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Notes

Congressional Treatment of Confidential Business Information: Proposals to Avert Unwarranted Disclosure

Sensitive business information enjoys no guarantee of confidential treatment in the hands of congressional committees. The owners of this information face a real dilemma—Congress may require the submission of business data essential to the effective implementation of its programs, but mishandling of this data may result in disclosure and uncompensable damage. The businessman's fear of congressional disclosure is heightened when regulatory agencies are required to transmit to Congress confidential information maintained by them pursuant to their regulatory functions, without judicial controls which would be privately available.

The private owners of confidential business information were unsuccessful in their efforts to avert anticipated disclosure in the recent case of *Ashland Oil, Inc. v. FTC*;¹ a federal court rejected their claim to an injunction to prevent agency release of such data to Congress. *Ashland Oil* thus constitutes an appropriate vehicle through which this note examines opportunities for both judicial and legislative action to alleviate the disclosure crisis produced by the juxtaposition of attenuated governmental control of confidential information against the increased use of such material. Problems endemic to both judicial and legislative resolution of the disclosure issue are explored and countered with suggested substantive and procedural proposals.

THE INSTITUTIONAL FRAMEWORK: LEGISLATURE, JUDICIARY, AND REGULATORY AGENCIES

In *Ashland Oil, Inc. v. FTC*,² the plaintiff, relying primarily on section 6(f) of the Federal Trade Commission Act,³ attempted to enjoin the Federal

¹409 F. Supp. 297 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

²*Id.*

³The Commission shall also have power

. . . .
To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

15 U.S.C. § 46(f) (1970)

Trade Commission (FTC) from delivering confidential gas reserve data to Congress.⁴ Ashland had provided the confidential data to the FTC pursuant to federal law,⁵ but feared public disclosure if the data was submitted to Congress.⁶ Concurring in Ashland's evaluation that its data was competitively sensitive, the FTC denied a request by Congressman John E. Moss, in his individual capacity, for the confidential information.⁷ However, the FTC treated a subsequent request by Moss in his official capacity as the Chairman of a congressional subcommittee as a "formal congressional request" and ordered delivery of the data.⁸

⁴Gas reserve data is confidential because "much like a patent or trade secret, [it] constitutes a valuable and closely guarded asset. Making this asset available to competitors, without due compensation, would most certainly be inimical to competition. . . ." *Amerada Hess Corp.*, 50 F.P.C. 1048, 1050 (1973). Owners of confidential information maintain the secrecy of their data avoiding public disclosure which would cause competitive and economic disadvantage. Much confidential natural gas reserve data fall within modern "trade secret" definitions; thus, acquisition by improper means is subject to tort redress. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474-78 (1974); *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 303 (D.D.C. 1976); RESTATEMENT OF TORTS § 757, Comment a at 3 (1939).

Congressional policy recognizes that confidential information does not belong in the public domain. *See, e.g.*, 18 U.S.C. § 1905 (1970); 5 U.S.C. § 552(b)(4) (1970); S. REP. NO. 813, 89th Cong., 2d Sess. 9 (1965); H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966); 121 CONG. REC. 19340 (daily ed. Nov. 5, 1975) (remarks of Sen. Roth). None of these congressional nondisclosure policies applies to Congress, however. *See note 6 infra*.

⁵Ashland submitted data pursuant to FTC investigative authority granted under 15 U.S.C. § 46(b) (Supp. V 1975), non-compliance with which would have resulted in federally prescribed penalties. *See Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 300 (D.D.C. 1976).

⁶Congress has exempted itself from application of numerous statutes preserving the confidential status of certain information. *See note 4 supra* & text accompanying. "A Congressional commitment to respect the confidentiality of . . . data [relating to the 'Arab Boycott' which had been submitted under an executive pledge of confidentiality] 'would raise serious issues of congressional responsibility' by placing 'unconstitutional limits on the authority of Congress.'" The Washington Post, Nov. 27, 1975, at 9, col. 4 (reported remarks of Rep. Moss). *See also Halverson, An Analysis of the Oil and Natural Gas Reserve Reporting Problem: The Government's Need to Know Versus the Private Company's Need to Protect the Confidentiality of its Sensitive Business Information*, 27 INST. ON OIL & GAS TAX. 119, 126 (1976) [hereinafter cited as *An Analysis of the Reporting Problem*].

⁷Coming from an individual, Moss' request was subject to two public disclosure exemptions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4) and (9) (1970). The FTC had then determined it was without discretion to disclose such exempt material. *But cf. Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C.C. 1975), *modifying* 360 F. Supp. 212 (D.D.C. 1973) (exemption from Act precludes mandatory disclosure, but exemption is not absolute). *Accord, Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974); *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996 (D.D.C. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974).

⁸The FOIA specifically excludes Congress from section (b) public disclosure exemptions. *See* 5 U.S.C. § 552(c) (1970). Thus, Congress may obtain information by traditional means of request or subpoena. *See Federal Public Records Law: Hearings Before a Subcomm. of the House Comm. on Gov. Operations*, 89th Cong., 1st Sess. 23 (1965) (remarks of Rep. Moss). FTC regulations authorize release of information to congressional committees on request without the initial determination, applicable to all other requesters, of whether the requested information is exempt from disclosure. *Compare* 16 C.F.R. § 4.11(b)(1) (1976) *with* 16 C.F.R. § 4.11(a)(1)(iv) (1976). Moss requested the information for committee oversight functions. *See note 51 infra*.

Citing instances in which either Moss or his subcommittee had "failed to accord confidentiality to admittedly sensitive trade materials,"⁹ Ashland argued that section 6(f) prohibited such disclosure by the FTC to *any* third party, including Congress.¹⁰ In opposition, Moss and the FTC urged that release without a subpoena was justified because section 6(f) so *mandated*: "[R]elying on legislative history, defendants Moss and FTC conclude that the Commission was intended to be no more than . . . a convenient storehouse of information readily accessible to the Congress."¹¹ Failing to resolve the issue, the District of Columbia Court of Appeals simply found that section 6(f) did not *prohibit* release of the data on request, if Ashland made no showing of imminent harm from public disclosure. A weighty presumption that Congress would not abuse Ashland's data foreclosed the demonstration of imminent harm, notwithstanding allegations of past breaches of confidentiality.¹²

Congress is certainly entitled to all information necessary to perform its constitutionally bestowed legislative duties.¹³ To insure that Congress obtains all relevant information, the "necessary and proper" clause of the United States Constitution,¹⁴ vesting in Congress all powers necessary to effectuate its legislative duties, has been construed to grant the legislature an implied power of compulsory process:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and

⁹409 F. Supp. at 308 n.14. Ashland alleged three past breaches of confidentiality: release of proprietary information by Moss to the public in breach of an express agreement; publication of detailed reserve estimates in committee reports and disclosure at hearings; and Moss' refusal to respect confidentiality pledges made by the executive branch.

¹⁰Both the district and appellate courts rejected Ashland's argument. The district court refused to enjoin dissemination of the data to Congress pursuant to a "valid" subpoena, absent demonstration of imminent irreparable harm. *Id.* at 309. The court of appeals found that section 6(f) did not *prohibit* transmission of the data to Congress on request absent a similar demonstration. 548 F.2d at 979.

¹¹409 F. Supp. at 302.

¹²The doctrine of separation of powers forces the judiciary to accord a coequal branch of government, here Congress, a strong presumption of future behavioral propriety, notwithstanding past breaches of confidentiality. *See* note 42 *infra* & text accompanying.

¹³ [T]he legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. . . . The very fact of representative government thus burdens the legislature with this informing function. Nevertheless its first informing function lies to itself, a necessary corollary of any legislative purpose.

Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 205 (1926) [hereinafter cited as *Constitutional Limitations*].

¹⁴ To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. 1, § 8, cl. 18.

also the information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.¹⁵

Long implemented by statute,¹⁶ the legislative subpoena power is broad: coextensive with the power to legislate. This power is circumscribed, however, by judicial application of a two-pronged test. Based on the language of the statute,¹⁷ this test demands that the inquiry for which the subpoena has been issued have an adequately defined valid legislative purpose and that Congress establish the "pertinency" of information requested for that purpose.¹⁸

If both requirements of the test are not met, a subpoena will not be judicially enforced.¹⁹ Fundamental fairness demands that the individual have sufficient notice of a legislative demand before risking penalties for non-compliance with a potentially pertinent, authorized inquiry.²⁰ Objection to a subpoena based on a vague or sweeping enunciation of purpose or demand for information not pertinent may be weighed by the judiciary against these

¹⁵*McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). *Constitutional Limitations*, *supra* note 13, provides a general discussion of the historical bases of the power. In *McGrain*, the Supreme Court extended this implied power beyond its historical antecedents to reach the private sector. As a result, Congress enjoys a unique prerogative to compel private individuals to appear before its committees, there to give testimony and to produce records, notwithstanding the status of that information in all other contexts. The power extends to congressional committees and subcommittees within their authorized jurisdictional boundaries. *See, e.g.*, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505 (1975); *Watkins v. United States*, 354 U.S. 178, 200-01 (1957); *United States v. Bryan*, 72 F. Supp. 58, 61 (D.D.C. Cir. 1947).

¹⁶2 U.S.C. § 192 (1970). This provision lends teeth to congressional compulsory process by attaching criminal penalties for failure to respond to a congressional subpoena thus invoking judicial aid to avoid contumacious conduct and delay in receiving information. *See, e.g.*, *Russell v. United States*, 369 U.S. 749, 755-56 (1962); *Watkins v. United States*, 354 U.S. 178, 207 (1957); *Fields v. United States*, 164 F.2d 97, 100 (D.C. 1947), *cert. denied*, 332 U.S. 851 (1948).

¹⁷2 U.S.C. § 192 (1970):

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

¹⁸*See, e.g.*, *Watkins v. United States*, 354 U.S. 178, 200-06 (1957); *United States v. Shelton*, 148 F. Supp. 926, 933 (D.D.C. 1957), *aff'd*, 280 F.2d 701 (D.C. Cir. 1960), *rev'd on other grounds*, 369 U.S. 749 (1962). *Ashland Oil, Inc. v. FTC* employs the three part test articulated in *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961). 409 F. Supp. at 305.

¹⁹*See, e.g.*, *Gojack v. United States*, 384 U.S. 702, 709 (1966) (dictum); *Watkins v. United States*, 354 U.S. 178 (1957); *Tobin v. United States*, 306 F.2d 270, 274-75 (D.C. Cir. 1962), *rev'd* 195 F. Supp. 588 (D.C. 1961), *cert. denied*, 371 U.S. 902 (1962); *United States v. Brewster*, 154 F. Supp. 126, 134 (D.D.C. 1957), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 842 (1958).

²⁰*See generally* *Russell v. United States*, 369 U.S. 749 (1962); *Watkins v. United States*, 354 U.S. 178 (1957); *Sinclair v. United States*, 279 U.S. 263, 292 (1929). *But cf.* *Barenblatt v. United States*, 252 F.2d 129, 131-33 (D.C. Cir. 1958), *aff'd*, 360 U.S. 109 (1959) (purpose derived from piecemeal sources).

two requirements which balance the public need for the information against the individual's protestations of harm. If the legislative purpose is unclear, or the information requested is not sufficiently material to the stated purpose, the individual's interest in protecting his constitutional rights will outweigh the presumptively heavy public interest in an informed legislature.²¹

Ashland Oil demonstrates the tension created when a regulatory agency holds private confidential data ostensibly required by Congress to legislate.²² The agency must weigh preservation of confidential private information²³ and the future availability and procurement of similar data²⁴ against congressional demands.²⁵ Disclosure to Congress is favored by the special constitutional status of Congress, acting for the "public good," and by the understandable desire of the regulatory agencies to appear willing to comply with congressional requests in this era of "government in the sunshine" openness²⁶

²¹Although historically privacy rights have been asserted against the subpoena power, presumably civil suits asserting abrogation by subpoena of constitutionally protected property rights may also be entertained. *See, e.g., Watkins v. United States*, 354 U.S. 178 (1957) (protecting privacy rights despite legislative prerogative).

²²The tension arises where information is demanded from a third party, here the agency, which cannot be expected to refuse to comply with compulsory process and place itself in contempt. The existence of a valid subpoena forestalled consideration of such tension in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), presumably because Congress would receive the information regardless of the source. Three concurring Justices, however, carefully pointed out that this valid legislative activity did not preclude searching judicial scrutiny for lack of validity in other cases:

When duly subpoenaed . . . such a person does not shed his constitutional right to withhold certain classes of information. . . .

The Speech or Debate Clause cannot be used to avoid meaningful review of constitutional objections to a subpoena simply because the subpoena is served on a third party.

Id. at 515-16. This viewpoint relates directly to *Ashland*, where no authorized subpoena compelled delivery of the information and immunized acts from scrutiny. *See* note 75 *infra*.

²³The proprietary value of confidential data is discussed in note 4 *supra*. *See also* *Levi, Confidentiality and Democratic Government*, 30-REC. BAR OF CITY OF N.Y. 323, 325 (1975) ("business requires some privacy as a prerequisite to economic survival") [hereinafter cited as *Confidentiality*].

²⁴The chairman of the FTC has said that "the FTC has to consider the need for preserving the effectiveness of its investigational, prosecutorial, and adjudicative functions. We need . . . to encourage respondents to provide confidential data voluntarily, thus avoiding time-consuming subpoena enforcement activity. . . ." Engman, *Remarks*, 34 FED. B.J. 340, 341 (1975). Delay from producers litigating compliance with agency subpoenas is illustrated by *FTC v. Texaco, Inc.*, 517 F.2d 137 (D.C. Cir. 1975), *modified*, No. 74-1547 (D.C. Cir. Feb. 23, 1977). *See also* *Reliability of Electric & Gas Service*, 49 F.P.C. 1428, 1430 (1973) (producer reluctance to divulge such information to the FPC hampers FPC's regulatory function).

²⁵The Attorney General stresses a balance of endeavor and accommodation of competing values of "confidentiality, the right of the people to know, and the right of the government to obtain important information." *Confidentiality, supra* note 23, at 334.

²⁶*See* Edelman, *Foreward: Openness in Government: A New Era*, 34 FED. B.J. 279 (1975); Markham, *Sunshine on the Administrative Process: Wherein Lies the Shade?* 28 AD. L. REV. 463 (1976).

and public suspicion of governmental favoritism to big business.²⁷ Furthermore, a characterization of the independent regulatory agencies as "arms of Congress," a characterization which stems from delegation to the agencies of legislative investigative powers,²⁸ encourages disclosure.

Portraying the agencies as "arms of Congress" or storehouses of information may, however, be too simplistic. Enabling legislation often grants quasi-legislative, -judicial and -executive powers to the regulatory agencies, making classification difficult²⁹ and potentially misleading. Traditional agency resistance to congressional information inquiries, prompting implementation of the congressional subpoena power by statute,³⁰ belies the superficial portrayal of these agencies as mere handmaidens of Congress. Ironically, agency independence has elicited knowledgeable criticism that Congress has abrogated its duty to make agencies accountable.

Absent unauthorized release,³¹ no constraints prohibit agency release of information to Congress without judicial enforcement of the subpoena standards.³² Yet opportunity exists for judicial action to prevent governmental evasion of private rights.

²⁷Treatment of the problem in the context of the natural gas industry appears in *An Analysis of the Reporting Problem*, *supra* at note 6.

²⁸See, e.g., *Ashland Oil, Inc. v. FTC*, 409 F. Supp. at 302 (FTC "convenient storehouse of information readily accessible to Congress"); *Amerada Hess* 50 F.P.C. 1048 (1973); *Reliability of Electric & Gas Service*, 49 F.P.C. 1430 (1973) (FPC an "arm of Congress" which should be responsive to legislative inquiries); *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 94th Cong., 2d Sess. 410 (1975 & 1976) [hereinafter cited as *Representation of Congress*].

²⁹Note, *Congressional Control of Agency Privilege*, 9 U. MICH. J.L. REF. 348, 356 (1976).

³⁰*Constitutional Limitations*, *supra* note 13, at 199. Assertions of "agency privilege" still present difficulties. See generally Note, *Congressional Control of Agency Privilege*, 9 U. MICH. J.L. REF. 348 (1976).

³¹Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures, of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (1970) (emphasis added). See also note 4 *supra*.

³²Administrative action is unreviewable under the Administrative Procedure Act, 5 U.S.C. § 701 (1970), "to the extent that . . . agency action is committed to agency discretion by law." Section 706, 5 U.S.C. § 706 (1970), allows the court to set aside agency action only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Thus, if Congress receives information voluntarily submitted pursuant to statute, regulation or authorized compulsory process, agency action is according to law or not committed to agency discretion. See *Amerada Hess Corp.*, 50 F.P.C. 1048, 1056-60 (1973) (dissenting opinion distinguishing public from congressional release).

THE JUDICIAL RESPONSE TO TREATMENT OF CONFIDENTIAL INFORMATION

Section 6(f) of The Federal Trade Commission Act

Whether the judiciary, in interpreting section 6(f) and analogous agency enabling legislation,³³ could uniformly require a congressional subpoena before a regulatory agency must release confidential information remains an unresolved issue. Section 6(f) has apparently never been construed, and the *Ashland Oil* court reserved comment on the question.³⁴ Contrary to FTC interpretation, compliance with congressional requests would not seem to be mandated by section 6(f). The language of the section is clearly permissive, bestowing on the FTC a discretionary power to report to Congress.³⁵

Legislative history supports the conclusion that delivery of confidential data to Congress is not mandated.³⁶ Although references to section 6(f) are rare, ambiguous and inconclusive,³⁷ they manifest no intent to impose affirmative duties on the FTC to surrender information on demand. On the contrary, remarks reveal that Congress contemplated an expert and independent agency building up a "comprehensive body of information for the *use and advantage* of the Government."³⁸ The Congress could then legislate effectively with the aid of recommendations and analyses of conditions made available to Congress.³⁹

³³"[T]he question of statutory interpretation posed by this case could have broad implications for Congress' ability to obtain information from the Executive Branch, since there are nearly 100 statutes which, like § 6(f), prohibit disclosure of information by an Executive agency but which do not expressly bar disclosure to Congress." *Representation of Congress, supra* note 28, at 410 (extract from Rep. Moss' Motion to Intervene in *Ashland Oil*).

³⁴See 548 F.2d at 981-82 n.6.

³⁵See 15 U.S.C. § 46(f) (1970). See note 3 *supra*. See also notes 38-39 *infra* & text accompanying.

³⁶Created by Congress, the FTC's powers should be construed specifically pursuant to statutory language. *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973). Where, as here, that language accommodates more than one interpretation, the judiciary must examine legislative history. *Id.* at 690.

³⁷Floor debate before passage of the Federal Trade Commission Act in 1914 focused on the delegation of legislative investigatory functions to the FTC, not the subsequent use of material gathered, and on incorporation of an "unfair competition" standard into the Act. Section 6(f) was passed with little comment, appearing now in substantially the same language as the original Senate and House Conference version of the trade bill. See, e.g., S. Doc. No. 573, 63rd Cong., 2d Sess. 13, 15 (1914) (comparative print of Senate and House bill versions); H.R. REP. NO. 533, 63d Cong., 2d Sess. 6 (1914) ("Congress may not delegate its purely legislative power to a commission," but it has not been held that Congress may not by a commission elicit information. . . .").

³⁸51 CONG. REC. 11089 (1914) (remarks of Sen. Newlands, emphasis added). Comments during House debate on Conference Report No. 1142, in part now section 6(f), equally demonstrate the advisory nature of FTC reports to Congress. 51 CONG. REC. 14935 (1914) (remarks of Rep. Stevens emphasizing the beneficial work of the FTC by recommendation and expert aid). *Accord*, H.R. REP. NO. 533, 63d Cong., 2d Sess. 8 (1914).

³⁹The judiciary indirectly substantiated such an interpretation of section 6(f) in *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), by emphasizing the tripartite structure and in-

Although a less permissive interpretation is possible,⁴⁰ without stronger evidence that section 6(f) affirmatively *increases* Congress' power to acquire information, the FTC would not appear statutorily compelled to furnish data without a subpoena. Information held by an agency should be reachable only by compulsory process subject to satisfaction of pertinency and purpose protections. Resistance to informal requests assures dissemination only to authorized parties, providing some certainty of confidential treatment. Yet these precautions, otherwise available to protesting individuals, would delay congressional inquiry no more than private opposition. Where an agency refused to strengthen its release procedures, judicially required subpoenas would preserve confidentiality by averting unwarranted congressional requests.⁴¹

Obstacles to Judicial Action

A judicial requirement of a subpoena may, however, be impractical for four reasons. Foremost, a subpoena may provide scant protection for confidential information because separation of governmental powers constrains judicial action.⁴² Although Congress should adequately demarcate the in-

dependence of FTC, implying that its domination by any one branch of the government would be impermissible:

The commission is to be non-partisan; and it must, from the very nature of its [quasi-legislative and quasi-judicial] duties, act with entire impartiality. . . . [I]ts members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

The debates in both houses demonstrate that the prevailing view was that the commission was not to be "subject to anybody in the government but . . . only to the people of the United States"; free from "political domination or control" . . . to be "separate and apart from any existing department of the government. . . ."

Id. at 624-25. *But cf. Representation of Congress*, *supra* note 28, at 410 (Ashland's interpretation of section 6(f) "would substantially undermine the access of Congress to the records maintained by its agent, the Federal Trade Commission").

⁴⁰See 51 CONG. REC. 8852 (1914) (remarks of Reps. Bartlett and Stevens that FTC would be required to report to Congress under section 6(f), giving whatever information it can to assist it). Compare original House bill describing FTC annual report to Congress: "This report shall contain such facts . . . collected by the commission as may be considered of value . . . : *Provided*, That no trade secrets . . . shall be embraced in any such abstract. . . . The report shall also include such recommendations . . . as the commission may deem necessary." H.R. REP. NO. 533, 63d Cong., 2d Sess. 18 (1914), with the superseding Senate version, 15 U.S.C. § 46(f) (1970), set forth at note 3 *supra*.

⁴¹The need for this judicial protection gains significance when juxtaposed against allegations of leaks of information. See notes 61-75 *infra* & text accompanying. When the FTC released information subject to an express confidentiality agreement over the telephone with less than seventy-two hours' notice to the owners, precluding challenge of release, the court noted tersely: "The Federal Rules of Civil Procedure . . . provide for motions to quash duly authorized subpoenas, but not phone calls." *FTC v. Texaco, Inc.*, 517 F.2d 137, 151 n.37 (D.C. Cir. 1975). The lack of protection to owners of information held by third parties was also emphasized in *Eastland v. United States Servicemen's Fund*, 421 U.S. at 513-18 (Marshall, J., concurring).

⁴²Due to the theory of separate but equal governmental branches, the judiciary must presume congressional propriety in all its legislative activities. Accordingly, this presumption encompasses congressional investigatory activity:

investigative jurisdiction of its committees and subcommittees,⁴³ failure to do so does not insure a successful challenge in court to an investigative committee subpoena.⁴⁴ Theoretically, courts construe vague or ambiguous investigatory authorizations narrowly,⁴⁵ but the presumption of propriety of congressional action defeats all but gross deviations from purpose and relevancy.⁴⁶ "The exact scope of an investigation cannot always be charted and bounded in advance [thus] some discretion must be left to those to whom the task is entrusted, if the objective [i.e., legislating in the public interest,] is to be attained."⁴⁷ Admissible evidence must be responsive to the scope of legislative inquiry which anticipates all possible cases, and is therefore quite broad.⁴⁸ Consequently, respect for the separation of powers has led the judiciary to find a valid legislative purpose even where obtained from piecemeal sources.⁴⁹ Coupled with the presumption that Congress will not abuse its inquisitorial powers, the willingness to find a valid purpose and presume the materiality of congressional inquiry effectively negates 'pertinency and purpose' challenges otherwise available.⁵⁰ Second, requiring a subpoena is tantamount to advocating agency and judicial resistance to rational pleas for increased congressional supervision of the regulatory agencies.⁵¹ Forcing Congress to subpoena

It would be intolerable if the judiciary were to intrude into the activities of the legislative branch . . . and virtually stop the progress of an investigation, which is intended to secure information that Congress deems necessary and desirable in the proper exercise of its functions, unless the lack of materiality and relevancy of the subject matter is clear and manifest.

United States v. Bryan, 72 F. Supp. 58, 61 (D.D.C. 1947). See also *Constitutional Limitations*, *supra* note 13, at 219. The presumption of propriety covers congressional treatment of information received as well:

Ashland suggests that the Court take judicial notice of the fact that . . . "there has been no promise or commitment that Ashland's trade secret data would be given confidential treatment." While the Court can appreciate Ashland's concern . . . it does not appear to the Court that isolated instances of breached confidentiality in the past are sufficient to overcome the continuing presumption of Congressional propriety.

409 F. Supp. at 308 (citation omitted).

⁴³See *Gojack v. United States*, 384 U.S. 702, 716 (1966); *Watkins v. United States*, 354 U.S. 178, 201 (1957); *Brewster v. United States*, 255 F.2d 899, 901 (D.C. Cir. 1958), *rev'g* 154 F. Supp. 126 (D.D.C. 1957), *cert. denied*, 358 U.S. 842 (1958).

⁴⁴See, e.g., *United States v. Bryan*, 72 F. Supp. 58, 61, 63 (D.D.C. 1947), *aff'd sub nom. Barsky v. United States*, 167 F.2d 241, 245-46 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 843 (1948).

⁴⁵See, e.g., *Watkins v. United States*, 354 U.S. 178, 204 (1957); *United States v. Tobin*, 195 F. Supp. 588, 598 (D.D.C. 1961), *rev'd on other grounds*, 306 F.2d 270, 274-75 (D.C. Cir. 1962).

⁴⁶See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 175-77 (1927); *United States v. Bryan*, 72 F. Supp. 58, 61 (D.D.C. 1947), *aff'd sub nom. Barsky v. United States*, 167 F.2d 241 (D.C. Cir. 1948).

⁴⁷*United States v. Bryan*, 72 F. Supp. 58, 63 (D.D.C. 1947).

⁴⁸*Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938).

⁴⁹See *Barenblatt v. United States*, 252 F.2d 129, 130-31 (D.C. Cir. 1958). *But cf. Tobin v. United States*, 306 F.2d 270, 274-75 (D.C. Cir. 1962), *rev'g* 195 F. Supp. 588 (D.D.C. 1961) (more explicit authorization required for inquiry undertaken).

⁵⁰See cases cited note 46 *supra*.

⁵¹*Adams, Sunset: A Proposal for Accountable Government*, 28 *Ad. L. Rev.* 511 (1976); *Kennedy, Regulatory Reform: A Confused National Issue*, 28 *Ad. L. Rev.* 447 (1976); *Ribicoff*,

confidential data mildly impedes the oversight of regulatory agencies. Third, unlike an individual choice to risk all to protect private rights, placing an agency chairman in contempt of Congress for failure to divulge subpoenaed information may be inappropriate. Expecting agency noncompliance is unrealistic when the agency may legally deliver the information to Congress and disclaim responsibility for subsequent improper handling of it.⁵² Finally, requiring a subpoena may be procedurally difficult. The owner of confidential data must have notice of impending disclosure to mount an injunctive challenge to its release to Congress. If the judiciary is then unwilling to weigh policy reasons for requiring stricter protections for confidential information,⁵³ any challenge may fail, particularly if the agency labels its reply to Congress' request a "special report" or its equivalent, which section 6(f), for example, grants the FTC power to forward to Congress voluntarily at any time.⁵⁴

Prophylactic Effect Outweighs Inadequacies

Despite potential inadequacies tempering the effectiveness of requiring a pre-release subpoena, the subpoena procedure may be a small cost to pay to insure the individual primary restraints on congressional information acquisition. Stricter enforcement of pertinency and purpose requirements weeds out unwarranted claims to information.⁵⁵ Judicial scrutiny at this stage is particularly appropriate because the conflicting congressional and private constitutional rights involved require delicate balancing, a task for which the judiciary is uniquely equipped.⁵⁶ Additionally, little realistic risk of contempt

Congressional Oversight and Regulatory Reform, 28 *Ad. L. Rev.* 415 (1976); and Note, *Congressional Control of Agency Privilege*, 9 *U. MICH. J.L. REF.* 348 (1976). Congressional oversight duties are defined by the Legislative Reorganization Act of 1946, ch. 753, § 136, 60 Stat. 832 (1946), as amended by 2 U.S.C. § 190(d) (Supp. V 1975). For a general discussion of oversight see J. HARRIS, *CONGRESSIONAL CONTROL OF ADMINISTRATION* (1964).

⁵²See *Reliability of Electric Gas & Service*, 49 F.P.C. at 1430-31. The agency is not responsible for information legally leaving its control. However, the FPC, in releasing information to Congress, made such disclosure "expressly subject to the requirements of confidentiality and protection against public disclosure as set forth in all related orders of this Commission." *Amerada Hess Corp.*, 50 F.P.C. at 1051. Such expression of policy does not bind Congress. See *The Washington Post*, Nov. 27, 1975, at 9, col. 4 (remarks of Rep. Moss, set forth at note 6 *supra*).

⁵³The policy considerations collected in this note include the inadequate protection afforded the owners of information held by a third party, particularly in light of the penalties imposed for failure to submit the information to the third party; the fact that congressional disclosure may hamper future agency and congressional acquisition of even mandatorily submitted data; and that delay in congressional acquisition due to a subpoena's being required merely averts legislative excess without precluding authorized access.

⁵⁴15 U.S.C. § 46(f) (1970). No specific time is assigned for transmission of special reports. Construed in another context, "special reports" consist of any information beyond the ordinary data of a routine annual report. *United States v. Morton Salt Co.*, 174 F.2d 703, 707 (7th Cir. 1949). However, note that the FTC's reliance on section 6(f) may be makeweight. The FPC has asserted the need to comply with less than legally sufficient compulsory process due to the special relation to Congress arising from delegation of legislative functions to them.

⁵⁵See note 41 *supra*.

⁵⁶Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 *HARV. L. REV.* 1113, 1175 (1973).

proceedings threatens an agency chairman, just as a private owner is unlikely to subject itself to such action. Given a legally insufficient congressional demand, the agency should notify the owner, allowing it to attempt to enjoin delivery of data and terminating agency responsibility.⁵⁷ Urgent demands may preclude notification and challenge, requiring the agency to act for the owner in attacking the request.⁵⁸ Protection thus afforded appeases the owner, who can do no more privately, enhancing the agency's ability to elicit similar information in the future.⁵⁹

Congress will normally be entitled to information demanded, notwithstanding subpoena requirements which provide some initial assurance of proper acquisition.⁶⁰ Assuming Congress acquires the information it seeks, attention then focuses directly on unwarranted congressional release of data by a committee, a member or a staff member. Such abuse of the information privilege may subvert congressional recognition of the need for confidentiality of this information.

CONGRESSIONAL TREATMENT OF CONFIDENTIAL INFORMATION

Procedural Inadequacies

Tension arises at the congressional level, not because Congress is not entitled to information, but because no guarantees of confidentiality or adequate protections exist at that level. Currently each House of Congress has independent rules governing administration of its hearings and meetings.⁶¹ Pro-

⁵⁷Action by the owner to protect its information was acceptable with respect to congressional requests and administrative subpoenas in *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976), and in *FTC v. Texaco*, 517 F.2d 137 (D.C. Cir. 1975), *modified by* No. 74-1547 (D.C. Cir. Feb. 23, 1977). The Supreme Court has recognized that a third party could not be expected to refuse compliance with a subpoena and place itself in contempt, thus foreclosing the traditional means of raising defenses to compulsory process. *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 497-98 (1975).

⁵⁸Requiring the agency to act as surrogate owner could be accomplished judicially or legislatively. A strict judicial subpoena requirement would foreclose unwarranted agency release and give the individual the level of protection he would demand for himself. Alternatively, the congressional policy of nondissemination of confidential material, *see* note 4 *supra*, argues that Congress should expect and require the agencies to restrict legislative access to such information. Access restrictions could be incorporated into agency enabling legislation or inserted in agency regulations.

⁵⁹*See* note 24 *supra* & text accompanying.

⁶⁰If allegations of information leaks by Congress continue, however, perhaps the judicial presumption of legislative propriety will come to be more easily rebutted.

⁶¹Title I of the Government in the Sunshine Act, a uniform measure to open committee meetings to the public, introduced as S. 5, 94th Cong., 1st Sess., 121 CONG. REC. S29 (daily ed. Jan. 15, 1975), was deleted from the Act when the report from the Senate Committee on Rules and Administration recommended that openness in Government "would more properly be achieved by direct amendment of the Standing Rules. . . ." S. REP. NO. 381, 94th Cong., 1st Sess. 2 (1975).

Currently committee meetings and hearings in the House of Representatives are governed by House Rule XI, clauses 2(g)(1) and 2(g)(2), H.R. Doc. No. 416, 93d Cong., 2d Sess. (1974). Senate meetings and hearings are held pursuant to Senate Rule XXV, § 7(b), S. Doc. No. 1, 94th Cong., 1st Sess. (1975), *as amended by* S. Res. 9, 94th Cong., 1st Sess. (1975), and 2 U.S.C. § 190a-1(b) (1970).

cedural variations distinguish hearings and meetings, and each committee or subcommittee may adopt such rules and regulations as are perceived necessary for its governance.⁶² When sensitive testimony is to be given, a general presumption of open committee meetings and hearings may be overcome by a vote in public session to close all or a portion of any hearing or meeting.⁶³ Procedures and standards for rebutting the presumption of openness vary.⁶⁴

A voted exception to a policy of open proceedings is thought to preserve flexibility by allowing each committee, based on its own experience, to strike an effective balance between confidentiality and public information.⁶⁵ However, such variable procedure fosters unpredictable latitude among committees in closing proceedings and a confusing diversity of practice⁶⁶ defeating the imperative preservation of confidentiality.

With a philosophy of "government in the sunshine" prevailing,⁶⁷ there is now, more than ever, opportunity for unwitting or untraceable leaks of con-

⁶²*Compare* 2 U.S.C. § 109a (1970) (Senate committee meeting procedure) with 2 U.S.C. § 190a-1 (1970) (Senate committee hearing procedure). Committee and subcommittee rules are adopted under 2 U.S.C. § 190a-2 (1970) (Senate committees) and House Rule XI, clause 2(a), H.R. Doc. No. 416, 93d Cong., 2d Sess. (1974).

⁶³The House rule for closing meetings for the transaction of business is House Rule XI, clause 2(g)(1), H.R. Doc. No. 416, 93d Cong., 2d Sess. 421-22 (1974), providing:

Each meeting for the transaction of business, including the markup of legislation, of each standing committee or subcommittee thereof shall be open to the public except when the committee or subcommittee, in open session and with a quorum present, determines by rollcall vote that all or part of the remainder of the meeting shall be closed to the public.

The analogous House rule with respect to hearings is House Rule XI, clause 2(g)(2), H.R. Doc. No. 416, 93d Cong., 2d Sess. 422 (1974), providing for open hearings except

when the committee or subcommittee, in open session and with a quorum present, determines by rollcall vote that all or part of the remainder of that hearing on that day shall be closed to the public because disclosure of testimony, evidence, or other matters to be considered would endanger the national security or would violate any law or rule of the House of Representatives.

By contrast, the later Senate rule lists specific guidelines paralleling the Freedom of Information Act, 5 U.S.C. § 552 (1970), *as amended*, (Supp. V. 1975), for closure of meetings to the public, *see* notes 94-95 *infra* & text accompanying, and provides:

Each meeting . . . including meetings to conduct hearings, shall be open to the public, except that a meeting or series of meetings by a committee or a subcommittee thereof on the same subject for a period of no more than fourteen calendar days may be closed to the public on a motion made and seconded to go into closed session to discuss only whether the matters enumerated in paragraphs (1) through (6) would require the meeting to be closed followed immediately by a record vote in open session by a majority of the members of the committee or subcommittee. . . .

Senate Rule XXV, § 7(b), *as amended* by S. Res. 9, 94th Cong., 1st Sess. (1975). The Senate procedure for open hearings, 2 U.S.C. § 190a-1(b) (1970), affords less specific closure guidelines, but does direct attention to confidential matters: "Each hearing conducted . . . shall be open to the public except when . . . the testimony to be taken . . . may divulge matters deemed confidential under other provisions of law or Government regulation."

⁶⁴*See* note 63 *supra*.

⁶⁵121 CONG. REC. S19337-38 (daily ed. Nov. 5, 1975) (remarks of Sen. Cannon as to change in procedures).

⁶⁶*See Id.* at S19339 (remarks of Sen. Chiles).

⁶⁷"While recognizing the need for some closed proceedings, we set as a basic goal the opening of committee activities to full public view, including, under reasonable restrictions and rules,

fidential data both to the public and to competitors.⁶⁸ In fact, protection by Congress has become so inadequate that one commentator notes:

[T]he Attorney General . . . has recently admitted that the risk that confidential and valuable commercial information may reach the public domain after submission to Government is "ever present."

. . . [A]s we have recently learned . . . information available to Congress means information available to the general public and to competitors. . . . [contravening] the free competitive system which argues against interchange of competitively sensitive information among competitors.⁶⁹

Although in theory Congress punishes the transgressions of its rules by its own members,⁷⁰ leaks are often not traceable to any particular individual. They may result from presentation of testimony and documents in public committee proceedings, publication in a committee report or unwarranted access by unauthorized staff and members of the public.⁷¹ Illustrative of the problem under current procedures are the following congressional observations on a recent leak of sensitive intelligence information:

The rules and security regulations adopted by the Select Committee were adequate. They were not, however, strictly adhered to or executed.

. . . .
 . . . [S]taff assistants to various Members of the Select Committee, not subject to the restraints put on Committee staff personnel, [reportedly] had considerable access to matters investigated by the Select Committee.

. . . [A]pparently little or no effort was made to insure Members and staff personnel left behind documents they obtained during their affiliation with the Committee. A number of classified and highly sensitive documents were discovered . . . still in the possession of Select Committee Members and staff personnel months after that Committee ceased to exist.⁷²

Lack of Redress

Magnifying the inadequacy of procedural safeguards controlling congressional handling of confidential information, monetary recovery for the

the televising, broadcasting, and photographing of committee hearings." H.R. REP. NO. 1215, 91st Cong., 2d Sess. 4, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4417, 4419.

⁶⁸The potentially adverse effect of "sunshine" legislation on competition in the administrative context is discussed in Markham, *Sunshine on the Administrative Process: Wherein Lies the Shade?* 28 AD. L. REV. 463 (1976). See also Edelstein, *Foreward: Openness in Government: A New Era*, 34 FED. B.J. 279, 279-80 (1975).

⁶⁹*An Analysis of the Reporting Problem*, supra note 6, at 120, 134.

⁷⁰"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior . . ." U.S. CONST. art. I, § 5, cl. 2.

⁷¹See, e.g., *Doe v. McMillian*, 412 U.S. 306, 308-09 (1973); *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 308 n.14 (D.D.C. 1976).

⁷²HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, REPORT ON INVESTIGATION PURSUANT TO H. RES. 1042 CONCERNING UNAUTHORIZED PUBLICATION OF THE REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE, H.R. REP. NO. 1754, 94th Cong., 2d Sess. 41-42 (1976) [hereinafter cited as REPORT ON INVESTIGATION PURSUANT TO H. RES. 1042].

destruction of valuable property rights resulting from disclosure, otherwise potentially compensable under the fifth amendment⁷³ or by a tort action,⁷⁴ is pretermitted by judicial expansion of legislators' immunity from suit under the Speech or Debate Clause.⁷⁵ Regrettably, lack of compensation for the destruction of property rights embodied in confidential industry data may controvert the public interest Congress seeks ultimately to serve, and may make it more difficult for Congress to obtain information in the future. The natural gas industry illustrates the potential adverse impact disclosure may have on the public interest:

In a period when the gas supply shortage is most acute, disclosure of detailed reserve data *would undoubtedly inhibit future exploration for new gas reserves* since speculators and competitors could equally benefit from the . . . expenditures of other companies.⁷⁶

Even if not entirely deterred from developing reserve data, the increased risk accompanying expenditures to acquire the information may ultimately be reflected in rising fuel prices.⁷⁷

Persistent failure to provide adequate redress may reduce the amount of information voluntarily supplied to agencies and Congress. Moreover, although owners of confidential data cannot falsify or withhold requested

⁷³"[N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. At least one FPC commissioner has expressed the explicit fear that congressional disclosure can destroy proprietary rights and that "a Congressional committee may render nugatory the supposed Constitutional guarantees of due process, by taking valuable [gas reserve] information . . . without the payment of just compensation." *Amerada Hess Corp.*, 50 F.P.C. 1048, 1060 (1973) (dissent). The majority infers this also. *Id.* at 1050.

⁷⁴See note 4 *supra*.

⁷⁵Legislators, and their aides and staff acting as agents, enjoy immunity from prosecution for actions within the sphere of "legislative activity." See *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972), *reh'g denied*, 409 U.S. 902 (1972). This is true even though the acts or words are knowingly false or wrong. See *Barsky v. United States*, 167 F.2d 241, 250 (D.C. Cir. 1948). Based on the speech or debate clause, U.S. CONST. art. 1, § 6, cl. 1, the immunity has been expanded by the judiciary to foreclose any civil or criminal proceedings against a legislator acting within the legitimate sphere of legislative activity including acts pursuant to an authorized subpoena. See Note, *Constitutional Law—Legislative Immunity Outweighs First Amendment Rights*, 27 MERCER L. REV. 1195, 1196-99 (1976). Non-legislative acts are granted no immunity. *Doe v. McMillan*, 412 U.S. 306, 323-24 (1973); See, e.g., *Gravel v. United States*, 408 U.S. 306, 323-24 (1973); *Hentoff v. Ichord*, 318 F. Supp. 1175, 1182 (D.C. Cir. 1970). See generally Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973). Although designed "to protect the integrity of the legislative process by insuring the independence of individual legislators," *United States v. Brewster*, 408 U.S. 501, 507 (1972), and not to accord legislative supremacy, *id.* at 508, expansive judicial interpretation of "legislative activity" has been allowed to bar private challenge.

⁷⁶Reliability of Gas & Electric Service, 49 F.P.C. 1428, 1429 (1973) (emphasis added). *Accord*, *An Analysis of the Reporting Problem*, note 6 *supra*, at 136. See also *Placid Oil Co. v. FPC*, 483 F.2d 880, 894 n.13 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974).

⁷⁷The FPC has the statutory duty not only to guard consumers against super-profits reaped from artificially inflated rates, but also to protect consumer interests by making sure that the rate schedule is high enough to elicit an adequate supply. 483 F.2d at 894 n.13.

records where judicially compelled,⁷⁸ they can substantially delay agency and congressional action by resisting questionnaires, subpoenas, etc.⁷⁹ Without speedy access to reliable industry data, congressional policymaking in quickly evolving fields such as energy could be seriously impeded.⁸⁰ Although Congress needs a measure of immunity in order to legislate free from litigious plaintiffs, absolute immunity which abrogates private constitutional rights requires reexamination of the means by which Congress and the courts may best serve the public interest.

Judicial Initiative To Promote Congressional Protection

Because the judiciary traditionally deals with conflicts of constitutional rights,⁸¹ judicial scrutiny of Congress' treatment of confidential information is justified in a situation such as *Ashland Oil*,⁸² where the owner of information faces penalties for not submitting its data to the regulatory agency and yet has no control over its dissemination once the agency turns the data over to Congress. Unwarranted revelation of such data is best averted when the judiciary provides an objective judgment of the deliberation backing specific disclosures. Notwithstanding the presumptively weighty legislative right to be adequately informed, private property rights asserted in relation to confidential information are also based on the Constitution and demand fair protection.⁸³ Since the judiciary expanded the immunity currently denying adequate protection against, or compensation for, destruction of property rights, the judiciary could reexamine the basis for the immunity and narrow it.⁸⁴ In fact,

⁷⁸See, e.g., 5 U.S.C. § 555(d) (1970).

⁷⁹See, e.g., *FTC v. Texaco, Inc.*, 517 F.2d 137 (D.C. Cir. 1975), modified by No. 74-1547 (D.C. Cir. Feb. 23, 1977); *Recent Cases—National Parks & Conservation Ass'n v. Morton*, 88 HARV. L. REV. 470, 476 (1974). Chairman Engman, when the FTC released Ashland's data to Congress, noted that litigation between the Commission and companies refusing to provide such data continued and emphasized that:

As a result, your Subcommittee will receive data only from those companies which have voluntarily complied with the Commission's orders. This fact is not lost upon companies faced with information requests from the Commission and will do little to encourage voluntary compliance, especially if any sensitive information is made public.

409 F. Supp. at 301.

⁸⁰See *An Analysis of the Reporting*, supra note 6, discussing the rapid bureaucratic developments designed to cope with the recent "energy crisis." See also, Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415, 419 (1976) (Congress relies on agencies for "hard facts").

⁸¹Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1174-75 (1973).

⁸²409 F. Supp. 297 (D.D.C. 1976), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

⁸³Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1174-75 (1973).

⁸⁴Critics of absolute immunity emphasize its creation to insure independence from executive interference and urge a traditional balancing of interests in private civil suits alleging violation of private constitutional rights with a potential yielding of the privilege to the individual rights. *Id.* See also Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960 (1951).

Although recent Supreme Court doctrine upholds the absolute nature of the immunity,

recent case law suggests that congressional immunity is being circumscribed.⁸⁵

Supporters of absolute immunity for legislators assert, however, that once Congress has obtained confidential information, judicial scrutiny interferes with the independence of the legislature.⁸⁶ The separation of powers doctrine and the presumption of proper congressional behavior, limiting judicial action in related contexts, intimate that the judiciary may not be willing to tell Congress which information appropriately belongs in the public domain, its competitive and confidential nature notwithstanding.⁸⁷ Because effective

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), the Court has also reaffirmed that:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel v. United States, 408 U.S. 606, 625 (1972). A congressional report examining the Department of Justice's representation of congressional interests in court reflects concern at the narrowing of the immunity by gradual re-definition of "legislative activity." See REPRESENTATION OF CONGRESS, *supra* note 28 at 3.

⁸⁵McSurely v. McClellan, 521 F.2d 1024 (D.C. Cir. 1975), *remanded on other grounds*, No. 73-1991 (D.C. Cir. Dec. 21, 1976).

In sum, even if Congress' use of material injurious to private reputation is protected for the purpose of issuing subpoenas, writing reports, and deliberating on legislation, the immunity afforded by the Speech or Debate Clause ceases if that material is disseminated either to the Executive or to the public at large.

521 F.2d at 1040. *Accord*, No. 73-1991 at 13-16, 41.

⁸⁶See, e.g., Note, *Constitutional Law—Legislative Immunity Outweighs First Amendment Rights*, 27 MERCER L. REV. 1195 (1976). The judiciary is by far the most ardent supporter of the privilege. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501-03 (1975); Gravel v. United States, 408 U.S. 606, 617-18 (1972).

⁸⁷When revelation of information in a committee report impinged on individual privacy rights, Mr. Justice Blackmun emphatically concurred in the majority's refusal to question congressional discretion to collect and to include the information in its report:

Stationing the federal judiciary at the doors of the Houses of Congress for the purpose of sanitizing congressional documents in accord with this Court's concept of wise legislative decisionmaking policy appears to me to reveal a lack of confidence in our political processes and in the ability of Congress to police its own members. It is inevitable that occasionally, as perhaps in this case, there will be unwise and even harmful choices made by Congress in fulfilling its legislative responsibility. That, however, is the price we pay for representative government. I am firmly convinced that the abuses we countenance in our system are vastly outweighed by the demonstrated ability of the political process to correct overzealousness on the part of elected representatives.

Doe v. McMillan, 412 U.S. 306, 338 (1973). See also *McSurely v. McClellan*, No. 73-1991, slip op. at 16 n.30 (D.C. Cir. Dec. 21, 1976).

Although the *McSurely* court distinguished congressional use of information from its dissemination to the public, that court also noted:

It would appear impossible for the courts to make detailed assessments of the propriety of each individual item of information obtained from a particular source by Congressional investigators, or revealed at a Congressional hearing, without engaging in exactly the kind of inquiry into motives that the Speech or Debate Clause was intended to foreclose.

521 F.2d 1024, 1039 (D.C. Cir. 1975) (emphasis added). But see *Representation of Congress*, *supra* note 28, quoting the *Ashland* court's displeasure with the scope of the immunity, given protection of confidential information in all other situations, when it questioned "whether Congress [sic], in its legislative function, has the right to set aside its own legislation imposing secrecy on other parties." *Id.* at 408.

judicial response to congressional information mishandling is unlikely, the ultimate means of redress lies with Congress.

CONGRESSIONAL RESPONSIBILITY

Congress itself has recognized the inappropriateness of placing confidential data in the public domain;⁸⁸ thus, congressional self-restraint is imperative to accord sensitive data the confidentiality it deserves. The legislative solutions here proposed, calling for congressional self-command, should ameliorate potential abuse by promoting selective disclosure and by providing redress for unwarranted damage.⁸⁹ Congressional access to and use of confidential information to legislate effectively should not be hindered; therefore under the proposed solutions Congress remains free to independently judge the confidential nature of particular information.⁹⁰

Procedural Protections

Initially, two broad procedural improvements are necessary: greater uniformity of committee procedure in dealing with confidential data, and organization of a staff specifically charged with evaluation and supervision of allegedly confidential data.

Uniformity of committee procedure is directed at the problem of substantial variations now manifest in the rules of the House and Senate and their numerous committees.⁹¹ Such variations create confusion, particularly under attenuated House guidelines,⁹² about what circumstances justify closing a meeting or hearing to the public. Where closure guidelines are ambiguous, committees are free to resist fragmenting proceedings into potentially inefficient public and nonpublic sessions by failing to require closure, thereby defeating confidentiality.⁹³

⁸⁸See note 4 *supra*. Note the partial step by the Senate toward greater specificity of subjects proper for closure of committee proceedings, see note 63 *supra* and notes 94-95 *infra* & text accompanying.

⁸⁹[I]mplicit in the concept of government . . . is the need and hence right to maintain the confidentiality of information. Confidentiality cannot be without limit . . . and must be balanced against the right of all citizens to be informed about the conduct of their government. An exercise of discretion is clearly required. In each instance the respective interests must be assessed so that ultimately the public interest may be served.

Confidentiality, supra note 23, at 332.

⁹⁰See The Washington Post, Nov. 27, 1975, at 9, col. 4 (reported remarks of Rep. Moss).

⁹¹See note 63 *supra*.

⁹²See note 63 *supra*; note 94 *infra*.

⁹³Resistance to fragmentation of proceedings into open and closed portions, the latter with limited staff help, is reflected by Reps. Landrum and Gibbons' colloquy during House debate on H.R. Res. 259, 93d Cong., 1st Sess., 119 CONG. REC. 6713 (1973):

[I]f we have to close the meeting we are precluding any expert whatsoever from any

Uniformity modifications emulating Senate rules for open and closed proceedings would provide guidelines encouraging closure in particular situations.⁹⁴ For example, Senate meetings, including meetings to conduct hearings, may be closed to the public when testimony or discussion may disclose information relating to trade secrets or commercial or financial information pertaining to a given person, where a congressional act requires governmental officers and employees to keep the information confidential, or where the information has been obtained by the government on a confidential basis and must be kept secret to prevent undue injury to the person's competitive position.⁹⁵ These guidelines stimulate the expectation of closure in particular situations, allowing prior planning for presentation of sensitive material in large segments in nonpublic proceedings. Additionally, given more standardization, changeovers between open and closed sessions would be less confusing and more controllable, particularly as greater uniformity would create relatively static categories of individuals permitted to attend closed sessions or otherwise deal with confidential information, thus reducing administrative difficulties of controlling access to such data.

However, no closure procedure is effective if laxly applied. Thus, control of unauthorized access to confidential data would be placed in the hands of a staff charged with monitoring closed hearings and with distributing and collecting confidential documents from a central location. Even assuming good faith congressional action, such documentary supervision would help prevent information leaks by aides, printers, secretaries and the public.

In addition to monitoring access to data, the staff would initially evaluate and classify information acquired by committees to determine whether it merits confidential treatment.⁹⁶ Staff demarcation of sensitive portions would

department of the Government assisting us. . . . [W]e could not operate . . . without the expertise and computers which we have to rely upon.

We can open the meeting if we need to do that.

Open every 5 minutes and close them every 5 minutes. . . . [W]e ought to get revolving doors.

⁹⁴The Senate rules, *supra* note 63, suggest meetings be closed where congressional enactments or special agreements require confidentiality to preserve the competitive position of the submitting party. Similarly, Senate hearing procedures encourage nonpublic session where the hearing "may divulge matters deemed confidential . . ." 2 U.S.C. § 190a-1(b) (1970).

By contrast, House rules for meetings provide no closure guidelines, and House hearings procedure merely suggests nonpublic session where "disclosure of testimony . . . would endanger the national security or would violate any law or rule of the House of Representatives." House Rule XI, clause 2(g)(2), H.R. Doc. No. 416, 93d Cong., 2d Sess. 422 (1974).

⁹⁵Senate Rule XXV, § 7(b), as amended by S. Res. 9, 94th Cong., 1st Sess. (1975).

⁹⁶The staff would provide an independent appraisal of data submitted, based on their own expertise and objective consideration of accompanying legends prepared by information owners, to flag attention to potentially sensitive portions. See O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 BUS. LAWYER 1125, 1144-46 (1975) (protection of business secrets held by an agency). See also, *e.g.*, *Burroughs Corp. v. Schlesinger*, 403 F. Supp. 633, 637 (E.D. Va. 1975) (hearings ordered to consider portions legended by owner). Staff appraisal would extend to expert affidavits and memoranda, such as the judiciary use in the FOIA context. See, *e.g.*, *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249-50 (E.D. Va. 1974); *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1007 (D.C.C. 1974); *Hughes*

flag congressional attention to data not appropriate for public dissemination.⁹⁷ Where public dissemination of some information was favored, aggregations of composite data prepared by the staff would generally satisfy the public need to know and preserve the owner's competitive advantage.⁹⁸ Where detailed, identifiable information was to be released, the staff could notify the owner of impending dissemination. Such notification would foster carefully considered disclosure while affording the owner an opportunity to challenge disclosure in court before release mooted the issue.⁹⁹

Creation of such a staff concededly encounters initial technical difficulties. Staff members must be sufficiently expert to judge whether information deserves confidential treatment. To insure experienced evaluation and to avert attempts to misuse information, a relatively stable group is preferable. Staff members might be drawn from various committee staffs dealing with confidential information or from industry, assigned permanently to this staff.

The potential for misuse of information by staff members themselves raises the issue of staff immunity, requiring reexamination of the extent to which the definition of "legislative activity" shields their work from scrutiny.¹⁰⁰ Moreover, a staff which monitors use of documents and in-

Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 296 (C.D. Cal. 1974). The staff could readily assess agency warnings as to the sensitivity of submitted materials. See, e.g., *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 300-01 (1976); *Reliability of Electric & Gas Service*, 49 F.P.C. 1428, 1431 (1973).

⁹⁷Legislators' awareness of certain information's sensitivity is imperative to prevent careless handling of documents and to insure that nonpublic testimony remains confidential. See, e.g., *United States v. Orman*, 207 F.2d 148, 151 (3d Cir. 1953) (refusal to testify before nonpublic session of Senate committee due to fear of newspaper publication of testimony).

⁹⁸Government agencies should be educated on the necessity for some leeway in reporting [gas] reserves, since [it] is not an exact science. . . .
 . . . [G]overnment agencies and Congress ought to be convinced . . . that the publication of aggregate proved reserves . . . ought to be enough to satisfy the interests of the American public. Other information may be needed for internal use by government policymakers but should remain in the hands of those in Government who have a "need to know" and should not, absent some overwhelming public policy argument, become a part of the public domain where one competitor could use it in a way inconsistent with the ideals underlying our free competitive system.

An Analysis of the Reporting Problem, *supra* note 6, at 136 (recommending standardization of reporting procedures). See also *Natural Gas Supplies: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 17, 55-59 (1976) (United States Geological Survey access to and experience dealing with confidential information suggests that a staff could by verification prepare aggregate data for public release). This approach is analogous to FOIA protection of confidential information by composite disclosure and deletion of identifying details. See, e.g., *Continental Oil Co. v. FPC*, 519 F.2d 31, 36 (5th Cir. 1975) (impersonal data fulfills public need for accurate information).

⁹⁹Both trial and appellate courts in *Ashland Oil* suggested that sufficient demonstration of focused impact from imminent release would rebut the weighty presumption of congressional propriety and justify enjoining release. 409 F. Supp. at 308-09 and 548 F.2d at 979. But the Supreme Court has hinted that some "unwise and even harmful" congressional choices may be the price of representative government. *Doe v. McMillan*, 412 U.S. 306, 338 (1973) (Blackmun, J. concurring).

¹⁰⁰To the extent aides and staff act as legislators' agents, they receive immunity for legislative acts as if performed by the legislator personally. *Gravel v. United States*, 408 U.S. 606,

investigates alleged information leaks, there being no present organization to handle this function,¹⁰¹ requires security and inquiry skills not found in specialists at analyzing business data. Bifurcation into two staff groups, with separate security and substantive duties, would alleviate procedural problems, but would frustrate desired core control by one staff.

Substantive Protections

Despite procedural precautions, unwarranted disclosure could still occur. Redress for damage must therefore be made available.¹⁰² Unlike an attempted suit against a congressman or aide where success rests on the scope of the definition given to "legislative activity" immunized by the Constitution, redress would be "impersonally" founded on governmental negligence causing a "taking" of property rights which should not be kept entirely uncompensable.¹⁰³ To avoid the sovereign immunity bar, an appropriate basis of redress must be discovered or enacted. Four possible substantive bases now exist.

616-17 (1972). This immunity includes information-gathering in preparation for a hearing. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), but immunity is not extended to acts not essential to legislating, *United States v. Johnson*, 383 U.S. 169 (1966), or to certain criminal acts, *Gravel v. United States*, 408 U.S. at 622. Thus, unauthorized release of confidential information by staff members should be subject to the criminal provisions of 18 U.S.C. § 1905 (1970) as not "necessary to prevent indirect impairment of such [congressional] deliberations." *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972).

¹⁰¹See REPORT ON INVESTIGATION PURSUANT TO H. RES. 1042, *supra* note 72, at 44 (proposing staff investigation into alleged leaks of security information).

¹⁰²Compensation alleviates the impact of disclosure, averting competitive damage by restoring funds used to develop confidential information. See O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 BUS. LAW. 1125, 1146 (1975). Absent compensation, disclosure should constitute a "taking" of property for public use without just compensation. See, e.g., *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 303-04 (D.D.C. 1976); *Reliability of Electric & Gas Service*, 49 F.P.C. 1428, 1429 (1973). Fifth amendment compensation has not apparently been extended to confidential information, but governmental liability for these legally recognized economic advantages, *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945), would appropriately follow the theory supporting required compensation in eminent domain: "[J]ust as the government has to pay for the property it deliberately takes, it should have to pay for the deliberate choices it makes to engage in activities which it knows in advance are sure to cause exceptional losses to private parties." K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.17, at 504 (1958). Eminent domain "takings" have encompassed intangible rights related to the physical thing creating an ownership interest. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 377-78, 380 (1945). Confidential data gives rise to analogous intangible rights. Governmental release of confidential data to the public could thus constitute a "taking" without requiring a reciprocal governmental benefit therefrom, as "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *Id.* at 378.

Thus, although governmental regulation and oversight of business is desirable in the public interest, "a beneficent governmental unit ought not to allow exceptional losses to be borne by those upon whom the governmental activity has happened to inflict them." K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.17, at 504 (1958). This argument is particularly compelling where a company such as Ashland submits its data, which subsequently is released to Congress and becomes potentially subject to public revelation, while parallel companies resist compliance and impede efficient governmental action yet avoid public release problems. See note 79 *supra*.

¹⁰³Potential litigation may arise in defining particular information as sufficiently valuable to constitute a legally protected property interest and whether disclosure during congressional com-

The Tucker Act¹⁰⁴ grants jurisdiction to the Court of Claims to hear any claims against the United States founded, *inter alia*, on the Constitution where there is a "specific finding that the Government has taken vested property rights of the plaintiffs."¹⁰⁵ However, since a complaint under the Tucker Act must specifically allege acts of taking by the United States to state a claim to which the United States will be deemed to have consented,¹⁰⁶ an action based on an untraceable leak of confidential information may lack the specificity required. On the other hand, lost property rights may be sufficiently significant to demand minimal extension of the Act to meet the less specific pleading this constitutional claim allows.

The Federal Tort Claims Act¹⁰⁷ also requires specific allegations of negligent or wrongful acts or omissions by government officials or employees.¹⁰⁸ To establish governmental liability, the allegedly negligent individual must have been acting within the scope of his employment.¹⁰⁹ Because a claim of negligent failure to follow committee procedures lacks specific accusations against a particular individual, a Federal Tort Claims Act suit might not succeed. Attempted specific allegations, for example charging negligence by the chief of staff, might fail as unwarranted leaks and arguably outside the scope of an employee's duties.¹¹⁰ Further, the Act is based on tort and only information defined as a "trade secret" would support a suit.¹¹¹ No specific provision of the Act would apply on the *Ashland Oil* facts, and, since

mittee activity constitutes a "taking" for a "public use."

The suit is based on general governmental negligence, and not specific individual action, because tort recovery otherwise available for destruction of property rights is confined to trade secret information. RESTATEMENT OF TORTS § 757 (1939). Certain confidential commercial or financial information may cause competitive harm or justify confidential treatment without actually falling within the "trade secret" boundaries. Individual recovery may nevertheless be foreclosed. *See* note 75 *supra*.

¹⁰⁴Ch. 359, 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C.). 28 U.S.C. §§ 1346(a)(2), 1491 (1970), *as amended*, 28 U.S.C. § 1941 (Supp. V. 1975), are here relevant.

¹⁰⁵*Vigil v. United States*, 293 F. Supp. 1176, 1184 (D. Colo. 1968). Focusing on the fifth amendment claim, and not a tort, allows a plaintiff to bring himself within the boundaries of the Tucker Act, notwithstanding the prohibition against claims "sounding in tort." *See, e.g.*, *Basso v. United States*, 40 Ct. Cl. 202, 215-16 (1905).

¹⁰⁶*United States v. Causby*, 328 U.S. 256, 261-63, 267 (1946) (specific "taking" facts); *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 23 (1940) (no "taking" shown thus claim untenable); *Vigil v. United States*, 293 F. Supp. 1176, 1184 (D. Colo. 1968).

¹⁰⁷28 U.S.C. §§ 1346(b), 2671 *et seq.* (1970).

¹⁰⁸*See, e.g.*, *Indian Towing Co., Inc. v. United States*, 350 U.S. 61 (1955) (alleging specific acts of negligence); *Dalehite v. United States*, 346 U.S. 15, 38 (1953).

¹⁰⁹28 U.S.C. § 1346(b) (1970). Discretionary acts are expressly excepted from the scope of the Act. 28 U.S.C. § 2680 (1970). *See Dalehite v. United States*, 346 U.S. 15, 33-34 (1953) (acting according to one's best judgment). Subordinate's acts and omissions are not actionable. *Id.* at 36. Such specificity of action by the individual and preclusion of nonofficial's acts forecloses recovery for untraceable information leaks.

¹¹⁰*See* note 109 *supra*.

¹¹¹The Federal Tort Claims Act was enacted to allow existing suits against the government which had been foreclosed by sovereign immunity, not to create new causes of action. *See, e.g.*, *Feres v. United States*, 340 U.S. 135, 142 (1950). Thus, actions seem to be limited to those arising out of trade secrets unless release of *any* confidential information were redefined as a tort.

the Act's sections are read narrowly,¹¹² extension of the Act to potential leaks of confidential information is unlikely. However, because both the Tucker Act and Federal Tort Claims Act sustain the compensation policy here sought, claims under both Acts could be brought alternatively to see if their minimal extension to confidential information destruction could be countenanced.

Private legislative acts provide a viable alternative.¹¹³ These acts confer jurisdiction on the Court of Claims to hear private parties' claims against the United States for damages suffered from governmental action.¹¹⁴ The constitutionality of such acts has been upheld,¹¹⁵ and their use is emphasized where all other redress is foreclosed by sovereign immunity.¹¹⁶ Such acts are strictly construed,¹¹⁷ however, and their applicability depends upon congressional consent to suit in particular situations. Thus, while affording potential redress, they provide a lesser guarantee of recovery than would specific legislation waiving immunity for a class within which an aggrieved party might bring itself.

Enactment of a specific statutory provision by Congress is appropriate because of the desirability of protecting valuable property rights, a policy Congress has directly supported by precluding public dissemination of confidential information in virtually all other contexts.¹¹⁸ Although such a statutory provision generally requires clamor for relief suffi-

¹¹²See *Feres v. United States*, 340 U.S. 135, 142 (1950). See also *Fitch v. United States*, 513 F.2d 1013, 1016 n.3 (6th Cir. 1975) (Act does not give courts powers of equity).

¹¹³"[W]e observe that our action dismisses Appellees' complaint for lack of jurisdiction and does not jeopardize their opportunity to secure compensation from Congress for the injustice that befell them." *Fitch v. United States*, 513 F.2d 1013, 1016 (6th Cir. 1975) (rejecting assertion of jurisdiction based on Federal Tort Claims Act).

¹¹⁴See, e.g., *United States v. Goltra*, 312 U.S. 203, 204 n.2 (1941); *Mizokami v. United States*, 414 F.2d 1375, 1376-77 (Ct. Cl. 1969); *Wright v. United States*, 95 F. Supp. 943 (Ct. Cl. 1951). Private legislation sometimes confers jurisdiction on district courts. See, e.g., *Grant v. United States*, 192 F.2d 482 (4th Cir. 1951).

¹¹⁵Congress is the lawmaking branch of the Government, and laws made by it are not unconstitutional because they are special, applicable to only one or some persons, rather than of general application, or because they are retrospective and applicable to fact situations which have occurred before their enactment. . . .

. . . [S]pecial acts of Congress . . . are constitutional, if they confer rights on private litigants against the Government, which rights are intended by Congress to fulfill a legal or moral obligation of the Government.

Menominee Tribe of Indians v. United States, 101 Ct. Cl. 10, 18-19 (1944). See also *Pope v. United States*, 323 U.S. 1, 9-10 (1944).

¹¹⁶Congressional committees approving private act relief, notwithstanding recommendations by the Department of Justice and Health, Education and Welfare that relief be denied as specifically precluded by the Federal Tort Claims Act, have noted:

The committee feels that the Government's admission of error and expression of regret for the incident is a commendable act. However, as is apparent . . . the Mizokami Bros. have *no other way to be compensated* for any damages or losses caused by the Government's erroneous actions but to appeal to Congress.

Mizokami v. United States, 414 F.2d 1375, 1378 (Ct. Cl. 1969) (emphasis in original).

¹¹⁷See, e.g., *United States v. Goltra*, 312 U.S. 203, 210 (1941).

¹¹⁸See note 4 *supra*.

cient to warrant enactment,¹¹⁹ the lack of alternative remedy and substantial damage potential in this class of cases justifies the relief proposed. In fact, congressional energy directed to enactment of a specific provision conserves time potentially spent on a series of private act requests.

CONCLUSION

Intensified protection for confidential business information transmitted to Congress is imperative to prevent its unwarranted public dissemination. Three approaches to the protection of this material have been examined here.

Stricter agency standards for release of confidential data achieved through modification of current agency rules and regulations would preclude unauthorized access by nonofficial congressional parties. Absent strengthening of release standards by the agencies, the judiciary has two opportunities to supplement confidentiality protections. Judicial enforcement of subpoena standards prior to transmission of information to Congress could deter unauthorized access to confidential data. After congressional receipt of such data, the judiciary can provide an objective judgment of the deliberation behind specific disclosures to avert the careless mishandling resulting in public dissemination.

Finally, but most significantly, Congress itself must act responsibly to guarantee the procedural and substantive protections necessary for confidential information. Strengthened congressional procedures in handling confidential information, if strictly enforced, should obviate the need for supplementary protections by eliminating the fear of and the potentiality of public dissemination. Such precautionary congressional self-restraint is appropriate, for Congress has already dictated nondissemination of such data in other contexts.

Should disclosure occur regardless of procedural precautions, governmental compensation must be made available to prevent or redress unequal impact on owners of information. Pervasive governmental intrusion into private rights has been found justified unless that action arbitrarily visits substantial injury on a party. Specific legislation protecting confidential information should extend this recovery policy to confirm equal treatment of parties and the ideals of competition. Open and active government should nourish honesty and integrity *in government* for competent public representation. It must not, however, be allowed to stultify private initiative and consequently contravene the public interest.

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Relief was often sought and sometimes granted through private bills in Congress, the number of which steadily increased as Government activity increased. The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication.

Feres v. United States, 340 U.S. 135, 140 (1950).

