

## SENATE LEGAL COUNSEL

The Office of Senate Legal Counsel was created by Title VII of the Ethics in Government Act of 1978 (2 U.S.C. §§ 288, *et seq.*).

The Counsel and Deputy Counsel are appointed by the President pro tempore of the Senate upon the recommendation of the Majority and Minority Leaders. The appointments are to be made without regard to political affiliation. The appointments of the Counsel and Deputy Counsel are made effective by resolution of the Senate, and the term of appointment for each is two Congresses.

The office is responsible to a bipartisan leadership group. The statute provides for four major activities of the office: (1) defending the Senate, its committees, Members, officers, and employees in civil litigation relating to their official responsibilities or when they have been subpoenaed to testify or to produce Senate records; (2) representing committees of the Senate in proceedings to aid their investigations; (3) appearing for the Senate when it intervenes or appears as *amicus curiae* in lawsuits to protect the powers or responsibilities of the Congress; and (4) advising committees and officers of the Senate.

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The Office of Senate Legal Counsel, which was created by Title VII of the Ethics in Government Act of 1978,<sup>1</sup> was the product of several years of legislative work in the Senate, by both the Committee on Governmental Affairs and the Subcommittee on the Separation of Powers of the Committee on the Judiciary.<sup>2</sup> As originally conceived, the legislation would have created an Office of Congressional Legal Counsel. The House conferees on the Ethics Act stated that the House was not prepared to establish a joint office, but agreed to a Senate amendment to establish an Office of Senate Legal Counsel.<sup>3</sup>

The Counsel and Deputy Counsel are appointed by the President pro tempore of the Senate upon the recommendation of the Majority and Minority Leaders. The appoint-

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<sup>1</sup> 2 U.S.C. § 288, *et seq.*

<sup>2</sup> The key document in the legislative history of the office is the report of the Committee on Governmental Affairs on the Public Officials Integrity Act of 1977, S. Rep. No. 170, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4216.

<sup>3</sup> H.R. Rep. No. 1756, 95th Cong., 2d Sess. 80 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4381, 4396. The interests of the House in litigation are represented by the General Counsel to the Clerk. Senate Counsel and House Counsel cooperate in litigation pursuant to the direction of the conference report on the Ethics Act that "the Senate Legal Counsel should, whenever appropriate, cooperate and consult with the House in litigation matters of interest to both Houses." *Id.*

ment of each is made effective by a resolution of the Senate, and each may be removed from office by a resolution of the Senate. The term of appointment of the Counsel and Deputy Counsel is two Congresses. The appointment of the Counsel and Deputy Counsel and the Counsel's appointment of Assistant Senate Legal Counsel are required to be made without regard to political affiliation.<sup>4</sup> The office is responsible to a bipartisan Joint Leadership Group, which is comprised of the Majority and Minority Leaders, the President pro tempore, and the chairman and ranking minority member of the Committees on the Judiciary and on Rules and Administration.<sup>5</sup> As the Senate report on the Ethics Act states, "[t]he purpose of the Office is to serve the institution of Congress rather than the partisan interests of one party or another."<sup>6</sup>

### **1. Defense of the Senate, its committees, Members, officers, and employees**

Defensive representation may be authorized when the Senate, a committee, Member, officer, or employee is named as a party defendant in a civil lawsuit about the validity of a proceeding or action that was undertaken in an official or representative capacity.<sup>7</sup> The report sets forth the intention of the Committee on Governmental Affairs that "[o]fficial capacity will cover any actions a Member of Congress or employee takes in the normal course of his employment," and that, in deciding whether a Senate defendant has acted within that individual's official duties, "the scope of the legislator's or aide's official duties be broadly construed."<sup>8</sup>

Examples in recent years of damage claims against Members, officers, and employees of the Senate include a defamation action by a government-funded researcher against a Member and legislative assistant for statements in a news release,<sup>9</sup> a claim by a nursing home operator

<sup>4</sup> Ethics Act, § 701(a) and (b); 2 U.S.C. § 288 (a) and (b).

<sup>5</sup> Ethics Act, § 702; 2 U.S.C. § 288a.

<sup>6</sup> S. Rep. No. 95-170, at 84; 1978 U.S. Code Cong. & Admin. News 4300.

<sup>7</sup> Ethics Act, § 704(a)(1); 2 U.S.C. § 288c(a)(1). "The Counsel may not be directed to represent a defendant in a criminal action or an action involving the unofficial activity of the defendant. . . . [N]o representation may be provided in contested election cases." S. Rep. No. 95-170, at 87; 1978 U.S. Code Cong. & Admin. News 4303.

<sup>8</sup> S. Rep. No. 95-170, at 87; 1978 U.S. Code Cong. & Admin. News 4303.

<sup>9</sup> *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

that communications by a committee chairman with federal and state health care financing agencies interfered tortiously with the business relationship between the operator and those agencies,<sup>10</sup> a claim against a committee chairman, counsel, and investigator for damages for violations of the constitutional rights and common-law privacy rights of persons whose documents were obtained by the committee during an investigation,<sup>11</sup> and a discrimination claim by a dismissed Capitol telephone operator against the Senate Sergeant at Arms.<sup>12</sup>

In other cases plaintiffs have named Senate parties in challenges to the constitutionality of congressional practices or actions. These actions have included claims by an impeached judge that the Senate could not constitutionally receive impeachment evidence through a committee and that his impeachment trial was barred by double jeopardy,<sup>13</sup> a claim by a Member of the Senate and Members of the House that provisions of the Federal Salary Act of 1967 that were in effect at the time of the lawsuit violated Article I, section 6, clause 1 of the Constitution, which requires that the compensation of Members of Congress "be ascertained by Law,"<sup>14</sup> a claim by Members of the House that the Tax Equity and Fiscal Responsibility Act of 1982 was passed in violation of Article I, section 7,

<sup>10</sup> *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir. 1988).

<sup>11</sup> *McSurely v. McClellan*, 753 F.2d 88 (D.C. Cir.), cert. denied, 474 U.S. 1005 (1985).

<sup>12</sup> *Hanson v. Hoffmann*, 628 F.2d 42 (D.C. Cir. 1980). The provision of counsel by the Senate does not commit the Senate to pay for damages that may be awarded. Thus, in reporting S. Res. 463 of the 94th Congress, a resolution (prior to the creation of the Office of Senate Legal Counsel) to authorize the payment of fees for defense counsel in *Hutchinson v. Proxmire*, the Committee on Rules and Administration expressly stated that those payments "would not include any amount that might possibly be obtained in the nature of a money judgment." S. Rep. No. 1041, 94th Cong., 2d Sess. 2 (1976). Payments of damages would require separate action by the Senate. Thus, disavowing the intent to create a precedent on indemnification by the Senate for the constitutional torts of its employees, the Senate, in agreeing to S. Res. 337 of the 99th Congress, determined that "the unique circumstances" of a judgment in *McSurely v. McClellan* against the widow of a former Senate employee, as representative of his estate, warranted the acceptance by the Senate of the responsibility of paying judgments resulting from the former employee's actions. 132 Cong. Rec. 1924 (1986) (remarks of Sen. Roth). See also 126 Cong. Rec. 22771 (1980) (text of S. Res. 497, 96th Cong., authorizing back pay for Capitol telephone operator reinstated as a result of a settlement in *Hanson v. Hoffmann*).

<sup>13</sup> *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C.), aff'd on other grounds, 887 F.2d 332 (D.C. Cir. 1989). The Senate's procedures in disciplining its Members have also been challenged. See *Williams v. Bush*, No. 81-2839 (D.D.C. Feb. 3, 1982) (claim by Senator that he was entitled to examine witnesses on the floor of the Senate during consideration of an expulsion resolution; the Senator had been accorded the right to subpoena and examine witnesses before the Select Committee on Ethics). A description of the proceedings and the court's opinion are found in *Report of the Comm. on the Judiciary Identifying Court Proceedings and Actions of Vital Interest to the Congress*, 97th Cong., 2d Sess., H.R. Prt. No. 22, at 105, 667 (Comm. Print 1982).

<sup>14</sup> *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir.), cert. denied, 109 S.Ct. 491 (1988).

clause 1 of the Constitution, which requires that all bills for raising revenue shall originate in the House,<sup>15</sup> a claim by Members of the House and private persons that the editing practices for the Congressional Record, including those of the Senate's Editor-in-Chief of the Official Reporters of Debates, violate their first amendment rights,<sup>16</sup> and a claim by taxpayers that the disbursement by the Secretary of the Senate of compensation to the Senate chaplain violates the establishment clause of the first amendment.<sup>17</sup>

The second kind of defensive representation the Counsel undertakes occurs when the Senate, its committees, Members, officers, or employees are subpoenaed to produce documents or provide testimony relating to official or representative functions.<sup>18</sup> Although the authority to represent Members, committees, officers, and employees as defendants is limited to civil proceedings, the authority to represent them when they are subpoenaed as witnesses extends to criminal proceedings as well.<sup>19</sup>

The representation of Members, committees, officers, and employees, when their testimony or documents are subpoenaed, helps to effectuate the Senate's power over the disposition of Senate documents, and to protect the Senate's interest in the attendance of its Members while the Senate is in session.<sup>20</sup> The Office of Senate Legal Counsel advises Members, officers, and employees when they receive subpoenas or requests for documents or testi-

<sup>15</sup> *Moore v. The United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984) (the Senate was also a defendant), *cert. denied*, 469 U.S. 1106 (1985).

<sup>16</sup> *Gregg v. Barrett*, 771 F.2d 539 (D.C. Cir. 1985).

<sup>17</sup> *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (en banc). Both Houses' chaplains, who invite a limited number of guest chaplains, have also been sued for not inviting as a guest a nontheist to deliver secular remarks to open sessions of the Senate and the House. *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988).

<sup>18</sup> Ethics Act, § 704(a)(2); 2 U.S.C. § 288c(a)(2). *See, e.g., In the Matter of the Applications of the City of El Paso, Texas*, 887 F.2d 1103 (D.C. Cir. 1989); *United Transportation Union v. Springfield Terminal Railway Co.*, 132 F.R.D. 4 (D. Me. 1990).

<sup>19</sup> S. Rep. No. 95-170, at 88; 1978 U.S. Code Cong. & Admin. News 4304 ("[T]he Counsel may be directed to defend [Senate parties] if the case is civil or criminal in nature but only if the subpoena arises from the performance of official duties. Grand jury subpoenas for Congressional documents and testimony are a matter of routine. Most such subpoenas arise when Congress investigates conduct which results in a criminal indictment.").

<sup>20</sup> Resolutions that authorize testimony by Senators have recited that "by Rule VI of the Standing Rules of the Senate, no Senator shall absent himself from the service of the Senate without leave," and that testimony is authorized "except when [the Senator's] attendance at the Senate is necessary for the performance of [the Senator's] legislative duties," and, when appropriate, "except concerning matters about which a privilege against disclosure should be asserted." *E.g.*, 132 Cong. Rec. 19604-05 (1986) (text of S. Res. 460, 99th Cong.).

mony and assists them in determining whether a congressional privilege should be asserted. The office also assists in preparing Senate resolutions to permit the production of documents and to authorize Members, officers, and employees to testify on matters not subject to a claim of congressional privilege.<sup>21</sup>

The representation of the Senate, its committees, Members, officers, or employees, whether as defendants or as subpoenaed witnesses, may be authorized by a resolution of the Senate.<sup>22</sup> To enable the Senate Legal Counsel to take initial necessary steps to defend Senate parties effectively in “emergencies,” particularly matters that arise during adjournments,<sup>23</sup> representation of Senate defendants or witnesses may alternatively be authorized by a vote of two-thirds of the members of the Joint Leadership Group.<sup>24</sup> The Senate has also empowered the Joint Leadership Group by a vote of two-thirds to authorize Senate testimony or the production of Senate documents during adjournments.<sup>25</sup> The defense of individuals—Members,

<sup>21</sup> Apart from language that is particularly applicable to testimony by Senators, see note 20 *supra*, resolutions that authorize Senate testimony or the production of Senate records recite (with variations appropriate to the case) that “by the privileges of the United States Senate and Rule XI of the Standing Rules of the Senate, no evidence under the control or in the possession of the Senate can, by the judicial process, be taken from such control or possession but by permission of the Senate. . . . [W]hen it appears that testimony of Members or employees of the Senate is or may be needful for use in any court for the promotion of justice, the Senate will take such action as will promote the ends of justice consistent with the privileges and rights of the Senate.” *E.g.*, 132 Cong. Rec. 19604–05 (1986) (text of S. Res. 460, 99th Cong.). Where an issue of Senate privilege might arise, these resolutions often also will provide for representation of the subpoenaed Senate party by the Senate Legal Counsel. *E.g.*, *id.*

<sup>22</sup> A resolution to direct the Senate Legal Counsel to defend the Senate, a committee or subcommittee, or a Member, officer, or employee of the Senate, is subject to special rules on limited debate. Ethics Act, § 711(a)(2); 2 U.S.C. § 288j(a)(2).

Under some circumstances, representation of a Member, officer, or employee by the Office of Senate Legal Counsel may be barred, as a matter of professional responsibility, because of a conflict between that representation and other responsibilities of the Counsel. The Ethics Act establishes a procedure to be followed when such a conflict is presented. Under the Act, if a “conflict or inconsistency” exists between representation of an individual and other responsibilities of the Counsel, the Counsel is required to “notify the Joint Leadership Group, and any party represented or person affected.” Ethics Act, § 710(a); 2 U.S.C. § 288i(a). Upon such notification, the Joint Leadership Group must recommend action to resolve or avoid the identified conflict. Ethics Act, § 710(b); 2 U.S.C. § 288i(b). If that recommendation is approved by a two-thirds vote of the Joint Leadership Group, the Counsel must follow the recommendation. If the recommendation is not so approved, the Joint Leadership Group is required to publish notification of the conflict and the proposed recommendation in the Congressional Record. *Id.* If after fifteen days the Senate has not directed that the conflict be resolved in another manner, the Counsel is required to follow the recommendation published in the Record. *Id.* Where an individual is not represented by the Counsel because of the existence of a conflict, the Senate may authorize reimbursement for that individual’s fees and costs incurred in obtaining other representation. Ethics Act, § 710(d); 2 U.S.C. § 288i(d).

<sup>23</sup> S. Rep. No. 95–170, at 85; 1978 U.S. Code Cong. & Admin. News 4301.

<sup>24</sup> Ethics Act, § 703(a); 2 U.S.C. § 288b(a).

<sup>25</sup> 128 Cong. Rec. 26769 (1982) (text of S. Res. 490, 97th Cong.).

officers, or employees—may be undertaken only with the consent of the individual involved.<sup>26</sup>

## 2. Proceedings to aid investigations by Senate committees

The Senate Legal Counsel may represent committees in proceedings to obtain evidence for Senate investigations. Two specific proceedings are authorized.

18 U.S.C. § 6005 provides that a committee or subcommittee of either House of Congress may request an immunity order from a United States district court when the request has been approved by the affirmative vote of two-thirds of the Members of the full committee. By the same vote, a committee may direct the Senate Legal Counsel to represent it or any of its subcommittees in an application for an immunity order.<sup>27</sup> The Attorney General is entitled to ten days' notice of the intention of the committee or subcommittee to apply for the order, although the Attorney General may waive the notice period and enable the committee or subcommittee to proceed sooner.<sup>28</sup> On the request of the Attorney General, the district court is required to defer action on the immunity application for up to twenty days. The district court must grant the application for an immunity order if it determines that these procedural requirements have been satisfied. The witness may not refuse to testify on the basis of the constitutional privilege against self-incrimination after the immunity order has been communicated to the witness by the chairman of the committee or subcommittee.

The Senate Legal Counsel may also be directed to represent a committee or subcommittee of the Senate in a civil action to enforce a subpoena. Prior to the Ethics in Government Act of 1978, subpoenas of the Senate could be enforced only through the cumbersome method of a contempt proceeding before the bar of the Senate or by a

<sup>26</sup> Ethics Act, § 704(b); 2 U.S.C. § 288c(b).

"It is a basic principle of the American Bar Association's Canons of Ethics that a client be given the freedom to choose the attorney who will represent him. Accordingly, while this bill provides that, with respect to committees . . . the representation by the [Senate] Legal Counsel will be mandatory, with respect to the representation of an individual, the Counsel can provide representation only if the individual to be represented consents."

S. Rep. No. 95-170, at 88; 1978 U.S. Code Cong. & Admin. News 4304.

<sup>27</sup> Ethics Act, §§ 703(d)(2), 707; 2 U.S.C. §§ 288b(d)(2), 288f.

<sup>28</sup> *In the Matter of the Application of the United States Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981).

certification to the United States attorney and a prosecution for criminal contempt of Congress under 2 U.S.C. §§ 192, 194. The Ethics Act authorizes a third method to enforce Senate subpoenas, through a civil action in the United States District Court for the District of Columbia.<sup>29</sup> The House chose not to avail itself of this procedure and this enforcement method applies only to Senate subpoenas. Senate subpoenas have been enforced in several civil actions, most recently in proceedings to hold in contempt a recalcitrant witness in the impeachment proceedings against Judge Alcee L. Hastings.<sup>30</sup>

The new civil action has important advantages, both for investigating committees and for witnesses. For committees, it establishes an expeditious procedure to test the objections offered by a witness and, if those objections are insufficient, to obtain by a judicial proceeding an order directing the witness to testify. A failure to comply with the order is a contempt of the court and may lead to the imposition of coercive sanctions. For the witness who asserts in good faith a legal objection to a Congressional inquiry, the civil proceeding provides a neutral forum to determine the validity of the objection, without the initiation of a criminal prosecution.

The statute details the procedure for directing the Senate Legal Counsel to bring a civil action to enforce a subpoena. In contrast to an application for an immunity order, which may be authorized by a committee, only the full Senate by resolution may authorize an action to enforce a subpoena.<sup>31</sup> The Senate may not consider a resolution to direct the Counsel to bring an action unless the investigating committee reports the resolution by a majority vote. The statute specifies the required contents of the committee report; among other matters, the committee must report on the extent to which the subpoenaed party has complied with the subpoena, the objections or privileges asserted by the witness, and the comparative effectiveness of a criminal and civil proceeding.<sup>32</sup>

There is a significant limitation on the civil enforcement remedy. The statute excludes from its coverage actions against officers or employees of the federal government acting within their official capacities. Its reach is

<sup>29</sup> Ethics Act, § 705(f)(1); 28 U.S.C. § 1365.

<sup>30</sup> See S. Rep. No. 98, 101st Cong., 1st Sess. (1989).

<sup>31</sup> Ethics Act, § 703(b); 2 U.S.C. § 288b(b).

<sup>32</sup> Ethics Act, § 705(c); 2 U.S.C. § 288d(c).

limited to natural persons and to entities acting or purporting to act under the color of state law.<sup>33</sup>

### 3. Representing the interests of the Senate as intervenor or amicus

The Senate by resolution may direct the Counsel to intervene or to appear as amicus curiae in the name of the Senate, or an officer, committee, subcommittee, or chairman of a committee or subcommittee, in any federal or state proceeding in which the powers or responsibilities of the Congress are placed in issue.<sup>34</sup> The Act provides that “[t]he Counsel shall be authorized to intervene only if standing to intervene exists under section 2 of article III of the Constitution. . . .”<sup>35</sup>

This authorization permits the Senate to advocate an interest of the Congress in cases in which the Department of Justice has challenged the constitutionality of a statute.<sup>36</sup> For example, the Senate Legal Counsel represented the Senate as amicus curiae in defense of the constitutionality of the independent counsel law.<sup>37</sup> The Senate Legal

<sup>33</sup> 28 U.S.C. § 1365(a).

<sup>34</sup> Ethics Act, §§ 706, 713(a); 2 U.S.C. §§ 288e, 288f(a).

“The Counsel may not be directed to intervene or appear in the name of an individual Member or any group of Members. Primarily the Counsel should represent the institutional interest of Congress. Individual Members have often brought successful legal actions in their own names which have benefited Congress as an institution, but for the Counsel to represent such individual Members is likely to involve partisan considerations.”

S. Rep. No. 95-170, at 98; 1978 U.S. Code Cong. & Admin. News 4314.

<sup>35</sup> Ethics Act, § 706(a); 2 U.S.C. § 288e(a).

<sup>36</sup> To enable the Houses of Congress to determine whether they should appear in litigation to defend Acts of Congress, the Attorney General is required to report to each House whenever he or she “determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional.” Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 21(a)(2), 93 Stat. 1040, 1049-50, *extended by* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, § 202(a), 104 Stat. 2101, 2116-17. The Attorney General is also required to provide timely notice to the Senate Legal Counsel of any determination by the Department of Justice not to appeal, in a case in which the United States is a party, any decision affecting the constitutionality of an Act of Congress. Ethics Act, § 712(b); 2 U.S.C. § 288k(b).

<sup>37</sup> *Morrison v. Olson*, 487 U.S. 654 (1988). Other cases in which the Senate Legal Counsel has appeared to defend Acts of Congress that were being challenged by the executive branch include *Metro Broadcasting, Inc. v. Federal Communications Commission*, 110 S.Ct. 2997 (1990) (constitutionality of Congressionally mandated affirmative action requirement); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (constitutionality of legislative veto); *Ameron v. U.S. Army Corps of Engineers*, 809 F.2d 979 (3rd Cir. 1986), *cert. dismissed*, 109 S.Ct. 297 (1988) (constitutionality of Comptroller General’s role under Competition in Contracting Act); *Lear Siegler, Inc., Energy Products Division v. Lehman*, 842 F.2d 1102 (9th Cir. 1988)(same); *In re*



Counsel has also represented the Senate as plaintiff-intervenor in an action brought by Members of the House to invalidate the President's use of a pocket veto in an intersession adjournment of the Congress during which each House had authorized an officer to receive veto messages from the President.<sup>38</sup>

In several cases the Senate Legal Counsel has appeared as *amicus curiae* in the name of committees of the Senate in support of requests or subpoenas to obtain information in the possession of the Department of Justice.<sup>39</sup>

Additionally, the Senate or its committees have appeared as *amicus curiae* in cases in which the interests of the executive and legislative branches are in harmony, but where there is still a special interest in separate Senate representation. The Senate Legal Counsel appeared on behalf of the Senate in an action to defend the

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*Benny*, 812 F.2d 1133 (9th Cir. 1987) (constitutionality of provisions of Bankruptcy Amendments and Federal Judgeship Act of 1984); *In re Koerner*, 800 F.2d 1358 (5th Cir. 1986)(same). The Senate Legal Counsel has also appeared in litigation to suggest prudential grounds for the Court not to decide the merits of an executive branch challenge to the constitutionality of an Act of Congress. *American Foreign Service Ass'n v. Garfinkel*, 109 S.Ct. 1693 (1989).

In some cases the Senate Legal Counsel has joined the executive branch in defending certain features of a statute, while defending against the executive branch's challenge to other aspects of the law in question. Thus, in *Bowsher v. Synar*, 478 U.S. 714 (1986), the Senate joined the executive branch in defending the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman-Hollings") against a challenge that it constituted an unconstitutional delegation of Congressional power, while opposing the plaintiffs' and the executive branch's claim that the Comptroller General's role under the Act violated the separation of powers. In *Mistretta v. United States*, 109 S.Ct. 647(1989), the Senate Legal Counsel appeared in the name of the Senate in the Supreme Court to support the United States Sentencing Commission's defense of the Sentencing Reform Act of 1984 after the executive branch, which generally supported the Act, questioned the constitutionality of the provision of the law that placed the commission in the judicial branch. See 134 Cong. Rec. 12100 (1988) (statement of Sen. Byrd on S. Res. 434, 100th Cong.).

The Senate has also directed the Senate Legal Counsel to defend the constitutionality of a Federal statute where the executive branch, without challenging the statute, has failed to defend it, e.g., *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989) (constitutionality of *qui tam* provisions of the False Claims Act), and also to defend the constitutionality of a statute where there was concern that the executive branch's defense, in light of legislative positions it had taken before the Congress, might be ambivalent. See *United States v. Eichman*, 110 S.Ct. 2404 (1990); 135 Cong. Rec. S16191-92 (daily ed. Nov. 19, 1989) (statement of Sen. Mitchell on S. Res. 213, 101st Cong., authorizing appearance of Senate as *amicus curiae* to defend the constitutionality in that case of the Flag Protection Act of 1989).

<sup>38</sup> *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

<sup>39</sup> *In re Grand Jury Impanelled October 2, 1978 (79-2)*, 510 F. Supp. 112 (D.D.C. 1981) (appearance on behalf of Committee on the Judiciary to obtain Department of Justice documents relating to Robert Vesco); *United States v. Dorfman*, No. 81 CR 269 (N.D. Ill. 1981) (appearance on behalf of Select Committee on Ethics to obtain wiretap evidence relating to alleged conspiracy to bribe member of the Senate) (a description of the proceedings and the transcript of the court proceedings in this case are found in *Report of the Committee on the Judiciary Identifying Court Proceedings and Actions of Vital Interest to the Congress*, 97th Cong., 2d Sess., H.R. PRT. NO. 14, at 294, 407 (Comm. Print 1981)).

Congressional frank, which had been challenged on the theory that it unfairly advantages incumbents over challengers.<sup>40</sup> The Legal Counsel also appeared on behalf of the Committee on Governmental Affairs as *amicus curiae* in an appeal concerning a Senator's participation in an oversight investigation of an executive department,<sup>41</sup> and intervened in the name of the Select Committee on Intelligence to represent the committee's interests in litigation under the Freedom of Information Act involving documents in the possession of an executive agency that the committee had generated in the course of an investigation.<sup>42</sup>

#### 4. Advice to committees and officers of the Senate

The Ethics Act details a number of advisory functions of the Office of Senate Legal Counsel. Principal among these are the responsibility of advising officers of the Senate with respect to subpoenas or requests for the withdrawal of Senate documents, and the responsibility of advising committees about their promulgation and implementation of rules and procedures for congressional investigations. The office also provides advice about legal questions that arise during the course of investigations.<sup>43</sup>

#### 5. Other duties

Section 708(c) of the Ethics Act<sup>44</sup> provides that the Counsel shall perform such other duties consistent with the purposes and limitations of Title VII as the Senate may direct.

When the office was changed in conference from an Office of Congressional Legal Counsel to an Office of Senate Legal Counsel, no specific provision was made for the representation of Senate interests concerning agencies which serve the entire Congress. One such entity is the Congressional Research Service. After an administrative law judge at the Federal Trade Commission issued a subpoena to CRS, at the request of oil company respondents in an FTC antitrust proceeding, the Senate used the

<sup>40</sup> *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982), *aff'd*, 461 U.S. 911 (1983).

<sup>41</sup> *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983).

<sup>42</sup> *Paisley v. CIA*, 724 F.2d 201 (D.C. Cir. 1984).

<sup>43</sup> Ethics Act, § 708(a)(5) and (6); 2 U.S.C. § 288g(a)(5) and (6).

<sup>44</sup> 2 U.S.C. § 288g(c).

catchall authority of section 708(c) to direct the Office of Senate Legal Counsel to represent CRS in order to protect the confidentiality of communications from CRS to the Members and committees of Congress.<sup>45</sup>

Section 708(c) was also used in the investigation relating to Billy Carter and Libya when the Senate directed the Counsel and Deputy Counsel to work under the direction of the chairman and vice chairman of the subcommittee charged with the conduct of that investigation. The Senate turned to the Office of Senate Legal Counsel as a nonpartisan office; the office became the nucleus of the investigating staff, and continued in that role under the direction of former Judge Philip Tone, when he was appointed to be Special Counsel to the subcommittee.<sup>46</sup>

Members of the office have undertaken other special assignments. In the Senate's investigation of Abscam and other undercover activities, the office detailed an Assistant Senate Legal Counsel to work on the committee staff.<sup>47</sup> The Senate Legal Counsel served as counsel to the Senate Impeachment Trial Committee that received evidence in the impeachment proceedings concerning Judge Harry E. Claiborne.<sup>48</sup> An Assistant Senate Legal Counsel served as counsel to the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.,<sup>49</sup> and the office provided extensive assistance to the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings.<sup>50</sup>

The Senate has assigned the Legal Counsel duties in connection with the consideration of claims presented under the Federal Tort Claims Act.<sup>51</sup>

In addition, the Legal Counsel provides informal advice to Members, officers, and employees on a wide range of legal and administrative matters relating to Senate business.

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<sup>45</sup> See 126 Cong. Rec. 6892-93 (1980) (text of S. Res. 396, 96th Cong.). The Senate Legal Counsel has also defended the Public Printer in actions brought to restrain the printing of Senate documents. See 135 Cong. Rec. S6397 (daily ed. June 8, 1989) (text of S. Res. 143, 101st Cong.).

<sup>46</sup> See S. Rep. No. 1015, 96th Cong., 2d Sess. (1980).

<sup>47</sup> See S. Rep. No. 682, 97th Cong., 2d Sess. (1982).

<sup>48</sup> See S. Hrg. No. 812, 99th Cong., 2d Sess. (1986).

<sup>49</sup> See S. Rep. No. 164, 101st Cong., 1st Sess. (1989).

<sup>50</sup> See S. Rep. No. 156, 101st Cong., 1st Sess. (1989).

<sup>51</sup> 128 Cong. Rec. 29927 (1982) (text of S. Res. 492, 97th Cong.); S. Rep. No. 649, 97th Cong., 2d Sess. (1982).