May 27, 2014

To: The Honorable Barbara Boxer
Chairman, Senate Committee on Environment
and Public Works

From: Morton Rosenberg
Legislative Consultant

Re: Legal Substantiality of the Nuclear Regulatory Commission's Grounds for Refusing to Comply With Valid Committee Requests for Documents

You have asked that I assess the legal substantiality of the Nuclear Regulatory Commission's (NRC) refusal to comply with your Committee's requests for certain documents that will allow it to evaluate the adequacy of NRC's response to the discovery of reactor coolant leaks at Units 2 and 3 at the San Onofre Nuclear Generating Station (SONGS) in San Clemente, California, which led to its shutdown and ultimate decommissioning.

My views in this matter have been informed by my 35 years of work as a Specialist in American Public Law with the American Law Division of the Congressional Research Service, during which time I concentrated particularly on constitutional and practice issues arising from interbranch conflicts in the course of congressional oversight and investigations of Executive agency implementation of their statutory missions. My understandings have been further refined by my hands-on assistance during inquiries and the preparation of testimony on investigative matters before many committees, including your Committee, and by the research involved in the writing and publication by the Constitution Project of a monograph entitled "When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry." Since my retirement I have continued to consult on such issues, most recently with respect to the foundational constitutional requirements a committee must meet to hold a witness in criminal contempt of Congress.

1. Background

The following chronology of events and descriptions of the statutory and procedural framework within which nuclear facility licenses are granted and modified, and the interplay between key interested parties in the SONGS matter that has aroused Committee concerns, relies essentially on formal decisions rendered by NRC's Atomic Safety and Licensing Board (ASLB) and by the Commission itself. The ASLB decision addressed the question whether a Confirmatory Action Letter (CAL) issued to the licensed operator of the SONGS by NRC staff properly allowed the licensee to avoid the formal license amendment procedure or did it constitute a *de facto* license amendment that should have been subject to a public adjudicatory hearing.[1] The ASLB held that it was a *de facto* license amendment. As a consequence, the licensee decided to cease its efforts to repair the facility and to decommission it. The Commission's subsequent decision involved the request of NRC staff to vacate ASLB's ruling as moot, which was granted.[2] The rulings provide an authoritative factual history of what occurred and shed light on NRC's internal decisionmaking processes.

On January 31, 2012, Southern California Edison (SCE), the licensee operator of the SONGS, informed the NRC that one of its two newly installed steam generator systems had experienced unexpected reactor coolant leaks as a result of degradation of its coolant tubes. Shortly thereafter, the new coolant system of the facility's second unit was found to be suffering from the same defect. The generators had been in operation for less than two years. Both of the operating SONGS units were shut down pending the NRC's assessment of the licensee's evaluation of the cause of the leaks, the nature of the danger posed by the faults, and the corrective actions necessary to safely restart the units. The assessment was conducted by NRC Staff. SCE, working with the designer and manufacturer of the generators, Mitsubishi Heavy Industries (MHI), sought approval from NRC Staff to develop a proposal to return the two units to power operation. On March 27, 2012, NRC issued a Confirmatory Action Letter (CAL) to confirm the actions the licensee committed to take.

[1] In the Matter of Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07, 77 NRC 307 (May 13, 2013)(ASLB Opinion).

[2] In the Matter of Southern California Edison Company, (San Onofre Nuclear Generating Station (Units 2 and 3) CLI-13-09 (December 5, 2013)(Commission Vacatur).

The regulatory process for nuclear plants is extraordinarily exacting. The operating license contains the exact design basis blueprints for the reactor and every safety and support system. It also delineates the maintenance schedule and the types of procedures used to assure that critical systems function effectively over decades of intense use despite high pressures, intense heat and concentrated radiation.[3] Licensees, under penalty of law, may not deviate from the terms of their reactor operating licenses.[4] This is to ensure that if anything goes wrong in a system at a nuclear plant at any time, staff or inspectors should be able to go immediately to the license blueprints and support documents to check on the last known condition of that system and its expected behavior under various stresses. If the actual system differs from the license blueprints staff could not in an emergency pinpoint what is going wrong since there would be no way to know what a properly working system should look like.

Normally, changes to NRC-issued licenses are made through license amendments. The license amendment process is governed by NRC regulations[5] and regulatory guidance for a reactor license may be amended hundreds of times during its term. A licensee must submit a license amendment request to the NRC for prior approval if the licensee proposes to modify the license terms and conditions or technical specifications, or if a proposed change, test or experiment meets the criteria of 10 CFR 50.59 (c)(2). The amendment process may entail regulations and federal laws mandating the involvement of the public by posting the proposed change in the Federal Register, soliciting comments, and holding formal hearings. [6]

However, the issuance by staff of a Confirmatory Action Letter (CAL) bypasses these public notice and participation processes. It is normally used to allow for speedier processing of minor changes and updates such as recognizing improvements in technology. But a licensee must request a license amendment if the proposed action requires that existing technical specifications be changed,[7] or if a change, test or experiment satisfies any of the eight criteria in 10 C.F.R. 50.59 (c)(2). For changes that more than minimally increase the possible occurrence of an "accident", "malfunction of a structure, system or

[3] 42 U.S.C. 2232(a).
[4] 42 U.S.C .2131.
[5] See, 10 C.F.R secs. 50.90 to 50.92.
[6] 42 U.S.C 2239(a)(1)(A); 10 C.F.R. 2.105.
[7] 10 C.F.R. 50.59 (c)(1)(i).

component important to safety," or the consequences of such accidents and malfunctions, or "create the possibility" of such accidents or malfunctions, a license amendment must be sought.[8]

On June 18, 2012, Friends of the Earth submitted a petition to intervene, in which it sought a hearing on the restart of both SONGS units, and a stay of any decision to authorize a restart pending conclusion of the requested hearing. Friends of the Earth argued, among other things, that SCE's replacement of the steam generators in Units 2 and 3 in 2010 and 2011 pursuant to 10 C.F.R 50.59, without first obtaining NRC approval via a license amendment, was unlawful, and that the process for resolving the CAL constituted a *de facto* license amendment. The Commission referred Friends of the Earth's Section 50.59 claim to the NRC Director for Operations for appropriate action under 10 C.F.R. 2.206, and referred its *de facto* license amendment claim to the ASLB for consideration.

In the meantime, the NRC continued processing the CAL. In its October 1, 2012, Unit 2 Return to Service Report, SCE indicated it would operate Unit 2 at no more than 70% power for no more than 150 days before conducting the next set of inspections of that units steam generator tubes.

On April 5, 2013, SCE submitted a license amendment for SONGS Unit 2 that would restrict its operation to no more than 70% of the then-current authorized power level and requested that the change remain in effect for a period of 18 to 24 months of plant operation. The NRC Staff ultimately approved allowing Unit 2 to operate for 150 days at 70% power, agreeing that the changes were minor.

On May 13, 2013, the ALSB issued an exhaustive 39 page opinion and order concluding that for three independent reasons the NRC's Staff CAL process with SCE constituted a *de facto* license amendment proceeding that is subject to a hearing opportunity under Section 189 of the Atomic Energy Act: SCE's Unit 2 Restart Plan, if implemented would (1) grant SCE authority to operate without the ability to comply with all technical specifications in its existing license; (2) grant SCE authority to operate beyond the ambit, or outside the restrictions of its existing license; and (3) grant SCE authority to operate its

[8] 10 C.F.R. 50.59 (c)(i-viii).

replacement steam generators in a manner that constitutes a test or experiment that meets the criteria in 10 C.F.R. 50. 59(c)(2) (viii) for seeking a license amendment. [9]

On May 23, 2013, Friends of the Earth filed a motion to convene a licensing board on the CAL Restart Plan and to consolidate SCE's April 5 license amendment with it. On June 7, 2013, the day petitions for review of ASLB's ruling were due, SCE notified NRC Staff that it would not seek to restart the plant. In response the staff sought, and was granted, an extension of time to file a petition for review of the ASLB decision to determine an appropriate course of action in light of SCE's decision to decommission the plant. Staff did not file a petition for review, however, but instead filed a motion to vacate the Board's decision. Friends of the Earth, and the States of New York and Vermont, as *amici,* opposed the motion.

A unanimous Commission voted to vacate the ASLB decision, apparently on the grounds that because SCE ended the adjudication by permanently shutting down the plant, "no live controversy remains between the litigants in this case." The Commission rejected the contention of Friends of the Earth that the issue is capable of recurrence and that the ASLB opinion would be an in-depth guide and precedent for resolving future CAL process situations. The Commission countered that the NRC's precedents deny precedential value to unappealed Board rulings; the possibility of recurrence principle under NRC precedent only applies when it is possible the same litigants will be involved, which is not possible here; and any future case with similar CAL issues should be "appropriately decided in the context of a concrete dispute, with 'self-interested opposing positions.'" The Commission noted that in similar situations it has vacated Board decisions "as a routine matter." Finally, the Commission found "vacatur particularly appropriate here, where the litigants vigorously disputed (among other things) the proper scope of the Board's review and whether CAL constituted a *de facto* license amendment. When vacating for mootness, we neither approve nor disapprove the underlying Board ruling. Therefore we take no position on the Board's decision." The Commission also dismissed the concerns of New York and Vermont that vacatur removes the Board from public access, remarking that the opinion is an agency record and

[9] ASLB Opinion at 24-37.

will be picked up by various reporting services and thus will remain a source for future supportive arguments.

NRC Chairman Macfarlane, in presenting separate additional views, agreed that the case was moot and that the longstanding practice of vacatur in such situations is appropriate here, but attempted to address the concern that vacation in such a "summary fashion may send the wrong message at a time when the NRC has not yet fully evaluated the issues that gave rise to the adjudicatory proceeding at San Onofre." She concedes that NRC Staff is dissatisfied with the Board's opinion and was of the view that a denial of the vacatur would have had a negative effect on Staff and licensee decisionmaking concerning future CAL action letters and cause confusion. "I am concerned that the affirmative act of vacatur, based on the motion before us, gives the perception of rejecting the Board's decision, without benefit of a robust debate." The NRC Chairman's only solution, however, is to "require any litigant seeking vacatur to provide a robust discussion for its argument that vacatur is warranted. We should then take into account the particular facts at hand in deciding whether to vacate."

2. Legal Issues Raised by NRC to Support Its Refusal to Comply With Committee Document Requests

Sensitized by the 2011 Fukushima nuclear meltdown disaster, the Committee has been at the forefront of efforts to assure that the NRC is capable of avoiding a similar calamity occurring here. Since learning of the SONGS coolant leakage it has been proactive in its efforts to monitor NRC's effectiveness in determining the cause of the failure, limiting its immediate dangers, and taking steps to assure that similar failures do not recur. Since the outset of its investigation, the Committee has sought information from the agency, the licensee, the manufacturer, and other sources about what was known and when was it known, about the defects in the design, construction and installation of the new steam generators. As evidence has accumulated that NRC monitoring of safety during the design and installation of the generators may have been compromised as a result of increased reliance on its non-public CAL process, agency resistance to Committee requests for more sensitive internal documents appears to have increased.

These refusals to comply have been accompanied by constitutional and other legal justifications that are highly problematic and unsupported by accepted law and practice. The NRC's legal positions are set forth in two letters to Chairman Boxer from NRC Chairman Allison M. Macfarlane, dated December 23, 2013 and January 28, 2014. The correspondence suggests that "separation of powers concerns" protect against forced agency disclosure of certain categories of documents in order to assure that there is not even the potential appearance of external influence on its actions by Congress. These concerns are said to be heightened by NRC's status and special role as an independent regulatory agency. The document categories identified encompass documents from an on-going NRC investigation, pre-decisional adjudicatory and enforcement documents, and internal deliberative documents, particularly those regarding the agency's efforts to gather and provide documents in response to the Committee's requests. Revelation of such documents, it is claimed, would serve to undermine the ability of NRC personnel to communicate freely and candidly with one another to make sound and independent decisions.

In support of her assertions, the NRC Chairman demonstrates a profound misunderstanding of the plenary nature of Congress's investigatory power in the circumstances prevalent in the SONGS matter; misstates the authority of three cited cases dealing with the law on congressional intercession in agency decisionmaking; ignores the overwhelming contrary case law on the deliberative process privilege that is applicable in this situation; and shows a lack of awareness of over 90 years of congressional investigations in which agencies have been consistently obliged to provide documents and testimony regardless of whether a litigation or adjudication is pending or anticipated, or to explain why an enforcement action or investigation was or wasn't taken, or whether the agency failure to provide requested information was for the purpose of obstructing a congressional inquiry, all in the face of agency claims of constitutional or common law privilege or policy.[10]. Finally, the NRC Chairman invokes the wise adjuration of the appeals court In *United States v. AT&T* that negotiation is vital in settling interbranch disputes over unclear allocations of constitutional power between the political branches. In that case the dispute was over the validity of a claim of presidential executive privilege to prevent a congressional committee from obtaining national security information from a

[10] See, Morton Rosenberg, "Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice, (CRS Report RL34197, August 20, 2008).

private entity working for the government. In the present circumstance, there is no question of constitutional power allocation. The NRC is a creation of the Congress which alone is responsible for its mission, authority and funding and is, as will be more fully detailed below, subject to Congress's plenary oversight power to determine how well it is performing. This is not to gainsay the need or appropriateness of negotiation oversight process, but as a practical matter, in the present circumstances, it is the jurisdictional committee that has the final say as to when negotiation has reached an impasse. Delay is well recognized as an anathema to effective oversight.

The following sections will briefly detail the breadth of the congressional oversight and investigatory power; the status of the NRC as an independent regulatory agency; the standard for finding congressional abuse of an agency's investigatory process; the unavailability to the NRC of use of the deliberative process privilege; the accessibility to congressional committees of proprietary information; and the question of waiver of privileges when a committee gains access to such materials.

3. The Breadth of the Investigatory Power[11]

Congress possesses broad and encompassing powers to engage in oversight and conduct investigations reaching all sources of information necessary to carry out its legislative functions. In the absence of a countervailing privilege or self-imposed statutory restriction upon its authority, Congress and its committees have virtually plenary power to compel production of information needed to discharge their legislative functions. Within certain constraints, the information so obtained may be made public.

These powers have been recognized in numerous Supreme Court cases, and the broad legislative authority to seek information and enforce demands was unequivocally established in two Supreme Court cases arising out of the 1920's Teapot Dome Scandal. In *McGrain v. Daugherty,*[12] which considered a Senate investigation of the Department of Justice, the Court described the

[11] See generally, Morton Rosenberg, "When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry (Constitution Project, 2009)(Oversight Monograph)
[12] 273 US. 135 (1927).

power of inquiry, with the accompanying process to enforce it, as "an essential and appropriate auxiliary to the legislative function." The Court explained:

> **A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to effect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[13]**

The Court also pointed out that the target of the Senate investigation, the Department of Justice, like all other executive departments and agencies, is a creation of Congress, from which it receives its powers, duties and funding, and is subject to its plenary legislative and oversight powers to determine "whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged misconduct being recited."[14]

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,*[15] a different witness at the congressional hearings refused to provide answers to questions and was prosecuted for contempt of Congress. Based on a separate lawsuit between the government and an oil company, the witness had declared "I shall reserve any evidence I may be able to give for those courts… and shall respectfully decline to answer any questions propounded by your committee." The Court upheld the witness' conviction after considering and unequivocally rejecting his contention that the pending lawsuit provided an excuse for withholding information from the Committee.[16]

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[13] Id., at 174-75
[14] Id., at177-78.
[15] 279 U.S. 263 (1929).
[16] Id., at 295

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress's investigative authority. For example, in *Eastland v. Servicemens Fund,* [17] the Court explained that "[t]he scope of [C]ongress's power of inquiry…is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[18] In addition, the Court, in *Watkins v. United States,*[19] stated that the broad power of inquiry "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[20] Congress's investigative power is at its peak when the subject is alleged fraud, waste, abuse, or maladministration within a government department.[21]

4. The NRC is in No Way Exempt From Congressional Oversight

Congress has the power to create agencies and offices and can select the manner of appointment of officials and limit the President's power to remove at will. In historical practice, Congress creates, locates, and abolishes agencies and offices. Congress also sets the qualifications for officeholders, as well as the terms of their tenure and compensation. In short, it can tailor agencies and offices of government in virtually any way it wants. Independent regulatory agencies (IRA's) are an example of such tailoring. IRA's are typically collegial bodies whose members appointed by the President and confirmed by the Senate and have staggered, lengthy terms. The key independence characteristic is that members are removable by the President only for cause. Other indicia of their independence include freedom from having their rules vetted by OMB's Office of Information and Regulatory Affairs and having to get clearance from OMB for testimony and legislative proposals to Congress. Thus the independence is from executive control - not from congressional control - by means of the power of the purse and oversight. Even in the very rare occasions when an IRA is given a degree of funding freedom, there is still a legislative oversight presence. The NRC has no special indicia of independence that removes it from the plenary oversight of the legislature.

[17] 421 U.S. 491 (1975).
[18] Id., at 504 n. 15.
[19] 354 U.S. 178 (1957).
[20] Id., at 187.
[21] Id.

5. Prevailing Appellate Case Law Permits Congressional Intercessions in Agency Adjudicatory Proceedings for Legitimate Oversight Purposes

NRC Chairman MacFarlane cites the 1996 ruling In *Pillsbury Co. v. FTC* [22] for the proposition that seeking a pre-decisional document in an agency's formal adjudication would be deemed an exercise of congressional undue influence that would taint the proceeding. *Pillsbury* involved a Senate hearing in which the Committee members subjected FTC officials to intense interrogation about which of two evidentiary standards was to be applied in an anti-trust adjudication then pending before the Commission. The members clearly indicated which standard they favored. That standard was selected and the loser, Pillsbury, appealed and the 5th Circuit held the inquiry was an improper intrusion into the agency adjudicatory process because it cast doubt on the appearance of impartiality by the decisionmakers. There was no finding that the interrogation influenced the agency's ultimate decision or was intended to do so. The court broadly ruled that "[w]hen [a congressional] investigation focuses directly and substantially upon the mental and decisional processes of a Commission in a case before it, Congress is intervening [impermissibly] into agency's adjudicatory function." The ruling was subsequently severely criticized as an unjustified judicial interference with the political process of policymaking: deciding whether to apply the rule of reason or a per se rule to acquisitions under Clayton Act is, it was argued, a policy decision which legislators should be free to do. In fact over the next 48 years only one court has overturned a quasi-judicial agency ruling on grounds of undue political influence. All other rulings to date have evinced a clear predilection to defer to congressional actions where they involve legitimate exercises of legislative oversight and oversight functions. Taint will not be unless the pressure is directly on the decisionmaker, concerns the merits of the case, and is not minimal.[23] Interestingly, NRC Chairman Macfarlane also cites *ATX v. Department of Transportation,* one of the cases that did not find taint. In that case 125 members of Congress, including the chair of the House jurisdictional committee and two subcommittee chairs of that committee, wrote to the Transportation Secretary to vehemently oppose the grant of an application to operate an airline to a person deemed unworthy. An appeals

[22] 354 F. 2d 952 (5th Cir. 1966).

[23] See, Morton Rosenberg and Jack Maskell, Congressional Intervention in the Administrative Process: Legal and Ethical considerations, CRS Report RL32113, 8-9,12-21, 36-42 September 25, 2003 CRS Intervention Report

court found that the opposition did not taint the decision to deny the application.

6. The Standard for Finding Congressional Influence that Abuses the Agency Investigatory Process is Very High

The NRC Chairman also cites approvingly the decision in *SEC v. Wheeling-Pittsburgh Steel Co.* [24] and blandly notes that the district court held that the "SEC's decision to investigate should not be rooted in third-party political pressure." That is hardly an accurate portrayal of the ruling. The *Wheeling-Pittsburgh court* made it clear that a court will deem a request for a the enforcement of an administrative subpoena an abuse of the judicial process only if it was *in fact* shown that the subpoena was being issued because of congressional influence, the agency knew that the process was being abused, that it knowingly did nothing, and that it vigorously pursued the frivolous charges. Under the standard articulated by the appeals court the motivation of the Members of Congress is irrelevant; the focus is on the actual impact of the congressional intercession on the motivation of the agency itself. Simply the appearance of impropriety is not enough. [25]

7. The Deliberative Process Privilege Is Likely to Be Held Unavailable to the NRC

The deliberative process privilege permits government agencies to withhold documents and testimony relating to policy formulation from the courts. The privilege was designed to enable executive branch officials to seek a full and frank discussion of policy options with staff without the risk of being held to account for rejected proposals.

Executive branch officials often argue, as they have here, in addition that congressional demands for information regarding an agencies policy development process would interfere with, and perhaps "chill," the frank and open internal communications necessary for policymaking. In addition, they may argue that privilege against premature disclosure of proposed policies before the agency considers and adopts them. Agencies may further argue that

[24] 482 F. Supp.555(W.D. Pa. 1979), vacated and remanded, 648 F. 2d 118 (3d Cir. 1981) (en banc), discussed in CRS Intervention Report at pp.30-36.
[25] Intervention Report at 30-36.

the privilege prevents the public from confusing matters merely considered or discussed during the deliberative process with those that constitute the grounds for a policy decision. These arguments, however, do not necessarily pertain to Congress in its oversight and legislative roles.

The courts have recognized that Congress's oversight process would be severely undermined were they to uniformly block disclosure of internal deliberations. Such a broad application of the privilege would encourage agencies to disclose only materials that support their positions and withhold those with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering whole evidence and would become a "show and tell" performance.

As with common law claims of attorney-client privilege and work product immunity, congressional practice has been to allow committees discretion over acceptance of deliberative process claims. In 1997 a D.C. Circuit ruling showed that the deliberative process privilege claim is easily overcome by an investigatory body's showing of need for the information. In *In re Sealed Case (Espy)*[26] a unanimous panel distinguished between the presidential communications privilege and the deliberative process privilege and described the severe limits of the latter as a shield against congressional investigative demands. The appeals court held that the deliberative process privilege is a common law privilege that Congress can more easily overcome than the constitutionally rooted presidential communications privilege. Moreover, in congressional investigations the claim of deliberative process privilege "disappears altogether when there is reason to believe government misconduct occurred."[27] The court's understanding thus severely limits the extent to which agencies can rely on the privilege to resist investigative demands. A congressional committee merely needs to show that it has jurisdiction and authority, and that the information sought is necessary to its investigation to overcome the privilege claim. A plausible showing of waste, fraud, abuse, or maladministration would conclusively overcome an assertion of the privilege. The *Espy* view was reiterated by the appeals court in 2004 in *Judicial Watch, Inc v. Department of Justice.*[28]

[26] 121 F. 3d 729 (D.C. Cir. 2007).
[27] 121 F,3d at 746.
[28] 365 F. 3d 1108 (D.C. Cir. 2004). See also In re Subpoena Duces Tecum, 145 F. 3d 1422, 1424 (D.C. Cir. 1998);In re Subpoena Served Upon Comptroller of the Currency, & Sec'y of Bd. Of Federaal Reserve Sys.., 967 F. 2d 630, 634

8. Proprietary Information and Trade Secrets Are Accessible to Congressional Committees

Congress's authority and power to obtain information, including but not limited to proprietary information, is extremely broad. The courts, when applying Congress's broad investigatory power to obtain confidential or proprietary information have expressly held that executive agencies and private parties may not deny Congress access to such documents even if they contain trade secrets whose disclosure to the public is otherwise statutorily barred.[29] Specifically, courts have held that the release of information to a congressional committee is not considered disclosure to the general public[30] and once the documents are in congressional control, the courts will presume that committees of Congress will exercise their power responsibly and with proper regard to the rights of the parties.[31] Moreover, it would appear that courts may not prevent congressional disclosure when such disclosure would serve a valid legislative purpose.[32]

9. Release of Attorney-Client. Work Product, or Deliberative Process Material to Congress Does Not Waive Applicable Privileges in Other Forums

Government agencies and private parties often assert that yielding to committee demands for material arguably covered by the attorney-client, work product or deliberative process privileges will waive those privileges in other forums. Applicable case law, however, is to the contrary. When a congressional committee compels the production of a privileged communication through a

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(D.C. Cir. 1992); Texaco P.R., v. Dept. of Consumer Affairs, 60 F. 3d 867, 885 (1st Cir. 1995); Convertino v. U.S. Dept. of Justice, 674 F. Supp. 2d 97,102-05 (D.D.C. 2009);Chaplancy of Full Gospel Churches v. Johnson, 217 F.R.D. 250, 256-58 (D.D.C. 2003), rev'd on other grounds sub. Nom. In re New England, 375 F. 3d 1169 (D.C. Cir. 2004). .

[29] See. e.g., FTC v. Owens-Corning Glass Fiberglass Corp., 626 F. 25 966, 970 (D.C. Cir. 1980); Exxon Corp. v. FTC, 589 F. 2d 582, 585-86 D.C. Cir. 1978), cert. denied 441 U.S. 943 (1979); Ashland Oil Co., Inc. v. FTC, 548 F. 2d 977, 979 (D.C. Cir.1976).,

[30] See, Owens –Corning Fiberglass Corp., 626 F, 2d at 970; see also Exxon Corp. 589 F,2d at 589; Ashland Oil, 548 F,2d at 979; Moon v. CIA, 514 F. Supp. 836, 840-41 (SDNY 1981).

[31] See, Owens-Corning Fiberglass Corp., 626 F. 2d at 970; Exxon Corp., 589 F.2d at 589; Ashland Oil, 548 F.2d at 979; Moon v. CIA , 514 F, Supp. at849-51.

[32] Doe v. McMillan, 412 U.S. 306 (1973).

properly issued subpoena, it does not prevent assertion of the privilege elsewhere,[33] as long as it is shown that the compulsion was in fact resisted.[34]

10. Concluding Observations

I conclude that your Committee has jurisdiction, and authority and grounds for the successful exercise of compulsory process should the withholding of the documents you seek from NRC continues.

[33] See, e.g., FTC v .Owen-Corning Fiberglasss Corp.., 626 F. 2d at 970; Exxon Corp. v. FTC, 589 F. 2d at 582; ; Rockwell International Corp. v U.S. Dept. of Justice, 235 F. 3d 598, 604 (D.C. Cir. 2001);; Florida Hous of Representatives v. Dept. of Commerce, 961 F. 2d 941, 946 (11th^{h} Cir. 1992);; United States v. Zolin, 809 F. 2d 1411-1415 (9th Cir. 1987), aff'd in part, vacated in part, 491 U.S. 554 (1989)..

[34] See, Ironworkers Union Local No. 17Insurance Fund v. Phillip Morris, Inc., 35 F. Supp. 2d 582 (N.D. Ohio, E.D. 1999) and Commonwealth of Massachusetts v. Phillip Morris, et al., 1998 Lexis (Mass. Sup. Ct. , July 30 1998).