

EXHIBIT 72

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ONE HUNDRED FIFTH CONGRESS
U.S. House of Representatives
 COMMITTEE ON STANDARDS OF
 OFFICIAL CONDUCT
 Washington, D.C. 20515-6328

March 20, 1998

The Honorable Bud Shuster
 U. S. House of Representatives
 2188 Rayburn House Office Building
 Washington, D.C. 20515

Transmitted Via Facsimile

Re: In the Matter of Representative Bud Shuster

Dear Colleague:

The Investigative Subcommittee and full Committee have considered your request to stay all proceedings in the above-captioned matter, received in this office on March 13, 1998, and deny the request for the reasons given below. We have also considered the issues identified in subsequent correspondence received from your attorneys, dated March 13 and March 19, addressed to Committee counsel.

1. Request for Stay

You indicated that you and/or former members of your staff "are more than witnesses and likely are the focus" of a Grand Jury investigation in the District of Massachusetts that may involve considerable overlap with respect to areas that are the subject of the Subcommittee's investigation. You stated that the continuation of the Subcommittee's investigation at this time will impair your ability to protect your interests before the Boston Grand Jury, and that the production of documents or taking of testimony in this matter will compromise your effective representation in the criminal investigation.

The Committee's obligation and legal authority to pursue an investigation is independent of any other investigation that might be conducted by another branch of the federal government. Although the Committee has the discretion to defer action on a complaint against a Member when it has reason to believe that the same conduct "is being reviewed by appropriate law enforcement or regulatory authorities" or when the Committee otherwise determines that it would be appropriate to have the conduct reviewed by other parties, it is not obligated to defer its action. Committee Rule 16(f).

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You cite several precedents of the House in support of your suggestion that granting your request would be consistent with the manner in which the Committee has acted in other similar instances. Although the Committee frequently exercises its discretion to defer its activities where the Respondent has been indicted and a criminal proceeding is ongoing, it is not obligated to defer, and has not commonly done so where a Respondent is the subject of a Grand Jury investigation but has not been indicted. See, e.g., *In The Matter of Representative Barbara-Rose Collins, Summary of Activities, One Hundred Fourth Congress*, H.R. Rept. No. 104-886, 104th Cong., 2d Sess. (1997). On occasion, the Committee has elected to proceed with investigations or hearings even in instances where a criminal trial or appeal is ongoing. See, e.g., *In The Matter of Representative Daniel J. Flood, H.R. Rept. No. 96-856, 96th Cong., 2d Sess. (1980)*. In *Flood*, the Committee proceeded with a disciplinary hearing notwithstanding the motion of the Respondent to defer pending completion of his criminal trial. In reaching this decision, the Committee noted that "this Committee will require a strong showing by a respondent to support a motion to defer Committee action on the ground that judicial proceedings are pending." *Id.* The Committee further noted that "[w]hen this Committee defers its disciplinary activities pending completion of judicial proceedings, Congress's interests may suffer. The Committee is committed to maintaining and improving public confidence in the integrity of the Congress, and believes that its proceedings ought not to be delayed except for compelling reasons." *Id.* In your case, you have provided no compelling reasons other than a general explanation that you find yourself in the position of "having to deal with parallel proceedings."

You have also cited *In The Matter of Representative Andrew J. Hinshaw, H.R. Rept. No. 94-1477, 94th Cong., 2d Sess. (1976)* to support your request to stay proceedings. In *Hinshaw*, the Respondent was convicted of bribery and an appeal was pending. The House referred a Resolution to Expel to the Committee and the Committee recommended that the resolution not be agreed to. In reaching its decision, the Committee limited its decision to the particular facts before it, and noted that the Member was involved in "an active, nondilatory criminal proceeding." In reaching this result, the Committee stated that it desired "to express clearly, however, that in this case its conclusion is based entirely on the instant set of facts and in no way implies that different circumstances may not call for a different conclusion."

The Committee elected to defer its investigation of Representative Rostenkowski only after it received a formal request from the United States Attorney to do so. *Summary of Activities, One Hundred Third Congress, H.R. Rept. No. 103-873, 103d Cong., 2d Sess. (1994)*. Based on the matters discussed with the United States Attorney during a meeting conducted in Executive Session, the Committee concluded that there were compelling reasons to defer its investigation in that instance, though it expressly noted that its decision to defer was entirely voluntary and limited to the narrow facts presented in that case.

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Our review of the subpoenas you have received in connection with the Grand Jury investigation confirms that while there are similarities in both investigations, they are not identical. Many of the allegations the Subcommittee is investigating relate exclusively to the Rules of the House, an area that is beyond the jurisdiction of the Department of Justice. Since you have not been indicted, it does not appear that your involvement with the criminal investigation in Boston, and any trial that might result from that investigation, are likely to be resolved soon. The Committee is not willing to delay its investigation under these circumstances and, indeed, would be remiss in its obligations to the House if it did so. Therefore, your request to stay this investigation pending the resolution of the Grand Jury investigation in Boston is hereby denied.

2. Subpoena Directed to You

Your attorneys have raised a number of objections with respect to the subpoena duces tecum directed to you. For example, they suggest that the Fifth Amendment prohibits the compelled production of your "personal papers," including correspondence and documents related to appointments, because the contents of these papers might tend to incriminate you. Letter of 3-12-98 from B. L. Ginsberg and M. L. Berger at 2.

We must reject this suggestion. At the outset, we note that it is doubtful that the Fifth Amendment ever protects the contents of voluntarily created documents, no matter how private. See United States v. Doe, 465 U.S. 605, 618 (1984) ("[T]he Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.") (O'Connor, J., concurring); In re Grand Jury Proceedings, 759 F.2d 1418, 1419 (9th Cir. 1985).

The decision in Senate Select Committee on Ethics v. Packwood, 845 F. Supp. 17 (D.D. C. 1994), stay denied, 510 U.S. 1319 (1994), is highly instructive in this regard. In that case Senator Packwood, relying (as have your attorneys) on Boyd v. United States, 116 U.S. 616 (1886), argued that "the Constitution prohibits the compelled disclosure of private papers such as his diaries which contain potentially incriminating entries or statements." 845 F. Supp. at 23. The court, however, concluded that subsequent Supreme Court decisions have largely repudiated Boyd and held that Senator Packwood could not assert a Fifth Amendment right with respect to the contents of his personal

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diaries because these documents, though no doubt highly personal and private, were created voluntarily. *Id.*

Even if the Fifth Amendment did protect the contents of private papers, however, this would be of no moment here. The documents you are withholding are *official* documents, created and maintained at public expense.² Numerous rules and regulations establish that such documents must be for the conduct of official and representational duties only, not for personal or private business.³ As the Supreme Court stated long ago, official documents are not protected by the Fifth Amendment. *Wilson v. United States*, 221 U.S. 361, 380 (1911) ("Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction.").

Your attorneys assert that the records in question "belong[]" to you. Letter of 3-13-98 from B. L. Ginsberg and M. R. Berger at 2. While this may be true in a limited sense, it is not dispositive of the nature of the documents for Fifth Amendment purposes. See *In re Sealed Case (Government Records)*, 950 F.2d 736, 740 (D.C. Cir. 1991) ("The proper characterization [for Fifth Amendment purposes] turns less on the ownership of

² It may be that some of the documents you are withholding are documents which do not relate to your official capacity, and which were not created, received or maintained by your congressional office. The Committee recognizes that you may be entitled to assert a right to withhold these documents on the ground that the act of producing them (rather than their contents) may tend to incriminate you. To the extent that you wish to assert such a claim of privilege for those documents, the Subcommittee will institute appropriate procedures to consider and rule upon the privilege claim.

³ By statute and House Rule, franked mail may be used only for official, not personal, purposes. 39 U.S.C. § 3210 *et seq.*; House Rule 46; see also *Common Cause v. Belger*, 574 F. Supp. 672 (D.D.C. 1982), *aff'd*, 461 U.S. 911 (1983) ("The clear purpose of the franking privilege is to facilitate the carrying on of official business.") Similarly, this Committee has made it clear that official resources must be used exclusively for official purposes. See HOUSE ETHICS MANUAL, COMM. ON STANDARDS OF OFFICIAL CONDUCT at 213, 102d Cong. 2d Sess. (1992). The Committee on House Oversight has also issued regulations specifying that the Member's Representational Allowance "may only be used to support the conduct of official and representational duties to the district from which elected. The MRA may not be used to pay for any personal, political, campaign, or committee expenses." COMM. ON HOUSE OVERSIGHT, MEMBER'S CONGRESSIONAL HANDBOOK (1985) (emphasis in original).

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the [document] than on its use.") Whether a document is a government or official record for Fifth Amendment purposes depends on its "nature, purpose and use." *Id.* at 332. In the present case, where the documents in question were created and/or maintained at taxpayer expense by federal employees in the course of performing official duties, there can be no question that they are government or official records. See United States v. Dean, 989 F.2d 1205, 1206 (D.C. Cir. 1993) (appointment calendars, a handwritten "to do" list and a typed document "resembling a diary" created by federal employee in the course of her official duties were government records).

Furthermore, even if a Member's office were most appropriately characterized as his or her personal business, rather than as a government office, the contents of the office's documents would still be entitled to no Fifth Amendment protection. In United States v. Doe, 465 U.S. 605, 610-12 (1984), the Court held that the contents of the records of a sole proprietorship were not protected by the Fifth Amendment, noting that there was no contention that the records were created involuntarily. The Court held that the only Fifth Amendment protection in this situation related to the act of producing, not to the contents of, the documents. *Id.* at 612-14. Since it cannot be suggested that the records in a Member's congressional office are somehow more personal or private than the records of a sole proprietorship, it is clear that the contents of the documents maintained in your congressional office are not protected.

Your attorneys have also indicated that the act of producing the documents in response to the Committee's subpoena would violate the Fifth Amendment because it would require you to make discretionary judgments regarding various categories of documents described in the subpoena. Letter of 3-12-98 from B. L. Ginsberg and M. R. Berger at 2. We disagree for several reasons. First, as already noted, the documents sought are official records, and therefore not subject to any Fifth Amendment objection, including an objection based upon the act of production. Second, we do not believe that producing documents in response to the subpoena would require you to make the kind of discretionary or subjective judgments that could be considered testimonial and incriminatory in nature. For example, the production of calendars and correspondence reflecting specified data from specific dates can be achieved by an entirely objective review of these documents.

Finally, your objection in this regard is particularly misplaced given that your Administrative Assistant, Timothy Hugo, and your attorneys advised Committee counsel that you had recused yourself from gathering documents responsive to your subpoena and that you had instructed Mr. Hugo to coordinate that effort. During a conversation with Mr. Hugo on February 25, 1998, Committee counsel confirmed that the documents Mr. Hugo and your scheduler, Tracy Mosebey, had identified as responsive to subpoenas served on each of them and on you were being preserved in your office in the Rayburn

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House Office Building as of that date.⁴ Under these circumstances, it is difficult to see how production of the documents could be construed as a testimonial act by you. Any conceivable problem could be obviated simply by designating, as Committee counsel have already suggested, a member of your staff to act as custodian of the documents and instructing that employee to produce the responsive documents. This is a procedure that courts often compel as a means of avoiding any act of production issue. See, e.g., SEC v. First Jersey Secs., Inc., 843 F.2d 74 (2d Cir. 1988).

3. Subpoenas Directed to Your Congressional Employees

Your attorneys have also raised several objections to the subpoenas duces tecum directed to Mr. Hugo and Ms. Mosebey. First, they have suggested that the subpoenas are somehow improper because they call for the production of documents which are not their personal records, but are official files under your legal control. Letter of 3-12-98 from B. L. Ginsberg & M. R. Berger at 2 n.1; Letter of 3-13-98 from B. L. Ginsberg and M. R. Berger at 2.

However, contrary to the repeated assertions of your attorneys, the Committee has never maintained that the documents sought by the subpoenas are the "personal property" of the employees subpoenaed.⁵ Nothing turns on the characterization of these documents as the "personal property" of the employees or you. Like judicial subpoenas, congressional subpoenas compel the production of all documents in the possession, custody or control of the subpoenaed individual, regardless of who owns the documents. See Mattie T. v. Johnston, 74 F.R.D. 498, 502 (N.D. Miss. 1976) ("A person seeking access to records through the issuance of a subpoena often has the subpoena served on the individual who has possession of the documents and the court has found no requirement that the subpoena be served on the person who owns the documents.") In United States v. IBM, 71 F.R.D. 88 (S.D.N.Y. 1976), the court held that a corporate officer was required by a subpoena to produce documents which were in his possession,

⁴ During a subsequent conversation with your attorneys on March 4, 1998, Committee counsel advised your attorneys that the Committee expected those documents to be preserved in your congressional office, and that the efforts of any party to remove those documents from your congressional office would raise additional issues that might be far more serious than those identified in the complaint previously filed against you.

⁵ Committee counsel have been advised that at least one of the employees has responsive documents which the employee believes may be personal, rather than official, but the employee has nonetheless been instructed to withhold it by your attorneys on the ground that it should be considered official. Because we do not believe that this dispute is material to the Committee's right to obtain all documents responsive to the subpoenas, we see no need to resolve it at this time.

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custody or control, even though the documents belonged to the corporation and even though a resolution of the Board of Directors specifically directed the officer not to produce the documents.

The Committee's power to compel the production of documents by the employees is greater than that of a court. House Rule 43 provides that "[a] Member, officer, or employee of the House of Representatives shall adhere to the spirit and the letter of the Rules of the House of Representatives and to the rules of duly constituted committees thereof." For employees to refuse to comply with duly authorized subpoenas of this Committee (or for you to instruct them not to comply) is completely inconsistent with House Rule 43.

The fact of an asserted Fifth Amendment objection does not change this analysis. Courts have repeatedly held that the Fifth Amendment does not prohibit compelled production of documents from an employee or other third party agent, even though the documents belong to and may incriminate the employer. See, e.g., Cough v. United States, 409 U.S. 322, 333-35 (1973) (documents subpoenaed from an accountant); In re Grand Jury Investigation U.S. Attorney Matter No. 89-4-8881-J, 921 F.2d 1184 (11th Cir. 1991) (documents subpoenaed from a legal secretary); In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987, 834 F.2d 1128 (2d Cir. 1987) (documents subpoenaed from administrative assistant).

The only exception to this rule is a very narrow one, which applies only where the employer entrusts documents to an employee for safekeeping only (or, at most, for a very limited purpose). In re Grand Jury Investigation, 921 F.2d at 1187-89. This exception could not possibly apply here. In the first place, the employees in a Member's congressional office are not the Member's personal employees; they are employees of the House who are paid for performing official duties, not personal duties. See generally HOUSE ETHICS MANUAL, COMM. ON STANDARDS OF OFFICIAL CONDUCT 183; United States v. Diags, 613 F.2d 988, 997 (D.C. Cir. 1979). As employees of the House, they have independent obligations to comply with House rules and to cooperate with investigations of this Committee. Therefore, no Member has a reasonable expectation that employees will withhold information relevant to this Committee's investigation. See Cough, 409 U.S. at 335-36 (noting that taxpayer had no reasonable expectation that accountant would not disclose information as required by law).

Moreover, your attorneys have not asserted, and we see no reason to believe, that documents in the possession, custody or control of Mr. Hugo or Ms. Mosebey were entrusted to them simply for safekeeping. Clearly these employees themselves create, receive or work with many documents that are in their possession, custody and control. (For example, we assume Ms. Mosebey routinely works with documents related to your appointments.) Thus, there could be no conceivable justification for withholding such documents to the extent they are responsive to the subpoena.

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The "authority" cited by your attorneys for the contrary position consists of a page from the House Employee Handbook which states that "the Office reserves the right to inspect and search all areas and property in the Office at any time."⁶ This presumably is intended to show that the employees do not have exclusive possession or control over the subpoenaed documents. Even if true, this is irrelevant. So long as the employees have sufficient control over the documents to qualify as substitute custodians, it makes no difference that the employer also has access to or control over the documents. See *In re Grand Jury Investigations*, 921 F.2d at 1189 (documents could be subpoenaed from legal secretary even though employing attorney exercised some control over them as well).

Accordingly, we see no merit to the objections with respect to the subpoenas directed to Mr. Hugo and Ms. Mosebey.

4. Mechanics of Production

Your attorneys have indicated that you maintained a personal calendar or calendars reflecting numerous entries that you would like to redact. You assert that many entries in these personal calendars relate to matters of national security, matters protected by the attorney-client privilege, or other matters of a personal nature. We instruct you to produce a copy of each such calendar to the Subcommittee immediately. Although we are not obligated under House precedent to do so, we recognize your assertion of the attorney-client privilege to the extent we will authorize redaction of any entries that reflect the substance of your communications with your attorneys. *Proceedings Against Ralph Bernstein and Joseph Bernstein*, H.R. Rept. No. 99-462, 99th Cong., 2d Sess. at 33 (1986). Entries that reflect the dates and locations of any such meetings, however, may not be redacted. We will not authorize redaction of any entries relating to matters of national security or those of a "personal nature" absent a specific request from you demonstrating compelling reasons to do so for each such entry, and even then we will instruct your attorneys to show an unredacted copy to Committee counsel to verify that their actions in this regard have been consistent with our instructions.

With respect to any other correspondence or other documents that are truly "personal," you must produce such documents unless they are protected by a judicially recognized privilege or legitimate constitutional right. *Packwood, supra*. Under the Rules of the House, you may not withhold evidence merely on the grounds that it "may tend to

⁶ We note that this sentence is completely consistent with our view that the documents are official records (available to the "Office") and thus beyond the scope of any Fifth Amendment protection.

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defame, degrade, or incriminate" you. House Rule XI(k)(5). You should provide the Subcommittee with a privilege log reflecting a list of all such documents for which you assert a privilege. This log should include a general description of each document, the identity of the author and the recipient (if applicable), the date it was created, and a description of the general subject matter. For each document, you should demonstrate a *prima facie* basis for asserting an identified privilege. We expect you or your attorneys to submit a completed privilege log to the Committee no later than Friday, March 27.

We would note that we have discussed the constitutional issues you have raised in extensive discussions with the Office of the General Counsel and the legal views expressed by the Committee are consistent with the guidance we have received from that office.

5. Conclusion

We instruct you to produce your personal calendar(s), redacted in accordance with the instructions set forth above, to the Committee offices by 5:00 p.m. on March 27, 1998.⁷ We will also expect a comprehensive privilege log for any other responsive documents that you decline to produce. We are confident that we can expect your full cooperation in instructing your attorneys, as well as Ms. Mosebey and Mr. Hugo, to

⁷ By use of the term "personal calendar," we are referencing the document or documents described by your attorneys in their meetings with Committee counsel. Your attorneys have advised Committee counsel that you maintain or maintained small "pocket calendars" in which you recorded notes of meetings and other data that might be responsive to the subpoena issued by the Committee. We do not consider the office calendars that were prepared and maintained in your office with the assistance of your staff to be "personal" and expect immediate production of unredacted copies of same. It is our understanding that your staff retrieved at least some of these office calendars from your office archives.

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deliver all other documents identified in these subpoenas to the Committee offices immediately. If you do not comply with these instructions, however, we must advise you that the Committee may resolve this matter by offering a Privileged Resolution for consideration by the House of Representatives on or after March 30, 1998.

Sincerely,


James V. Hansen
Chairman


Howard L. Berman
Ranking Democratic Member

JVH/HLB:vhj

cc: Benjamin L. Ginsberg, Esq.
Mitchell R. Berger, Esq.