and Commerce validly delegated this function to the Subcommittee. See pp. 141-43, supra.

among other things, and charges the Committee with legislative and oversight responsibilities in those substantive areas within its jurisdiction. See Rule X, cl. 1(h), cl. 2(b), Rules of the House of Representatives, 98th Cong. Thus, the two questions properly before the Dingell Subcommittee were whether the Superfund legislation needed amendment and whether EPA was implementing it as Congress wished. Perry was asked whether he told Barrett that nobody at EPA saw good reason to withhold from the Subcommittee certain Superfund documents which might be relevant on those two questions. Perry answered that he could not recall.517/

Even assuming that his answer was false and that Perry could, when he testified, recall making such a statement, his testimony concerning the statement, as distinguished from the statement itself, is of questionable materiality. We may agree

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517/ In order to facilitate this analysis, we have proceeded as though Perry had simply denied making the statement to Barrett rather than testifying, as he did, that he could not recall making it. Perry's claim of failed recollection further complicates any prospective prosecution by raising the question of the reasonableness, under the circumstances, of his claim. See United States v. Letchos, 316 F.2d 481, 484 (7th Cir. 1963) (perjury statute provides safeguards for too-ready punishment for mere lapse of memory). Perry, who by then had already compiled a history of troubled interactions with the Subcommittee staff, Barrett, Sept. 17, 1986, memo at 6-8; Frandsen, Sept. 29, 1986, memo at 14, testified under circumstances which could quite easily have caused "surprise, confusion, inadvertence, honest mistake of facts, carelessness, or negligence," United States v. Haldeman, 559 F.2d at 102. The questioning was aggressive, repetitive, at times hostile, and took place in the supercharged atmosphere of the executive privilege claim and potential contempt proceedings against the Administrator. While the credibility of Perry's claimed failure of recollection is a jury matter, see, e.g., Sigman v. United States, 320 F.2d 176, 178 (9th Cir. 1963), cert. denied, 375 U.S. 967 (1964), a jury could conclude from the circumstances of his testimony that Perry's claimed failure of recollection was reasonable.

that EPA's attitude toward turning over the documents -- and hence Perry's October 8 statement to Barrett that EPA was willing to do so -- might well have been material at the time the statement was made to the legislative and oversight issues before the Subcommittee. But the same cannot be said, in our view, of Perry's testimony two months later about exactly what he said or did not say to Barrett on that particular occasion.

By the time Perry testified, intervening events had rendered whatever view he expressed on October 8 inoperative, and the resolution of Perry's dispute with Barrett over what was said on October 8 could not have affected the Subcommittee's exercise of its legislative or oversight function in December. Perry and Barrett talked relatively early in the process which led up to the President's decision to assert executive privilege. The Department, for instance, had just received the documents from EPA; no subpoenas had yet been issued; and it would appear that Perry had not placed the matter before the Administrator, despite the contrast between her history of open-handedness in dealing with congressional requests for information and the more conservative views recently expressed by the Department. Thus, Perry's October 8 statement to Barrett represented nothing more than Perry's preliminary thought expressed before the issues had been clearly framed and without the benefit of the Department's considered views or the Administrator's informed determination of

the agency position. As such its materiality as of December 3 is not readily apparent, and the materiality of testimony concerning whether such a statement was made is even more attenuated.518/

We therefore conclude that a prosecution of Perry for perjury in violation of § 1621 on the basis of his testimony is unwarranted.

518/ In United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956), the Court employed similar reasoning in concluding that certain testimony was not material under § 1621. There, the murder of an army officer in Italy had given rise to a congressional inquiry into "whether existing law adequately covered crimes against persons or property committed overseas by members of [U.S.] armed forces." Id. at 385. Icardi, suspected of the offense, appeared as a witness. He denied any knowledge of, or involvement in, the murder but was contradicted by other witnesses and later indicted for perjury under § 1621 on the basis of his denials. The Court found that Icardi's testimony was not material and granted a motion for judgment of acquittal.

> Whether Icardi denied or confessed guilt by his answers, his testimony could not have influenced the subcommittee's conclusion on subjects which might be legitimately under investigation, namely, whether existing law adequately covered the prosecution of crimes committed under the circumstances of the specific charge under investigation, and whether the Defense Department had functioned adequately in its investigation . . . . Therefore . . . the Court holds as a matter of law that the alleged false answers by Icardi were not material to the subcommittee's authorized investigation.

Id. at 389.

b. The Department's Alleged Request For All The Superfund Documents

On at least three occasions during his testimony, Perry denied that the Department had ever instructed him to send to the Department all of the requested Superfund documents without retaining copies at EPA. Perry also denied telling Barrett that the Department had so instructed him. We conclude that neither statement warrants prosecution.

(i.) Perry's Denial That The Department Ever Asked For All Of The Documents

Applying the Bronston standard we conclude that a prosecution of Perry under § 1621 based on his testimony concerning his conversations with the Department about a possible transfer of the documents is unwarranted because the testimony is literally true. Even if false, the testimony is, for the reasons already discussed, of questionable materiality in a prosecution under § 1621.

There is no evidence that anyone at the Department ever did instruct or ask Perry to send to the Department all of the Superfund documents, originals as well as copies.519/ Indeed,

519/ Of course, Perry may have misunderstood Simms to have made that request. But Perry's answer that he received no such instruction from the Department is, regardless of whatever misimpression he may have held for a few hours, nevertheless literally true and therefore not prosecutable under Bronston. What Perry believed Simms told him, as distinguished from what Simms actually said, was never brought out during Perry's testimony. But Bronston makes clear that the responsibility to do so rested with the Subcommittee and not with Perry.

all the evidence from Department witnesses is to the contrary. Simms was unequivocal that he never said anything like that to Perry. On the contrary, Simms told Perry that such action would be illegal, unethical, and futile. And in a conversation late on the afternoon of October 8, 1982, Olson assured Barrett that no one at the Department had counseled, or ever would counsel, Perry to do such a thing. Barrett apparently accepted those assurances when they were offered, but maintained that, irrespective of what the Department may have told Perry, Perry nevertheless told him that the Department had instructed Perry to send it all copies of the documents.

Given Simms' account, which we have no reason to question, Perry's testimony that the Department never ordered him to send it all the documents appears, at the very least, to be literally true. It is therefore not prosecutable under Bronston.

Moreover, Perry's testimony concerning his conversations with the Department about the documents is of questionable materiality for purposes of a prosecution under § 1621. As noted, Perry's testimony was material only insofar as it could have influenced the Subcommittee's determinations whether the Superfund legislation needed amendment and whether EPA was implementing the legislation as Congress intended.

But it is not at all apparent just how a precise understanding of Perry's conversations with the Department about a possible transfer of the documents, even if they did occur, could have influenced the Subcommittee's decisions on the Superfund legislative and oversight issues before it. Even if the

Department had initially instructed Perry to transfer all copies of the documents to the Department in order for EPA to avoid compliance with the subpoena, Perry's truthful testimony would have informed the Subcommittee only that, for a period of a few hours on October 8, 1982, the Department and EPA had considered an inappropriate way for EPA to avoid compliance with a subpoena for the Superfund documents, which was abandoned as soon as Subcommittee staff questioned it. That information cannot fairly be said, particularly under the standards which apply in a criminal prosecution, to have been seriously capable of influencing the Subcommittee on the Superfund legislative and oversight issues before it.

(ii.) Perry's Denial That He Ever Told Barrett That The Department Had Asked For The Documents

We conclude that Perry's denial that he ever told Barrett that the Department had asked for all of the requested documents does not warrant prosecution because there is insufficient independently corroborated and uncontradicted evidence that Perry ever made the statement. In addition, Perry's denial is, for reasons already discussed, probably not material within the meaning of § 1621.

The evidence that Perry did tell Barrett that the Department had asked for all of the documents consists of Barrett's prospective testimony and two letters to Perry, one from Chairman Dingell written contemporaneously with the October 8, 1982

conversation, and the other from Barrett some three weeks later.520/ For reasons earlier discussed in detail, the letters are inadmissible as corroboration because they do not come from an "independent" source, see United States v. Diggs, 560 F.2d at 270, and because to the extent that Dingell and not Barrett wrote the October 8 letter, it is hearsay. Barrett's testimony is therefore the only admissible evidence that Perry testified falsely when he denied telling Barrett that the Department had asked for all of the documents. But, as we have also noted, the uncorroborated testimony of a single witness is insufficient to make out the element of falsity required in a perjury prosecution under § 1621. United States v. Haldeman, 559 F.2d at 97 n.185.

Perry's denial that he ever told Barrett that the Department suggested a transfer of all the documents from EPA to the Department is also of questionable materiality under § 1621. We have already explained why a precise understanding of Perry's conversations with the Department about a possible transfer of the requested documents could not have significantly influenced the Subcommittee's decisions on the Superfund issues properly before it. A precise understanding of what Perry did or did not

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520/ The only witness to any part of the conversation between Perry and Barrett, other than the participants, was Kim Pearson, Perry's Special Assistant. As noted earlier, see n. 513, supra, Pearson was present in Perry's office during two conversations which Perry had with Barrett on October 8, 1982 and could hear Perry's, but not Barrett's, part of the dialogue. To some extent, Pearson contradicted Barrett. As Pearson recalled Perry's remarks, Perry discussed the transfer of documents only in hypothetical terms, asking questions such as: "What if we give the Department the documents? Then EPA can't respond to a subpoena and is off the hook." Pearson did not recall Perry ever saying to Barrett that the Department was asking or had told EPA to transfer the requested documents to the Department.

tell Barrett about those same immaterial conversations is, in our view, even more remote from those issues than the conversations themselves and therefore of even less materiality.