

EVIDENCE FROM HOUSE MEMBERS OF JOINT COMMITTEE

Thank you for your letter of 17 August 2000, in which the Committee of Privileges seeks views on matters it should take into account when determining whether to hear evidence from House of Representatives members of the Joint Committee on Corporations and Securities.

I hope that the following observations may be of use to the committee.

Relevant rules of the Senate

It may be helpful if I begin by setting out the relevant rules of the Senate.

Standing order 178 provides that where the Senate or one of its committees requires the attendance of a member or officer of the House of Representatives, a message is sent by the Senate to the House asking that the House authorise its members or officers to give evidence. If the House authorises its members or officers to give evidence, they are not compelled to do so. The House of Representatives has a similar rule in relation to evidence by senators or officers of the Senate.

The standing orders are interpreted as not requiring a message to be sent for the purpose of members or officers of one House appearing by invitation before committees of the other. Members of the House of Representatives, including on one occasion the Speaker, have appeared by invitation before Senate committees without a message to the House or a House resolution authorising their appearance.

This informal procedure of appearance by invitation is used only in cases where members are offering their views on matters of policy or administration under inquiry by Senate committees. The procedure has not been used in cases where the conduct of individuals may be examined, adverse findings may be made against individuals or disputed matters of fact may be under inquiry. For such cases it is considered that the formal process of message and authorisation to appear should be employed.

Even where the formal message and authorisation process occurs, however, this does not set aside the rule that one House cannot inquire into, or judge, the conduct of a member of the other House, except where the conduct of a minister as a minister is under examination. This rule was referred to in rulings by President Sibraa on 17 May 1988 and 19 and 22 September 1994 and by President Reid on 23 October 1997. On the basis of the rule, President Sibraa declined to give precedence to matters of privilege because they would necessarily involve inquiry by the Senate into conduct of members of the House, and a reference to the Senate Privileges Committee on 27 October 1997 was explicitly framed so that the committee, in pursuing its inquiry, would not examine the conduct of any member of the House in that capacity.

If a member of the House appears before a Senate committee pursuant to an authorisation by the House after a message from the Senate, the committee must therefore refrain from putting any

questions to the member which would amount to inquiring into his or her conduct, and cannot make any findings about the conduct of the member.

Past cases

I now turn to the way in which the matter has been handled in past cases.

In previous cases where the Senate Committee of Privileges has examined unauthorised disclosures of the documents of joint committees, it has written to House members of those committees asking for any information in their possession on the matters under inquiry (these cases were reported in the 54th and 74th reports of the committee, there being two cases in the latter report). In another case the joint committee concerned had already asked its members whether they had disclosed the material in question (48th report). The committee did not go beyond this step of asking House members of the joint committees for relevant information.

It may be thought that simply by writing to the House members of the joint committees, the Privileges Committee was getting into the forbidden area of inquiry into conduct of House members. I do not think that this is so; I think that that step is consistent with the rules outlined above. If the House members, in their voluntary responses, had revealed anything which could have led to inquiry into their conduct or adverse findings about them, the committee would then have been obliged to refrain from any such inquiry or finding. In effect, the step of writing to the members was taken simply to discover whether they had any relevant evidence which could be considered by the Senate Privileges Committee in accordance with the rules.

Hearing oral evidence from House members, however, would involve a risk of inquiry into their conduct in the course of putting questions to them. Such questions might be limited to their knowledge of other persons' relevant activities or of relevant circumstances, but invariably questions would arise about their own relevant activities, and any such questions would probably amount to inquiry into their conduct.

In two cases in which the House of Representatives committee was directed by the House to inquire into unauthorised disclosures from joint committees, in 1986 and 1993, the House sent messages to the Senate asking the Senate to authorise senators to give evidence before the House Privileges Committee. The Senate duly authorised its senators to appear if they chose. In neither case did the possibility of inquiry into the senators' conduct or adverse findings against senators arise; in both cases the House Privileges Committee was not able to discover who made the unauthorised disclosures.

Implications for the current case

I now turn to the implications of the rules and precedents for the current case.

If the committee decides to hear oral evidence from House members of the Joint Committee on Corporations and Securities, the committee should recommend to the Senate that the Senate send a message to the House asking the House to authorise those members to appear. It would not be appropriate to adopt the process of informal appearance by invitation in an inquiry into an unauthorised disclosure.

If this step is taken, and House members appear before the committee, the committee would need to carefully frame any questions put to the members so as not to be in the position of inquiring into their conduct. The committee would also have to refrain from making any adverse findings about them. Questions could be put to the members about their knowledge of relevant circumstances or relevant activities of other persons (other than other House members). The committee would need to consider whether any such questions could usefully be put to the members.

If the committee requires any elucidation or elaboration of these points, or any other information, I would be pleased to respond.