

# CIVIL ENFORCEMENT OF CONGRESSIONAL AUTHORITIES

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## HEARING

BEFORE THE

### SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

### COMMITTEE ON THE JUDICIARY

### U.S. HOUSE OF REPRESENTATIVES

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# C O N T E N T S

TUESDAY, JUNE 8, 2021

|                                                                                                                                                                                                                                                                                                 | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| OPENING STATEMENTS                                                                                                                                                                                                                                                                              |      |
| The Honorable Henry C. “Hank” Johnson, Jr., Chair of the Subcommittee on the Courts, Intellectual Property, and the Internet from the State of Georgia .....                                                                                                                                    | 1    |
| The Honorable Darrell Issa, Ranking Member of the Subcommittee on Courts, Intellectual Property, and the Internet from the State of California .....                                                                                                                                            | 18   |
| The Honorable Jerrold Nadler, Chair of the Committee on the Judiciary from the State of New York .....                                                                                                                                                                                          | 19   |
| WITNESSES                                                                                                                                                                                                                                                                                       |      |
| Elise Bean, Director, Washington Office, Levin Center at Wayne Law                                                                                                                                                                                                                              |      |
| Oral Testimony .....                                                                                                                                                                                                                                                                            | 21   |
| Prepared Statement .....                                                                                                                                                                                                                                                                        | 24   |
| Thomas G. Hungar, Partner, Gibson, Dunn & Crutcher LLP                                                                                                                                                                                                                                          |      |
| Oral Testimony .....                                                                                                                                                                                                                                                                            | 37   |
| Prepared Statement .....                                                                                                                                                                                                                                                                        | 39   |
| Praveen Fernandes, Vice President, Constitutional Accountability Center                                                                                                                                                                                                                         |      |
| Oral Testimony .....                                                                                                                                                                                                                                                                            | 52   |
| Prepared Statement .....                                                                                                                                                                                                                                                                        | 54   |
| Todd Garvey, Legislative Attorney, Congressional Research Service                                                                                                                                                                                                                               |      |
| Oral Testimony .....                                                                                                                                                                                                                                                                            | 62   |
| Prepared Statement .....                                                                                                                                                                                                                                                                        | 64   |
| LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING                                                                                                                                                                                                                                            |      |
| A statement from Anne Tindall, Counsel, Protect Democracy and Grant Tudor, Policy Advocate, Protect Democracy, submitted by the Honorable Henry C. “Hank” Johnson, Chair of the Subcommittee on the Courts, Intellectual Property, and the Internet from the State of Georgia for the record .. | 6    |





## CIVIL ENFORCEMENT OF CONGRESSIONAL AUTHORITIES

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**Tuesday, June 8, 2021**

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,  
AND THE INTERNET

COMMITTEE ON THE JUDICIARY  
*Washington, DC*

The Subcommittee met, pursuant to call, at 10:10 a.m., via Zoom, Hon. Henry C. “Hank” Johnson, Jr. [Chair of the Subcommittee] presiding.

*Present:* Representatives Johnson of Georgia, Nadler, Jones, Deutch, Lieu, Stanton, Lofgren, Cohen, Ross, Neguse, Issa, Jordan, Chabot, Gohmert, Gaetz, Tiffany, Massie, Bishop, Fitzgerald, and Bentz.

*Staff Present:* John Doty, Senior Advisor; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Jordan Dashow, Professional Staff Member; Cierra Fontenot, Chief Clerk; John Williams, Parliamentarian; Merrick Nelson, Digital Director; Jamie Simpson, Chief Counsel, Subcommittee on Courts; Danielle Johnson, Counsel, Subcommittee on Courts; Matt Robinson, Counsel, Subcommittee on Courts; MaryBeth Walker, Detailee, Subcommittee on Courts; Rosalind Jackson, Professional Staff Member, Subcommittee on Courts; Betsy Ferguson, Minority Senior Counsel; and Kiley Bidelman, Minority Clerk.

Mr. JOHNSON of Georgia. With that, the Subcommittee will come to order. Without objection, the chair is authorized to declare recesses of the Subcommittee at any time.

Welcome to this morning’s hearing on Civil Enforcement of Congressional Authorities.

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today.

If you would like to submit materials, please send them when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself any time you seek recognition.

I will now recognize myself for an opening statement.

Today, I convene the Subcommittee for a bipartisan hearing on civil enforcement of congressional authorities. This is an important issue for the Committee, for the institutional interests of Congress, and for the enduring strength of our constitutional system.

When Congress asks for information, it expects to receive it. Congress cannot effectively or fully carry out its constitutional duties of legislating or oversight without the information it needs to do its job.

An essential part of Congress' oversight and investigative authority is the power to compel testimony and documentary information, including the power to issue and enforce subpoenas.

The Supreme Court has explained, quote, "that mere requests for information often are unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are necessary to obtain what is needed," end quote.

None of this is to say that Congress can operate *carte blanche*. Courts have recognized that certain constitutional privileges, protections, and safeguards exist in the Congressional Subpoena process, and normally the most expeditious way to obtain information is through negotiation and settlement.

The accommodation process is the bedrock of congressional investigative activity, particularly when those investigations focus on the Executive Branch.

What recent history has taught us, and what we will hear more about from the Witnesses appearing before us today, is that when the process takes too long, it breaks down and impedes Congress' constitutionally mandated work.

Timing is often critical because Congress operates in two-year cycles and a Presidential Administration can last for as little as four years. There is something wrong when we can assume that a court case to enforce a Congressional Subpoena will last longer than the Congress that issued the subpoena or even the Presidential Administration defying it, no matter when the subpoena was issued.

I would be remiss if I did not note the political nature of some of the investigations that inform today's hearing. They include different branches of government controlled by different parties.

We may not all agree on the purpose, scope, or tenor, or even propriety of these investigations, but what I hope we can all agree on is that the process is important.

Congress cannot function without information to support its legislative efforts. The institutional interests of Congress are at risk when, in practical effect, the Executive Branch can control the investigative process, especially when engagement by the Judicial Branch occurs too slowly.

The courts are well equipped to resolve disputes over subpoenas. At bottom, subpoena enforcement is a basic judicial task which Federal Courts are very familiar with.

This is true even when a case involves coequal branches of government, as disputes over Congressional Subpoenas often do. Recent history, however, suggests that courts may need some additional direction, particularly given the timing sensitivities surrounding Congressional Subpoenas.

I look forward to hearing from our witnesses to understand where we are today as we look for solutions to reinforce Congress'

power to compel the production of testimony and documents when negotiations break down.

I started by saying that this is an important bipartisan issue for the Committee. I know that this is an issue important to our Ranking Member, Mr. Issa, in particular. He has invested a lot of time personally in looking for solutions and a lot of energy in trying to make those solutions into law. I thank him for his work on the enforcement issue and look forward to a productive hearing.

Also, without objection, I would like to enter into the record a statement from Anne Tindall and Grant Tudor at Protect Democracy titled "Modernizing Congress' Subpoena Compliance and Enforcement Methods."

[The information follows:]



**MR. JOHNSON OF GEORGIA FOR THE RECORD**

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**Testimony of Anne Tindall and Grant Tudor Prepared for the Record**

**“Modernizing Congress’s Subpoena Compliance and Enforcement Methods”**

**House Committee on the Judiciary  
Subcommittee on Courts, Intellectual Property, and the Internet**

**June 8, 2021**

Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee, thank you for calling this important and timely hearing.

Anne Tindall serves as counsel at Protect Democracy. She previously served as Assistant General Counsel for Litigation and Oversight at the Consumer Financial Protection Bureau; as oversight counsel for Chairman Henry Waxman on the Energy and Commerce Committee staff; and in the congressional oversight practice at WilmerHale. Grant Tudor serves as a policy advocate at Protect Democracy and has specialized in the reinvigoration of various Article I roles and authorities, including congressional subpoena compliance and enforcement.

We appreciate the opportunity to testify today on the fulcrum of Congress’s oversight function: the “essential” power to “secure needed information.”<sup>1</sup> As the Members of this Committee on both sides of the aisle know all too well, it is often when Congress needs information most that it most struggles to obtain it. Its methods of enforcing compliance with its legitimate demands, including its subpoenas, are therefore at the heart of congressional oversight.

Our organization, Protect Democracy, works to prevent and respond to government actions that undermine our democratic system. We are thus necessarily concerned with preventing abuses of executive power, including rebuffing congressional oversight. That is why we have led efforts with a cross-ideological coalition to support the Protecting Our Democracy Act, which includes various provisions to strengthen Congress’s Article I roles, including its power of inquiry, to rebalance the branches of government and prevent future abuses.

For decades, Congress’s power of inquiry has been steadily compromised, driven in part by the weakening of its subpoena compliance and enforcement tools. As we will expand upon below, while Executive Branch actions have worked to undermine the norms and rules of compliance, so too has Congress ceded its ground. Ineffective compliance tools have in turn meant that congressional oversight of the Executive Branch is increasingly at the discretion of the Executive Branch—undermining our constitutionally mandated system of checks and balances. Our organization therefore views the reinvigoration of Congress’s subpoena compliance and enforcement tools as pivotal to the health of that system.

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<sup>1</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174, 161 (1927).

In our testimony below, we first will outline the weakening of these tools, resulting in the current inability of Congress to effectively deter noncompliance and compel cooperation from executive officials when necessary. Congress has traditionally relied on two complementary methods of enforcing its subpoenas, one drawn from its inherent contempt power and the other from a statutory contempt procedure. Because they could generate political and material costs to noncompliance, these methods long served as an historically effective backstop in negotiations with executive officials to accommodate congressional requests. This is no longer the case. Both are now, at best, symbolic. With its traditional tools moot, Congress has in more recent years outsourced dispute resolution to the courts, which have proven to be neither a timely nor effective enforcement option.

Second, we will underscore that Congress has a number of options to reverse these trends, which include proposals by Members of this Committee to modernize Congress's subpoena compliance and enforcement methods. Although Congress today struggles to effectively enforce its subpoenas against the Executive Branch, this is not because it lacks power to do so. To the contrary, Congress enjoys a robust constitutional toolbox to enforce its demands. But the tools are in need of modernization.

Congress should rebuild and refine its enforcement methods within each of its three compliance frameworks: enforcement through the courts, through federal law enforcement, and through its own self-vindicating means. Specifically, proposals to expedite judicial proceedings in the event disputes reach the courts; to update its statutory contempt process with an independent counsel mechanism in lieu of relying solely on a too-often conflicted attorney general; and to modernize Congress's inherent contempt power through levying fines as a modern alternative to deploying its sergeant-at-arms, would all go far in rebalancing the branches at the proverbial negotiating table. Congress should be comprehensively rebuilding its toolbox, and so these proposals should be seen as complementary, not mutually exclusive. We will outline some benefits of strengthening each of these three compliance frameworks, as well as downsides to account for in policy design.

Third, we want to acknowledge legitimate concerns that reinvigorating Congress's subpoena compliance and enforcement tools could be subject to partisan abuse. Just as with executive power, congressional power is of course also vulnerable to misuse. In our discussions with various stakeholders on the topic, this is among the most commonly expressed apprehensions. We will briefly touch on guardrails to curb the likelihood of abuse when designing new enforcement systems. But our organization also strongly believes that the risks of abuse in a Congress with strengthened subpoena compliance tools are far outweighed by the ongoing threat of unchecked executive power.

We have had experience on both sides of the table during oversight disputes—acting on behalf of both the legislative and executive branches as well as representing private parties in response to congressional demands—and appreciate that disagreements over information demands can be worked out in good faith. We have also, however, been witness to the breakdown in the informal accommodation process through which parties have historically negotiated requests and come to satisfactory settlements. Together with our organization, we believe it is incumbent upon Congress to reinvigorate its full suite of subpoena compliance tools as a first, critical step in incentivizing a return to productively resolving disputes and ensuring both branches fulfill their constitutional obligations.

### Nullification of Congress's Subpoena Compliance and Enforcement Tools

Recent years have seen an alarming escalation in Executive Branch noncompliance with congressional subpoenas. Such a trendline towards noncompliance poses a profound threat to Congress's constitutional responsibilities. As the Supreme Court reiterated as recently as last summer, "Without information, Congress would be shooting in the dark."<sup>2</sup> Thus, as the Court has long held, "The congressional power to obtain information is 'broad' and 'indispensable.'"<sup>3</sup> The undermining of this power not only poses a profound threat to congressional oversight, but also to Congress's core legislative function.<sup>4</sup>

While the Trump Administration's practice of issuing blanket policies of noncompliance with congressional requests for information set a new highwater mark,<sup>5</sup> refusals to accommodate congressional requests and negotiate their parameters in good faith did not begin with the previous administration. Rather, the normalization of noncompliance has followed decades of Executive Branch actions—under administrations of both parties—to frustrate lawmakers' ability to access information and to weaken Congress's tools used to coerce compliance when necessary. In 1984<sup>6</sup> and 1986<sup>7</sup> in particular, Office of Legal Counsel (OLC) opinions laid the contemporary groundwork for shielding subpoenaed information from Congress and neutering its enforcement tools. While the legal basis for these opinions has been contested, and even their factual accuracy disputed,<sup>8</sup> they are still regularly deployed.

But just as noncompliance has been a function of aggressive executive action, it has been equally—if not more so—a function of Congress's own *inaction*. In the face of a concerted effort to deprive lawmakers of their compliance and enforcement tools, they have too often acquiesced. Congress has not always been without effective enforcement options. To the contrary, it has for most of its history wielded credible threats to both coerce and punish noncompliance that, while rarely used, were sufficient to incentivize accommodation of legitimate requests. But with respect to Executive Branch officials, Congress's historically effective enforcement methods are today in practice null.

The first, Congress's inherent contempt power—whereby either chamber may punish nonmembers for obstructing its work—was historically enforced through arrests by the sergeant-at-arms. Although upheld in multiple early Supreme Court decisions,<sup>9</sup> OLC has dismissed the constitutionality of Congress's

<sup>2</sup> *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020).

<sup>3</sup> *Id.* (quoting *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957)).

<sup>4</sup> See *McGrain v. Daugherty*, 273 U.S. 135, 174–175 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . 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—which not infrequently is true—recourse must be had to others who possess it.").

<sup>5</sup> See Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. Times (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html>.

<sup>6</sup> See *Prosecution for Contempt of Cong. of Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101 (1984).

<sup>7</sup> See *Response to Cong. Requests for Info. Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68 (1986).

<sup>8</sup> See, e.g., Josh Chafetz, *Executive Branch Contempt of Congress*, U. Chi. L. Rev., 1083, 1141–1143 (2009) (discussing the OLC memos and noting several deficiencies therein); see also Morton Rosenberg & Todd B. Tatelman, Cong. Rsch. Serv., RL34097, *Congress's Contempt Power: Law, History, Practice, and Procedure*, at 11 (2007) ("Factual, legal, and constitutional aspects of these OLC opinions are open to question...").

<sup>9</sup> See *Anderson v. Dunn*, 19 U.S. 204 (1821) (holding that the House of Representatives may punish non-members for contempt); see also *McGrain v. Daugherty*, 174 ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").



inherent contempt power when exercised in relation to executive officials, first in 1984 and most recently in response to a House subpoena of former White House counsel Don McGahn.<sup>10</sup> Congress long ago stopped deploying its sergeants-at-arms to execute arrests; and so in the absence of any modern method of enforcing its contempt power, it has in practice acquiesced to OLC's position. Congress also complemented its inherent contempt power with a criminal contempt statute, instructing the attorney general to prosecute contempt citations.<sup>11</sup> Available evidence suggests that the threat of criminal prosecution had been effective at incentivizing cooperation, including among senior government officials.<sup>12</sup> But the Justice Department has now in practice abandoned its obligation of enforcing contempt citations when they involve Executive Branch officials.

This has left Congress toothless in enforcing its subpoenas, either through its own means or through reliance on federal law enforcement. Thus, Congress has increasingly turned to the courts. Since 2008, civil action has in fact been Congress's *only* method of endeavored enforcement.<sup>13</sup> This was also, notably, the preferred method advocated by OLC, which has repeatedly suggested that Congress resort to civil suits<sup>14</sup>—given, it seems likely, its presumption that litigation would prove lengthy and uncertain, benefiting the Executive Branch. Congress's recent experiences litigating its Executive Branch subpoenas have borne this out. Congress has rarely—if ever—secured full or timely compliance through the courts; and even decisions ostensibly favorable to Congress have at best been a mixed bag.

In 2012, for instance, the House issued a criminal contempt citation against Attorney General Eric Holder for his failure to overturn subpoenaed documents. According to the criminal contempt statute, citations are to be referred “to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.”<sup>15</sup> With the attorney general in charge of U.S. Attorneys, this put Mr. Holder in the position of greenlighting prosecution of a citation against himself, which he declined to do. The House thus also brought suit against the Justice Department. A 2016 ruling eventually mandated compliance, but also, and for the first time, validated the Executive Branch's underlying privilege claims as having a constitutional foundation.<sup>16</sup> As the Congressional Research Service concluded, despite the technical (albeit delayed) victory for Congress, “the court's reasoning may affect Congress's ability to obtain similar documents from the executive branch” in the future.<sup>17</sup>

<sup>10</sup> See *Testimonial Immunity Before Cong. of the Former Counsel to the President*, 43 Op. O.L.C. (2019), <https://www.justice.gov/olc/opinion/file/1215066/download>.

<sup>11</sup> 2 U.S.C. §§ 192, 194.

<sup>12</sup> Between 1975 and 1998, “there were 10 votes to hold cabinet-level executive officials in contempt. All resulted in complete or substantial compliance ... before the necessity of a criminal trial,” with evidence that in various cases, “contemnors were reluctant to risk a criminal prosecution to vindicate a presidential claim of privilege or policy, which led to settlements.” Morton Rosenberg & William J. Murphy, *Good Gov't Now, The Case for Direct Appointment by the House of Outside Counsel to Prosecute Citations of Criminal Contempt of Executive Branch Officials* (Dec. 5, 2019), <https://goodgovernmentnow.org/wp-content/uploads/2020/02/The-Case-for-Direct-Appointment-by-the-House-of-Outside-Counsel-to-Prosecute-Citations-of-Contempt-v9.pdf>.

<sup>13</sup> See *Comm. on the Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008).

<sup>14</sup> See *Prosecution for Contempt of Cong.*, 8 Op. O.L.C. 101, 132 n. 31 (“[A] much more effective and less controversial remedy is available—a civil suit to enforce the subpoena—which would permit Congress to acquire the disputed records by judicial order.”); see also *Response to Cong. Requests for Info.*, 10 Op. O.L.C. 68, 83 (“The House would have three alternatives available to enforce the subpoena: (1) referral to the United States Attorney for prosecution under 2 U.S.C. §§ 192–194; (2) arrest by the Sergeant-at-Arms; or (3) a civil suit seeking declaratory enforcement of the subpoena. The first two of these alternatives may well be foreclosed by advice previously rendered by this Office.”).

<sup>15</sup> 2 U.S.C. § 194.

<sup>16</sup> *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016).

<sup>17</sup> Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, at 9 (2019).

Similarly, the House voted in 2019 to hold Attorney General William Barr and Secretary of Commerce Wilbur Ross in criminal contempt of Congress for their failure to comply with a congressional subpoena. But again, as was reported at the time, “There is no real risk the [Justice] department will pursue the case.”<sup>18</sup> The citation was thus “largely symbolic.”<sup>19</sup>

In neither case under the Obama and Trump administrations did attempts to criminally prosecute or civilly litigate the obstruction of Congress’s work result in timely or effective compliance; and in neither instance did Congress even bother to invoke its inherent contempt power, given its apparent mootness. All presumably available options thus proved insufficient. Given this current state of affairs, whereby Congress today enjoys no practical or effective methods for enforcing its subpoenas, this Committee’s efforts at exploring options to modernize Congress’s compliance tools are timely and urgent.

### Judicial Enforcement: Strengthening Civil Actions

Each of the three existing frameworks for subpoena compliance rely on enforcement through one of the three branches: Congress can seek enforcement through the Judiciary by taking civil actions; it can enforce compliance through the Executive Branch by referring citations to federal law enforcement; and it can enforce compliance itself by effectuating its own inherent contempt power. Various proposals, including those developed by Members of this Committee, would strengthen each.

Civil litigation is today the predominant method for attempted enforcement. Recent experiences have demonstrated a number of shortcomings associated with civil enforcement, such as long litigation timeframes that enable the Executive Branch to ‘run out the clock.’ Perhaps these experiences led Ranking Member Darrell Issa to first introduce the Congressional Subpoena Compliance and Enforcement Act in 2017, and for Representative Madeleine Dean to re-introduce Mr. Issa’s bill two years later—which, among other provisions, would seek to expedite judicial proceedings.<sup>20</sup> The same is true of the congressional subpoena enforcement provisions of the Congressional Subpoena Compliance and Enforcement Act.

As we will detail below, civil enforcement as a compliance framework is not only relatively novel, but developed largely in response to the collapse of the other two enforcement options. Congress filed its first-ever civil suit to enforce its subpoenas of the Executive Branch in 1973. The courts sided with the Executive Branch.<sup>21</sup> In light of Congress’s failure to secure enforcement through litigation then, it took over three decades for it to try again. Congress filed its second civil suit in 2008,<sup>22</sup> which initiated the current period in which civil action has become the default method of attempted enforcement.

<sup>18</sup> Nicholas Fandos, *House Holds Barr and Ross in Contempt Over Census Dispute*, N.Y. Times (July 17, 2019), <https://www.nytimes.com/2019/07/17/us/politics/barr-ross-contempt-vote.html>.

<sup>19</sup> Andrew Desiderio, *House Holds William Barr, Wilbur Ross in Criminal Contempt of Congress*, POLITICO (July 17, 2019), <https://www.politico.com/story/2019/07/17/house-votes-to-hold-william-barr-wilbur-ross-in-criminal-contempt-of-congress-1418900>.

<sup>20</sup> H.R. 4010, 115th Cong. (2017); H.R. 3732, 116th Cong. (2019).

<sup>21</sup> See *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (affirming District Court’s dismissal of the Senate Select Committee’s suit to obtain tapes of conversations between President Nixon and White House Counsel John Dean); see also 4 Lewis Deschler, *Precedents of the United States of the House of Representatives*, H.R. Doc. No. 94-661, at Ch. 15 § 4 (1994).

<sup>22</sup> <https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V4/pdf/GPO-HPREC-DESCHLERS-V4-1-3-3.pdf> (summarizing the Senate Select Committee’s efforts at enforcing its subpoena for the tapes through the courts).

<sup>23</sup> *Comm. on the Judiciary v. Miers*.

Litigation to compel compliance with congressional subpoenas has since demonstrated at least three overarching challenges hampering meaningful enforcement. First, courts and Congress operate according to two very different timetables. In *Committee on the Judiciary v. Miers* (2008), the dispute was settled more than two years after the subpoena was issued, and with both a new President and a new Congress in place. It has likewise taken over two years of litigation to settle a dispute over a subpoena issued to former White House counsel Don McGahn (in April 2019), again finally accommodated with a new President and a new Congress.<sup>23</sup> These have been among the more rapid cases.

Congress should, in response, establish procedures for expedited judicial review, in a federal district court and on appeal, as recourse for noncompliance. The Congressional Subpoena Compliance and Enforcement Act requires a suit to be heard by a three-judge court convened at the request of Congress and reviewable only by appeal directly to the Supreme Court.

However, Members of this Committee should also be aware that establishing expedited proceedings may, in practice, have a limited effect on speeding up litigation. Cases marked by complex requests for information involving a variety of privilege claims may only move so quickly. For instance, even when a court mandated compliance in *Committee on Oversight v. Holder*, and the Justice Department “disgorged more than 10,000 documents originally withheld, totaling more than 64,000 pages,” it still “took a special master over a year to pore through and address” before they were delivered to the Committee.<sup>24</sup>

Second, the House—unlike the Senate<sup>25</sup>—has provided itself with no statutory cause of action in order to seek judicial enforcement of its subpoenas, leaving jurisdictional issues unresolved that have permitted courts to decline intervening (as was most recently the case in *Committee on the Judiciary v. McGahn*<sup>26</sup>). This could be resolved with legislation expressly providing the House with a statutory framework for initiating civil actions.

Third, seeking judicial intervention in an interbranch dispute does not, of course, guarantee that the Judiciary will defend Congress’s institutional interests. To the contrary, evidence to date suggests that courts will rarely—if ever—deliver unambiguous enforcement decisions in Congress’s favor. Even rulings that have been considered ‘wins’ for Congress on their face may in practice limit its ability to secure information from the Executive Branch in the future. At best, courts—whose membership is predominantly composed of Executive Branch alumni—may deliver partial ‘wins’; at worst, overreliance on the courts risks further diluting congressional power over time.<sup>27</sup>

<sup>23</sup> See Ann E. Marimow, *Biden Administration, House Democrats Reach Agreement in Donald McGahn Subpoena Lawsuit*, Wash. Post (May 11, 2021), [https://www.washingtonpost.com/local/legal-issues/donald-mcghahn-subpoena-lawsuit-settled/2021/05/11/8c445dfe-b2ab-11eb-ab43-bebdc5a0f65\\_story.html](https://www.washingtonpost.com/local/legal-issues/donald-mcghahn-subpoena-lawsuit-settled/2021/05/11/8c445dfe-b2ab-11eb-ab43-bebdc5a0f65_story.html).

<sup>24</sup> *Why Enacting H.R. 4010, the Congressional Subpoena Compliance and Enforcement Act of 2017, Is a Big Mistake*, LegBranch (Jan. 9, 2018), <https://www.legbranch.org/2018-1-9-why-enacting-hr-4010-the-congressional-subpoena-compliance-and-enforcement-act-of-2017-is-a-big-mistake/>.

<sup>25</sup> See 28 U.S.C. § 1365.

<sup>26</sup> 973 F.3d 121 (D.C. Cir. 2020).

<sup>27</sup> For a survey of the shortcomings of judicial intervention to compel compliance with congressional subpoenas, see Grant Tudor, *Avoiding Another McGahn: Options to Modernize Congress’s Subpoena Compliance Tools*, Lawfare (October 16, 2020), <https://www.lawfareblog.com/avoiding-another-mcghahn-options-modernize-congress-subpoena-compliance-tools>.

For example, as Senator Chuck Grassley testified after a federal court mandated Justice Department compliance in *Committee on Oversight v. Lynch*, the judge “gave the House a victory in practice, but gave the Department a victory on the principle” by recognizing for the first time the constitutionality of the deliberative process privilege claimed by the Justice Department. “Despite the court’s order to the Department to produce documents . . . [the opinion] is a major threat to the oversight powers of the legislative branch” by legitimizing the Executive Branch’s underlying claims.<sup>28</sup> More recently, commenting on *Trump v. Mazars*, Molly Reynolds and Margaret Taylor observed that while the ruling largely reaffirmed Congress’s power to compel the production of information, the decision was still a “mixed bag for Congress, setting a new—and much higher—standard for establishing the legitimacy of congressional investigations generally.”<sup>29</sup> Courts already wary of wading into interbranch disputes are unlikely to clearly vindicate Congress’s oversight powers, including compliance with its subpoenas.

As part of comprehensively rebuilding its compliance and enforcement toolkit, we urge this Committee to advance the Congressional Subpoena Compliance and Enforcement Act in order to address certain key problems associated with civil enforcement. But as with each of the tools discussed here, *only* improving the civil enforcement option is unlikely to by itself reverse the multi-decade trend towards noncompliance. Issues with civil enforcement will remain unresolved, such as truly swift enforcement decisions and the risks of aberrant rulings. But most importantly, Executive Branch officials will likely continue to defy subpoenas without any discernible downsides. Kicking disputes to the courts exacts no material costs for noncompliance. Without concrete incentives to engage in good faith negotiations with Congress, we should expect subpoena compliance to worsen.

Successfully securing requested information from the Executive Branch will also require raising real costs for noncompliance. Therefore, other methods of subpoena compliance and enforcement that focus on imposing such costs—and in turn incentivizing executive officials to negotiate with their congressional counterparts in good faith—are also critical.

### Congressional Enforcement: Modernizing Inherent Contempt

Before the recent advent of civil litigation, Congress employed two complementary enforcement mechanisms that served as credible threats and generated material and political costs to subpoena noncompliance: inherent and criminal contempt. As discussed above, because of ineffective enforcement mechanisms, both are today in practice null.

The first—inherent contempt—could be modernized by levying monetary penalties in lieu of executing arrests. The Congressional Inherent Contempt Power Resolution,<sup>30</sup> reintroduced last month, is one such proposal, which draws on Congress’s self-validating power to enforce its subpoenas without reliance on either of the other branches. Currently, Executive Branch recipients of congressional subpoenas face few if any costs should they elect to not comply. Reanimating enforcement of Congress’s inherent contempt

<sup>28</sup> *Hearing on Operation Fast and Furious: Obstruction of Congress by the Department of Justice Before the H. Comm. on Oversight and Gov’t Reform*, 115th Cong. (2017) (statement of Sen. Chuck Grassley of Iowa, Chairman, S. Comm. on the Judiciary 9–10), <https://republicans-oversight.house.gov/wp-content/uploads/2017/06/Grassley-Remarks-to-HOGR-about-FF-FINAL.pdf>.

<sup>29</sup> Molly E. Reynolds and Margaret L. Taylor, *The Consequences of Recent Court Decisions for Congress*, Lawfare (Oct. 5, 2020), <https://www.lawfareblog.com/consequences-recent-court-decisions-congress>.

<sup>30</sup> H.Res. 406, 117th Cong. (2021).

power would seek to solve this problem, introducing modest but concrete costs. The specter of possible penalties and a clear mechanism for collecting them would serve as a deterrent to noncompliance, better incentivizing officials to negotiate with lawmakers and cooperate with requests in good faith. We have joined with other groups across the ideological spectrum in support of this enforcement option.<sup>31</sup>

Generally, according to this approach, if an official with the authority to effect compliance is held in contempt, a schedule of monetary penalties, capped at some amount, would go into effect. The House would need to establish its own mechanism for implementation, such as directing its sergeant-at-arms or Office of General Counsel to employ collection agencies if contemnors fail to remit the fined amount. Importantly, because the authority to levy penalties is derived from a power *inherent* to Congress, establishing such a procedure would require a change only to House rules rather than legislation.

To minimize the likelihood of partisan abuse of this enforcement tool, the House could ensure that only senior officials, rather than mid-level officials who may otherwise get stuck in the cross-hairs of interbranch disputes, may be fined if held in contempt—narrowly limiting the scope of contemnors subject to the penalty. Additionally, in the event that there are legitimate arguments regarding the validity of the underlying congressional demands, Congress could also provide an express cause of action such that any contemnor may contest the fine in court—ensuring an avenue for remedy if the enforcement tool is clearly misused.

Regarding its constitutionality, the underlying authority for Congress to enforce its contempt power has been validated by multiple Supreme Court decisions.<sup>32</sup> In *Anderson v. Dunn* (1821), the court determined this power was ultimately a matter of “self-preservation” for the House.<sup>33</sup> However, there is some uncertainty surrounding the legality of the enforcement mechanism by which Congress would effectuate this power. Because Congress has never before levied fines against executive officials for defiance of its subpoenas, courts have never judged its legality. Nonetheless, the courts have indicated that Congress could pursue this option.<sup>34</sup> For instance, in *Jurney v. MacCracken* (1935), the Supreme Court found that Congress’s inherent contempt power is “governed by the same principles as the power of the judiciary to punish for contempt,”<sup>35</sup> which includes levying fines.

Of note, the Judicial Branch has long adopted this same posture of self-enforcement. As the Supreme Court explained in *Young v. United States ex rel. Vuitton et Fils S.A.* (1987), “Courts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated.”<sup>36</sup> Judicial enforcement of judicial orders “is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.”<sup>37</sup> Otherwise, “the courts

<sup>31</sup> *Bipartisan Coalition Letter Urging Congress to Include Inherent Contempt Fines Provision in House Rules Package*, Good Gov’t Now (Oct. 22, 2020), <https://goodgovernmentnow.org/2020/10/22/bipartisan-coalition-letter-urging-congress-to-include-inherent-contempt-fines-in-house-rules-package/>.

<sup>32</sup> See *Inherent Contempt Fines Rule*, Good Government Now, <https://goodgovernmentnow.org/modified-inherent-contempt-enforcement-rule/> (“The Supreme Court has sustained the constitutional validity and necessity of inherent contempt as a self-protective institutional mechanism at least four times between 1821 and 1935.”)

<sup>33</sup> 19 U.S. 204, 230 (1821).

<sup>34</sup> See generally Kia Rahnama, *Restoring Effective Congressional Oversight: Reform Proposals for the Enforcement of Congressional Subpoenas*, 45 Notre Dame J. of Legis. 235 (2018).

<sup>35</sup> 294 U.S. 125, 127 (1935).

<sup>36</sup> 481 U.S. 787, 796 (1987).

<sup>37</sup> *Id.*

[are] impotent.”<sup>38</sup> Last year, in declining to enforce a House subpoena, the U.S. Court of Appeals for the D.C. Circuit reminded the House that “Congress has long relied on its own devices,” inviting it to do so once again.<sup>39</sup>

To be sure, reviving inherent contempt alone, enforced through a mechanism such as monetary penalties, would constitute an important but likely insufficient step towards increased compliance. For various reasons, monetary penalties may fail to by themselves deter noncompliance and incentivize better cooperation with congressional requests. (Consider, for example, fines levied against a wealthy cabinet member.) Nonetheless, it would equip Congress with an additional tool to vindicate its oversight authority. Perhaps most importantly, it would send a powerful signal that Congress is committed to protecting the integrity of that authority—and that as do the other two branches, it will draw on self-validating powers to protect its institutional prerogatives.

### Executive Enforcement: Modernizing Statutory Contempt

The second traditional enforcement mechanism, statutory contempt, establishes criminal liabilities for those who refuse to testify or produce documentation when demanded by Congress,<sup>40</sup> and creates a process whereby a criminal contempt citation is referred to federal law enforcement for prosecution.<sup>41</sup> Historically, the possibility of a criminal contempt citation served as an effective complement to inherent contempt in deterring noncompliance.

The legislative record suggests that lawmakers not only intended the criminal contempt procedure to complement inherent contempt,<sup>42</sup> but that it should specifically include executive officials in its applicability.<sup>43</sup> Since 2008, however, each time Congress held an executive official in criminal contempt for withholding subpoenaed information during an investigation, the Justice Department refused to refer the matter to a grand jury, in contravention of the statute’s plain language.<sup>44</sup> Congress therefore now requires a mechanism to ensure that federal law is faithfully executed, even when it implicates an executive official.

The Congressional Research Service has summarized various proposals introduced in past Congresses that would statutorily amend the criminal contempt process to establish a procedure for referring citations of executive officials to an independent counsel.<sup>45</sup> This Committee should consider such a proposal as part of a comprehensive effort to strengthen Congress’s subpoena compliance and enforcement tools.

<sup>38</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

<sup>39</sup> *Comm. on Judiciary v. McGahn*, 973 F.3d 121, 125 (D.C. Cir. 2020).

<sup>40</sup> See 2 U.S.C. § 192.

<sup>41</sup> See 2 U.S.C. § 194.

<sup>42</sup> See Rosenberg & Tafelman, Cong. Rsch. Serv., RL34097, *Congress’s Contempt Power*, at 7 (2007) (“It is clear from the floor debates and the subsequent practice of both Houses that the legislation was intended as an alternative to the inherent contempt power, not as a substitute for it.”).

<sup>43</sup> See *id.*, at 12 (“The assertion that the legislative history of the 1857 statute establishing the criminal contempt process demonstrates that it was not intended to be used against executive branch officials does not appear to be supported by the historical record.”).

<sup>44</sup> See, e.g., Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* at 3 (2019) (“Four times since 2008, the House of Representatives has held an executive branch official (or former official) in criminal contempt of Congress for denying a committee information subpoenaed during an ongoing investigation. In each instance the executive branch determined not to bring the matter before a grand jury.”).

<sup>45</sup> *Id.*

Generally, these proposals authorize an independent counsel to make litigation and enforcement decisions pursuant to 2 U.S.C. § 192 and § 194, which govern the criminal contempt process. Shifting such decisions to an independent official insulated from political pressures addresses the longstanding problem of U.S. attorneys responding to “subtle and direct pressure” when a contemnor is an executive official.<sup>46</sup> An independent official would still enjoy prosecutorial discretion, and could also elect not to prosecute a citation. However, with reduced political influence, proper discretion would serve to more faithfully execute the law. For instance, in cases where an individual has clearly violated 2 U.S.C. § 192, an independent prosecutor could move expeditiously to take enforcement action absent political pressure not to do so. At the same time, an independent counsel would likewise be empowered to decline enforcement actions in the event of evidently inappropriate contempt determinations, insulating the mechanism from partisan abuse.

Various options have been proposed for determining such an official’s selection, including a congressional request of appointment from a three-judge panel, as was the model prescribed by the post-Watergate Independent Counsel Act (ICA)<sup>47</sup> and upheld by the Supreme Court in *Morrison v. United States*.<sup>48</sup> Further, as with other independent counsel, the attorney general would exercise a supervisory role, including for-cause removal subject to judicial review. As the Congressional Research Service counsels in its analysis, “it would seem prudent to mirror the [ICA] framework approved in *Morrison*, subject to some potential adjustments.”<sup>49</sup>

Finally, given an accretion of OLC opinions intended to weaken enforcement of Congress’s contempt power, Congress should make clear with any updated statutory contempt framework that an independent counsel is not bound by OLC’s determination that the criminal contempt statute cannot constitutionally be enforced against an executive branch official asserting executive privilege at the direction of the President.<sup>50</sup> Any new criminal contempt procedure could explicitly include language that executive branch officials are subject to all generally applicable federal criminal laws, and criminal contempt statutes are no exception.

By charging an independent counsel with enforcement of Congress’s criminal contempt citations, Congress would go far in addressing the multi-decade trend by administrations of both parties in thwarting congressional oversight of the Executive Branch through non-enforcement of federal law for

<sup>46</sup> *Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 30 (1983) (statement of Stanley F. Brand, former Counsel to the Clerk of the House of Representatives).

<sup>47</sup> 28 U.S.C. § 599 (setting five-year sunset provision that Congress renewed several times and before the Act expired in 1999). Of note, the ICA faced valid criticisms that any new procedure should also account for, including a bipartisan consensus that the independent counsel’s jurisdiction was overly broad; thus, for example, Congress could narrowly tailor any new procedure to the investigation and prosecution of contempt and attempts to obstruct such investigations. Most importantly, however, any new appointment procedure that seeks to promote more prosecutorial independence will likely face executive pushback, likely in the form of civil action. However, this should compel Congress to aggressively assert its constitutional lawmaking authority—to ensure enforcement of its criminal laws and to establish inferior officer positions—rather than demure in light of executive reactions.

<sup>48</sup> 487 U.S. 654 (1988).

<sup>49</sup> Cong. Res. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* at 38 (2019).

<sup>50</sup> See, e.g., Testimonial Immunity Before Cong. of the Former Counsel to the President, 43 Op. O.L.C. at 20 (2019), <https://www.justice.gov/olc/opinion/file/1215066/download> (arguing that, with respect to Don McGahn’s noncompliance with a subpoena from the Committee on the Judiciary, “criminal contempt of Congress statute does not apply[.]”) (quoting *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995)).

political considerations. It would return another tool, appropriate for today's context, to Congress's compliance and enforcement toolbox.

### Conclusion

Congress's authority to secure information is expansive. But that authority is only as meaningful as the means by which it is practically enforced. Absent dependable methods to compel compliance, Congress's authority here is "reduced to a formalized request rather than a constitutionally based demand for information."<sup>51</sup>

We encourage this Committee to consider proposals for modernizing each of Congress's three compliance frameworks: enforcing its subpoenas itself through, for example, levying fines for noncompliance; through the enforcement of federal law by employing an independent counsel; and by making civil enforcement a more practical option, such as by expediting judicial processes. No single tool will by itself prove sufficient.

Indeed, compliance tools have historically served to complement each other: for instance, when invoking inherent contempt would prove insufficient, the specter of a criminal contempt citation traditionally served as a critical backstop. As the Supreme Court observed when upholding the constitutionality of the criminal contempt statute, its purpose is to "supplement the power of [inherent] contempt by providing additional punishment."<sup>52</sup>

But most importantly, *a robust enforcement toolbox better ensures that tools rarely need to be used*. When costs are concrete and threats are credible, disputes are more likely to be settled satisfactorily between the two branches through negotiation and compromise, and remain out of the courts altogether. Only by having strong enforcement options on which to fall back can Congress credibly come to the negotiating table and advocate for its legitimate demands. The accommodations process, whereby executive and congressional officials come to the table to hash out their needs and red lines, can be reconstituted. This, ultimately, should be the objective of subpoena compliance and enforcement modernization: for Congress to develop credible enough threats such that they rarely need to be employed.

But what if subpoena compliance tools do in fact become too regularly employed, and subject to partisan abuse? As reviewed above, there are ample opportunities through policy design to mitigate the risk of abuse. Nonetheless, as with any power, abuse should still be anticipated. To consider a related example, Congress is vested with the sole power of the purse. It is certainly not the case that that power is always wielded responsibly, as evidenced by partisan brinkmanship and government shutdowns. But an Executive Branch untethered from fiscal accountability to Congress is certainly worse. The same must hold true for Congress's power of inquiry. The Supreme Court reasoned as much in an early case vindicating Congress's contempt power. While it acknowledged the real possibility of abuse, it nonetheless concluded that the alternative was worse. In fact, it concluded that the inability to compel

<sup>51</sup> Cong. Res. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, at 2 (2019).

<sup>52</sup> *Jurney v. MacCracken*, 151.



compliance with its investigatory demands would lead to “the total annihilation of the power of the House of Representatives,”<sup>53</sup> given how important this underlying power is to all its others.

The Court’s warnings were prescient. Whereas the Executive Branch has been prone to self-aggrandizement, Congress has been prone to the *opposite* ailment: abdicating its authorities when confronted with executive aggression and severely weakening its position within our system of checks and balances. In the wake of decades of ceding ground on its subpoena compliance and enforcement options, it is well past time for Congress to invest in modernizing its tools and reanimating its power of inquiry. The practical ability to access information in a timely manner is fundamental to checking executive power, to fulfilling the legislative branch’s constitutional legislative and oversight functions, and ultimately to safeguarding itself. Effective subpoena compliance and enforcement form the lynchpin in the health and preservation of our constitutional system.

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<sup>53</sup> *Anderson v. Dunn*, 229.

Mr. JOHNSON of Georgia. With that, I will now recognize the gentleman from California, the Ranking Member of the Subcommittee, Mr. Issa, for his opening statement.

Mr. ISSA. Thank you, Mr. Chair, and thank you for holding this important hearing. With the legislation that is anticipated, once again, Congress will show that it can work on a bipartisan basis to do its job.

The first investigation conducted by Congress was not one that had controversy as to the two branches, but rather, Congress, under President George Washington, was asked to investigate in 1791 the loss in an Indian war by the United States because the President could not, by definition, trust his generals to investigate their own failure.

That, like so many others, represent probably 70 or 80 percent of all investigations, ones in which the Executive Branch not only complies but often wants the result.

Congressional Subpoenas are more than just the requirement that we see in oversight. They are, in fact, essential to the job we do. We cannot authorize the spending of trillions of dollars and not expect that somewhere among the millions of people who call the Federal government their employer, whether as a contractor or as an employee, we can't expect that there won't be a few bad actors.

Over the decades, Congress has successfully investigated everything from, if you will, under Henry Waxman, countless different examples of waste, fraud, and abuse. My own tenure exposed many. Also, when conflicts arise as to the conduct of the office itself, such as with John Conyers when he called for and took two years to get Harriet Miers to comply, we, in fact, constantly find ourselves with what the Chair referenced, which is delay is, in fact, the equivalent of denial.

Currently, we have a system in which each time we move to compel, whether in the private sector or with the government, we are treated often less well than a common FOIA request.

Under FOIA, an Article III Judge fairly quickly finds himself having to make a decision about whether the Executive Branch is to comply. In the case that I have had experience with, we have had as much as two years' delay in a judge deciding whether or not they are going to hear it and what the width of that hearing is going to be.

I believe there is a consensus within the Congress that, in fact, even if we disagree with one Chair or another Chair's subpoena, that we would like it handled quickly and in a way that we can believe is just and not partisan.

Only through quickly and effectively implementing it when there is a dispute between the two branches, an Article III Judge, or in the case of a private individual, the fact is an Article III Judge can hold someone in contempt if they refuse to comply with a subpoena. Well, in fact, our contempt has no teeth in it unless the Executive Branch agrees and prosecutes the individual.

Our legislation, therefore, must have three elements.

- (1) The participation of Article III Judges;
- (2) a timeline;
- (3) a process that if, in fact, either side is not satisfied with the initial decision, that it be expeditiously reviewed so that there can be certainty.

Mr. Chair, I appreciate this hearing coming in the early part of this Congress so that hopefully, before this Congress is over, we can, in fact, on a bipartisan basis, once and for all move ourselves toward a predictable process for discovery, whether it is through the Executive Branch discovery or private individuals.

I join with you and many Chairs of the past who have been frustrated by the process and want to see a predictable process going forward.

So, again, thank you, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Issa. We share that aspiration.

With that, I will recognize the Chair of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. Well, thank you, Mr. Chair. I want to thank you for holding this important hearing. I share your commitment to protecting Congress' place in our constitutional system.

I hope this hearing will demonstrate that ensuring Congress has the tools it needs to enforce its subpoenas transcends partisanship.

Nearly a century ago, in *McGrain v. Daugherty*, the United States Supreme Court framed the responsibility of congressional oversight this way: "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions in which the legislation is intended to affect or change . . . . And where the legislative body does not itself possess the requisite information—which is not infrequently true—recourse must be had to others who do possess it," unquote.

Congress' authority to obtain information, including by use of compulsory process, flows directly from its article I legislative function. In 2017, I spoke on the House floor in support of the Congressional Subpoena and Enforcement Act of 2017, a bill that was first introduced by the gentleman from California, Mr. Issa.

What I said then holds true today: It is our responsibility to ask for the information we require to do our jobs effectively, and the Constitution empowers us to enforce those requests if we are at first denied.

In other words, if Congress cannot reliably enforce its lawfully issued subpoenas, our constitutional structure has been profoundly undermined.

In many instances, Congress and the party from whom it seeks information, frequently the Executive Branch, have been able to reach an agreement without resorting to litigation. This is certainly the preferred outcome. Sometimes, whether because of stonewalling or legitimate disagreement, there is no other option.

It should go without saying that time is of the essence when a Congressional Committee seeks judicial enforcement of its subpoenas, and that delay can be as damaging to a congressional investigation as an unfavorable ruling.

Responsible congressional investigators are constantly juggling the need to uncover the facts against having enough time to translate those facts into legislative action.

If we do have to file suit, it is essential that our lawsuit be resolved quickly. Unfortunately, recent subpoena enforcement cases have taken years to reach resolution.

The Judiciary Committee's suit to secure the testimony of Don McGahn, former President Trump's White House Counsel, is a case in point.

In one sense, that suit ended with a victory for congressional oversight. We negotiated a settlement with the Justice Department that resulted in Mr. McGahn sitting for a transcribed interview last Friday.

We made clear that the Executive Branch must respect our subpoenas, that there is no such thing as absolute immunity from congressional testimony, and that congressional investigators will eventually secure their witness in response to appropriately issued subpoenas.

Our victory also highlighted the deficiencies in the civil enforcement process that I have just described. It took two years to enforce the subpoena, and Mr. McGahn's interview happened more than four months after the President he served under left office. That is an unacceptable delay.

Modern experience has taught us that, although effective congressional oversight is essential to a functioning democracy, Congress can no longer simply assume good faith cooperation with our Committees and swift enforcement of our subpoenas in Federal Court.

Congress needs to take a hard look at how to ensure that its fundamental power to investigate will survive in an era of unprecedented stress on our democratic institutions.

To be sure, not every investigation is equally worthwhile, and not every subpoena may be immune from challenge. Congress' constitutional authority to investigate and to enforce its valid subpoenas must be incontestable.

I thank the Chair and the Ranking Member for the bipartisan nature of this hearing, and I look forward to hearing from our Witnesses about these important issues.

With that, I yield back the balance of my time.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

I will now introduce our Witnesses.

Ms. Elise Bean is a Director of the Washington, DC, office of the Levin Center at Wayne Law, which she helped establish after Senator Carl Levin's retirement from the Senate.

Ms. Bean has more than 30 years of experience working as an investigator for Senator Levin, including more than a decade as his Staff Director and Chief Counsel on the U.S. Senate Permanent Subcommittee on Investigations.

In that role, Ms. Bean handled investigations, hearings, and legislation on a wide variety of matters, including money laundering, offshore tax abuse, corruption, shell companies, and corporate misconduct.

Ms. Bean earned her Bachelor of Arts from Wesleyan University and her J.D. from the University of Michigan Law School.

Welcome, Ms. Bean.

Thomas Hungar is a partner in the Washington, DC, office of Gibson, Dunn & Crutcher LLP. His practice focuses on appellate litigation, complex trial court litigation matters, and congressional investigations.

Mr. Hungar previously served as General Counsel of the U.S. House of Representatives, providing legal advice and representation on a nonpartisan basis to the House and its leadership, Members' offices and staff, and worked closely with House Committees on oversight and investigative activities. He also previously served in the Office of Solicitor General, including as Deputy Solicitor General.

Mr. Hungar received his Bachelor of Science degree from Willamette University and his law degree from Yale Law School.

Welcome, Mr. Hungar.

Praveen Fernandes is Vice President at the Constitutional Accountability Center, CAC. Before CAC, Mr. Fernandes was a principal at The Raben Group, where he advised nonprofit clients on issues including LGBTQ equality, criminal justice, wealth inequality, digital equity, and judicial nominations.

Mr. Fernandes also served as Senior Counsel and Advisor to the General Counsel at the Office of Personnel Management during the Obama Administration. He began his career on Capitol Hill, where he served on Senator Edward Kennedy's Labor Committee staff.

Mr. Fernandes earned his undergraduate degree from Brown University, a masters in public health degree from the University of North Carolina Gillings School of Public Health, and his J.D. from the University of North Carolina School of Law.

Welcome, Mr. Fernandes.

Mr. Todd Garvey is a legislative attorney with the American Law Division of the Congressional Research Service, where he provides nonpartisan analysis to Members of Congress, staff, and Congressional Committees.

Mr. Garvey specializes in issues dealing with Congressional oversight and investigations and constitutional separation of powers. He has written extensively on Congressional Subpoenas and compliance by Executive Branch officials and on Congress' contempt power.

Mr. Garvey received his undergraduate degree in political science and government from Colgate University and his J.D. from the William and Mary Law School.

Welcome, Mr. Garvey.

Before proceeding with testimony, I would like to remind all our Witnesses appearing today that you have a legal obligation to provide truthful testimony and answers to this Subcommittee and that any false statement you make today may subject you to prosecution under section 1001 of title 18 of the United States Code.

Please note that your written statement will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in five minutes. There is a timer in Zoom to help you stay within that time limit.

Ms. Bean, you may now begin.

#### **STATEMENT OF ELISE BEAN**

Ms. BEAN. Thank you very much. I appreciate this opportunity to testify about the need to strengthen civil enforcement of Congressional Subpoenas, in particular subpoenas directed to the Executive Branch. As a long-time congressional investigator, I know how important this issue is.

The problem, as has already been described, is that the Executive Branch, their compliance with congressional information requests has continued to erode.

A couple of examples.

Last year, Senator Toomey led the filing of a bipartisan amicus brief challenging a decision by the Commerce Department to refuse to release a report on auto tariffs, even though a statute required that report to be published in the **Federal Register**.

Despite that law, the Commerce Department just refused to provide the report, still refuses today, and the Department of Justice, through its Office of Legal Counsel, has issued an opinion sustaining the position of the Commerce Department.

Another example from last year. The Department of Justice just refused to appear at a hearing before the House Judiciary Committee. The Assistant Attorney General for Civil Rights, the Director of the Bureau of Prisons, and the head of the U.S. Marshals Service refused to appear at an October hearing because, as was said in a letter from the Justice Department, quote, "The Judiciary Committee had squandered its opportunity to conduct a meaningful oversight hearing with the Attorney General," end quote, the month before, so they chose not to appear.

Of course, we are all familiar with the White House assertion that former White House Counsel Don McGahn was absolutely immune to any Congressional Subpoena and did not have to appear even to assert Executive Privilege, and that is a stance that has been taken by Presidents of both parties for over 50 years.

Finally, as mentioned earlier, the Fast and Furious case, a House oversight investigation led by Congressman Issa. They issued a 2011 subpoena to the Department of Justice. When that was not fulfilled, they filed a lawsuit in 2012. They litigated that actively for four years, until 2016, and the case itself was not fully closed until 2019. So, that is a seven-year journey through the Federal Courts.

As the Executive Branch becomes increasingly confident that courts won't step in to enforce a Congressional Subpoena even in egregious cases, then the Executive Branch becomes increasingly dismissive of the accommodations process because they know refusing to provide the information will have few, if any, consequences.

Congress can fix this problem. They can do a lot to make their ability to get information better.

In my written statement, I give you a long menu of different options, and I put them in three categories: Enacting better laws when it comes to civil enforcement, creating new penalties, such as civil fines, and streamlining judicial review. I want to mention just three out of that long list of options.

The first is to codify Congress' right to file civil enforcement actions in Federal Court. It is hard to believe that there is no statute on the books today that allows the House to do so, and the Senate statute exempts subpoenas to the Executive Branch.

Congress, in light of the Mazars decision by the Supreme Court and the McGahn en banc decision from the D.C. Circuit, this creates a very good moment to pass that type of legislation, especially with a President in office who acknowledges and understands the need Congress has for accurate information.

Second, Congress could enact a statute to expedite judicial review. There are several bills, one of which passed the House in 2017, that would create a duty, a statutory duty, of the courts to expedite cases involving Congressional Subpoenas.

One of the bills actually says the Judicial Conference and the Supreme Court must issue rules, actual rules, to make sure that happens. That is a very good way to go.

Finally, Congress could codify a small set of rules for the Executive Branch compliance with Congressional Subpoenas.

For example, there is no absolute immunity to Congressional Subpoenas, and if you are going to assert Executive Branch privilege, the President needs to do that in writing, and there needs to be a privilege log, or the privilege will be waived.

Even a larger thing that Congress could do is to create a congressional counterpart to the Department of Justice Office of Legal Counsel so that they can issue official opinions on oversight issues, including with respect to subpoenas.

If they issue opinions that are bipartisan, bicameral, thoughtful, well supported, you could provide guidance not only to Congress and the Executive Branch, but also strengthen the hand of Congress in the courts.

Thank you for delving into this very important subject to revitalize Congress' ability to get the information it needs to make informed decisions. Thank you.

[The statement of Ms. Bean follows:]

**Testimony of Elise J. Bean  
Director of the Washington Office of the Levin Center at Wayne Law**

**Hearing Before**

**House Judiciary Subcommittee on  
Courts, Intellectual Property, and the Internet**

**On**

**Civil Enforcement of Congressional Authorities**

June 8, 2021

Thank you, Chairman Johnson, Ranking Member Issa, and the other members of this Subcommittee for the opportunity to comment on civil enforcement of congressional authorities.

I am here today on behalf of the Levin Center at Wayne Law whose primary mission is to support bipartisan, fact-based oversight by Congress and the 50 state legislatures. Before becoming director of the Levin Center's Washington Office, I worked for nearly 30 years as an investigator for Senator Carl Levin, including as his staff director and chief counsel on the Permanent Subcommittee on Investigations. Over the last six years at the Center, I've been leading oversight training workshops which have helped more than 300 Republican and Democratic staffers sharpen their investigative skills and support subcommittees like this one.

I would like to commend the Subcommittee for holding this hearing and for recognizing that Congress needs to strengthen its ability to acquire information from the executive branch. Good government is virtually impossible without good oversight. And good oversight of the government is virtually impossible without timely and useful information from the executive branch.

Our country's Founders named Congress in Article I of the U.S. Constitution and empowered it to legislate, spend taxpayer dollars, confirm senior executive branch officials, and provide for the common defense and general welfare of the country. The Founders also gave Congress a vital role in the American system of checks and balances, including the ability to curb executive branch abuses. To fulfill those sacred constitutional obligations, Congress needs information.

**The Problem**

The problem is that the ability of Congress to obtain useful information from the executive branch has deteriorated, not only because federal agencies have ignored or defied congressional information requests, but also because Congress has had a difficult time enforcing its subpoenas.



This problem isn't new. Getting information from the executive branch has been a challenge for Congress since the country's inception. Fortunately, the Supreme Court has long recognized Congress' need for information to carry out its responsibilities. Over 100 years ago, in an 8-0 opinion upholding a congressional subpoena seeking information about the Attorney General, the Supreme Court wrote:

“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. ... 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 – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.”<sup>1</sup>

As the Supreme Court recognized then and more recently in the *Mazars* case,<sup>2</sup> Congress must be able to compel information if it is to make informed decisions based on the facts.

At the same time, the practical reality is that compelling information from the executive branch has become increasingly difficult. A few examples illustrate the problem.

**Refusing to Provide Agency Reports.** Today, some federal agencies refuse to produce information to Congress even when required to do so by law. In one 2019 case, a bipartisan group of eight senators led by Senator Pat Toomey (R-PA) filed an amicus brief urging a federal court to compel the Commerce Department to provide to Congress and the public a report on automobile tariffs which a statute requires to be published in the Federal Register.<sup>3</sup> The Commerce Department not only continues to refuse to release the report, the Justice Department continues to stand by a legal opinion justifying the Commerce Department's intransigence.<sup>4</sup> And despite the passage of two years, the U.S. district court has yet to issue an opinion in the case.<sup>5</sup>

<sup>1</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174-175 (1927).

<sup>2</sup> *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

<sup>3</sup> *Cause of Action Inst. v. Commerce Dep't*, No. 19-CA-778 (CJN) (D.D.C. Mar. 6, 2020), Brief of Amici Curiae Senator Pat Toomey and Members of Congress in Support of Plaintiff (signed by Senators Grassley, Wyden, Cassidy, Johnson, Lee, Sasse, Toomey, and Warner).

<sup>4</sup> *Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security*, U.S. Department of Justice Office of Legal Counsel (Jan. 17, 2020), <https://www.justice.gov/olc/opinion/file/1236426/download>.

<sup>5</sup> For another example, see *Comm. on Ways and Means, U.S. House of Rep. v. U.S. Dep't of the Treasury*, Case No. 19-cv-01974-TNM (D.D.C. 2019) (seeking to compel the Treasury Department to produce certain tax returns to the committee under a statute explicitly requiring Treasury to do so upon request); *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, U.S. Department of Justice Office of Legal Counsel (June 13, 2019), <https://www.justice.gov/olc/file/1173756/download> ((justifying Treasury's refusal to produce the tax returns)).

**Refusing to Provide Testimony.** Interbranch conflicts are not confined to disputes over documents; they also extend to congressional requests for oral testimony. The most prominent dispute involves the *McGahn* case which examines the extreme claim that current and former senior advisors to the president are absolutely immune to congressional testimonial subpoenas, despite judicial precedents to the contrary.<sup>6</sup> While that case was initiated under the Trump administration, the same position was taken by the Obama administration and past presidents from both parties,<sup>7</sup> and may be asserted by future presidents.

Moreover, the executive branch's refusal to provide oral testimony to Congress has not been limited to senior White House officials. Last year, the Department of Justice informed the House Judiciary Committee that three DOJ officials, Assistant Attorney General (Civil Rights) Eric Dreiband, Bureau of Prisons Director Michael Carvajal, and U.S. Marshals Service Director Donald Washington, would not appear at an October 1, 2020 oversight hearing, because the Committee had—according to the DOJ letter—“squandered its opportunity to conduct a meaningful oversight hearing with the Attorney General” in September.<sup>8</sup> Three days later, the head of an independent agency that supervises Voice of America and other broadcast institutions defied a bipartisan testimonial subpoena issued by the House Foreign Affairs Committee and refused to appear at a committee hearing.<sup>9</sup>

**Blocking Access to Grand Jury Materials.** In another matter, when the House Judiciary Committee initiated impeachment proceedings and, as part of that inquiry, asked a federal court for access to certain grand jury materials from a closed criminal investigation related to the executive branch official, the Justice Department intervened to oppose a court order granting access. It is hard to understand why Congress, as part of the Constitution's

<sup>6</sup> *Comm. on the Judiciary of the United States House of Representatives v. McGahn*, Case No. 19-5331 (D.C. Cir. 2019). See also *Testimonial Immunity Before Congress of the Former Counsel to the President*, U.S. Department of Justice Office of Legal Counsel (May 20, 2019), [https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-20-test-immun-fmr-whc-2\\_1.pdf](https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-20-test-immun-fmr-whc-2_1.pdf).

<sup>7</sup> See, e.g., *Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President*, Department of Justice Office of Legal Counsel (July 12, 2019), <https://www.justice.gov/olc/file/1183271/download> (noting “the Executive Branch has invoked this immunity for nearly 50 years”); *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, Department of Justice Office of Legal Counsel (July 15, 2014), <https://www.justice.gov/file/30896/download> (“The Executive Branch's longstanding position, reaffirmed by numerous Administrations of both political parties, is that the President's immediate advisers are absolutely immune from congressional testimonial process.”).

<sup>8</sup> Letter from Stephen Boyd, Assistant Attorney General (Legislative Affairs), to House Judiciary Committee (Sept. 21, 2020), <https://int.nyt.com/data/documenttools/doj-letter/ceade3b0830c34b/full.pdf>.

<sup>9</sup> See, e.g., *Head of government media agency flouts subpoena, angering Democrats and Republicans*, Washington Post (Sept. 24, 2020 1:15 PM), [https://www.washingtonpost.com/national-security/head-of-government-media-agency-flouts-subpoena-angering-democrats-and-republicans/2020/09/24/d5aa8296-fe76-11ea-b555-4d71a9254f4b\\_story.html](https://www.washingtonpost.com/national-security/head-of-government-media-agency-flouts-subpoena-angering-democrats-and-republicans/2020/09/24/d5aa8296-fe76-11ea-b555-4d71a9254f4b_story.html).

system of checks and balances, can't review information from a closed criminal inquiry about an executive branch official under consideration for impeachment. Yet that dispute has also been pending before the courts for two years without resolution.<sup>10</sup>

**Glacial Court Reviews.** Even when courts determine that Congress has a right to information, the courts have moved so slowly that justice delayed has meant justice denied. For example, in the Fast and Furious case initiated under the leadership of Congressman Issa ten years ago, a 2012 lawsuit filed by the House Oversight and Government Reform Committee to enforce a subpoena for Justice Department records was actively litigated until 2016 and formally closed in 2019, a total of seven years.<sup>11</sup> By then, the president when the subpoena was issued was long gone.

At the same time, the norms surrounding executive branch compliance with congressional information requests have continued to erode. As the Supreme Court noted in *Mazars*: “Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the ‘hurly-burly, the give-and-take of the political process between the legislative and the executive.’”<sup>12</sup> But in recent years, interbranch subpoena battles have increasingly landed in court. In the *McGahn* case, the en banc D.C. Circuit Court upheld Congress’ right to file suit to enforce its subpoenas, in part because those suits “would preserve, rather than disrupt, th[e] historical practice of accommodation.”<sup>13</sup> The court reasoned: “Without the possibility of enforcement of a subpoena issued by a House of Congress, the Executive Branch faces little incentive to reach a negotiated agreement in an informational dispute. Indeed, the threat of a subpoena enforcement lawsuit may be an essential tool in keeping the Executive Branch at the negotiating table.”<sup>14</sup>

That analysis rings true, but as the members of this Subcommittee know all too well, when courts take years to act and the executive branch gains confidence that the courts won’t enforce congressional subpoenas in a timely manner, senior officials become more dismissive of the accommodations process, calculating that a refusal to turn over information will have few, if any, consequences.

The executive branch’s disregard for Congress’ constitutional authority to compel information not only undermines the accommodations process, it deprives Congress of important information. The foreseeable result is that Congress is increasingly forced to make decisions without full information, flying partially blind when legislating, spending taxpayer dollars, and

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<sup>10</sup> *In re Application of the Comm. on the Judiciary, U.S. House of Rep., for an Order Authorizing the Release of Certain Grand Jury Materials*, Case No. 19-5288 (D.C. Cir. 2019), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1328.html>.

<sup>11</sup> *Committee on Oversight and Reform of the United States House of Representatives v. Barr*, (D.C. Cir. May 8, 2019), Motion for Voluntary Dismissal with Prejudice.

<sup>12</sup> 140 S. Ct. 2029.

<sup>13</sup> *Comm. on the Judiciary of the United States House of Representatives v. McGahn*, 968 F. 3d 755, 770-771 (D.C. Cir. 2020) (en banc).

<sup>14</sup> *Id.* at 771.

evaluating military and national security issues. Denying the legislature's access to factual information is a dangerous course of action that is not sustainable in a functioning democracy.

### **Strengthening Civil Subpoena Enforcement**

In response, some supporters of Congress urge the House and Senate to revive actions last taken nearly 100 years ago to imprison recalcitrant executive branch officials for contempt of Congress. Others urge use of aggressive political tools to force compliance with congressional subpoenas including by withholding appropriations, derailing the president's legislative agenda, rejecting nominees, or impeaching offending officials. While the Supreme Court has upheld the inherent authority of Congress to punish contempt and lock up offenders, that type of heavy-handed response is an extreme solution. Other aggressive political tools are not only unwieldy and disruptive, but may escalate political tensions, increase the public's dismay with government, and even do harm to the country. While Congress shouldn't unilaterally disarm by taking aggressive tactics off the table, detaining officials, defunding programs, or sidelining nominees risk much higher political costs than seeking an orderly judicial resolution of interbranch subpoena disputes.

The better approach is the one being considered today at this hearing: taking steps to strengthen Congress' ability to employ civil enforcement mechanisms to defend its right to information and revitalize the accommodations process. Both the Supreme Court and D.C. Circuit Court have recently affirmed the right of Congress to obtain information from the executive branch.<sup>15</sup> That affirmation makes it an appropriate time for Congress to secure stronger subpoena enforcement mechanisms, especially when working with a president who personally understands the constitutional importance of congressional oversight.

In fashioning new civil enforcement mechanisms, Congress should keep in mind at least three constitutional provisions that support its authority to do so. First is the Necessary and Proper Clause in Article I, Section 8, which broadly empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its constitutional

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<sup>15</sup> See *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2033 (2020) ("It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served." *United States v. Rumely*, 345 U.S. 41, 43 (1953)."); *Comm. on Judiciary, U.S. House of Rep. v. McGahn*, 968 F.3d 755, 778, 781 (D.C. Cir. 2020) (en banc) ("Congress cannot intelligently legislate without identifying national problems in need of legislative solution and relying on testimony and data that provide a deeper understanding of those problems, their origins, and potential solutions. It likewise cannot conduct effective oversight of the federal government without detailed information about the operations of its departments and agencies.").

responsibilities. Second and third are two Article III provisions that explicitly authorize Congress to establish and regulate the jurisdiction of federal courts.<sup>16</sup>

### **Possible Civil Enforcement Mechanisms**

To strengthen civil enforcement of its subpoenas, Congress can choose from a variety of measures that may be implemented through changes to House and Senate rules or reforms enacted into law. The available measures fall into three broad categories: (1) codifying better civil enforcement provisions; (2) authorizing new penalties to deter noncompliance; and (3) streamlining judicial review.

**Codifying Better Civil Enforcement Provisions.** One set of measures to strengthen civil enforcement of congressional subpoenas involves improving existing federal statutes. Key steps include codifying the right of Congress to file civil actions in court to compel information from the executive branch, and spelling out the obligations of the executive branch to comply with congressional subpoenas.

Currently, no federal statute directly addresses the right of Congress to file a civil action in federal court to enforce a congressional subpoena against the executive branch.<sup>17</sup> The Supreme Court in *Mazars* and the en banc D.C. Circuit Court in *McGahn* recently upheld both propositions, but rather than continue to rely on case law, it is time for Congress to codify its civil enforcement authority in statute.

Legislation could draw from H.R. 4010, a bill which was introduced by Rep. Issa and passed the House in 2017,<sup>18</sup> and H.R. 8335 which was introduced in the last Congress by Rep. Dean.<sup>19</sup> Both bills explicitly authorize Congress to file civil actions in federal court to enforce congressional subpoenas.<sup>20</sup> One issue with the wording in both bills is that neither explicitly

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<sup>16</sup> See Article III, Section 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”) and Section 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States .... In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

<sup>17</sup> While a federal statute does generally authorize the Senate to file civil enforcement actions in federal court, that statute includes an exception for actions to enforce a subpoena “issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity.” 28 U.S.C. 1365(a). Due to the exception, the Senate cannot rely on Section 1356 to file civil an enforcement action in court against the executive branch.

<sup>18</sup> H.R. 4010 (115<sup>th</sup> Cong.), section 2 (proposing a new 28 U.S.C. 1365a(a)).

<sup>19</sup> H.R. 8335 (116<sup>th</sup> Cong.), section 3 (proposing a new 28 U.S.C. 1365a(a)).

<sup>20</sup> The wording in H.R. 8335 is more explicit, stating that the House, Senate, or a committee or subcommittee “may bring a civil action” against the recipient of a subpoena. The wording in H.R. 4010 is slightly less direct, stating that “any civil action” filed “against the recipient of a subpoena” concerning “the failure to comply” is subject to several rules, one of which is that the action “shall be filed” in federal court.

refers to executive branch agencies or officials when establishing the right of Congress to file a civil enforcement action in court; on the other hand, neither bill exempts the executive branch as is now done in the Senate's civil enforcement statute.<sup>21</sup> The better approach would be to name the executive branch in the text of the statute to remove any doubt about the scope of the law, drawing not only on the Supreme Court's ruling that such actions are constitutionally permissible, but also on Congress' constitutional authority to shape the jurisdiction of the federal courts. Enacting such a statute would help solidify the *Mazars* and *McGahn* rulings.

A second problem is that no federal statute currently establishes any rules governing how the executive branch should respond to a congressional subpoena. So another step Congress could take would be to fill that void.

Congress could begin by enacting a statute directing any recipient of a congressional subpoena, including any executive branch recipient, to appear and testify or produce records in a manner consistent with the subpoena. That approach could draw on provisions in both H.R. 4010 and H.R. 8335.<sup>22</sup> Congress could also codify more specific rules. For example, Congress could specify that executive branch reports and other information mandated by law to be provided to Congress must be produced, if not already available, within 48 hours of a written request by a committee, subcommittee, or member of Congress. Congress could codify the principle that no executive branch official has or may assert absolute immunity to a congressional subpoena, ending the executive branch's 50-year effort to convince a court to uphold that extreme position despite judicial precedents to the contrary. Congress could also codify the principle that the executive branch has no authority to file suit to block a congressional application for a court order to gain access to grand jury materials in a closed case. None of those principles is currently laid out in any congressional rule or federal statute.

In addition, Congress could address several issues related to executive privilege. For example, as proposed in House Resolution 406 introduced last month by Subcommittee Member Ted Lieu, Congress could specify that executive privilege may be asserted only by the president "personally and in writing."<sup>23</sup> Congress could also adopt the approach taken in H.R. 4010 stating that any assertion of a privilege by the recipient of a congressional subpoena "may be determined to have been waived" with respect to a particular document if a court finds that the subpoena recipient failed to submit a privilege log with respect to that document.<sup>24</sup> The bill also specifies

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<sup>21</sup> Compare H.R. 8335, section 3 (proposing a new 28 U.S.C. 1365a(a)) and H.R. 4010, section 2 (proposing a new 28 U.S.C. 1365a(a)) with 28 U.S.C. 1365.

<sup>22</sup> See H.R. 4010 (115<sup>th</sup> Cong.), section 3 (proposing a new 2 U.S.C. 105(a)); H.R. 8335 (116<sup>th</sup> Cong.), section 4 (proposing a new 2 U.S.C. 105(a)). Again, neither bill explicitly refers to executive branch agencies or officials, an omission that it might be wise to address.

<sup>23</sup> H. Res. 406 (117<sup>th</sup> Cong.) (proposing a new clause 7.(g) to House Rule XI).

<sup>24</sup> H.R. 4010 (115<sup>th</sup> Cong.), section 2 (proposing a new 28 U.S.C. 1365a(c)). See also H. Res. 406 (117<sup>th</sup> Cong.), section 2 (proposing a new clause 7.(l)(2) stating, in part, that the failure to file "an appropriate and timely privilege log shall be the basis for overruling or disregarding any objection."); H.R. 8335 (116<sup>th</sup> Cong.), section 3 (proposing a new 28 U.S.C. 1365(d)).

the information that must be provided in the privilege log.<sup>25</sup> Those provisions could help curb inappropriate and excessive claims of executive privilege to justify withholding subpoenaed information.<sup>26</sup>

Provisions mandating executive branch compliance with congressional subpoenas would likely be tested in the courts for their constitutionality. But they would also collectively establish, for the first time, a set of reasonable principles and procedures governing executive branch responses to congressional subpoenas. In so doing, they would provide needed guidance to both legislative and executive branch personnel. Together, they would also change the tenor of the accommodations process, making it more likely the executive branch would negotiate rather than ignore or defy Congress' informational needs.

Some legislative proposals recommend that Congress adopt detailed internal procedures governing how and when a subpoena recipient may object to a specific subpoena request and how Congress must handle those objections. The Levin Center recommends a cautious approach to establishing a set of detailed internal procedures related to subpoena objections, because not all disputes require such formality; it may invite procedural disagreements, delays, and even lawsuits; and it may burden the accommodations process with an overly restrictive procedural framework. To me, it would essentially push the Congress toward an adversarial process more akin to civil litigation over liability issues instead of a congressional process geared to gathering information for policy purposes. My own experience is that complex procedures can easily intensify rather than reduce interbranch disputes. On the other hand, procedures governing assertions of executive privilege, such as the already suggested requirements for a personal, written assertion by the president and submission of a privilege log, are relatively straightforward mechanisms that could foster negotiation, curb executive branch overreach, and facilitate court review.

In addition to strengthening existing statutes, another important step Congress could take in the civil enforcement arena would be to establish a bicameral, bipartisan congressional counterpart to the Justice Department's Office of Legal Counsel.<sup>27</sup> The OLC has been producing

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<sup>25</sup> H.R. 4010 (115<sup>th</sup> Cong.), section 3 (proposing a new 2 U.S.C. 105(b)). See also H.Res. 406 (117<sup>th</sup> Cong.) (proposing a new clause 7.(1)(2) to House Rule XI: "The log shall be in such form as instructed by the committee or, in the absence of such instruction, shall be in the form that would be required by the rules and practice of the United States District for the District of Columbia."); H.R. 8335 (116<sup>th</sup> Cong.), section 4 (proposing a new 2 U.S.C. 105(b)(2)).

<sup>26</sup> See "The Executive's Privilege," Professor Jonathan David Shaub (2020) (describing the executive branch's increasing use of executive privilege to deny congressional information requests), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3477699](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477699).

<sup>27</sup> For decades, the Department of Justice [Office of Legal Counsel](#) (OLC) has been issuing official legal opinions that provide guidance to executive branch agencies on how to respond to congressional information requests. Criticisms of OLC opinions for excessive secrecy, bias, and overreach have been growing. See, e.g., "Weaponizing the Office of Legal Counsel," Prof. Emily Berman (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3455556](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455556); "The Executive's Privilege," Prof. Jonathan David Shaub (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3477699](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477699). The Justice Department nevertheless continues to use its OLC

legal opinions for decades on oversight issues, all of which favor the executive branch over the legislative branch. It is past time for Congress to respond by designing its own process for issuing official legal opinions on pressing oversight issues, including the executive branch's obligation to comply with congressional information requests. As we explained in testimony before the House Modernization Committee earlier this year,<sup>28</sup> if Congress as an institution were to issue thoughtful, well-supported, bipartisan legal opinions on oversight matters, including congressional subpoenas, Congress could help establish its own oversight norms, educate Members and staff, reduce committee disparities, inform the executive branch of Congress' oversight expectations, and advance oversight effectiveness. The opinions would also strengthen the hand of Congress in court.

Codifying Congress' right to file civil enforcement actions in federal court, specifying rules governing executive branch responses to congressional subpoenas, and establishing a congressional counterpart to the OLC are critical steps to strengthening Congress' ability to compel information from the executive branch.

**Establishing New Penalties.** A very different set of measures to strengthen civil enforcement of congressional subpoenas would be to establish new penalties to deter executive branch noncompliance.

One popular option already included in some legislative proposals is to authorize the imposition of civil fines on any executive branch agency or official (as well as any other party) who defies a congressional subpoena.<sup>29</sup> An initial issue is whether the fine would be imposed by Congress itself or by a court in receipt of a request from Congress.<sup>30</sup> If Congress were to authorize itself to impose fines pursuant to its inherent contempt authority, key issues would include whether to use a willful or knowing standard to trigger the fine,<sup>31</sup> who would decide on whether and how much of a fine to impose,<sup>32</sup> and whether the House or Senate as a whole would have to vote to ratify the decision.

Because any fine would likely be contested in court by the executive branch, if Congress itself were to initiate the fine, it would need to ensure that its decisionmaking process was

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opinions not only to unify how federal agencies respond to Congress, but also to try to persuade courts to favor the executive branch over the legislative branch when disputes arise.

<sup>28</sup> House Select Committee on the Modernization of Congress, Virtual Discussions, "Modernization Fix Congress Cohort Listening Session" (March 25, 2021), <https://modernizecongress.house.gov/committee-activity/virtual-discussions/meeting-modernization-cohort-listening-session>.

<sup>29</sup> See, e.g., H.Res. 406 (117<sup>th</sup> Cong.) (proposing a new clause 7.(j) in House Rule XI); H.R. 8335 (116<sup>th</sup> Cong.), section 3 (proposing a new 28 U.S.C. 1365a(c)); H.R. 4010 (115<sup>th</sup> Cong.), section 2 (proposing a new 28 U.S.C. 1365a(b)).

<sup>30</sup> Compare H.Res. 406 (authorizing Congress) with H.R. 8335, section 3, and H.R. 4010, section 2 (authorizing the courts).

<sup>31</sup> Compare H.R. 4010 (using a willful standard) with H.R. 8335 (using a knowing standard).

<sup>32</sup> See, e.g., 2 U.S.C. 288b (citing the Joint Leadership Group in the Senate) and House Rule 2, clause 8 (citing the Bipartisan Legal Advisory Group in the House).



bipartisan, supported by a preponderance of the evidence, and ratified by the House or Senate. In addition, Congress may want to specify a deferential standard for judicial review that, for example, might bar de novo judicial review of any congressional factfinding and set an abuse of discretion standard for overturning a fine.

Choosing whether to have a court or Congress impose civil fines for noncompliance with a congressional subpoena requires weighing several factors. If imposed by a court, the fines would be more likely to pass judicial muster and would free Congress from having to establish an internal process and use that process to assess fines. On the other hand, leaving the fines to a court would compel Congress to continue to rely on the judiciary to enforce its subpoenas rather than rely on its own inherent contempt authority. In contrast, if the fines were imposed by Congress, the House and Senate would have to go through the complex work of establishing and using a bipartisan, evidence-based procedure to assess the fines, but they would also control the nature and timing of the process to prevent extended delays. Before a fine could be collected, however, its assessment would likely have to undergo judicial review anyway, with the attendant delays and unpredictability. In short, the decision on whether the courts or Congress should impose civil fines on noncompliant subpoena recipients is neither easy nor obvious.

No matter which approach is used, authorizing civil fines to deter noncompliance with congressional subpoenas is an innovative civil enforcement mechanism that, if it survives court challenge, would strengthen Congress' ability to compel information. Civil fines offer a fresh enforcement option that could help revitalize the accommodations process by convincing the executive branch that it would be better to negotiate than contest a civil penalty.

**Streamlining Judicial Review.** A final set of measures to strengthen civil enforcement of congressional subpoenas focuses on streamlining judicial standards and procedures to resolve interbranch disputes.

Today, one of the biggest problems with congressional civil enforcement is that courts take months and sometimes years to decide a dispute. A simple but effective response to that problem is to establish an expedited court review process. H.R. 4010, for example, which passed the House in 2017, states that if the House or Senate files a civil action to enforce a congressional subpoena, "[i]t shall be the duty" of the federal district courts, circuit courts, and Supreme Court "to advance on the docket and to expedite to the greatest possible extent the disposition of any such action and appeal."<sup>33</sup> The more recent bill, H.R. 8335, also requires the Judicial Conference and Supreme Court to "prescribe rules of procedure to ensure the expeditious treatment" of congressional civil enforcement actions.<sup>34</sup> No such statutory requirements now exist, and together they could help reduce the delays that now plague congressional enforcement cases.

In addition, both bills authorize Congress to request a three-judge district court panel to adjudicate the enforcement action and then skip the D.C. Circuit and lodge any appeal directly with the Supreme Court. An alternative would be to authorize Congress to file a civil

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<sup>33</sup> H.R. 4010 (115<sup>th</sup> Cong.), section 2 (proposing a new 28 U.S.C. 1365a(a)(2)).

<sup>34</sup> H.R. 8335 (116<sup>th</sup> Cong.), section 3 (proposing a new 28 U.S.C. 1365a(e)).

enforcement action directly with the D.C. Circuit Court, skipping the district court stage, and then file any appeal with the Supreme Court. Both approaches would shorten the judicial appellate review process and help ensure a more timely adjudication of the issues.

Another important statutory provision would state explicitly that federal courts may not conduct a line-by-line review of a congressional subpoena during a civil enforcement action, but must instead limit their analysis to whether the information sought by the subpoena is, in the words of the Supreme Court, “not plainly incompetent or irrelevant to any lawful purpose [of the Committee] in the discharge of [its] duties.”<sup>35</sup>

This limitation would be in line with existing judicial precedent granting deference to Congress’ constitutional authority to conduct oversight. For example, in 2018, D.C. District Court Judge Richard Leon wrote: “While ... ‘Congress’ investigatory power is not, itself, absolute’ and ... it ‘is not immune from judicial review,’ ... this Court will not – and indeed, may not – engage in a line-by-line review of the Committee’s requests.”<sup>36</sup> In 2019, U.S. District Judge Edgardo Ramos from the Southern District of New York similarly ruled against conducting “a line-by-line review of the information requested” in a congressional subpoena explaining: “[T]he committees have alleged a pressing need for the subpoenaed documents to further their investigation, and it is not the role of the Court or plaintiffs to second guess that need, especially in light of the Court’s conclusions that the requested documents are pertinent to what is likely a lawful congressional investigation.”<sup>37</sup> In another 2019 decision, D.C. District Judge Ketanji Brown Jackson wrote: “[A]s a committee of Congress, the Judiciary Committee has the ‘broad power’ under Article I of the Constitution to conduct its investigations however it sees fit, so long as it does not impinge upon the constitutional rights of those it undertakes to question.”<sup>38</sup> The Supreme Court held in *Mazars* that “to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary

<sup>35</sup> *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp., 17, 20-21 (D.D.C. 1994) (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960)).

<sup>36</sup> *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 44 (D.C.C. 2018).

<sup>37</sup> *Trump v. Deutsche Bank AG*, No. 19 CIV. 3826 (ER), bench opinion, hearing transcript at 70, 85, 2019 WL 2204898 (S.D.N.Y. May 22, 2019), aff’d in part, 943 F.3d 627 (2d Cir. 2019), vacated on other grounds sub nom. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). See also *Trump v. Committee on Oversight & Government Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76, 93 (D.D.C. 2019) (D.C. Judge Amit P. Mehta: “Once a court finds that an investigation is one upon which legislation could be had, it must not entangle itself in judgments about the investigation’s scope or the evidence sought. Only an investigative demand that is ‘plainly incompetent or irrelevant to any lawful purpose of the [committee] in the discharge of its duties’ will fail to pass muster. *McPhaul v. United States*, 364 U.S. 372, 381 (1960) (citation omitted) (cleaned up). Importantly, in making this assessment, it is not the judicial officer’s job to conduct a ‘line-by-line review of the Committee’s requests. ... ‘There is no requirement that every piece of information gathered in such an investigation be justified before the judiciary.’”), aff’d sub nom. *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), vacated on other grounds sub nom. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

<sup>38</sup> *Comm. on the Judiciary, United States House of Representatives v. McGahn*, 415 F. Supp. 3d 148, 192 (D.D.C. 2019).

to support Congress's legislative objective," but did not itself engage in a line-by-line analysis nor require that type of painstaking, time-consuming review.<sup>39</sup>

Together, directing courts to expedite congressional subpoena enforcement cases, requiring the judiciary to issue specific procedural rules to accomplish that objective, and prohibiting line-by-line reviews that second-guess congressional factfinding efforts would significantly reduce the delays that now make judicial review such a frustrating and often inept enforcement option.

A completely different step Congress may want to consider when thinking about using courts to strengthen its enforcement efforts is one that would revive its ability to bring criminal contempt actions in court against executive branch officials who defy congressional subpoenas. Right now, 2 U.S.C. 194 requires U.S. attorneys to prosecute criminal contempt cases brought to them by Congress, but the Justice Department refuses to comply with the law if the subject of the contempt action is an executive branch official. In response, Congress could establish the authority of the House and Senate to hire a private sector attorney to prosecute a criminal contempt action in court under 2 U.S.C. 192. This new provision could rely on the wording now used to permit the Senate to designate a private attorney to commence a civil enforcement action under 28 U.S.C. 1365(d). It might also be possible to make this change by amending House and Senate rules, rather than enacting new legislation.

Finally, Congress needs to resolve several statutory interpretation issues affecting congressional civil enforcement authority. First is an issue that arose in the *McGahn* case, when a three-judge circuit court panel accepted a Justice Department argument that when the Senate enacted a statute governing civil enforcement of Senate subpoenas, that statute also limited the civil enforcement options available to the House.<sup>40</sup> The D.C. Circuit, acting en banc, rejected the panel's reasoning, but Congress could address the issue more broadly via a statutory provision stating that Congress has multiple avenues into court to adjudicate disputes over its right to compel information,<sup>41</sup> and enacting one option does not limit or preclude use of another. The provision could use language similar to that in H.R. 8335 indicating that enacting new subpoena enforcement mechanisms does not limit Congress' inherent authority or foreclose any other means for enforcing compliance with a congressional subpoena.<sup>42</sup>

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<sup>39</sup> 140 S. Ct. 2036.

<sup>40</sup> *Comm. on the Judiciary of the United States House of Representatives v. McGahn*, 951 F.3d 510, 522 (D.C. Cir. 2020), vacated 968 F.3d 755 (D.C. Cir. 2020) (en banc).

<sup>41</sup> Those avenues include a criminal contempt statute (2 U.S.C. § 192), two civil contempt statutes (2 U.S.C. §§ 288b(b) and 288d(a)), a civil enforcement statute (28 U.S.C. § 1365), criminal prohibitions on false statements, perjury, and obstruction (18 U.S.C. §§ 1001, 1505, and 1621), the Declaratory Judgement Act (28 U.S. Code § 2201), and equitable relief under the Constitution (28 U.S.C. § 1331).

<sup>42</sup> H.R. 8335 (116<sup>th</sup> Cong.), section 5 ("Nothing in this Act may be interpreted to limit or constrain Congress' inherent authority or foreclose any other means for enforcing compliance with congressional subpoenas, nor may anything in this Act be interpreted to establish or recognize any ground for noncompliance with a congressional subpoena.") See also H.R. 4010 (115<sup>th</sup> Cong.), section 4 ("Nothing in this Act shall be interpreted to diminish Congress' inherent

Congress should also eliminate the executive branch exception to civil enforcement actions by the Senate now included in 28 U.S.C. 1365.<sup>43</sup> That exception prevents the Senate from using that statute's civil enforcement mechanism to resolve disputes with the executive branch and raises an issue about whether it also constricts the House, as explained above. Given the recent rulings by the Supreme Court and D.C. Circuit that federal courts have jurisdiction to adjudicate interbranch subpoena disputes, this exception is no longer appropriate, weakens congressional subpoena enforcement efforts, and creates legal confusion.

**Setting Priorities.** Strengthening civil enforcement of congressional subpoenas can be accomplished in many ways, as set out in the three categories listing possible measures. When setting priorities among these options, perhaps the most important steps would be to enact a statute that codifies the right of Congress to file civil enforcement actions against the executive branch in federal court and requires expedited judicial review of congressional subpoena disputes. Also important would be to codify a small set of rules related to executive branch compliance with congressional subpoenas, including issues related to absolute immunity and executive privilege, and at the same time establish a bipartisan, bicameral process to issue congressional guidance on a broader set of concerns related to subpoenas and other congressional oversight issues.

## Conclusion

Strengthening Congress' ability to civilly enforce subpoenas directed to the executive branch is key to maintaining the checks and balances envisioned in the Constitution, ensuring Congress has the information it needs to fulfill its constitutional responsibilities, and freeing Congress from using more aggressive mechanisms that increase interbranch conflicts and political tensions. The Supreme Court's *Mazars* ruling and a president who understands Congress' need for information make this a good moment to take on this critical issue. Thank you again for delving into it.

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authority or previously established methods and practices for enforcing compliance with congressional subpoenas, nor shall anything in this Act be interpreted to establish Congress' acceptance of any asserted privilege or other legal basis for noncompliance with a congressional subpoena.").

<sup>43</sup> 28 U.S.C. 1365(a) ("This section shall not apply to an action to enforce ... any subpoena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity.").

Mr. JOHNSON of Georgia. Thank you.  
 We will now hear testimony from Mr. Hungar.  
 Mr. Hungar, you may begin.

#### STATEMENT OF THOMAS G. HUNGAR

Mr. HUNGAR. Thank you, Chair Johnson, Ranking Member Issa, Chair Nadler, and the Members of the Subcommittee. I appreciate the opportunity to appear before you today to testify about the important topic of the enforcement of Congressional Subpoenas.

In my former role as House General Counsel, I experienced firsthand some of the many obstacles, frustrations, and delays that the Congress frequently encounters in attempting to obtain information from the Executive Branch pursuant to its legitimate oversight requests. I hope this hearing will assist the Committee and the House in identifying potentially viable solutions for that pressing problem.

Congress' constitutional authority to compel testimony and production of documents in response to oversight requests is beyond dispute. The permissible scope of congressional inquiry is, in the Supreme Court's words, "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."

In fact, the court has said a legitimate oversight encompasses inquiries concerning the Administration of existing laws, as well as proposed or possibly needed statutes, surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them, as well as probes into departments of the Federal government to expose corruption, inefficiency, or waste.

Unfortunately, however, in the past dozen years or so it has become increasingly clear that the traditional mechanisms for encouraging Executive Branch compliance with congressional requests for information are no longer adequate to the task. Imprisonment for inherent contempt, for example, is widely viewed as impractical and unrealistic, and the Executive Branch refuses to prosecute Federal officials for criminal contempt, rendering those traditional tools effectively useless in the oversight context.

As a result, the House has been forced to resort to civil enforcement actions. That mechanism has also proven to be unsatisfactory in many instances because, among other reasons, the Department of Justice's litigating tactics, continuing areas of legal uncertainty, and the discretionary scheduling decisions of Federal judges can lead to inordinate delays and unduly limited relief, effectively defeating Congress' oversight efforts.

Mr. JOHNSON of Georgia. Mr. Hungar, you are now over your time. If you could sum up, please.

Mr. HUNGAR. Yes, Mr. Chair. I set forth in my written testimony various proposals for remedying this situation, including legislation that has previously been proposed, and will be happy to address the Committee's questions about any of those issues. Thank you.

Mr. JOHNSON of Georgia. Mr. Hungar, I am in error. That message I got pertained to the last Witness. So, you have 2 minutes. So, please proceed. I am so sorry.

Mr. HUNGAR. Thank you, Mr. Chair.

So, just to flesh out briefly, some of the proposed solutions that have been offered that could help address this problem include the following.

First, legislation could be enacted to reinvigorate the inherent contempt procedure by providing for the imposition of fines or the preclusion of salary payments when a Federal official is found in contempt of Congress after appropriate House or Senate proceedings.

Second, legislation along the lines of the Congressional Subpoena Compliance and Enforcement Act that passed the House in 2017 could be enacted with provisions designed to eliminate meritless legal objections that the Department of Justice currently seeks to advance in subpoena enforcement actions.

Ensure expedited judicial resolution of civil enforcement actions at every level of the Federal Courts.

Permit congressional committees to obtain direct Supreme Court review, thereby minimizing appellate delays and avoiding the intermediate step of going to the Federal Courts of appeals.

Finally, require the Executive Branch to specify, as Ms. Bean said, to specify its claims of privilege promptly or be deemed to have waived them to prevent the types of delaying tactics that the Justice Department has used to considerable effect in the past.

Third and finally, the House could modify its appropriations procedures to ensure that the appropriations power is wielded in a manner calculated to incentivize prompt compliance with legitimate Congressional Subpoenas.

Thank you.

[The statement of Mr. Hungar follows:]

Written Testimony of

Thomas G. Hungar  
Partner, Gibson, Dunn & Crutcher, LLP  
Former General Counsel, U.S. House of Representatives

Before the

Subcommittee on Courts, Intellectual Property, and the Internet  
Committee on the Judiciary  
United States House of Representatives

Hearing on

“Civil Enforcement of Congressional Authorities”

June 8, 2021  
Room 2141, Rayburn House Office Building

Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee, thank you for the opportunity to appear before you today to testify about the important topic of the enforcement of congressional subpoenas. Having had the honor and privilege of serving as House General Counsel from 2016-2019, I experienced first-hand some of the many obstacles, frustrations, and inordinate delays that Congress frequently encounters in attempting to obtain information from the Executive Branch pursuant to legitimate oversight requests. I commend the Subcommittee for holding this hearing to consider potential solutions to this difficult and recurring bipartisan problem.<sup>1</sup>

As you know, Congress's inherent constitutional authority to conduct oversight of the Executive Branch is broad and far-reaching, encompassing a wide array of fact-finding and evidence-gathering aimed at informing potential legislation; examinations of the manner in which the Executive Branch has or has not implemented congressional appropriations and directives; and investigations regarding potential misfeasance, malfeasance, or nonfeasance by Executive Branch officers and employees in the exercise of their official duties. Importantly, this legislative oversight power necessarily includes the authority to compel testimony and the production of information from the Executive Branch. While Congress has traditionally employed a variety of mechanisms to effectuate its oversight authority, in recent decades it has become evident that those mechanisms are increasingly inadequate to the task. In order for Congress to successfully perform its important oversight role, its enforcement authorities must be strengthened.

I will first provide an overview of Congress's constitutional authority to investigate. Second, I will outline the existing enforcement mechanisms available to Congress to compel compliance with its demands for information, and the various practical and structural limitations that serve to undermine the effectiveness of those mechanisms at present. Finally, I will discuss a number of proposals that could be adopted to enhance Congress's ability to conduct effective investigations of the Executive Branch and obtain the information it needs to fulfill its oversight and other legislative responsibilities effectively.

## **I. Congress's Power to Investigate**

The Constitution confers upon the Senate and House of Representatives "[a]ll legislative Powers herein granted."<sup>2</sup> The authority of each legislative chamber to conduct oversight and investigations is an inherent attribute of that constitutional grant of legislative power.<sup>3</sup> That authority

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<sup>1</sup> The views stated in my written and oral testimony are my own, and do not necessarily reflect the views of my law firm or its clients.

<sup>2</sup> U.S. Const. art. I, § 1.

<sup>3</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927) (“[T]he power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function.... 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.”).



necessarily includes the power to compel testimony and the production of documents through the issuance of subpoenas.<sup>4</sup>

Congress’s investigative authority is sweeping in its ambit. As the Supreme Court has recognized, “the scope of [Congress’s] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”<sup>5</sup> Thus, while Congress’s exercise of its oversight authority must always be in furtherance of a legitimate legislative purpose,<sup>6</sup> the range of valid legislative purposes extends to “inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”<sup>7</sup>

Recipients of congressional subpoenas have an “unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.”<sup>8</sup> Unfortunately, however, that obligation is not always honored. As a practical matter, Congress’s investigatory and subpoena powers are only as effective as Congress’s ability to enforce them, and the experience of the past dozen years has cast substantial doubt on Congress’s ability to achieve an acceptable degree of compliance by means of its existing authorities.

## II. Existing Enforcement Mechanisms and their Limits

At present, Congress has three primary methods by which to achieve compliance or deter non-compliance with a subpoena—inherent contempt powers, criminal contempt powers, and the ability to file civil enforcement actions. For close to a century, however, Congress has not utilized its inherent contempt powers, and criminal contempt proceedings at the behest of Congress are simply unavailable in cases involving Executive Branch officials (and have become vanishingly rare with respect to private parties as well). As a result, congressional committees have increasingly been forced to resort to filing civil enforcement actions in federal district court in an effort to compel compliance by recalcitrant subpoena recipients. Those civil enforcement actions have generally proven to be unsatisfactory enforcement mechanisms, however, because the

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<sup>4</sup> *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504-05 (1975) (“The issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking....”).

<sup>5</sup> *Id.* at 504 n.15; *see Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (“The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate[.]”).

<sup>6</sup> *Trump v. Mazars USA, LLP.*, 140 S. Ct. 2019, 2031 (2019).

<sup>7</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957); *see generally* Michael D. Bopp, Gustav W. Eyster, & Scott M. Richardson, *Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations*, 25 CORN. J. OF LAW & PUB. POLICY 453, 456 (2015).

<sup>8</sup> *Watkins*, 354 U.S. at 187–88.

Department of Justice’s litigating tactics, existing areas of legal uncertainty, and the discretionary scheduling decisions of federal judges can lead to inordinate delays and unduly limited relief, effectively defeating Congress’s oversight efforts. In this context as in many others, justice delayed is justice denied.

#### A. Inherent Contempt.

By virtue of its constitutional grant of the federal legislative power, Congress possesses the inherent authority to find recalcitrant witnesses (among others) in contempt of Congress and to impose appropriate sanctions. While not explicitly outlined in the Constitution, the Supreme Court has recognized the existence and legitimacy of this power, explaining that without it, Congress would be “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, [might] mediate against it.”<sup>9</sup>

In practice, however, Congress’s inherent contempt power has been of no practical utility in the modern era. First, the Senate, the House, and the courts have understandably imposed procedural requirements to constrain and guide the exercise of this power. Traditionally, for example, it has been understood that the relevant legislative chamber must first adopt a resolution setting forth the allegations of misconduct and formally charging the defendant with contempt; the resolution must be served on the defendant, or the Sergeant at Arms must take the defendant into custody to answer the charges at the bar of the chamber; and a trial or evidentiary hearing must be held allowing for access to counsel, defense witnesses, submission of evidence, and witness examination.<sup>10</sup> If the House or Senate finds the defendant guilty, the defendant may be imprisoned during that term of Congress, either to coerce compliance or as punishment for the contempt.<sup>11</sup>

Given the many procedural requirements, among other difficulties, this process has been “described as ‘unseemly,’ cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar.”<sup>12</sup> Moreover, incarceration by Congress is simply not realistic or practicable in the twenty-first century. Congress has no jail where it could imprison individuals held in contempt, the political costs of imprisoning recalcitrant witnesses are widely viewed as unacceptably high, and the obvious practical and structural difficulties inherent in asking the Sergeant at Arms to arrest

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<sup>9</sup> *Anderson v. Dunn*, 19 U.S. 204, 228 (1821); *see also* *Marshall v. Gordon*, 243 U.S. 521, 542 (1917) (“The right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed.”)

<sup>10</sup> *See, e.g., Bopp et al.*, 25 CORN. J. OF LAW & PUB. POLICY 453, 460 (2015); TODD GARVEY AND ALISSA M. DOLAN, CONG. RSCH. SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH 10-11 (2017).

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.* at 12 (citing S. Rep. No. 95-170, 95th Cong., 1st Sess. 97 (1977)).

and imprison a federal official are daunting, to say the least.<sup>13</sup> As a result, Congress has not used this power since 1934.<sup>14</sup>

## B. Criminal Contempt

In recognition of the practical difficulties posed by use of the inherent contempt power to enforce compliance with congressional subpoenas, in 1857 Congress enacted a statutory criminal contempt procedure as an additional mechanism for vindicating its interests in conducting legislative investigations. Under the criminal contempt statute, any person who “willfully” refuses to comply with a committee subpoena for testimony or documents “shall be deemed guilty of a misdemeanor,” punishable by a substantial fine or imprisonment up to one year.<sup>15</sup> Moreover, the statute sets forth a mechanism whereby a congressional committee can submit a statement of facts regarding a witness’s contempt to the President of the Senate or the Speaker of the House, who must then certify the witness’s contempt to “the appropriate United States attorney, *whose duty it shall be* to bring the matter before the grand jury for its action.”<sup>16</sup>

By its express terms, this statute provides Congress with a powerful tool to compel compliance with its legitimate subpoenas. In reality, however, and particularly in recent decades, the usefulness of this mechanism has been limited at best, because Congress depends on the Executive Branch for enforcement. Notwithstanding the mandatory language of the statute, which specifies that the U.S. Attorney “shall” prosecute a recalcitrant witness upon certification by Congress, the Executive Branch has taken the position that it retains the discretion not to prosecute, and in particular that it has no obligation to prosecute federal officials for alleged contempt when they assert executive privilege, because the power to prosecute is exclusively vested in the Executive Branch under Article II of the Constitution.<sup>17</sup> Thus, specifically in the context of Executive Branch resistance to congressional oversight requests, the criminal contempt statute is effectively useless, and other enforcement mechanisms are necessary.

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<sup>13</sup> See, e.g., *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 91 (D.D.C. 2008) (explaining that imprisoning an executive branch official would “exacerbate the acrimony between the two branches and would present a grave risk of precipitating a constitutional crisis”)

<sup>14</sup> GARVEY & DOLAN, *supra* n.10, at 12; see *Jurney v. MacCracken*, 294 U.S. 125 (1935).

<sup>15</sup> 2 U.S.C. § 192.

<sup>16</sup> 2 U.S.C. § 194 (emphasis added).

<sup>17</sup> See, e.g., Letter from Karl R. Thompson, Acting Ass’t Attorney Gen., Office of Legal Counsel, Dep’t of Justice, to Ronald C. Machen, Jr., U.S. Attorney for D.C. (June 16, 2014); Letter from James M. Cole, Deputy Att’y Gen., to Hon. Charles E. Grassley, Ranking Minority Member, Comm. on the Judiciary, U.S. Senate at 1 (July 16, 2010) (“the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President’s claim of executive privilege”) (quoting *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984)); TODD GARVEY, CONG. RSCH. SERV., RL45442, CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 20 (2021).

### C. Civil Enforcement Actions

A third mechanism available to the House<sup>18</sup> and Senate<sup>19</sup> to enforce subpoena matters is to initiate a civil enforcement action in federal court. When a recalcitrant witness refuses to comply with a subpoena, the relevant chamber may authorize a committee, typically via a resolution or standing rule, to file suit in federal district court seeking an order requiring the recalcitrant witness to comply with the subpoena. If the court then orders compliance and the witness fails to obey, the witness can be found in contempt of court and subjected to appropriate sanctions to coerce compliance. While this enforcement mechanism has had greater success in recent years than the contempt mechanisms discussed above, the House's experience with civil enforcement actions over the past dozen years has revealed substantial inadequacies that severely limit this mechanism's effectiveness in most circumstances.

First, civil enforcement actions have tended to result in substantial delays and prolonged litigation spanning different Congresses and even different presidential Administrations. By far the most egregious example of inordinate litigation delays occurred in the Fast and Furious investigation. There, the House Committee on Oversight and Government Reform issued a subpoena to the Attorney General for documents related to allegations of Executive Branch misconduct arising out of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' use of so-called "gunwalking" tactics in an undercover sting operation known as Operation Fast and Furious. After the Executive Branch asserted executive privilege (after many months of stonewalling), the Committee filed a civil enforcement action in August 2012. Amazingly, the district court did not even order production of *unprivileged* documents until August 2014, *two years* after the lawsuit had been filed,<sup>20</sup> and it did not resolve any of the Executive Branch's specific (and meritless) privilege objections until January 2016, nearly *three and a half years* after the litigation had commenced.<sup>21</sup> By the time the case was finally resolved in the district court, a presidential election and *two* congressional elections had intervened, and legitimate congressional efforts to obtain highly relevant information had been effectively stifled. As one committee report correctly observed, "[a]n enforcement tool requiring three and a half years simply to get a district court order is unacceptable."<sup>22</sup>

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<sup>18</sup> While it is generally understood that either house of Congress may bring a civil enforcement action, *see infra* n.40, the Department of Justice has consistently argued otherwise, and Congress's ability to bring civil enforcement actions against the Executive Branch has been called into question by a now-vacated panel decision of the D.C. Circuit. *See* Comm. on Judiciary of U.S. House of Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020).

<sup>19</sup> 2 U.S.C. § 288d; 28 U.S.C. § 1365.

<sup>20</sup> Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332, ECF No. 81 (D.D.C. Aug. 20, 2014) (Amy Berman Jackson, J.).

<sup>21</sup> Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016) (Amy Berman Jackson, J.).

<sup>22</sup> H.R. Rep. No. 114-848, at 401.

Other civil enforcement actions have proceeded in the federal district courts without similarly egregious delays. But even when federal district judges are prepared to act expeditiously, the necessarily time-consuming nature of the civil litigation process and the often slow pace of appellate review render the litigation mechanism a less-than-satisfactory means of vindicating Congress's need for the prompt submission of information in response to oversight requests. In 2007, for example, the House Judiciary Committee issued subpoenas for the testimony of the former White House Counsel and Chief of Staff regarding the firings of nine United States attorneys. The Executive Branch categorically refused to comply, and the Committee filed suit in March 2008. The district court acted with commendable diligence, resolving the case in favor of the Committee in July 2008.<sup>23</sup> Thereafter, however, the Executive Branch appealed, and the D.C. Circuit, while granting the Executive Branch a stay pending appeal, *declined* to expedite the appeal, thereby frustrating the Committee's obvious and compelling interest in a speedy resolution of the dispute. Ultimately, the D.C. Circuit never resolved the case, because a presidential election intervened, and the new administration was able to settle the dispute. The former White House Counsel did not testify until March 2009, after the administration in which she had served was no longer in office.<sup>24</sup>

A similar pattern unfolded during the Trump Administration, when subpoena disputes intensified but litigation delays continued to frustrate congressional efforts to obtain information within a reasonable period of time. The House's experience in these disputes serves only to confirm the lesson that, for the Executive Branch, litigation delays can be as effective as a favorable court decision in resisting congressional investigations.

Perhaps the best known example involves the *Mazars* and *Deutsche Bank* cases, which arose out of several subpoenas to third parties for private financial records of then-President Trump. The subpoenas were issued by the Committee on Financial Services, the Committee on Intelligence, and the Committee on Oversight and Reform. Rather than comply with these subpoenas, then-President Trump challenged them in federal court. Although the district courts in both cases proceeded with admirable promptness in deciding the cases in the first instance,<sup>25</sup> the subsequent process of judicial consideration, involving direct appeal to the courts of appeals, review by the Supreme Court, and further proceedings on remand, resulted in protracted delays. The *Mazars* and *Deutsche Bank* subpoenas were issued in April 2019, and the Supreme Court issued its decision in July 2020, but the cases remain pending with no final decision,<sup>26</sup> and in the meantime a presidential election has occurred and a new administration has taken office.

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<sup>23</sup> Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (John D. Bates, J.).

<sup>24</sup> David Johnston, *Top Bush Aides to Testify in Attorney's Firings*, N.Y. TIMES (Mar. 4, 2009), <https://www.nytimes.com/2009/03/05/us/politics/05rove.html>.

<sup>25</sup> Trump v. Committee on Oversight & Reform, 380 F. Supp. 3d 76 (D.D.C. 2019) (Amit P. Mehta, J.), *aff'd sub nom.*, Trump v. Mazars USA LLP, 940 F.3d 710 (D.C. Cir. 2019), vacated, 140 S. Ct. 2019 (2020); Trump v. Deutsche Bank, AG, 2019 WL 2204898 (S.D.N.Y. May 22, 2019) (Edgardo Ramos, J.), *aff'd in part*, 943 F.3d 627 (2d Cir. 2019), vacated, 140 S. Ct. 2019 (2020).

<sup>26</sup> Trump v. Committee on Oversight & Reform, No. 19-cv-01136 (D.D.C.); Trump v. Deutsche Bank,

[Footnote continued on next page]

The same is true of the remaining two subpoena cases that arose in 2019. In the *McGahn* case, the House Judiciary Committee issued a subpoena to former White House Counsel Donald McGahn in April 2019. The Executive Branch took the position that McGahn was absolutely immune from compelled testimony, and the Committee filed suit in August 2019 to compel enforcement. The district court promptly ruled in favor of the Committee in November 2019,<sup>27</sup> but a panel of the D.C. Circuit reversed, and the case has been pending on appeal (with multiple twists and turns) ever since. Ultimately, it appears that the dispute may finally have been resolved, not by the courts but by a settlement reached after the new administration took office. Finally, *Committee on Ways and Means v. U.S. Treasury*, which involves a subpoena issued to Treasury Secretary Mnuchin and Internal Revenue Service Commissioner Charles Rettig for six years of President Trump's tax returns, was stayed pending resolution of the various overlapping legal issues raised in the *McGahn* appeal, and the parties are now apparently engaged in settlement negotiations.<sup>28</sup>

It is striking that not one of the six lawsuits discussed above resulted in the House obtaining any relief before at least one congressional and presidential election intervened. Given the typically short timeframes on which congressional investigations usually operate, these lengthy litigation delays are a serious obstacle to effective oversight, and serve only to encourage the Executive Branch to engage in vigorous resistance at every step of the process. As a practical matter, the limited victories that Congress has been able to obtain through litigation have proven to be largely hollow, with access to meaningful information generally delayed for years, if achieved at all. Reforms are needed if Congress is to regain its ability to conduct effective oversight of the Executive Branch in the face of stubborn resistance.

### III. Possible Mechanisms for Enhancing Oversight Effectiveness

As shown above, Congress's existing authorities are inadequate to the task of enforcing legitimate congressional subpoenas against recalcitrant Executive Branch officials in a timely manner. As one House Select Committee aptly summarized the current reality, "[a]ll three enforcement mechanisms—inherent powers, criminal charges and civil enforcement—have questionable usefulness today and are largely dependent upon other branches of government agreeing with or pursuing the cause and remedy. The administration's obstruction of congressional oversight is the inevitable and predictable result."<sup>29</sup>

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[Footnote continued from previous page]  
AG, No. 1:19-cv-03826 (S.D.N.Y.).

<sup>27</sup> *Committee on Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019) (Ketanji Brown Jackson, J.), appeal pending (No. 19-5331).

<sup>28</sup> *Comm. on Ways and Means, U.S. House of Representatives v. U.S. Dep't of the Treasury*, No. 1:19-cv-01974 (D.D.C.).

<sup>29</sup> H.R. Rep. No. 114-848, at 401 (2016).

A number of proposals for attempting to remedy this problem have been made over the years, and several of them have the potential to meaningfully enhance Congress's oversight powers. Some of these proposals are discussed below.

#### A. Enhancing the Efficacy of the Contempt Power

As discussed above, procedural and structural inefficiencies render the existing contempt avenues largely ineffectual as mechanisms for ensuring compliance with congressional subpoenas. The political costs, public-relations optics, and practical obstacles to arresting, trying, and imprisoning recalcitrant witnesses pursuant to the inherent contempt power have made it a dead letter for more than 80 years, and the Department of Justice's consistent refusal to pursue criminal contempt charges against federal officials renders the criminal contempt process effectively toothless.

Commentators have proposed a variety of potential remedies aimed at reinvigorating the contempt power and transforming it once again into an effective tool for bolstering congressional oversight efforts. One proposal would entail the imposition of monetary fines on persons found guilty of inherent contempt; the rationale for this approach is that fines would be a more politically and practically feasible alternative to the traditional but somewhat jarring penalty of imprisonment.<sup>30</sup> For example, Congress could pass a statute imposing a range or graduated schedule of monetary penalties for government officials found to have engaged in willful contempt of Congress pursuant to the inherent contempt mechanism, with the penalties designed to incentivize compliance with lawful subpoenas and/or punish those who continue to resist compliance. Such a provision could provide for judicial imposition and enforcement of such fines (with carefully framed mandatory provisions aimed at guiding and constraining judicial discretion in order to ensure an effective fines regime), or it could provide for the automatic imposition of specified fines on federal officials found in contempt, with collection to be enforced through mandatory salary deductions.

To avoid potential due process objections, such a regime would of course need to include appropriate procedural protections for individuals charged with contempt, to ensure that the House's or Senate's inherent contempt determination would not be subject to legitimate challenge in the courts. As discussed above, the procedural protections deemed appropriate in the inherent contempt context have typically included fair notice of and an opportunity to respond to the contempt charges, the right to be represented by counsel, and the like.<sup>31</sup> As the Supreme Court explained in a legislative contempt case decided in 1972, "we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'"<sup>32</sup> At the same time, however, "the panoply of

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<sup>30</sup> See e.g., Morton Rosenberg, *WHEN CONGRESS COMES CALLING* 24-25 (2017).

<sup>31</sup> GARVEY & DOLAN, *supra* n.10, at 11; Mort Rosenberg, *Reasserting Congress' Investigative Authority* 2 n.6 (R Street 2017).

<sup>32</sup> *Gropi v. Leslie*, 404 U.S. 496, 502 (1972).

procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings.”<sup>33</sup>

A related proposal that could be adopted as an alternative to or in conjunction with the imposition of monetary fines would be the enactment of annual appropriations riders forbidding the use of appropriated funds to pay the salary of any federal officer or employee found to be in contempt of Congress.<sup>34</sup> Such a prohibition could be effective for a specified period of time, or until the contemnor has complied with Congress’s lawful demand for information (subject to constitutional limitations). Congress has adopted analogous appropriations riders in other contexts. For example, Section 713 of the Consolidated Appropriations Act of 2020 provides that “[n]o part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who ... prohibits or prevents ... any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress” on official matters.<sup>35</sup> A similar rider could easily be fashioned to preclude salary payments to congressionally adjudicated contemnors. And to ensure implementation of this approach during each appropriations cycle, the House “change its rules to allow a point of order against any appropriations measure, including conference reports, and continuing resolutions, that would fund the salary of a Federal official held in contempt of Congress.”<sup>36</sup>

Properly implemented, neither a salary-freezing mechanism nor a monetary penalty structure would constitute an impermissible bill of attainder. Such measures would not be drafted to target particular identified individuals, but would instead operate generally (like any criminal statute), with their penalties or prohibitions being triggered only by separate findings of contempt pursuant to each legislative chamber’s well-recognized inherent power to make such findings in accordance with due process.<sup>37</sup>

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<sup>33</sup> *Id.* at 501.

<sup>34</sup> *See e.g.*, H.R. Rep. No. 114-848, at 402 (2016).

<sup>35</sup> Consolidated Appropriations Act, 2020, Pub. L. No. 116-93 § 713, 133 Stat. 2487 (2020).

<sup>36</sup> H.R. Rep. No. 114-848, at 401 (2016).

<sup>37</sup> The Supreme Court has defined bills of attainder as “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” *United States v. Lovett*, 328 U.S. 303, 315 (1946). The imposition of penalties based on a finding of contempt pursuant to Congress’s constitutional inherent contempt procedures would not be an impermissible bill of attainder, as evidenced by the fact that the Supreme Court has consistently upheld Congress’s power to impose punishment on the basis of such findings. *See supra* n.9.



## B. Enhancing the Efficacy of the Civil Enforcement Mechanism

### 1. *Expediting Judicial Proceedings*

In recognition of the fact that the time-consuming nature of civil enforcement has proven to be the largest single obstacle to its effectiveness, proposals to enhance the civil enforcement process have typically focused on mechanisms for expediting judicial consideration and resolution of such cases.<sup>38</sup> In 2017, the House of Representatives passed H.R. 4010, a bill aimed at resolving several of the problems posed by current civil enforcement procedures, specifically including the problem of delay.<sup>39</sup> The bill would have ameliorated that problem in several ways.

First, by making clear that the House and its committees may bring civil enforcement actions to enforce congressional subpoenas, the bill would have eliminated one of the Department of Justice's delaying tactics, namely, its traditional (but meritless) argument that the House lacks a cause of action and therefore cannot pursue civil enforcement litigation.<sup>40</sup>

Second, the bill would have imposed on all levels of the federal court system the "duty ... to advance on the docket and to expedite to the greatest possible extent the disposition of any such action and appeal."<sup>41</sup> In addition, the bill would have given the committee initiating the lawsuit the option of requesting that the case be heard by a three-judge court with direct appeal to the Supreme Court, thereby eliminating an entire layer of appellate review with its attendant delays.<sup>42</sup>

Subsequent proposed bills have included additional enhancements that would also help further the goal of securing expedited judicial consideration of subpoena enforcement actions. For ex-

<sup>38</sup> See e.g., H.R. Rep. No. 114-848, at 402 (2016) (proposing mechanisms for expedited resolution, and explaining that "[a]n investigation delayed by years of legal deliberations does not allow Congress to make timely legislative decisions.").

<sup>39</sup> H.R. 4010, 115th Cong. (2017).

<sup>40</sup> See H.R. 4010, § 2(a) (proposed 28 U.S.C. § 1365a(a)), 115th Cong. (2017). As noted above, the assertion that the House lacks a cause of action was responsible for some of the delay in the McGahn matter, and as a result of the settlement of that matter it will not be resolved by the D.C. Circuit in the near term. Of course, the Department of Justice's position on this issue has been rejected by multiple district court decisions, which correctly recognize that the House's constitutional right to compel compliance with its subpoenas necessarily carries with it the ability to vindicate that right in court. See *Committee on Judiciary v. McGahn*, 415 F. Supp. 3d 148, 193-95 (D.D.C. 2019); *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1, 22-24 (D.D.C. 2013); *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 78-94 (D.D.C. 2008). Unfortunately, the now-vacated panel decision in the McGahn case (which reached the opposite conclusion) will undoubtedly encourage the Department of Justice to continue advancing this argument, so it can be expected to cause delay in future cases unless precluded by statute.

<sup>41</sup> H.R. 4010, § 2(a) (proposed 28 U.S.C. § 1365a(a)(2)), 115th Cong. (2017).

<sup>42</sup> *Id.* § 2(a) (proposed 28 U.S.C. § 1365a(a)(3)).

ample, one proposal would add statutory language authorizing appellate courts to issue interlocutory relief as necessary to compel prompt judicial action when a district court fails to proceed expeditiously, and directing the federal courts to prescribed rules of procedure “to ensure the expeditious treatment” of subpoena enforcement actions.<sup>43</sup>

One additional matter that would be worthy of legislative attention in this regard is the potential enactment of statutory language mandating expedited district court and appellate consideration of actions brought to quash, modify, or enjoin enforcement of congressional subpoenas. Most such actions are barred by the Speech or Debate Clause,<sup>44</sup> but as illustrated by the *Mazars* case, courts have entertained actions to enjoin third-party recipients of congressional subpoenas from complying with demands for production of documents belonging to the plaintiff, and such cases have sometimes failed to proceed at an appropriately expedited pace. A statutory obligation to expedite such cases to the greatest extent feasible at all levels of the federal judicial system would presumably help alleviate this problem.

## **2. Streamlining Privilege Disputes**

House Bill 4010 also included language requiring subpoena recipients to provide timely privilege logs detailing any claims of privilege or be deemed to have waived such privilege claims.<sup>45</sup> Requiring a privilege log—a list describing any documents withheld and the corresponding protective privilege—would substantially accelerate the subpoena enforcement process by mandating that the Executive Branch specify its claims of privilege at the beginning of the process. In the *Fast and Furious* investigation, for instance, the Executive Branch refused to assert even a blanket claim of executive privilege until faced with contempt proceedings, and failed to provide a detailed privilege log until finally ordered to do so after years of litigation, tactics that resulted in substantial delay.

Additionally, Congress could enact legislation making clear that each chamber or committee has discretion to decline to recognize common law privileges when asserted by the Executive Branch. Limiting the available privileges in the context of particularly compelling investigations could expedite the oversight process by minimizing the number of privilege disputes to be litigated.

## **C. Wielding the Appropriations Power to Enhance Oversight**

Separate and apart from proposals to enhance the effectiveness of the contempt and civil enforcement mechanisms, the effectiveness of the House’s oversight investigations could also be enhanced through more aggressive deployment of the appropriations power in a manner targeted at recalcitrant federal agencies. Many mechanisms for achieving this goal could be devised, but one potential approach would be to modify the House’s Rules to empower standing committee

<sup>43</sup> H.R. 8335, § 3(a) (proposed 28 U.S.C. § 1365a(b)(2) & (e)), 116th Cong. (2020).

<sup>44</sup> *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 507 (1975).

<sup>45</sup> H.R. 4010, §§ 2(a) & 3(a) (proposed 28 U.S.C. § 1365a(c) & Rev. Stat. § 105).

chairs whose legitimate oversight requests have been stonewalled by particular Executive Branch agencies to certify those agencies' noncompliance to the Appropriations Committee, which would then be obligated to impose mandated percentage reductions in funding for the relevant agency or an appropriate element thereof (such as its senior leadership units), in the next annual appropriation bill. To ensure compliance, language could be also be added to Rule XXI.9 stating that it shall not be in order for the House to consider on the floor any bill, joint resolution, amendment, or conference report appropriating funds in a manner inconsistent with the foregoing percentage reductions, unless the certifying committee confirms that the recalcitrant agency has resolved its subpoena compliance issues.

\* \* \*

Thank you for the opportunity to testify regarding this important subject.

Mr. JOHNSON of Georgia. Thank you, Mr. Hungar, and sorry for that interruption once again.

We will now hear from Mr. Fernandes.

Mr. Fernandes, you have five minutes, sir, and you may begin.

#### **STATEMENT OF PRAVEEN FERNANDES**

Mr. FERNANDES. Thank you. I would like to thank the Chair, Ranking Member, and other Members of the Subcommittee for the privilege of offering some thoughts as you consider congressional oversight and the enforcement of subpoenas.

Congressional investigatory power is deeply rooted in our political system and is embedded in our Constitution, which grants Congress the right to legislate.

There is a problem. Over the last four decades there has been a congressional oversight effectiveness crisis, particularly with respect to oversight of the Executive Branch. Executive Branch officials have refused to comply with subpoenas, and resolution of these disputes in the courts has taken too long.

An example proves instructive.

In early 2019, the House Oversight Committee subpoenaed Mazars USA for documents related to the President, President Trump, and his businesses' finances. In the ensuing litigation, the House won at the District Court and Circuit court levels.

In July 2020, the Supreme Court held, in accordance with precedent and centuries of history, that Congress has broad investigatory powers and can investigate the Executive Branch and, indeed, even the President himself.

However, because the court concluded that the lower courts had not properly taken into account separation of powers concerns, the court also vacated the lower courts' opinion and remanded the case.

Now, more than two years after the start of the lawsuit, the issue is nowhere near resolved, and there is still a pending motion for summary judgment at the District Court level.

This is just one example, which I am providing simply because of its ongoing nature and because it was litigated at every level of the Federal Court system.

How one feels about any given example might be influenced by one's partisan affiliation, one's feelings about a Presidency, or one's commitment to the underlying subject matter.

The problem is larger than any subject, political party, or Presidency. In countless cases, delays in the courts have prevented Congress from receiving the information to which it is entitled and which it needs to do its job.

The consequences of such delays are particularly acute in the House, which is not a continuing body. Each time a new House is sworn in, its ongoing investigations end, and its subpoenas expire. If new leadership decides not to reissue subpoenas, the ongoing litigation could be mooted, foreclosing the chance of the House receiving the information.

One possible solution is for Congress to establish a pathway for expedited court review of oversight disputes. Congress has considered this option before. For instance, Congresswoman Dean in the last Congress and Ranking Member Issa in the 115th Congress in-

roduced legislation that would streamline the process of resolving disputes over subpoenas.

According to both legislative proposals, any time the House, Senate, or one of its Committees or Subcommittees brings a civil action against the recipient of a Congressional Subpoena, the Federal Courts at every level must expedite disposition to the greatest possible extent.

Both pieces of legislation further provide that if requested by the plaintiff, the action shall be heard by a three-judge court and shall be reviewable by appeal directly to the Supreme Court. The bills also require notice of appeal to be filed within 10 days.

Allowing for expedited review and a direct appeal to the Supreme Court would allow for a quicker and more efficient process when it comes to enforcing Congressional Subpoenas.

This streamlined review has precedence. For example, 28 USC 2284 allows for a three-judge panel for actions challenging the constitutionality of apportionment of congressional districts or apportionment of any statewide legislative body.

In addition to making provision for a three-judge panel and streamlined appellate review, Congress should consider clarifying that this pathway would govern, regardless of any other statutory schemes implicated by the subpoena.

To cite just one example, documents created or maintained by the White House are subject to the Presidential Records Act, which sets out its own procedures for resolving disputes. Congress should make clear that, other statutory schemes notwithstanding, disputes over congressional oversight in the Federal Courts will be resolved through an expedited pathway.

In conclusion, Congress' right to obtain information is not in doubt. What is in doubt, however, is whether Congress will be able to obtain the information to which it is entitled in a timely fashion.

Currently, when oversight disputes go to the Federal Courts, this remains an open question. Congress should consider expedited court review as one way of answering it.

Thank you.

[The statement of Mr. Fernandes follows:]



**Testimony of Praveen Fernandes, Vice President, Constitutional Accountability Center**

**Hearing on “Civil Enforcement of Congressional Authorities”**

**Subcommittee on Courts, Intellectual Property, and the Internet**

**House Committee on the Judiciary  
United States House of Representatives**

**June 8, 2021**

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## I. Introduction

I would like to thank the Chairman, Ranking Member, and other members of the Subcommittee for the privilege of offering some thoughts as you consider congressional oversight and the enforcement of subpoenas.

I am the Vice President of the Constitutional Accountability Center (CAC), a non-partisan think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has drafted and distributed an issue brief that explains the historical and legal basis for the exercise of congressional oversight authority.<sup>1</sup> CAC has also filed several *amicus* briefs on congressional subpoenas.<sup>2</sup> I also speak on issues related to the Supreme Court, the lower federal courts, and the Constitution on academic panels, at public events, and in the media.

Congressional investigatory power is deeply rooted in our political system and is embedded in our Constitution, which grants Congress the power to legislate.<sup>3</sup> As the Supreme Court has explained, "[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—which not infrequently is true—recourse must be had to others who do possess it."<sup>4</sup> Given Congress's need for information to fulfill its legislative function, the Supreme Court has held that the congressional power to investigate is broad and is "indeed co-extensive with the power to legislate."<sup>5</sup>

Despite this constitutional history and Supreme Court precedent, executive branch officials have repeatedly refused to comply with congressional requests for information.<sup>6</sup> Accordingly, congressional committees have often been forced to engage in civil court proceedings, and resolution of these disputes

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<sup>1</sup> Brianne J. Gorod, Brian R. Frazelle, & Ashwin P. Phatak, *ISSUE BRIEF: The Historical and Legal Basis for the Exercise of Congressional Oversight Authority*, Constitutional Accountability Center (Jan. 30, 2019), <https://www.theconstitution.org/think-tank/issue-brief-the-historical-and-legal-basis-for-the-exercise-of-congressional-oversight-authority/>.

<sup>2</sup> *Trump v. Mazars USA, LLP*, Constitutional Accountability Center (last visited June 2, 2021), <https://www.theconstitution.org/litigation/trump-v-mazars-usa-llp/>; *Trump v. Deutsche Bank AG & Capital One*, Constitutional Accountability Center (last visited June 2, 2021), <https://www.theconstitution.org/litigation/trump-v-deutsche-bank-ag-capital-one/>; *Committee on the Judiciary v. Donald F. McGahn, II*, Constitutional Accountability Center (last visited June 2, 2021), <https://www.theconstitution.org/litigation/committee-on-the-judiciary-v-donald-f-mcgahn-ii/>.

<sup>3</sup> See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* § 8, cl. 18 (Congress has the power "[t]o 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.").

<sup>4</sup> *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

<sup>5</sup> *Quinn v. United States*, 349 U.S. 155, 160 (1955).

<sup>6</sup> Frank O. Bowman III, *Trump's Defense Against Subpoenas Makes No Legal Sense*, The Atlantic (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/trumps-defense-against-subpoenas/605635/>; Donald Trump Is Not the First President to Fight Subpoenas, The Economist (May 2, 2019), <https://www.economist.com/united-states/2019/05/02/donald-trump-is-not-the-first-president-to-fight-subpoenas>.

has been protracted.<sup>7</sup> For instance, it has been more than two years since President Trump filed a lawsuit to declare the House Committee on Oversight and Reform's subpoena of his accounting firm, Mazars USA, LLP "invalid and unenforceable."<sup>8</sup> Significantly, the House won in substantial part in federal court, including at the Supreme Court level, where the Court reaffirmed the House's subpoena authority. Yet the Supreme Court remanded the case, and the litigation continues, which means that the House Oversight Committee has still not gotten access to the materials it needs to legislate.<sup>9</sup>

This example illustrates a serious problem, but one that Congress can address. Most significantly, Congress can put in place expedited review for oversight-related litigation, as it has done in several other areas of law.<sup>10</sup>

## II. Congressional Oversight Power and Its Roots<sup>11</sup>

### a. *The History of Congressional Oversight*

The practice of legislative oversight predates the birth of the United States with "roots [that] lie deep in the British Parliament."<sup>12</sup> For example, in the 1680s, the British Parliament investigated issues as diverse as the conduct of the army in "sending Relief" into Ireland during war, "Miscarriage in the Victualing of the Navy," and the imposition of martial law by a commissioner of the East India Company.<sup>13</sup> These investigations were premised on the idea that Parliament could not properly legislate if it could not gather information relevant to the topics on which it wanted to legislate. Thus, for example, a February 17, 1728 entry in the *Commons' Journal* described a parliamentary committee's investigation of bankruptcy law as follows:

Ordered, That the Committee, appointed to inspect what Laws are expired, or near expiring, and to report their Opinion to the House, which of them are fit to be revived, or continued, and who are instructed to inspect the Laws relating to Bankrupts, *and consider what Alterations are proper to be made therein*, have Power to send for Persons, Papers, and Records, with respect to that Instruction.<sup>14</sup>

This early British practice of legislative investigation was replicated by American colonial legislatures. "The colonial assemblies, like the House of Commons, very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention."<sup>15</sup> For example, in 1722, the Massachusetts House of Representatives declared that it was "not only their Privilege but Duty to demand of any Officer in the pay

<sup>7</sup> David Janovsky & Sarah Turberville, *Congress Needs to Reclaim Its Time from the Courts*, Project on Government Oversight (Nov. 18, 2020), <https://www.pogo.org/analysis/2020/11/congress-needs-to-reclaim-its-time-from-the-courts/>.

<sup>8</sup> Complaint at 13, *Trump v. Mazars USA, LLP*, No. 1:19-cv-01136 (D.D.C. Apr. 22, 2019).

<sup>9</sup> Janovsky & Turberville, *supra* note 7.

<sup>10</sup> Neal Devins, *The Majoritarian Rehnquist Court?*, 67-SUM Law & Contemp. Probs. 63, 70 (2004); Neal Devins, *Congress As Culprit: How Lawmakers Spurred On the Court's Anti-Congress Crusade*, 51 Duke L.J. 435, 442-43 (2001).

<sup>11</sup> This entire portion of my testimony draws heavily from the Constitutional Accountability Center's issue brief on the historical and legal basis for congressional oversight, see Gorod, Frazelle, & Phatak, *supra* note 1.

<sup>12</sup> James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926).

<sup>13</sup> *Id.* at 162.

<sup>14</sup> *Id.* at 163 (emphasis added) (citation omitted).

<sup>15</sup> C.S. Potts, *Power of Legislative Bodies To Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708 (1926).



and service of this Government an account of his Management while in the Public Employ."<sup>16</sup> In exercising that duty, the House called before it two military officers to question them about their "failure to carry out certain offensive operations ordered by the [H]ouse at a previous session," over the objection of the Governor.<sup>17</sup> Similarly, the Pennsylvania Assembly had "a standing committee to audit and settle the accounts of the treasurer and of the collectors of public revenues,"<sup>18</sup> which had the "full Power and Authority to send for Persons, Papers and Records by the Sergeant at Arms of this House."<sup>19</sup>

The United States Congress also demonstrated early in the Republic's history that it viewed broadly its authority to investigate, including its authority to investigate the Executive Branch. As the Supreme Court would later recount, the first Congresses used compulsory process to investigate "suspected corruption or mismanagement of government officials."<sup>20</sup>

For example, in March 1792, only a few years after the adoption of the Constitution, the House created a special committee to inquire into a particular military defeat. Record of the debate in the House shows that a majority of Members believed that Congress should establish a select committee to investigate this matter itself, rather than direct the President to investigate. Representative Thomas Fitzsimons, for instance, believed it "out of order to request the President . . . to institute . . . a Court of Inquiry," and instead argued that a committee was better suited "to inquire relative to such objects as come properly under the cognizance of this House, particularly respecting the expenditures of public money."<sup>21</sup> Similarly, Representative Abraham Baldwin "was convinced the House could not proceed but by a committee of their own," which "would be able to throw more light on the subject, and then the House would be able to determine how to proceed."<sup>22</sup> Thus, the House rejected a proposal directing the President to carry out the investigation, and instead passed by a 44 to 10 vote a resolution creating its own committee to investigate.<sup>23</sup>

Numerous similar congressional investigations took place over the subsequent decades. For instance, in 1800, a select committee was formed to investigate the circumstances of the Treasury Secretary's recent resignation. Representative Roger Griswold believed such an investigation was important because if there is an investigation "on the retirement of every Secretary of the Treasury from office" about "his official conduct, it will operate as a general stimulus to the faithful discharge of duty."<sup>24</sup> The committee was directed "to examine into the state of the Treasury, the mode of conducting business therein, the expenditures, of the public money, and to report such facts and statements as will conduce to a full and satisfactory understanding of the state of the Treasury."<sup>25</sup>

*b. Congressional Oversight, the Power to Investigate, and Supreme Court Precedent*

Congress's power to investigate is deeply rooted in our political tradition, and the ability of Congress to investigate is embedded in our national charter, which gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution."<sup>26</sup>

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<sup>16</sup> *Id.* (citation omitted).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 709.

<sup>19</sup> *Id.* (citation omitted).

<sup>20</sup> *Watkins v. United States*, 354 U.S. 178, 192 (1957).

<sup>21</sup> 3 Annals of Cong. 492 (1792).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 493.

<sup>24</sup> 10 Annals of Cong. 788 (1800).

<sup>25</sup> *Id.* at 796-97.

<sup>26</sup> U.S. Const. art. I § 8, cl. 18.

Since the twentieth century, the Supreme Court has consistently connected the power to legislate with Congress's broad power to investigate. For example, in the 1927 case *McGrain v. Daugherty*, the Court considered whether the Senate, in the course of an investigation regarding the Department of Justice, could compel a witness—in that case, the brother of the Attorney General—to appear before a Senate committee to give testimony.<sup>27</sup> The Court held that “the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.”<sup>28</sup> As the Court explained, the power to compel witnesses to testify is an essential aspect of the power to legislate:

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—which not infrequently is true—recourse must be had to others who do possess it.<sup>29</sup>

Applying these principles, the Court then turned its attention to whether the particular subpoena at issue was designed “to obtain information in aid of the legislative function.”<sup>30</sup> The Court concluded that it was, and explained: “Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.”<sup>31</sup> Two years later, the Court reiterated that “the power of inquiry is an essential and appropriate auxiliary to the legislative function.”<sup>32</sup>

In 1955, the Court emphasized the breadth of Congress's power to investigate. In *Quinn v. United States*, the Court considered whether a member and field representative of the United Electrical, Radio and Machine Workers of America who was subpoenaed before a subcommittee of the House Committee on Un-American Activities could be convicted of contempt of Congress under 2 U.S.C. § 192.<sup>33</sup> As in *McGrain*, the Court described the breadth of Congress's investigatory powers in unequivocal terms:

There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.<sup>34</sup>

Similarly, in *Watkins v. United States*, the Court again made clear that “investigation is part of lawmaking,”<sup>35</sup> and once more described the congressional power to investigate expansively:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

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<sup>27</sup> *McGrain*, 273 U.S. at 150-52.

<sup>28</sup> *Id.* at 154.

<sup>29</sup> *Id.* at 175; see *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (reaffirming this language).

<sup>30</sup> *Id.* at 176.

<sup>31</sup> *Id.* at 177.

<sup>32</sup> *Sinclair v. United States*, 279 U.S. 263, 291 (1929).

<sup>33</sup> *Quinn*, 349 U.S. at 156-57.

<sup>34</sup> *Id.* at 160-61.

<sup>35</sup> 354 U.S. at 187.

In short, the House and Senate possess broad powers to investigate rooted in the Constitution's grant of the legislative power to Congress under Article I. Indeed, even the executive branch has agreed. As the Department of Justice's Office of Legal Counsel has noted, "[i]t is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws."<sup>36</sup> There is therefore agreement among the three branches that Congress can investigate the executive branch as part of its power to legislate. And of course, Congress's investigatory power extends beyond the government, allowing it to obtain from private entities information relevant to any area of legislative interest.<sup>37</sup>

### III. The Problem

Over the last four decades, there has been a crisis with regard to the effectiveness of congressional oversight, particularly with respect to oversight of the executive branch.<sup>38</sup> Recently, this crisis deepened, with delays in congressional ability to obtain information due to executive branch officials refusing to comply with subpoenas and release information requested from House committees.<sup>39</sup> According to *Politico*, as of April 2019, the last "administration ha[d] at least 30 times refused or delayed turning over documents to 12 House committees."<sup>40</sup> In addition, "[a] half dozen officials ha[d] refused to appear before five committees while two officials ha[d] refused to come in for interviews with two other committees."

In response to this obstruction, the House of Representatives was forced to engage in several lawsuits relating to the information being subpoenaed. Unfortunately, these lawsuits have taken far too long to be resolved.

An example proves instructive. In early 2019, the House Committee on Oversight and Reform subpoenaed then-President Trump's accounting firm, Mazars USA, LLP for documents related to President Trump's and his businesses' finances from 2011 until the present. On April 22, 2019, President Trump and his businesses sued Mazars, asking the U.S. District Court for the District of Columbia to declare the subpoena "invalid and unenforceable," and the Oversight Committee subsequently intervened to defend its subpoena. The District Court ruled in favor of the House, and the D.C. Circuit affirmed.<sup>41</sup>

The President's lawyers then asked the Supreme Court to hear the case, and in July 2020, the Court held, in accordance with precedent and with centuries of history, that Congress has broad investigatory powers and can investigate the executive branch and even the President himself. However, because the Court concluded that the lower courts had not properly taken into account separation of powers concerns, the Court also vacated the lower court's opinion and remanded the case back to the D.C. Circuit for further proceedings.<sup>42</sup> In October 2020, the D.C. Circuit held oral arguments on whether the case should be remanded to the district court, and ultimately concluded that it should.<sup>43</sup> And now, more than two years

<sup>36</sup> *Scope of Congressional Oversight and Investigative Power with Respect to the Executive Branch*, 9 Op. Att'y Gen. 60, 60 (1985); see *id.* at 61 ("It is now settled that Congress' power to obtain information necessary to legislate is broad.").

<sup>37</sup> Gorod, Frazelle, & Phatak, *supra* note 1, at 10.

<sup>38</sup> *Inherent Contempt Fine Rules*, Good Government Now (last visited June 2, 2021), <https://goodgovernmentnow.org/modified-inherent-contempt-enforcement-rule/>.

<sup>39</sup> Victoria Bassetti & Tim Lau, *Trump's Troubling Rebuke of Congressional Oversight*, Brennan Center (May 7, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-troubling-rebuke-congressional-oversight>.

<sup>40</sup> Anita Kumar & Andrew Desiderio, *Trump Showdown With House Democrats Ignites Into All-Out War*, *Politico* (Apr. 23, 2019), <https://www.politico.com/story/2019/04/23/trump-investigators-congress-1288795>.

<sup>41</sup> *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2028 (2020).

<sup>42</sup> *Id.* at 2036.

<sup>43</sup> Quinta Jurecic & Bryce Klehm, *Whither the Trump Financial Documents Cases?*, *Lawfare* (Mar. 2, 2021), <https://www.lawfareblog.com/whither-trump-financial-documents-cases>.

after the start of the lawsuit, the issue is nowhere near resolved, as there is still a pending motion for summary judgment at the district court level.<sup>44</sup>

This is just one example, which I am providing simply because of its ongoing nature and because it was litigated at every level of the federal court system. How one feels about any given example might be influenced by one's partisan affiliation, one's feelings about a presidency, or one's commitment to the underlying subject matter. But the problem is larger than any subject, political party, or presidency. In countless cases, delays in the courts have prevented Congress from receiving information to which it is entitled and which it needs to do its job. In countless cases, delays in the courts have prevented Congress from receiving information to which it is entitled and which it needs to do its job. The consequences of such delays are particularly acute in the House, which is not a continuing body. Every time a new House is sworn in, its ongoing investigations end, and its subpoenas expire. To be sure, House committees can reissue subpoenas, but if the new leadership decides not to do so, the ongoing litigation could be mooted, foreclosing resolution of the litigation and the chance of the House receiving the material it was seeking.

#### IV. One Solution – Expedited Court Review

One potential solution to delayed resolution of congressional oversight is for Congress to establish a pathway for expedited review of oversight disputes in the federal courts. Congress has considered this option before. For instance, during the 116th Congress, Rep. Madeleine Dean (D-PA) introduced the Congressional Subpoena Compliance and Enforcement Act of 2019, which would streamline the process of resolving disputes over subpoenas.<sup>45</sup> The provisions echo those of the Congressional Subpoena Compliance and Enforcement Act of 2017, legislation introduced by Rep. Darrell Issa (R-CA) in the 115th Congress.<sup>46</sup> According to the provisions of both legislative proposals, any time the House, Senate, or one of its committees or subcommittees brings a civil action against the recipient of a congressional subpoena, the federal courts at every level must "expedite to the greatest possible extent the disposition of any such action and appeal."<sup>47</sup>

In addition, both pieces of legislation further provide that if a three-judge court is requested by the plaintiff, "the action shall be heard by a three-judge court . . . and shall be reviewable only by appeal directly to the Supreme Court of the United States."<sup>48</sup> The bills also add: "Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision." Allowing for expedited review and a direct appeal to the Supreme Court would allow for a quicker and more efficient process when it comes to enforcing congressional subpoenas.

This kind of expedited review is not without precedent. For example, 28 U.S.C § 2284 allows a three-judge panel to proceed over actions "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."<sup>49</sup> Similarly, the Balanced Budget and Emergency Deficit Control Act of 1985,<sup>50</sup> the Cable Television Consumer Protection and Competition Act of 1992,<sup>51</sup> the Communications Decency Act of 1996,<sup>52</sup> the Bipartisan Campaign Finance

<sup>44</sup> Plaintiffs' Motion for Summary Judgement and Supporting Memorandum of Points and Authorities, *Trump v. Mazars USA, LLP*, No. 1:19-cv-01136 (D.D.C. Apr. 5, 2021).

<sup>45</sup> H.R. 3732, 116th Cong. (2019).

<sup>46</sup> H.R. 4010, 115th Cong. (2017).

<sup>47</sup> H.R. 3732, 116th Cong. (2019); H.R. 4010, 115th Cong. (2017).

<sup>48</sup> *Id.*

<sup>49</sup> 28 U.S.C. § 2284(a).

<sup>50</sup> Pub. L. No. 99-177, § 274, 98 Stat. 1037, 1098 (1985).

<sup>51</sup> Pub. L. No. 102-385, § 23, 106 Stat. 1460, 1500 (1992).

<sup>52</sup> Pub. L. No. 104-104, § 561, 110 Stat. 56, 142 (1996).

Reform Act of 2002,<sup>53</sup> and the Voting Rights Act<sup>54</sup> all contained provisions allowing disputes to be heard by a three-judge court, with available direct appeal to the Supreme Court. Expedited review is no less important with respect to disputes involving congressional subpoenas.

In addition to making provision for a three-judge panel and appellate review that is both streamlined and expedited, Congress should also consider clarifying that this pathway would govern regardless of any other statutory schemes implicated by its subpoena. To cite just one example, documents created or maintained by the White House are subject to the Presidential Records Act, which sets out its own procedures for resolving disputes.<sup>55</sup> Congress should make clear that other statutory schemes notwithstanding, disputes over congressional oversight in the federal courts will be resolved through the expedited pathway.

## V. Conclusion

Congressional oversight power is rooted firmly in both law and history. Congress's right to obtain information is not in doubt. What is in doubt, however, is whether Congress will be able to obtain the information to which it is entitled in a timely fashion. Currently, when oversight disputes go to the federal courts, this remains an open question. Congress should consider expedited court review as one possible way of answering it.

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<sup>53</sup> Pub. L. No. 107-155, § 403, 116 Stat. 81, 113 (2002).

<sup>54</sup> Pub. L. No. 89-110, §§ 4, 5, 10, 79 Stat. 437, 438, 439, 442 (1965).

<sup>55</sup> Pub. L. No. 95-591, 92 Stat. 2523 (1978); see also Austin Evers, Ryan Goodman, & Justin Hendrix, *Congress Proved It Can't Handle the Jan. 6 Mess. The Right Commission Could*, Wash. Post (May 14, 2021), <https://www.washingtonpost.com/outlook/2021/05/14/capitol-riot-commission-congress/>.

Mr. JOHNSON of Georgia. Thank you, Mr. Fernandes.  
 We will now hear from Mr. Garvey.  
 Mr. Garvey, you are recognized for five minutes.

#### STATEMENT OF TODD GARVEY

Mr. GARVEY. Thank you, Mr. Chair, Chair Johnson, Ranking Member Issa, and the Members of the Committee, thank you for inviting me here today to discuss the enforcement of Congressional Subpoenas.

It is perhaps best, I think, to start this discussion by recognizing the potency of the subpoena power. A Congressional Subpoena is a constitutionally based demand for information that triggers a legal obligation on behalf of the recipient.

In the words of the Supreme Court, all citizens, whether government officials or private persons, have a duty to cooperate with Congress and an unremitting obligation to respond to subpoenas.

That obligation is lifted for what amount to only a handful of reasons. For example, where the Committee lacks a legislative purpose or exceeds its jurisdiction, or where a specific and overriding privilege or right justifies withholding information from the Congress.

Though the legitimate justifications for not complying with a subpoena may be few in number, they are rich in ambiguity. With the courts historically playing only a limited role in adjudicating oversight disputes, these areas of uncertainty are ripe for conflict.

There is perhaps no better example of this than Executive Privilege, a contested constitutional doctrine that frequently forms the basis for Executive Branch refusals to comply with Congressional Subpoenas.

So, disagreements between the branches inevitably develop, and when they do, the first phase is generally one of negotiation. This is sometimes referred to as the accommodations process, and it is a method of dispute resolution that derives both from long-settled historical practice and, arguably, the Constitution itself.

Compromise is not always possible, and when negotiations fail and subpoena obligations go unfulfilled, the ball is left in Congress' court.

So, when faced with noncompliance, this house has various options. It can look inward and leverage its own legislative powers to enforce compliance. This can take many forms, for example by enacting legislative or appropriations restrictions or by withholding consent to legislative or funding priorities until the subpoena is complied with. Though potentially effective, this can be a blunt and unwieldy enforcement tool.

Alternatively, the House can look to the Executive Branch and refer a contempt of Congress citation to the Department of Justice for criminal prosecution.

Failure to comply with a Committee subpoena is a criminal offense, but, like other criminal offenses, the power and discretion to prosecute lies with the Executive Branch.

It is now clear from recent history that in most instances the Executive Branch is unlikely to prosecute an Executive Branch official for not complying with a Congressional Subpoena. As a result, the criminal contempt statute has lost much of its deterrent value.

The obstacles associated with looking to either its own powers or to the Executive Branch have led the House to instead turn with increasing frequency to a third option, the courts.

Today, it appears that civil enforcement or the process of asking a Federal Court to order compliance with a Congressional Subpoena has become the House's chief means of enforcement. Like the other options, this too has drawbacks.

First, there is always the risk of an adverse decision. In a legal environment with very few judicial decisions, one unfavorable opinion can significantly disrupt the long-term balance of power between the branches.

There is also the problem of time. The judicial process is generally not a fast one, so even when Congress wins, it may come too late. Because the Executive possesses what Congress desires, delay favors the Executive Branch.

Consider these past enforcement examples, all which I know the Members of this Committee are familiar with.

Beginning in 2008, this Committee spent 18 months litigating a subpoena to former White House Counsel Harriet Miers. Beginning in 2012, the House Oversight and Reform Committee spent nearly seven years litigating a subpoena to Attorney General Eric Holder. Most recently, your Committee has now spent two years litigating a subpoena to former White House Counsel Don McGahn.

Now, it is worth noting that each of these cases ended not with a final judicial decision but with an accommodation or agreement between the branches in which the House generally obtained much of the information it sought. Ms. Miers testified behind closed doors, DOJ turned over most of the Fast and Furious documents, and Mr. McGahn sat for an interview last week. The delay in obtaining the sought-after information would appear to have frustrated timely congressional oversight.

The process, as it stands, leaves the House and this Committee with numerous questions. Should Congress be going to the courts to resolve these disputes? If yes, is the current process, with all its uncertainty and delays, acceptable? If no, what alternative enforcement mechanisms are there?

Thank you again for the opportunity to testify, and I look forward to your questions.

[The statement of Mr. Garvey follows:]



Statement of

**Todd Garvey**  
Legislative Attorney

Before

Committee on the Judiciary  
Subcommittee on Courts, Intellectual Property, and the Internet  
U.S. House of Representatives

Hearing on

## **“Civil Enforcement of Congressional Authorities”**

June 8, 2021

Congressional Research Service

7-5700

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Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee:

My name is Todd Garvey, and I am a legislative attorney in the American Law Division of the Congressional Research Service. I am honored to be testifying before you today on the enforcement of congressional subpoenas. My testimony today will focus mainly on information access disputes between House committees and the executive branch.<sup>1</sup>

Through its investigative powers, Congress gathers information it considers necessary to oversee the implementation of existing laws or to evaluate whether new laws are necessary.<sup>2</sup> This “power of inquiry” is essential to the legislative function and derives directly, though implicitly, from the Constitution’s vesting of legislative power in the Congress.<sup>3</sup>

The information that Congress seeks, whether to inform itself for lawmaking purposes or to conduct oversight, often lies in the executive branch’s possession.<sup>4</sup> While executive branch officials may comply with many congressional requests for information,<sup>5</sup> “experience has taught that mere requests” can sometimes be “unavailing,” and that “information which is volunteered is not always accurate or complete . . . .”<sup>6</sup> The Supreme Court has therefore determined that “some means of compulsion [is] essential” for Congress “to obtain what is needed.”<sup>7</sup> When Congress finds an inquiry blocked by the withholding of information, or where the traditional process of negotiation and accommodation<sup>8</sup> is considered inappropriate or unavailing, a subpoena—either for testimony or documents—may be used to compel compliance with congressional demands.<sup>9</sup> An individual—whether a member of the public or an

<sup>1</sup> This testimony is adapted primarily from CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey and other available CRS products.

<sup>2</sup> *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (“The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate . . . .”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”). See also J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951) (describing the power of investigation as “perhaps the most necessary of all the powers underlying the legislative function”).

<sup>3</sup> Congress’s power of inquiry is both essential in purpose and extensive in scope. See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”); *Barenblatt*, 360 U.S. at 111 (“The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”). Yet, the power remains subject to legal limitations. See *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 n.15 (1975) (“Although the power to investigate is necessarily broad it is not unlimited . . . . We have made it clear [] that Congress is not invested with a ‘general power to inquire into private affairs.’ The subject of any inquiry always must be one ‘on which legislation could be had.’” (citations omitted)).

<sup>4</sup> The Supreme Court has stated that “[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—which not infrequently is true—recourse must be had to others who do possess it.” *McGrain*, 273 U.S. at 175.

<sup>5</sup> See, e.g., Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 116 (1996) (“Cooperation dominates most congressional requests for information, with the executive turning over the requested information as a matter of routine. On rare occasion, however, the executive resists information requests.”); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) (noting that the “process of negotiation and accommodation . . . most often leads to resolution of disputes between the political branches”).

<sup>6</sup> *McGrain*, 273 U.S. at 175.

<sup>7</sup> *Id.*

<sup>8</sup> See *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (noting that the Framers relied “on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system”).

<sup>9</sup> *Id.* Each standing committee has been delegated subpoena power by House or Senate rule. See CLERK OF THE HOUSE OF

executive branch official—has a legal obligation to comply with a duly issued congressional subpoena, unless a valid and overriding privilege or other legal justification permits non-compliance.<sup>10</sup> The subpoena, however, is only as effective as the means by which it is potentially enforced. Without a process by which Congress can compel compliance or deter non-compliance, the subpoena would be reduced to a formalized request rather than a constitutionally based demand for information.<sup>11</sup>

Congress currently employs an ad hoc combination of methods to combat non-compliance with subpoenas. The two predominant methods rely on the authority and participation of another branch of government. First, the *criminal contempt* statute permits a single house of Congress to certify a contempt citation to the executive branch for the criminal prosecution of an individual who has willfully refused to comply with a committee subpoena.<sup>12</sup> Once the contempt citation is received, any later prosecution lies within the control of the executive branch.<sup>13</sup> Second, Congress may try to enforce a subpoena by seeking a civil judgment declaring that the recipient is legally obligated to comply.<sup>14</sup> This process of *civil enforcement* relies on the help of the courts to enforce congressional demands.

Historically, Congress has only infrequently resorted to either criminal contempt or civil enforcement to combat non-compliance with subpoenas.<sup>15</sup> In most circumstances involving the executive branch, committees can obtain the information they seek through voluntary requests or after issuing (but not yet seeking enforcement of) a subpoena. Even where the executive branch is initially reluctant to provide information, Congress can use the application of various forms of legislative leverage, along with an informal political process of negotiation and accommodation, to obtain what it determines to be useful.<sup>16</sup>

REPRESENTATIVES, 117TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES XI, cl. 2 (m)(3), at p. 20 (2021), <https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf>; S. Doc. No. 113-18, RULE XXVI(1), at p. 31 (2013), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf>.

<sup>10</sup> *Watkins v. United States*, 354 U.S. 178, 187–88 (1957) (“It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.”).

<sup>11</sup> *McGrain*, 273 U.S. at 174 (observing that the “process to enforce” the investigatory power is “essential” to the “legislative function”).

<sup>12</sup> 2 U.S.C. §§ 192, 194.

<sup>13</sup> Although the criminal contempt statute provides that “it shall be” the U.S. Attorney’s “duty . . . to bring the matter before the grand jury for its action,” the executive branch has asserted discretion in whether to present the matter to the grand jury. *See, e.g.*, Letter from Ronald C. Machen Jr., U.S. Attorney, U.S. Dep’t of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015); Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 102 (1984) [hereinafter *Olson Opinion*].

<sup>14</sup> *See* 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365; *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 94 (D.D.C. 2008) (“The Court concludes that the Committee has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power.”). *See also* CRS Report RL34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey (discussing the two predominant subpoena enforcement mechanisms).

<sup>15</sup> *See infra* “The Current Process in Use.”

<sup>16</sup> *See* Devins, *supra* note 5, at 114 (arguing that “Congress rarely makes use of its subpoena power” partly because of the “benefits that each branch receives by cooperating with the other”). The D.C. Circuit has suggested that Congress and the executive branch have an “implicit constitutional mandate” to accommodate each other’s needs during a conflict. *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (“Each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes.”).

In addition, acting pursuant to its broad constitutional authority, Congress may shape agencies' basic structures and operations.<sup>17</sup> It may withhold agency funding until Congress's wishes are fulfilled.<sup>18</sup> The Senate may condition or withhold its consent to the ratification of a treaty or the President's appointment of persons to important government positions in order to obtain executive branch compliance with congressional desires.<sup>19</sup> Impeachment and removal of an executive official is also a powerful (though rarely used) tool to influence executive action.<sup>20</sup>

The use or threatened use of these powers in a way that would impose burdens on an agency can encourage compliance with subpoenas (or make it more likely that requested information will be provided without need to issue a subpoena) and solidify Congress's position when trying to negotiate a compromise during an investigative dispute with the executive branch.<sup>21</sup>

Legislative leverage and the subpoena enforcement mechanisms do not always ensure congressional access to requested information, particularly from the executive branch. Recent controversies could be interpreted to suggest that the existing mechanisms are at times inadequate—at least when necessary to respond to a current or former executive branch official who has refused to comply with a subpoena.<sup>22</sup>

## Criminal Contempt of Congress

The criminal contempt of Congress statute, enacted in 1857 and only slightly modified since, makes the failure to comply with a duly issued congressional subpoena a criminal offense.<sup>23</sup> The statute, now

<sup>17</sup> See generally CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner (discussing various tools that Congress may use to compel or incentivize agency compliance with congressional demands).

<sup>18</sup> For example, Congress has used restrictions on the payment of salaries to buttress its legislative prerogatives. See, e.g., 5 U.S.C. § 5503(a) (prohibiting salary payments for certain recess appointments); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, tit. VI, § 618, 188 Stat. 3, 354 (2004) (prohibiting the use of funds to pay the salary of a federal official or employee who prevents another federal official or employee from communicating with Congress).

<sup>19</sup> U.S. CONST. art. II, § 2, cl. 2. For example, prior to his confirmation as Assistant Attorney General in charge of Office of Legal Counsel (OLC), Steven Engel agreed to review after taking office an OLC opinion—*Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. 1 (2017)—which asserts that individual Members of Congress do not, absent specific authorization, have authority to engage in "oversight" of the executive branch. See 163 Cong. Rec. S4077, S4079 (daily ed. July 19, 2017).

<sup>20</sup> In total, only three Presidents and one member of the Cabinet have been impeached by the House, and none of those officials were convicted in the Senate. U.S. House of Representatives, Office of the Historian and Office of Art & Archives, *List of Individuals Impeached by the House of Representatives*, <https://history.house.gov/Institution/Impeachment/Impeachment-List/> (last accessed June 4, 2021).

<sup>21</sup> See Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 931 (2014) ("Congress may use legislative authorizations and appropriations as leverage against the Executive Branch to obtain requested information."); Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325 (2002) (noting that oversight disputes are often "decided by the persistence of Congress and its willingness to adopt political penalties for executive noncompliance. Congress can win most of the time—if it has the will—because its political tools are formidable.").

<sup>22</sup> See *infra* "The Current Process in Use." Although modern examples have highlighted potential limitations with Congress's current subpoena enforcement options, such inefficiencies are not a new development. For example, political scientist James Burnham wrote in 1959 that the process for enforcing committee subpoenas:

is neither sure nor speedy. It can be postponed indefinitely when it is not avoided altogether, by legal technicalities, the plea of civil rights, or Congress' own unwillingness to pursue the matter vigorously. Thus, with very little personal hazard, witnesses may defeat the ends of a current inquiry: there will be a new Congress with new interests before the question of punishment is decided one way or the other.

JAMES BURNHAM, *CONGRESS AND THE AMERICAN TRADITION* 245 (1959).

<sup>23</sup> R. S. § 102; Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155 (codified at 2 U.S.C. § 192).

codified under 2 U.S.C. § 192, provides that any person who “willfully” fails to comply with a properly issued committee subpoena for testimony or documents is guilty of a misdemeanor, punishable by a substantial fine and imprisonment for up to one year.<sup>24</sup>

The criminal contempt statute outlines the process by which the House or Senate may refer the non-compliant witness to the Department of Justice (DOJ) for criminal prosecution. Under 2 U.S.C. § 194, once a committee reports the failure to comply with a subpoena to its parent body, the President of the Senate or the Speaker of the House is directed to “certify[] the statement of facts . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.”<sup>25</sup> The statute does not expressly require approval of the contempt citation by the committee’s parent body, but both congressional practice and judicial decisions suggest that approval may be necessary.<sup>26</sup> Although approval of a criminal contempt citation under § 194 appears to impose a mandatory duty on the U.S. Attorney to submit the violation to a grand jury, the executive branch has repeatedly asserted that it retains the discretion to determine whether to do so.<sup>27</sup>

A successful contempt prosecution may lead to criminal punishment of the witness in the form of incarceration, a fine, or both.<sup>28</sup> Because the criminal contempt statute is punitive, its use is mainly as a deterrent. In other words, while the threat of criminal contempt can be used as leverage to encourage compliance with a specific request, a conviction does not necessarily lead to release of the information to Congress.<sup>29</sup>

## Civil Enforcement of Subpoenas

Congress may also choose to enforce a subpoena through a civil suit in the federal courts by a process known as civil enforcement. Under this process, either house of Congress may unilaterally authorize one of its committees or another legislative entity to file a suit in federal district court seeking a court order declaring that the subpoena recipient is legally required to comply with the demand for information.<sup>30</sup>

<sup>24</sup> 2 U.S.C. § 192. The subpoena that gives rise to the contempt must have been issued for a legislative purpose, be pertinent to the matter under inquiry, and relate to a matter within the House or Senate committee’s jurisdiction. See Senate Perm. Subcomm. on Investigations v. Ferrer, 199 F. Supp. 3d 125, 134–38 (D.D.C. 2016), *vacated as moot on other grounds*, 856 F.3d 1080 (D.C. Cir. 2017).

<sup>25</sup> 2 U.S.C. § 194. The DOJ has previously obtained convictions under 2 U.S.C. § 192 against executive branch officials pursuant to plea deals without a vote of the House or Senate. See *Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Gov’tal Relations of the H. Comm. on the Judiciary*, 98th Cong. 23–24 (1983).

<sup>26</sup> See CHARLES W. JOHNSON, ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE ch. 17 § 2, at p. 458–60 (2017), <https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-115/pdf/GPO-HPRACTICE-115.pdf>; Wilson v. United States, 369 F.2d 198, 201–02 (D.C. Cir. 1966) (“It has been the consistent legislative course that the Speaker is not under a ‘mandatory’ duty to certify the report of the committee, but on the contrary that the committee’s report is subject to further consideration on the merits by the House involved. When the House is in session the Speaker does not automatically transmit the report of alleged contempt to the United States Attorney. Instead as a matter of routine a member of the committee offers a resolution for the consideration of the House involved.”).

<sup>27</sup> See, e.g., Andrew Desiderio, *DOJ Won’t Charge William Barr, Wilbur Ross After Contempt Vote*, POLITICO (July 24, 2019, 5:50 PM), <https://www.politico.com/story/2019/07/24/justice-william-barr-wilbur-ross-1432595>; Letter from Ronald C. Machen Jr., U.S. Attorney, U.S. Dep’t of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015) (declining to present criminal contempt citation to a grand jury); *Olson Opinion*, *supra* note 13, at 102.

<sup>28</sup> 2 U.S.C. § 192.

<sup>29</sup> For example, during an investigation into the White House Travel Office, contested documents were turned over to Congress on the day a contempt resolution against the White House Counsel was scheduled for a floor vote. See H.R. REP. NO. 104-874, at 47 (1997).

<sup>30</sup> See 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365; Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 94 (D.D.C. 2008).

Federal law provides the jurisdictional basis for the Senate’s exercise of its civil enforcement power.<sup>31</sup> Under 28 U.S.C. § 1365, the U.S. District Court for the District of Columbia (D.C. District Court) has jurisdiction “over any civil action brought by the Senate or committee or subcommittee of the Senate to enforce . . . any subpoena.”<sup>32</sup> The law, however, makes clear that the grant of jurisdiction “shall not apply” to an action to enforce a subpoena issued to an executive branch official acting in his or her official capacity who has asserted a “governmental privilege.”<sup>33</sup>

The House has no corresponding statutory framework but has previously, and successfully, authorized its committees to enforce its subpoenas in court.<sup>34</sup> Although the House’s authority in this regard is the subject of ongoing litigation, prior practice, discussed below, suggests that a House committee may initiate a subpoena enforcement lawsuit so long as it is authorized by the House. That authorization has often been provided through a simple House resolution granting the committee that issued the subpoena the ability to seek a court order declaring that the subpoena recipient is legally required to comply with the demand for information.<sup>35</sup> However, the House has authorized subpoena enforcement suits in other ways, including through the Bipartisan Legal Advisory Group.<sup>36</sup>

As opposed to criminal contempt, a successful civil enforcement suit generally has the benefit of securing compliance with the congressional subpoena—meaning the committee may obtain the information it seeks. If the court orders compliance with the subpoena and disclosure of the information, generally after finding both that the subpoena is valid and that the individual has not invoked an adequate privilege justifying non-compliance, continued defiance may lead to contempt of court as opposed to contempt of Congress.<sup>37</sup>

## The Current Process in Use

Modern congressional disputes with the executive branch over access to information provide insight into the functioning of both the criminal contempt of Congress and civil enforcement processes.

### *The Miers and Bolten Subpoenas*

In 2007, former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten failed to comply with subpoenas issued by the House Judiciary Committee for testimony and documents relating to the dismissal of various U.S. Attorneys during the George W. Bush Administration.<sup>38</sup> The

<sup>31</sup> 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365.

<sup>32</sup> 28 U.S.C. § 1365.

<sup>33</sup> *Id.* § 1365(a) (“This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, except that this section shall apply if the refusal to comply is based on the assertion of a personal privilege or objection and is not based on a governmental privilege or objection the assertion of which has been authorized by the executive branch of the Federal Government.”).

<sup>34</sup> See H.R. Res. 706, 112th Cong. (2012) (Attorney General Eric Holder); H.R. Res. 980, 110th Cong. (2008) (White House advisers Harriet Miers and Joshua Bolten). See *Miers*, 558 F. Supp. 2d, at 78–88; Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013).

<sup>35</sup> See, e.g., H.R. Res. 706, 112th Cong. (2012); H.R. Res. 980, 110th Cong. (2008).

<sup>36</sup> See H.R. Res. 430, 116th Cong. (2019) (resolving that “the chair of each standing and permanent select committee, when authorized by the Bipartisan Legal Advisory Group, retains the ability to initiate or intervene in any judicial proceeding before a Federal court on behalf of such committee, to seek declaratory judgments and any and all ancillary relief, including injunctive relief, affirming the duty of the recipient of any subpoena duly issued by that committee to comply with that subpoena”).

<sup>37</sup> 18 U.S.C. §§ 401–02.

<sup>38</sup> See H.R. REP. NO. 110-423, 110th Cong., at 4–7 (2007).



President asserted executive privilege in each case,<sup>39</sup> declaring that the subpoenaed testimony and documents involved protected White House communications. Both Ms. Miers and Mr. Bolten relied on the President's determination as justification for non-compliance with the committee subpoenas.<sup>40</sup> After failed negotiations, the House held both individuals in criminal contempt of Congress and simultaneously approved a separate resolution authorizing the Judiciary Committee to initiate a civil lawsuit in federal court to enforce the subpoenas.<sup>41</sup> After receiving the criminal contempt citation, the Attorney General informed the Speaker that the DOJ would exercise its discretion and not take any action to prosecute Mr. Bolten or Ms. Miers for criminal contempt of Congress.<sup>42</sup> The DOJ's position was that requiring such a prosecution would inhibit the President's ability to assert executive privilege and infringe on the DOJ's prosecutorial discretion.<sup>43</sup> Shortly thereafter, the House Judiciary Committee filed suit, asking the federal court to direct compliance with the subpoenas.<sup>44</sup>

In *Committee on the Judiciary v. Miers*, the D.C. District Court rejected the Bush Administration's main argument that a senior presidential adviser asserting executive privilege at the direction of the President is immune from being compelled to testify before Congress.<sup>45</sup> The court described the asserted immunity as "entirely unsupported by existing case law" and instead held that Ms. Miers had to appear, but was free to assert executive privilege "in response to any specific questions posed by the Committee."<sup>46</sup> Thus, Ms. Miers could still assert the protections of executive privilege during her testimony depending on the substance of any individual question asked by a Member of the Committee.<sup>47</sup> As for Mr. Bolten, the court directed that the executive branch produce a "detailed list and description of the nature and scope of the documents it seeks to withhold on the basis of executive privilege" to allow the court to resolve those claims.<sup>48</sup> The district court decision was appealed. Almost two years after the first subpoena was issued, with the appeal pending before the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) and a newly elected Congress and President in office, the parties reached a settlement and the case was dismissed.<sup>49</sup> Under that settlement, most of the requested documents were provided to the Committee and Ms. Miers would testify, under oath, in a closed but transcribed hearing.<sup>50</sup>

<sup>39</sup> In general, executive privilege is an implied legal doctrine that permits the executive branch "to resist disclosure of information the confidentiality of which [is] crucial to fulfillment of the unique role and responsibilities of the executive branch of our government." *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997).

<sup>40</sup> H.R. REP. NO. 110-423, 110th Cong., at 5 (2007).

<sup>41</sup> See H.R. Res. 979, 110th Cong. (2008); H.R. Res. 980, 110th Cong. (2008); H.R. Res. 982, 110th Cong. (2008).

<sup>42</sup> Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 63–64 (D.D.C. 2008).

<sup>43</sup> *Id.*

<sup>44</sup> Specifically, the Committee asked the court to direct that Ms. Miers testify and Mr. Bolten provide a privilege log. *Id.* at 55 ("The Committee . . . asks the Court to declare that . . . Miers must comply with a subpoena and appear before the Committee to testify . . . and that current White House Chief of Staff Joshua Bolten must produce a privilege log in response to a congressional subpoena."). The case filed by the Committee was limited only to whether Ms. Miers and Mr. Bolten could be forced to comply with the issued subpoenas, not whether the House had the authority to hold either in contempt of Congress.

<sup>45</sup> *Id.* at 99. The court also ordered Mr. Bolten to "produce more detailed documentation concerning privilege claims." *Id.* at 98.

<sup>46</sup> *Id.* at 105.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 107.

<sup>49</sup> Comm. on the Judiciary v. Miers, No. 08-5357, 2009 U.S. App. LEXIS 29374, at \*1 (D.C. Cir. Oct. 14, 2009).

<sup>50</sup> See David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. TIMES (Mar. 4, 2009), <https://www.nytimes.com/2009/03/05/us/politics/05rove.html>.

### *The Holder Subpoena*

In 2012, Attorney General Eric Holder failed to comply with a House Oversight and Government Reform Committee subpoena seeking documents relating to misleading communications made by the DOJ in response to the Committee's ongoing investigation into operation Fast and Furious—a Bureau of Alcohol, Tobacco, Firearms, and Explosives operation in which firearms were permitted to be “walked,” or trafficked, to gunrunners and other criminals in Mexico.<sup>51</sup> Similar to his predecessors in previous controversies, President Barack Obama asserted executive privilege over the pertinent documents and directed the Attorney General not to comply with the subpoena.<sup>52</sup> Procedurally, the Holder controversy mirrored that of Ms. Miers and Mr. Bolten. The House held the Attorney General in criminal contempt of Congress and simultaneously passed a resolution authorizing the Committee to enforce the subpoena in federal court.<sup>53</sup> The DOJ shortly thereafter informed the Speaker that it would not take any action on the criminal contempt citation, again citing congressional encroachments on executive privilege and prosecutorial discretion.<sup>54</sup> The Committee responded by filing a lawsuit, authorized by House resolution, seeking judicial enforcement of the subpoena.<sup>55</sup>

The D.C. District Court held that it had jurisdiction to hear the dispute in 2013<sup>56</sup> and denied the Committee's motion for summary judgment in 2014.<sup>57</sup> However, it was not until 2016—in a new Congress and after Attorney General Holder had left his position—that the D.C. District Court issued an opinion in *Committee on Oversight and Government Reform v. Lynch* instructing the new Attorney General to comply with the subpoena.<sup>58</sup> The court rejected the DOJ's argument that the deliberative process privilege—a prong of executive privilege that protects pre-decisional and deliberative agency communications—justified withholding the subpoenaed documents in the case.<sup>59</sup> In “balancing the competing interests” at stake, the court held that the asserted privilege must yield to Congress's “legitimate need” for the documents.<sup>60</sup>

Despite the Committee's victory, two aspects of the court's reasoning may affect Congress's ability to obtain similar documents from the executive branch. First, in denying the Committee's earlier motion for summary judgment, the court rejected the argument that the deliberative process privilege can never justify withholding documents in the face of a congressional subpoena.<sup>61</sup> While a previous D.C. Circuit decision had suggested that the deliberative process privilege is a “common law” privilege,<sup>62</sup> typically subject to override by legislative action, the district court determined that “there is an important

<sup>51</sup> H.R. REP. NO. 112-546, 112th Cong., at 3–10 (2012). The Department had initially provided the Committee with a letter stating that it had no knowledge of the gun walking, but that letter was subsequently withdrawn as inaccurate. See Letter from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, and Charles E. Grassley, Ranking Member, Senate Judiciary Committee (Dec. 2, 2011).

<sup>52</sup> H.R. REP. NO. 112-546, 112th Cong., 39–40 (2012).

<sup>53</sup> See H.R. Res. 711, 112th Cong. (2012); H.R. Res. 706, 112th Cong. (2012).

<sup>54</sup> Letter from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (June 28, 2012).

<sup>55</sup> Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013).

<sup>56</sup> *Id.* at 4.

<sup>57</sup> Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332, 2014 U.S. Dist. LEXIS 200278 (D.D.C. Aug. 20, 2014).

<sup>58</sup> Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104, 107 (D.D.C. 2016).

<sup>59</sup> *Id.* at 104.

<sup>60</sup> *Id.* at 112, 115.

<sup>61</sup> See *id.* at 104 (citing *Holder*, No. 12-1332, 2014 U.S. Dist. LEXIS 200278, at \*2–8).

<sup>62</sup> *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (noting that the “deliberative process privilege is primarily a common law privilege”).

constitutional dimension to the deliberative process aspect of the executive privilege.<sup>63</sup> Although the scope of the deliberative process privilege remains unsettled, by explicitly concluding that it has some degree of constitutional foundation, the court's decision might have strengthened the privilege in certain contexts, especially for its use in response to a congressional subpoena.<sup>64</sup>

Second, in ordering disclosure of the subpoenaed material, the court emphasized that the substance of the DOJ's internal deliberations had been publicly disclosed as part of a DOJ Inspector General investigation and report.<sup>65</sup> Thus, in considering the DOJ's interests, the court noted that the agency would suffer only "incremental harm" from disclosing the documents to the Committee.<sup>66</sup> This suggests that in a scenario where deliberative process privilege documents have not been disclosed, a court may give more weight than the *Lynch* court to the agency's interest in protecting the confidentiality of its communications.

Although the Committee won the case, it still appealed the decision to the D.C. Circuit out of concern for the reasoning applied.<sup>67</sup> While that appeal was pending, the parties reached a negotiated settlement in March 2018 that was contingent upon the vacation of two specific orders issued earlier by the district court.<sup>68</sup> In October 2018, the district court declined to vacate those decisions.<sup>69</sup> The parties then reached a new, more limited settlement in May 2019 and the case was dismissed.<sup>70</sup>

### *The Lerner Contempt*

In 2013, former Internal Revenue Service (IRS) official Lois Lerner appeared before the House Oversight and Government Reform Committee for a hearing on allegations that the IRS had given increased scrutiny to conservative political groups applying for tax-exempt status.<sup>71</sup> After Ms. Lerner provided an opening statement denying any wrongdoing, she invoked her Fifth Amendment privilege against self-incrimination and refused to respond to questions from Committee members.<sup>72</sup> After further deliberation, the Committee ruled that she had waived her Fifth Amendment privilege by making an opening statement proclaiming her innocence.<sup>73</sup> About 10 months later, the Committee recalled her to provide testimony and she again asserted her Fifth Amendment privilege.<sup>74</sup> Ultimately, the House adopted a resolution citing Ms. Lerner for criminal contempt of Congress,<sup>75</sup> but did not choose to approve a resolution authorizing the Committee to pursue civil enforcement of the subpoena in federal court, as had been done in 2008 with Ms. Miers and 2012 with Attorney General Holder. The U.S. Attorney for the District of Columbia later informed the Speaker that Ms. Lerner's actions did not warrant a prosecution for criminal contempt, as he

<sup>63</sup> *Lynch*, 156 F. Supp. 3d, at 104 (citing *Holder*, No. 12-1332, 2014 U.S. Dist. LEXIS 200278, at \*2).

<sup>64</sup> See MORT ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 72 (2017) (noting the decision's "immediate and long-range disruptive consequences for effective [] oversight").

<sup>65</sup> *Lynch*, 156 F. Supp. 3d, at 112–15.

<sup>66</sup> *Id.* at 114.

<sup>67</sup> Comm. on Oversight & Gov't Reform v. Sessions, No. 16-5078 (D.C. Cir. Apr. 18, 2016).

<sup>68</sup> See Josh Gerstein, *Judge Upends Settlement in Fast and Furious Documents Case*, POLITICO (Oct. 22, 2018, 7:10 PM), <https://www.politico.com/story/2018/10/22/fast-and-furious-documents-case-926645>.

<sup>69</sup> Comm. on Oversight & Gov't Reform v. Sessions, 344 F. Supp. 3d 1 (D.D.C. 2018).

<sup>70</sup> See Josh Gerstein, *Subpoena Fight Over Operation Fast and Furious Documents Finally Settled*, POLITICO (May 9, 2019, 12:10 AM), <https://www.politico.com/story/2019/05/09/fast-and-furious-documents-holder-1313120>.

<sup>71</sup> H.R. REP. NO. 113-415, 113th Cong., at 7–9 (2014).

<sup>72</sup> *Id.* at 9–11.

<sup>73</sup> *Id.* at 11–13.

<sup>74</sup> *Id.* at 12–14.

<sup>75</sup> H.R. RES. 574, 113th Cong. (2014).



had determined that she had not waived her Fifth Amendment rights.<sup>76</sup> This decision was notable in that unlike the Miers, Bolton, and Holder scenarios, Ms. Lerner was relying on a personal privilege rather than the President's assertion of executive privilege as justification for her non-compliance.

### *The McGahn Subpoena*

In April of 2019, the House Committee on the Judiciary issued a subpoena to former White House counsel Don McGahn—who at that point had left his position in the Trump Administration—for both testimony and documents as part of the Committee's ongoing investigation into various issues connected to the 2016 election.<sup>77</sup> The subpoena came shortly after Special Counsel Robert Mueller released his report, part of which focused on possible obstruction of justice by President Donald J. Trump, in which Mr. McGahn figured prominently.<sup>78</sup> The White House instructed Mr. McGahn not to turn over documents (citing executive branch confidentiality interests) and not to appear for testimony.<sup>79</sup> With respect to the testimony, the White House claimed—consistent with past executive branch policy—that “close presidential advisors” like Mr. McGahn are “absolutely immune” from being compelled to speak to Congress.<sup>80</sup> The Committee rejected that argument, as had the district court in *Miers*, and instructed Mr. McGahn to appear.<sup>81</sup> Mr. McGahn ultimately declined.<sup>82</sup>

After continued negotiations, the parties reached an agreement on the disclosure of the subpoenaed documents, but not on Mr. McGahn's testimony. In August of 2019, the Committee then initiated a lawsuit asking the D.C. District Court to direct Mr. McGahn to comply with the subpoena.<sup>83</sup> Thus began a lengthy series of judicial decisions, appeals, and remands.

To start, the district court ruled in favor of the Committee, holding that the Committee had both standing and a cause of action to enforce its subpoenas in court.<sup>84</sup> The district court also rejected the executive's claim of absolute immunity for presidential advisers.<sup>85</sup> That decision was appealed and reversed when a three-judge panel of the D.C. Circuit held that the Committee lacked standing to bring its suit.<sup>86</sup> That panel opinion, however, was reversed by an en banc panel of the D.C. Circuit, which held that neither separation of powers considerations nor principles of standing barred the courts from hearing the Committee's lawsuit.<sup>87</sup> On remand, however, the three-judge panel again rejected the Committee's lawsuit, this time holding that the Committee lacked a cause of action.<sup>88</sup> The court reasoned that in the absence of a specific statute authorizing subpoena enforcement lawsuits brought by House committees, neither the Constitution nor other federal statutes could be interpreted to create an implied cause of action.<sup>89</sup> Like the first panel decision on standing, this second panel decision on whether there was a cause

<sup>76</sup> Letter from Ronald C. Machen Jr., U.S. Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

<sup>77</sup> Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 761 (2020).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 761–62.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 762.

<sup>83</sup> *Id.* at 762.

<sup>84</sup> Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 214–15 (D.D.C. 2018).

<sup>85</sup> *Id.* at 215.

<sup>86</sup> Comm. on the Judiciary v. McGahn, 951 F.3d 510, 516 (D.C. Cir. 2020).

<sup>87</sup> Comm. on the Judiciary v. McGahn, 968 F.3d 755, 760–61 (D.C. Cir. 2020).

<sup>88</sup> Comm. on the Judiciary v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020).

<sup>89</sup> *Id.* at 123–126. The court noted that “[i]f Congress (rather than a single committee in a single chamber thereof) determines that

of action was then accepted for en banc review and the judgment vacated. In May 2021, while an appeal was pending before the en banc D.C. Circuit, the Committee reached an agreement over Mr. McGahn's testimony with the new Joseph R. Biden Administration.<sup>90</sup>

The terms of the accommodation provide that Mr. McGahn will sit for a closed door transcribed interview conducted by the Committee.<sup>91</sup> Although the interview itself will be private, the accommodation envisions that the transcript will be made public.<sup>92</sup> The agreement restricts the scope of the interview while also limiting—but not removing—executive privilege as a potential barrier to the Committee's receipt of aspects of Mr. McGahn's testimony.<sup>93</sup> The interview occurred on June 4, 2021.

In addition, the accommodation provides that the Committee will file a motion asking the court to vacate the three-judge panel opinion, reasoning that the Committee lacked a cause of action, and the motion will not be opposed by the DOJ.<sup>94</sup> The decision to vacate will be an important one, because though the panel's judgment has been vacated, the panel's supporting opinion has not and could still hold precedential value in future subpoena enforcement cases.<sup>95</sup>

### *Barr and Ross Subpoena*

In April of 2019, Secretary of Commerce Wilbur Ross and Attorney General William Barr failed to comply with a subpoena issued by the House Committee on Oversight and Reform for documents relating to the Trump Administration's attempts to add a citizenship question to the 2020 census.<sup>96</sup> To enforce the subpoena, the Committee chose to pursue both criminal contempt charges and civil enforcement of the subpoena in federal district court. The House ultimately approved the criminal contempt citation, which was then forwarded to the appropriate U.S. Attorney for prosecution.<sup>97</sup> The DOJ responded shortly thereafter, informing the House that it would not "prosecute an official for contempt of Congress for declining to provide information subject to a presidential assertion of executive privilege."<sup>98</sup> The Committee also sought to enforce the subpoena in federal court. That case, however, was stayed pending the outcome of the D.C. Circuit's consideration of the *McGahn* litigation.<sup>99</sup>

## Implications of Recent Practice

A pair of observations may be gleaned from the above events. First, efforts to punish an executive branch official for non-compliance with a committee subpoena through the criminal contempt of Congress statute

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its current mechanisms leave it unable to adequately enforce its subpoenas, it remains free to enact a statute that makes the House's requests for information judicially enforceable." *Id.* at 126.

<sup>90</sup> *Comm. on the Judiciary v. McGahn*, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020).

<sup>91</sup> *See Agreement Concerning Accommodation*, *Comm. on the Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. May 12, 2021).

<sup>92</sup> *Id.* at 1.

<sup>93</sup> *Id.* at 1–2. During the interview, the DOJ may not assert executive privilege with respect to information that McGahn has already provided to the Special Counsel, but the DOJ does "otherwise retain the right to assert executive privilege." *Id.* at 2.

<sup>94</sup> *Id.* at 2.

<sup>95</sup> *Compare* *Comm. on the Judiciary v. McGahn*, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020) (vacating the panel judgment) *with Agreement Concerning Accommodation* at 2, *Comm. on the Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. May 12, 2021) (providing that the "Committee will [] ask the D.C. Circuit to vacate the three-judge panel opinion that it agreed to rehear en banc.").

<sup>96</sup> *See* H.R. Rep. No. 116-125, 116th Cong. (2019).

<sup>97</sup> H.R. Res. 497, 116th Cong. (2019).

<sup>98</sup> *See, e.g.,* Andrew Desiderio, *DOJ Won't Charge William Barr, Wilbur Ross After Contempt Vote*, POLITICO (July 24, 2019, 5:50 PM), <https://www.politico.com/story/2019/07/24/justice-william-barr-wilbur-ross-1432595>.

<sup>99</sup> *See Minute Order*, *Comm. on Oversight & Reform v. Barr*, No. 1:19-cv-03557 (D.D.C. Oct. 15, 2020).

will likely prove unavailing in certain circumstances. For example, when the President directs or endorses the non-compliance of the official, such as when the official refuses to disclose information pursuant to the President's decision that the information is protected by executive privilege, past practice suggests that the DOJ is unlikely to pursue a prosecution for criminal contempt.<sup>100</sup> As a result, it would appear arguable that there is not currently a credible threat of prosecution for violating 2 U.S.C. § 192 when an executive branch official refuses to comply with a congressional subpoena at the direction of the President.<sup>101</sup>

Even when the official is not acting at the clear direction of the President, as in the Lerner controversy, the executive branch has contended that it retains the authority to make an independent assessment of whether the official (or former official) has in fact violated the criminal contempt statute.<sup>102</sup> If the executive branch determines either that the statute has not been violated or that a defense is available that would bar the prosecution, then it may—in an exercise of discretion—leave a congressional citation unenforced. The criminal contempt statute, therefore, may have limited utility as a deterrent to non-compliance with congressional subpoenas by executive branch officials faced with similar circumstances.<sup>103</sup>

Second, seeking enforcement of congressional subpoenas in the courts, even when successful, may lead to significant delays in Congress obtaining the sought-after information.<sup>104</sup> This shortcoming was apparent in *Miers*, the Fast and Furious litigation, and *McGahn*. *Miers*, which never reached a decision on the merits by the D.C. Circuit, was dismissed at the request of the parties after about 19 months;<sup>105</sup> the Fast and Furious litigation was settled after approximately seven years;<sup>106</sup> and the *McGahn* litigation, which appears to be on the verge of being dismissed, has taken over two years.<sup>107</sup> Though each case ended in the House obtaining much of the information it sought, the passage of time, together with the intervening congressional and presidential elections in each case, could be said to have diminished both the value of the disclosure and the committee's ability to engage in timely oversight.<sup>108</sup>

Relying on civil enforcement also involves the risk that a court will reach a decision that will make it harder for committees to obtain information in the future. For example, while the *Miers* decision rejected

<sup>100</sup> See Letter from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (June 28, 2012); *Olson Opinion*, *supra* note 13, at 102.

<sup>101</sup> See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1146 (2009) ("As the president is unlikely to authorize one of his subordinates (the United States Attorney) to file charges against another of his subordinates who was acting according to his orders, it is safe to assume that the executive branch will generally decline to prosecute an executive branch official for criminal contempt of Congress.").

<sup>102</sup> See Letter from Ronald C. Machen Jr., U.S. Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

<sup>103</sup> But see Fisher, *supra* note 21, at 347–59 (describing instances from 1975–2000 in which committee action on a criminal contempt citation was effective in obtaining compliance with a congressional subpoena).

<sup>104</sup> The Senate recently had a rather different experience in enforcing a subpoena against a private citizen. After authorizing civil enforcement of a Senate committee subpoena issued to Carl Ferrer, the Chief Executive Officer of Backpage.com, the Senate was able to obtain a district court decision directing compliance in less than five months. See Senate Perm. Subcomm. on Investigations v. Ferrer, 199 F. Supp. 3d 125, 128 (D.D.C. 2016). Mr. Ferrer's subsequent appeal was dismissed as moot. Senate Perm. Subcomm. on Investigations v. Ferrer, 856 F.3d 1080, 1083 (D.C. Cir. 2017). See also S. REP. NO. 114-214 (2016). This could suggest that subpoenas to members of the general public can be enforced more expeditiously through the courts.

<sup>105</sup> Comm. on the Judiciary v. Miers, No. 08-5357, 2009 U.S. App. LEXIS 29374, at \*1 (D.C. Cir. Oct. 14, 2009) (granting appellants' motion for voluntary dismissal).

<sup>106</sup> Complaint, Comm. on Oversight & Gov. Reform v. Holder, No. 1:12-cv-1332 (D.D.C. Aug. 13, 2012).

<sup>107</sup> See Agreement Concerning Accommodation, Comm. on the Judiciary v. McGahn, No. 19-5331 (D.C. Cir. May 12, 2021).

<sup>108</sup> See ROSENBERG, *supra* note 64, at 3 (arguing that civil enforcement "has been shown to cause intolerable delays that undermine the effectiveness of timely committee oversight").

absolute immunity for senior presidential advisers and may have removed a barrier to Congress's access to such testimony in the future, the district court opinions in the Fast and Furious litigation may have a more limiting effect on congressional efforts to access testimony by certain executive branch officials, because the court recognized that the deliberative process privilege has constitutional roots and must be balanced against Congress's need for the information.<sup>109</sup> Similarly, the second panel decision in *McGahn*, depending on its fate, could significantly restrict the House's ability to use the courts to enforce subpoenas until Congress provides House committees with a cause of action through a specific statute authorizing subpoena enforcement lawsuits.<sup>110</sup>

There would appear to be several ways in which Congress could alter its approach to enforcing committee subpoenas issued to executive branch officials. These alternatives include the enactment of laws that would expedite judicial consideration of subpoena-enforcement lawsuits filed by either house of Congress; the establishment of an independent office charged with enforcing the criminal contempt of Congress statute; or the creation of an automatic consequence, such as a withholding of appropriated funds, triggered by the approval of a contempt citation.<sup>111</sup> In addition, the House could consider acting on internal rules of procedure to revive the long-dormant inherent contempt power as a way to enforce subpoenas issued to executive branch officials.<sup>112</sup> These options, some of which may raise constitutional concerns, are discussed in greater length in CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey.

<sup>109</sup> Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 105 (D.D.C. 2008) (rejecting a claim of absolute immunity for presidential advisers); Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104 (D.D.C. 2016) (describing the district court order on motion for summary judgment as holding that "there is an important constitutional dimension to the deliberative process aspect of the executive privilege"); Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332, 2014 U.S. Dist. LEXIS 200278, at \*2-8 (D.D.C. Aug. 20, 2014) ("So, the Court rejects the Committee's suggestion that the only privilege the executive can invoke in response to a subpoena is the Presidential communications privilege.").

<sup>110</sup> Although the judgment of the second three-judge panel decision in *McGahn* has been vacated, the opinion has not and could hold precedential value for future cases. See Comm. on the Judiciary v. McGahn, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020).

<sup>111</sup> CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey, at 29-44 (discussing alternative subpoena enforcement frameworks).

<sup>112</sup> *Id.* at 30-36.

Mr. JOHNSON of Georgia. Thank you, Mr. Garvey.

We will now proceed under the five-minute rule with questions, and I will begin by recognizing myself for five minutes.

Ms. Bean, my first question is for you.

The focus of this hearing is on strengthening Congress' investigatory powers, but I think it is important to note that how Congress uses those powers can affect how those powers are viewed in court.

What are some of the hallmarks of a serious congressional investigation of the Executive Branch?

Ms. BEAN. Well, of course, a bipartisan stance is the most important thing.

I think if Congress had some official legal opinions about how the Executive Branch ought to respond to Congressional Subpoenas, we have so much turnover in staff, and often there is turnover in the Members of Congress, that people don't know what are the norms, what is acceptable, what kinds of negotiating goes on in the accommodations process. So, I think having better guidance would also help.

Other hallmarks are this bipartisan having joint subpoenas, having a joint report, having a hearing that has bipartisan elements. All those things increase public perception and maybe judicial perception of how legitimate the information request is.

Mr. JOHNSON of Georgia. Thank you.

Ms. Bean, I have a second question building on that same theme. Why will the accommodation process continue to be important even in situations where a Committee goes to court to enforce its subpoena?

Ms. BEAN. Well, as we all know, and we have been saying, getting a court to actually resolve issues on a subpoena is a very lengthy process. So, increasing the cost for the Executive Branch to ignore a congressional request is what makes the accommodation process work.

So, if the Executive Branch thinks, all right, we are going to lose this case, and we are going to lose it not just for us but for future types of information requests, if we have to pay a civil fine, if there was an appropriations sanction, if there was a possibility of criminal contempt using a private sector attorney, for example, instead of a U.S. prosecutor, all those things raise the cost for the Executive Branch to ignore the accommodations process.

If those threats are there, they are more likely to negotiate, more likely to try to come to some agreement.

Mr. JOHNSON of Georgia. Thank you.

Mr. Hungar, I have a related question for you. What steps do you think are important for a Committee to take before going to court to make sure a subpoena it issues isn't ruled invalid?

Mr. HUNGAR. Thank you, Mr. Chair.

So, in addition, to the points that Ms. Bean made, which I agree with, the Committee's hand is certainly going to be strengthened if it has engaged in a reasonable amount of negotiation with the Executive Branch in an attempt to obtain negotiated compliance with its demands and has made sure that the scope of the information it is seeking and its relationship to the topic is appropriately focused and it is clear that there is a legitimate, strong need for the information.

In those circumstances, the Committee, by the time it gets to court, if it is actually forced to go to that stage, is going to be well positioned to demonstrate to the court why this step is essential and reasonable.

Mr. JOHNSON of Georgia. Thank you.

Mr. Fernandes, your testimony identifies a crisis in effectiveness of congressional oversight of the Executive Branch in the last four decades.

Can you give us some more context about how this crisis has developed, in your opinion, and how it has been shaped, especially in the last four years?

Mr. FERNANDES. Sure. Thank you so much for the question, Chair Johnson.

I would say that one of the things that is most dispiriting is the fact that the accommodations process, which has formed the backbone of the vast majority of congressional oversight requests being fulfilled, has actually sort of been a process that has been mired in the possibility of an Administration running the clock either on a Presidency or any given House of Representatives. As the possibility for the slow adjudication in the courts making the running out of a clock possible, the accommodations process has broken down.

Again, I think that the prospect, as Ms. Bean said, of quicker adjudication in the courts takes away this incentive that you saw.

Quite frankly, in the last four decades, although you are right to point out in the last four years, the sheer number of flat rejections to comply with subpoenas seems to have increased. One hopes that as a quicker adjudication of the courts becomes possible, that we will return to some sense of normalcy with respect to good faith negotiations and accommodation.

Mr. JOHNSON of Georgia. Thank you.

My time has expired, and I will now turn to the gentleman from California, Mr. Issa, to be recognized for five minutes.

Mr. ISSA. Thank you, Mr. Chair, and I know my time will expire well before I get all my questions answered.

I want to try and go through some bullet points.

A couple of decades ago, President Richard Nixon was investigated for his involvement or possible knowledge of corrupt activity—basically Watergate. That process took less than two years.

Is there any logical reason that the court should have inherent—have there been any changes in the court that would justify President Nixon leaving office less than two years after the Watergate break-in, and let's just say in the case of these last few cases, three to five years, even seven years before final adjudication?

Mr. HUNGAR, if you could opine on that quickly.

Mr. HUNGAR. I think the answer is no. I think the intransigence of the Executive Branch has been what has changed over the last decades.

Mr. ISSA. So, it is fair to say that the Executive Branch has become more clever at finding delaying techniques. Would that be fair to say?

Mr. HUNGAR. That is correct.

Mr. ISSA. I just want to highlight one in particular. You mentioned in your opening statement the record of asking for a proffer of each and every element of an Executive Privilege or a rejection.

Can you go over briefly, if you recall, during the process we went through in Fast and Furious, what was alleged to be Executive Privilege, and then what happened when the judge asked for that list to be produced?

Mr. HUNGAR. It is a few years ago, but I will do my best.

Well, first, the Executive Branch resisted for many months in even making an express claim of Executive Privilege, let alone producing a privilege log, and only when threatened with contempt did they finally even make the claim. Then, when litigation was initiated, they still hadn't provided a privilege log.

Ultimately, after a couple of years of litigation, they were finally required to produce one, and they then claimed that vast quantities of information were privileged and that basically Executive Privilege extended to what have always been understood to be just traditional common law privileges, like the attorney-client privilege, that Congress has always viewed itself as being empowered to reject. So, their claim of Executive Privilege was incredibly sweeping.

Mr. ISSA. Exactly. Just to refresh your memory, one of them was, of course, the theory that there is a clearance that we don't have to receive law enforcement sensitive information was one of the claims not codified in any law.

I want to just for the record, though, do you recall that more than 10,000 pages were delivered outside of privilege as soon as the log was requested? In other words, when Judge Jackson asked for the log and they finally had to produce it, we discovered that tens of thousands of pages of documents had no privilege and, in fact, when they had to make that evaluation, those were delivered.

Does that refresh your memory?

Mr. HUNGAR. That is exactly right. Even one of the unfortunate aspects of that case was that it took more than two years of litigation before the judge even ordered the Department of Justice to produce those unprivileged documents.

Mr. ISSA. For the other Witnesses, similar history all of you have had. If anyone wants to quickly opine on the privilege log being in this legislation and the time sensitive nature of getting to that.

Ms. BEAN. I will just offer the comment that no attorney likes to produce a privilege log because then it admits what documents you have and what the precise reason is for withholding it. So, I think the concept of requiring a privilege log and saying that if you don't produce it you are waiving the privilege is one way to address that problem.

Mr. ISSA. Thank you.

Mr. Chair, if there is time for a second round, I look forward to it, but I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Issa.

At this time, we will turn to the gentleman from New York, Mr. Nadler, for five minutes.

Chair NADLER. Well, thank you, Mr. Chair.

We have all been frustrated by the undue delays in enforcing the Congressional Subpoena power through the courts.

Mr. Hungar, do you think we could dispense with all that if we were to revive the inherent contempt power, and if so, how?

Mr. HUNGAR. Well, as I suggested in my written testimony for instance, Congress could pass legislation that would authorize the imposition of fines in lieu of imprisonment, which I think everyone recognizes is a less than entirely salutary or desirable remedy in this day and age.

Particularly in the case of Federal officials, there would also be the possibility of imposing salary restrictions or reductions, that is, using the appropriations power to preclude the payment of salaries to Federal officials who are obstructing Congressional Subpoenas and are found in inherent contempt of Congress by the House or the Senate.

Those could at least be additional tools that might be effective in moving and advancing Congress' legitimate interests.

Chair NADLER. None of those would be subjected to litigation?

Mr. HUNGAR. Well, certainly I would expect, particularly the first time it was tried, that the contemnor would challenge that.

Again, if it were done by legislation, if Congress, if the House or the Senate utilized appropriate procedures to ensure that the contemnor was allowed due process pursuant to the traditional standards for inherent contempt before a finding of contempt was made, that there would be strong arguments in favor of the validity of that approach.

Chair NADLER. Let me ask Mr. Garvey the same question about reviving the inherent contempt power.

Mr. GARVEY. Thank you, Mr. Chair.

Yeah, I think my thoughts are that the court has made quite clear that the inherent contempt power is one that Congress has. The possible benefits of bringing it back would be that Congress would no longer be reliant on the Executive Branch to bring a criminal prosecution or the courts to adjudicate their subpoenas.

Just one note about litigation that can still come out of the inherent contempt power is that, if detained, the individual would still have the ability to bring a habeas corpus proceeding, which is what has happened in some of these historical examples.

Chair NADLER. If not detained but simply fined with large fines, there would be no habeas corpus proceeding.

Mr. GARVEY. Yeah. I think that would—so that would be a different question. So, yeah, if the reinvigoration of the power was not one of detention but rather fines, then it is unlikely to have a habeas proceeding.

At the same time, if the fines were imposed and not paid, the question becomes how do you enforce that fine and is it through the courts? Because that is the concern, is that we don't want to make changes to the subpoena enforcement framework to avoid the courts that ultimately end back up in the courts anyway.

Chair NADLER. It is sort of a Catch-22.

In recent years, we have seen the Executive Branch argue that Congress categorically cannot get a court to enforce its subpoenas. One version of that argument is that Congress can't sue the Executive Branch because there isn't a statute that says it can. Another version is that Congress doesn't have standing to sue.



Mr. Fernandes and Mr. Hungar, we all have an intuition that these arguments are problematic, but I hope you can help explain what is wrong with them.

What would happen if Congress suddenly couldn't enforce its subpoenas in Federal Court?

Mr. FERNANDES. I think if—I am sorry. I didn't know whether you wanted me to go first.

Chair NADLER. Go on.

Mr. FERNANDES. If Congress is able to vindicate its interests in court it, again, creates this incredible disincentive for any sort of compliance from the Executive Branch. Also, it then places this huge burden on these other mechanisms, all which take a lot more political capital and raise the temperature of any given moment.

The inherent contempt power that was referenced earlier before has not been used since 1935, and I think that is for a good purpose, at least in terms of the political optics of those sorts of things.

Adjudication of the courts allows for Congress to vindicate its interests in a way that doesn't increase the political temperature and in a way that hopefully allows for oversight to be seen in a way rooted firmly in both the Constitution and our history.

Chair NADLER. Thank you.

I want to hurry up on one thing because I want to get one more question in.

We have heard the concern that passing legislation to establish a cause of action and expedited review could incorrectly be viewed as an implicit admission that Congress didn't have those rights in the first place. I think the argument is wrong, but it is something I think we need to take seriously.

How can we ensure that any legislation or resolutions we pass to strengthen our investigatory powers aren't misconstrued to weaken or even extinguish some of those powers?

Mr. Fernandes?

Mr. JOHNSON of Georgia. The time has expired, but the gentleman may answer the question.

Mr. FERNANDES. Sure. I mean, expedited procedures can be set up with findings in the legislation, acknowledging that there are other routes certainly preserving this, at least conversationally.

Also, there have been expedited pathways set up on other subject matters, as I mentioned in my testimony, which doesn't sort of exclude other pathways. It just simply says that when things are going through the courts, there is a quicker way to adjudicate it.

Chair NADLER. Thank you.

As the Chair said, my time has expired, and I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Nadler.

We will next hear from the gentleman from Mr. Ohio, Mr. Chabot, for five minutes.

Mr. CHABOT. Thank you, Mr. Chair.

Thank you to all the Witnesses for appearing this morning in this hearing.

I have served on the Judiciary Committee for 25 years now, and during that time I have seen impeachments—first President Clinton, I was one of the House managers, and then President Trump twice—and countless investigations, some of which resulted in the issuance of subpoenas to compel testimony of documents, depend-

ing on which party was in the majority in Congress and who was the President at the time.

In recent years, specifically in the last two years and five months, it seems to me that the speedy and oftentimes hasty issuance of subpoenas has become much more prevalent due to political grand-standing.

The issuance of a Congressional Subpoena not only comes at a financial cost to the Federal government—and to the taxpayers, of course, who ultimately foot the bill—but, it also strains relationships between Congress and the Executive Branch.

What is often lost in the process of an investigation is the informal negotiating between the two branches. In fact, the Supreme Court recognized this process and noted that, quote, “Each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation,” unquote.

Sure, this give and take between the Executive Branch and Congress is time-consuming and oftentimes complex, but I believe it is a much more efficient and productive process than attempting to score political points by dragging Administration officials through a costly litigation process. I think that is the case whether it is Republicans or Democrats who are in the Congress or in the Executive Branch.

Now, a couple of questions.

Mr. Hungar, with respect to Congressional Subpoenas, can you give us a quick overview of the accommodations process—and I know we discussed it a little bit already this morning—what that process looks like and, probably more importantly, what it should look like between Congress and the Executive Branch, and provide some recent practical examples, if you would?

Mr. HUNGAR. Sure.

So, of course, at least in the vast majority of cases, Congress doesn’t and shouldn’t start the process by issuing a subpoena. It typically begins with a request for information to the Executive Branch, and there can be extended negotiations back and forth.

Sometimes the Executive Branch, as it should, complies reasonably, but more often than not in these days there are substantial disagreements about the validity and scope of the request.

Sometimes those can be resolved through negotiation. As I said earlier, it is important for a Committee to go through that process in good faith in the hope of resolving it.

The fact of the matter is, and this has been increasingly a problem more recently, I think in part because the Executive Branch realizes that it has the upper hand when it knows that it is not likely to be forced to produce documents it doesn’t want to produce, it has an incentive to refuse to produce those documents and to fail to engage in the negotiation process in good faith.

Mr. CHABOT. Thank you.

What would you say are some of the pitfalls or negative consequences associated with Congress immediately or very soon in the process issuing a subpoena after not receiving everything in its initial request for information?

Mr. HUNGAR. I mean, the courts have shown that they are reluctant, they really prefer not to get into disputes between the political branches, as we have seen, which I think explains part of the frustrations that have occurred in litigation.

If it appears to the court, rightly or wrongly, that there has been a rush to issue a subpoena and sue, they may be more reluctant to act expeditiously and may, indeed, try to encourage the parties to go back through the process of negotiation and compromise.

So, yes, it is important to give a good faith attempt to resolve the dispute through discussions before running to court.

Mr. CHABOT. Thank you.

Before my time expires, I would just make the point, we have already mentioned the Fast and Furious and Attorney General Holder, but I do think that that was a time where, unfortunately, to the public it was one of those things where, why can't these people either ever work together or get it right?

I think Congress looked oftentimes feckless. Even worse was that the Administration, the Attorney General, looked guilty of something, trying to hide something, and the public was really noticing that.

So, that was a real black eye, I think, to the Congress, and especially the Justice Department, in how that all played out.

My time has expired, so I yield back.

Mr. JOHNSON of Georgia. I thank the gentleman from Ohio and will next recognize the gentleman from California, Mr. Lieu, for five minutes.

Mr. LIEU. Thank you, Chair Johnson and Ranking Member Issa, for holding this important hearing.

I would like to follow up on Chair Nadler's questions about inherent contempt, which is the power of Congress to impose consequences on both public and private sector Witnesses who ignore Congressional Subpoenas.

So, Ms. Bean, my first question is to you. Prior to World War II, Congress used this power a number of times. Is that correct?

Ms. BEAN. Yes.

Mr. LIEU. Just because Congress hasn't used this power in a while doesn't mean we don't have the power of inherent contempt. Is that right?

Ms. BEAN. That is correct.

Mr. LIEU. Okay. One of these powers would be the ability of Congress to impose fines on Witnesses who disregard Congressional Subpoenas. Correct?

Ms. BEAN. Well, I believe Congress has that authority, although it has never been used to impose civil fines.

Mr. LIEU. Congress actually used even more powerful authority, which is, in fact, we have imprisoned—we put people in jail for ignoring Congressional Subpoenas. Is that correct?

Ms. BEAN. Yes.

Mr. LIEU. Okay. So, thank you very much.

Mr. Hungar, you are absolutely correct that the first time Congress reuses its power will likely be litigated. You are in private practice, and you understand that incentives matter. So, right now, the current incentive, let's say with Don McGahn, is even as a private citizen, he can simply ignore the Congressional Subpoena, and

at the end of the day, if the courts say he has to show up, he shows up and then he testifies. If there was an actual consequence there where not only would he have to show up, but he might have to pay a fine of let's say \$50,000 if he was wrong in the litigation, that would probably be a pretty powerful incentive for someone to, in fact, not challenge in court and to show up. Is that correct?

Mr. HUNGAR. I think that is correct. I mean, particularly for private subjects of congressional investigations, the costs, and risks of litigating those issues would be substantial. Private parties, generally, try to avoid getting into that position in the first place.

Mr. LIEU. Thank you.

Mr. Fernandes, I thought you made a good point about time. In terms of Congress, particularly the House of Representatives, we operate in two-year cycles. That means the House could flip. Chairships could change. So, if a Witness is able to delay a Congressional Subpoena more than two years—and often it will be less than two years because Congress usually doesn't issue a subpoena on day one of Congress. If they could simply delay it for, let's say, one and a half years, oftentimes circumstances could change so radically that essentially the Congressional Subpoena becomes meaningless. Isn't that correct, Mr. Fernandes?

Mr. FERNANDES. That is exactly correct, Congressman.

Mr. LIEU. So, let me take my remaining time to just offer some thoughts. Both Democratic and Republican Administrations have ignored Congressional Subpoenas, and it is wrong when Republicans do it. It is wrong when Democrats do it. We saw, for example, that when a Democratic Administration delayed for more than two years having a Witness show up, that the Republicans didn't fix that when the Republicans were in control of the House and the Senate. Let's not make that mistake again.

Democrats control the House and the Senate. Just because we believe we have a good President doesn't mean that we won't have future Presidents that won't do exactly what the former President did and run roughshod over the Constitution and Congress and the American people. We need to rein in the Executive Branch.

I just want to note that under the Department of Justice, under Merrick Garland's leadership, it has taken the exact same view of maximizing presidential power to the point of absurdity. It is refusing to release the Barr memo. It is refusing to even say that the D.C. Court Panel case that says Congressional Subpoenas are meaningless was wrongly decided. In fact, it supports that decision. Then recently, the Department of Justice says it is going to act as the former President's private attorneys to defend the defamation lawsuit by Ms. Carroll.

So, this is the same exact Department of Justice that has been maximizing presidential power to the great harm of our separation of powers, that is shredding the way the Framers set up our Constitution. We, as a Congress, need to rein in the Executive Branch. If we don't pass any reforms to try to rein in Executive Branch, then shame on us.

I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Lieu.

I will next recognize the gentleman from Wisconsin, Mr. Tiffany, for five minutes.

Mr. TIFFANY. Thank you, Mr. Chair.

I have a question for Mr. Hungar to start with. The Supreme Court in *Quinn v. United States* held that there are certain limitations on Congress' subpoena authority. For example, the subpoena needs to serve a valid legislative purpose. What exactly does that mean?

Mr. HUNGAR. Well, a valid legislative purpose in the views of the House and the Supreme Court has been long understood to be an extremely sweeping concept because anything that Congress may or could legislate on is within the Congress' legitimate purpose to investigate, and any sort of official misconduct or simply the implementation of congressional legislation and appropriations is also within the legitimate scope of congressional investigations, and, therefore, there is a legitimate legislative purpose in investigating those topics as well.

Mr. TIFFANY. Could you give me an example of a subpoena that may not serve a valid legislative purpose, give me an example?

Mr. HUNGAR. Well, the court has suggested that investigations, for instance, that are aimed purely at exposing private misconduct would be beyond the scope or investigations that are essentially trying to take the place of a judicial proceeding, a function of the other branch of government would be inappropriate, but it is an extremely broad category of investigations that Congress is permitting to implement.

Mr. TIFFANY. Thank you, Mr. Hungar.

I am going to yield back the balance of my time to the Ranking Member, Mr. Issa.

Mr. ISSA. I thank the gentleman. I appreciate that. I am going to follow up exactly where you left off.

Let's go through some hypothetical examples, because I think it is important. Mr. Hungar, or for each of the panelists, would it be fair to say that investigating the actions of a President or some other official after they are in office, for the actions in their private life before they came to office—and I will use the example of Whitewater and President Clinton.

Is it fair to say that investigating—and I am trying to be partisan on both sides here—is it fair to say that that would be something that after an election, trying to adjudicate something you claim the President did wrong before he came, would be outside a legislative purpose? Is that one example?

Mr. HUNGAR. Well, I would hesitate to say that is outside legislative purpose, but I would say it is further removed, certainly further removed from the core of legislative purpose and, therefore, you are likely to see more resistance in the courts if you are trying to pursue such an investigation. Again, if it is a legitimate—it certainly depends on the justification being offered, as we have seen from the Supreme Court in the Mazars case. If there is a legislative need for Congress to get the information to legislate, for example, the mere fact that it was conduct prior to service in office doesn't preclude the investigation.

Mr. ISSA. On another note, there was some discussion about—whether an investigation is partisan or not. Most investigations in the House historically have had one party or the other leading it, normally the party in the majority, correct?

Mr. HUNGAR. Yes.

Mr. ISSA. So, it is fair to say that partisan may not be the test. Let's go through a couple of recent examples very quickly. In the case of whether or not the U.S. attorneys were fired properly by George W. Bush. In that case, then John Boehner led a walkout of more than 100 Members of the House rather than voting for it. Did that diminish the legitimate right of the Congress to know whether or not those firings were for some nefarious purpose?

Mr. HUNGAR. No.

Mr. ISSA. In the case of Fast and Furious, when you had a letter sent to Senator Grassley, which turned out to not be true, the investigation of why and how the Department of Justice clearly and knowingly lied to a U.S. Senator is—does it matter whether that is partisan in who is bringing it?

Mr. HUNGAR. No.

Mr. ISSA. Lastly, for all the panelists, is there a structure you can see—and I do see one potentially—where we could extend our power well past two years of subpoenas by having an enduring document, just as we do have things appropriate over multiple Congresses? Anyone see that there is no remedy for that? It is not in the current legislation.

Well, that one will be continued. I hope that all of you will ponder that, because I would like to set up a structure in any new legislation that gives us the ability not to have to rely on the next Chair for something that is ongoing, because I do believe that is part of what presidencies often rely on.

With that, thank you. Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. Thank you. Next to be recognized will be the gentleman from Arizona, Mr. Stanton, for five minutes.

Mr. STANTON. Good morning, Mr. Chair, Members of the Committee, and our esteemed panel. I want to thank each of you for spending your day with us today and taking our questions on these important issues.

As each of you know, a defining characteristic of our system of government is the principle of checks and balances. It is not a new or novel idea. It is one that is outlined in our Constitution, discussed thoughtfully in James Madison's Federalist Papers, and, of course, it has been litigated before the Supreme Court. As part of our system of checks and balances, Congress, through committees and subcommittees like this one, has the power of inquiry, the power of oversight over the Executive Branch.

What is new, though, at least more frequent, it would seem, are the Executive Branch's attempt to effectively stonewall the Congress when it moves to investigate Executive action and refusing to comply with Congressional Subpoenas. We have heard testimony today regarding four historical examples created under four different Presidents from both political parties, which has shown us that Congress must engage our third branch of government to enforce Congressional Subpoenas civilly through the courts. It is a time-consuming task that impedes and delays appropriate and necessary oversight.

So, I am heartened today to see that there is bipartisan engagement we have on this important issue, and I look forward to work-

ing with my colleagues on this Committee to advance solutions that will allow Congress to better execute our constitutional duties.

With that, I will turn to some questions. My first is for three of the panelists. There exists what I would call friendly criticisms of Congress, focusing on going to court more to enforce its subpoenas. As I understand that this critique, the argument is that if Congress shouldn't try to change the civil enforcement process because Federal Courts are simply inhospitable to Congressional Subpoena enforcement actions. What would you say to this criticism that our cases will never move quickly enough, even if we pass the statute requiring expedited review?

How about Mr. Fernandes? I will start with you and then also ask Ms. Bean and Mr. Hungar.

Mr. FERNANDES. Thank you, Congressman.

While there is no guarantee of how quick an adjudication can happen, at least the way these expedited review mechanisms have happened in other subject matters, so, for instance, apportionment cases, incredibly important congressional apportionment cases, we have seen that an expedited mechanism provides the prospect of a quicker adjudication. Now, in that statutory scheme, and in any expedited statutory scheme, there is no number-of-day requirement or no strict requirement of how long an adjudication can happen. I think that there is some optimism that the courts can, if given the necessary urge from Congress, expedite consideration and adjudication in these disputes.

Mr. STANTON. Thank you.

Either Ms. Bean or Mr. Hungar.

Ms. BEAN. I will just say that I think the courts would comply with the law. If there was a law that required them to have a duty to expedite and they were required to issue procedural rules that put that into effect, I think the courts would comply with the law.

Mr. HUNGAR. I agree.

I would only add that the proposed legislation that would allow the filing of a case in a three-judge District Court and then direct appeal to the Supreme Court would necessarily speed things up because it would skip a layer that we currently have to go through in getting final resolution.

Mr. STANTON. All right. Thank you.

Ms. Bean, I have a follow-up for you. In your written testimony, you advocate for Congress to establish a bicameral, bipartisan congressional counterpart to the Department of Justice's Office of Legal Counsel. So, I would like for you to elaborate on that. It is a really interesting idea. How would you propose such a body be organized, and how that legal opinion is drafted by the Legislative Branch might strengthen Congress' case for enforcement in court?

Ms. BEAN. Well, right now, the Department of Justice cites its own legal opinions all the time in court as if they were judicial opinions, and they have a very persuasive impact, and Congress has nothing similar to rely on. If Congress wanted to set up a counterpart, it has to be bipartisan, really truly bipartisan, and I think it would be better if it were bicameral as well. It doesn't have to be. You could just have the Senate legal counsel and the House general counsel form a body.

Some people talk about having CRS do it. I don't think that is as good an idea, because they don't litigate in the courts and don't understand the law in the same way as the people who have to litigate. They could address a very small number of issues that are very bipartisan.

For example, there is no absolute immunity to Congressional Subpoenas for Senior White House or Presidential aides. I think both parties could agree on that. Executive Privilege, the way to assert it, you have to have a written assertion by the President. You have to have a privilege log or it is waived.

If we had those kinds of bipartisan, and especially bicameral opinions, I think it would be very influential in the court. It has worked for the Executive Branch, and it could work for Congress as well.

Mr. STANTON. Those are great ideas.

I yield back.

Ms. BEAN. You don't need a law either.

Mr. STANTON. Yeah. Great ideas. Thank you so much for that testimony.

I yield back.

Mr. JOHNSON of Georgia. Thank you.

I now recognize the gentleman from Texas, Judge Gohmert, for five minutes.

Mr. GOHMERT. Thank you, Mr. Chair. Appreciate this hearing and this time. This is something that we ought to be working diligently together to resolve, because we have not done a good job of oversight of some parts, especially Intel. I know some areas are outside our jurisdiction, but the Justice Department.

Mr. Hungar, I was going to ask. You are familiar with what happened in Fast and Furious and the effort of Congress to get information about that, right?

Mr. HUNGAR. Yes.

Mr. GOHMERT. That was such a frustrating time. To me, it wouldn't have mattered what Administration was in office but to actively work to get over 2,000 weapons in the hands of the drug cartels just seemed to be something bordering on criminal that we needed to really get to the bottom of, and we never did. Of course, the Attorney General was held in contempt. Still, as others have noted, there wasn't any firm decision until he was out of office, and it was really too late.

So, I am curious, based on what you have seen and thought about in analyzing that, what would have been the best way to go about getting the documentation we never got to give us specifics about how that whole thing came about, who was responsible, why they did what they did? What would have been a better way to go about getting that information?

Mr. HUNGAR. Well, I think in that case, as others have suggested, the biggest problem was simply the inordinate delays that occurred in the District Court, where it took literally three and a half years before the District judge ruled on the merits of the Committee's claims, which, of course, is completely unacceptable, given the timeframe of congressional investigations.

Mr. GOHMERT. Sure. How do we improve on that? There has got to be a way.



Mr. HUNGAR. The proposals to mandate expedited proceedings in the District Court, as well as the courts of appeals, one of the bills that was proposed last term, last session, would have also authorized essentially appellate—going to the Court of Appeals for a prompt ruling, compelling the District Court to move quickly if the District Court fails to do so. I think that is a good idea as well.

Mr. GOHMERT. What kind of language would you use to do that?

Mr. HUNGAR. An obligation on each level of the Federal judiciary to expedite to the greatest extent possible these proceedings, a provision enabling the Committee to go—

Mr. GOHMERT. Mr. Hungar, you are a good lawyer. You know when you leave back doors open, like, to the greatest extent possible, you will have Federal judges that say that is just not possible. I have got these other cases that are more important, and I am going to deal with those and I will get to the other as soon as I deem it is possible.

I am wondering if there needs to be language that said the court had to give it priority over all other cases that are not life-threatening, if we needed to be more specific to get that case taken up.

Mr. HUNGAR. That might be helpful. In fairness, most Federal District judges in these cases have proceeded relatively quickly, one month, four months, five months, things like that. The Fast and Furious case was a real aberration in that regard. The appellate process is what takes so long and allowing for direct review in the Supreme Court would help short-circuit that.

Mr. GOHMERT. Well, do you agree with Clarence Thomas' statement, Congress has no power to issue a legislative subpoena for private, nonofficial documents, whether they belong to the President or not?

Mr. HUNGAR. No. The Supreme Court doesn't seem to, either.

Mr. GOHMERT. Well, I understand that. So, how far do you think we should be able to go, delving into nonofficial private documents?

Mr. HUNGAR. Well, again, there has to be a legitimate legislative purpose, and certainly the Supreme Court has rightly recognized that merely trying to expose private individuals is not a legitimate legislative purpose. There are certainly going to be circumstances in which, for instance, the backpage investigation by the Senate a few years ago, where private entities have information that the Congress needs to address legislative responsibly about a problem.

Mr. GOHMERT. I see my time is expiring.

I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Gohmert.

We will next hear from the gentlelady from California, Ms. Lofgren, for five minutes.

Ms. LOFGREN. Thank you very much, Mr. Chair.

This has been an interesting and important hearing, and I was listening carefully to my colleague, Mr. Chabot. He and I were elected the same year, 1995. So, we have been through a lot of these fights in the Judiciary Committee, and in the Congress. Thinking about the legitimate scope of an inquiry, legitimate legislative purpose, to some extent, it is in the eye of the beholder.

When Republicans sought information from Democratic Administrations, Democrats in the House might not think it was legitimate. When Democrats did the same to a Republican President, the Re-

publicans might not feel it is legitimate. In the end, what we have seen is that its diminishment of congressional authority relative to executive authority. I think that is not what the Founders had in mind. If we are able to put our partisan views to one side and think about strengthening the Legislative Branch, that we will make progress.

I am wondering this: We have had several suggestions made here today. I love the idea of having a countervailing loss of legal counsel. I have thought that for a long time. It is absolutely bizarre the Administration cites itself as an authority in court and that somehow that is given some credence by the judiciary. So, we ought to have a countervailing provision.

I think the expedited civil review is something that we need to pursue. The definition of what actually counts as privilege and the requirement that it be detailed through a privilege log in—detailed either in person or in writing, all those things, as well as a revitalization of inherent contempt, especially looking at the civil fines.

So, here are the two questions. One, if we did all the above, would the element of having alternatives be viewed by a court as a way to defeat any of the other alternatives, because anything we do is going to be litigated at least initially?

Here is the second question for each of the Witnesses. We have had oversight over the years. I remember being on the staff during the impeachment of Richard Nixon. We didn't have any White House officials refuse to come in and be interviewed by the Judiciary Committee at that time. Now, we see administrative officials just refusing to even respond. So, how did it come to this point?

Those two questions, starting with you, Mr. Fernandes, Mr. Hungar, and Ms. Bean.

Mr. FERNANDES. Sure. So, thanks. I would like to take the first question first.

I don't think that the existence of multiple options necessarily weakens any one given option. I do think, when you come before the courts for any particular judge who, or court that is hesitant to get into an interbranch dispute, you could see the subconscious punting to other mechanisms, and certainly you have seen courts pull away at times. You that you in the litigation of the Myers controversy of saying, well, there is an accommodations process. We are going to hold off until that is exhausted.

So, it is certainly possible that it could be used by any given court as a way of sort of punting, and because they are hesitant to get involved in interbranch disputes, but I don't think that simply having those options weakens any one of them.

Ms. LOFGREN. Ms. Bean and then Mr. Hungar, I am going to run out of time before my second question gets answered.

Ms. BEAN. I was just going say to that, because most of these disputes are resolved in the accommodations process anyway, having these alternatives raises the cost for the Executive Branch to just say, I am not going to be even respond. So, I think that is an important thing to think. It is not just about courts. I agree with Mr. Fernandes that a court is not going to say, because you have other alternatives, I am not going to go forward here, other than some pressure that way, but if they are going to decide, they are going so decide.

How did we get to this point? We got to this point because we can't enforce the subpoenas. So, every time a subpoena is not enforced, the Executive is emboldened to say, I am not going to engage in the accommodation process. So, I think it is sort of a self-fulfilling prophecy there.

Ms. LOFGREN. My time is expired.

I wonder, Mr. Chair, if Mr. Hungar disagrees with the other speakers, if he could at least indicate that.

Mr. HUNGAR. I don't disagree. I think there is a risk that courts might do that, but they shouldn't. In general, I don't think they would on the contempt power as a means for not granting relief.

Ms. LOFGREN. My time has expired.

Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you.

I now recognize Mr. Massie, the gentleman from Kentucky, for five minutes.

Mr. MASSIE. Thank you, Mr. Chair.

Just quickly, following up on Mr. Gohmert's point, if Congress could subpoena private and corporate records, that sets up a dangerous asymmetry, because we enjoy speech and debate clause, and our own documents aren't FOIA-able from those private citizens. So, I would be a little bit worried about that.

Just quickly, I once had breakfast with Antonin Scalia and a dozen other Congressmen and the Republican Congressmen were complaining about the balance of power and how the courts needed to step in and restore the balance of power between the Executive and Legislative Branches, and this was in the context of Eric Holder not complying with requests for Witnesses or documents.

Scalia said, "well, you have all the power you need right there in the Constitution."

One of our colleagues said, "Well, impeachment is so unwieldy."

Scalia laughed, and he said, "I am not talking about impeachment. You fund all of the things you complain about purchase."

Now, obviously, the lack of funding can't directly compel documents to appear or Witnesses, but I think if we would just cut their funding 10 percent, you would see those documents delivered the very next day.

So, anyways, with that, I don't really have questions for the Witnesses. I want to yield the balance of my time to the Ranking Member, who is over the target and right on point on this issue, Mr. Issa.

Mr. ISSA. Thank you, and my memory of Justice Scalia and those—his pushing back on our request is still very vivid.

So, let's follow that up for each of the Witnesses. A powerful tool would be, in fact, to deny the Executive Branch individuals, or for that matter, Federal or—for that matter, private individuals, the ability to use Federal funds to defend themselves. I would like you to opine on the value of that. Conversely, the explicit ability to use Federal funds for voluntary compliance, if we were to set that up in the law very specifically, no appropriated funds may be used to fight, but, of course, appropriated funds can be used for all voluntary cooperation, would that be a powerful tool to both give and to take?

I will start with Ms. Bean.

Ms. BEAN. I think it would be a very powerful additional tool, and I thought Mr. Hungar's suggestions about also making it possible to take away somebody's salary is a pretty powerful tool as well. Using the appropriations process in general is very difficult, because it doesn't coincide at the time that you need to get documents. You have to set up mechanisms that were not dependent upon a particular appropriations cycle, but your suggestions aren't dependent upon the appropriations cycle. So, I think it is a very interesting way to go.

Mr. ISSA. Mr. Hungar, you have watched a few of these in actual cases. The amounts spent by the Executive Branch let's just say, both in Fast and Furious, and in the Harriet Miers case, and the firing of the U.S. attorneys, do you think that the court would invalidate that, or do you think it would be held constitutional for us to limit some aspects of their ability to defend outside of voluntary cooperation?

Mr. HUNGAR. I think that is a hard question. One thing I suspect a court, if faced with a situation in which the Justice Department said we can't litigate this because we have no funds, a court might be unwilling to entertain the dispute without perhaps appointing an amicus curiae counsel essentially to represent the government's interests which raises its own difficult challenges.

So, I am not sure how that would come out. I think the courts would be very uncomfortable with being asked to litigate enforcement actions where one side has its hands tied behind its back. Certainly, it would create problems for the Justice Department, which might make them a little less willing to go to litigation.

Mr. ISSA. In most cases when I have done depositions, I have noticed that counsel typically will have the Executive Branch counsel and private counsel there. As a matter of fact, I almost never remember a Witness not bringing their personal counsel, in addition to the government counsel. Is that more or less your memory?

Mr. HUNGAR. Generally speaking, yes.

Mr. ISSA. So, if we are trying to structure something, to a certain extent, we are really just eliminating the ability to use both.

I see my time or Mr. Massie's time has expired and I yield back, and I thank the Chair and Mr. Massie.

Mr. JOHNSON of Georgia. Thank you.

I find it deeply disturbing but not surprising that Justice Scalia would be caught up in a secret, private meeting with legislators, with action before the courts likely to end up before his own court, and he is dispensing political, and perhaps legal advice to those Congresspeople. I find it deeply disturbing.

Mr. MASSIE. Let me defend him really quickly. He refused to opine on the exact case.

Mr. JOHNSON of Georgia. Just the mere fact of meeting and having a private breakfast is deeply disturbing.

With that, I will yield to the gentleman from Tennessee, Mr. Cohen, for five minutes.

Mr. COHEN. Thank you, Mr. Chair.

Mr. Garvey, in your testimony, you talked about criminal contempt. I know there have been some questions asked about criminal contempt. What do you think? As I understand it, it was said

that we didn't have—the House didn't pass due process, as the Senate had, to have criminal contempt, and we had to pass the statute. Is that your understanding that we needed to pass the statute, laying out due process for criminal contempt to be effectuated on a House subpoena?

Mr. GARVEY. If I understand your question correctly, Congressman, are you talking about criminal contempt or civil enforcement of subpoenas?

Mr. COHEN. Criminal contempt.

Mr. GARVEY. Yes, so, criminal contempt is actually a pretty basic and straightforward process. The statutory provisions already lay out that process. The Committee votes; the House votes; it is forwarded to the U.S. Attorney, and the statute says that it shall be the duty of that U.S. Attorney to forward it to a grand jury, and at that point the prosecution would proceed under the control of the Executive Branch.

Mr. COHEN. Well, maybe I am misremembering, or failing to remember something, but I thought we wanted to use criminal contempt to enforce our subpoenas. We were told that it was a 1920-something case and the Senate had acted and laid out some rules and we had not in the House laid out any rules so that we needed to do that. I thought it was in the Rules Committee and it kind of got stuck there, but I am not sure. You can't put any more meat on the bones?

Mr. GARVEY. I don't know, Congressman. Due process comes up in some of the other contexts when we are talking about inherent contempt and reviving inherent contempt. It is clear that Congress would have to provide due process.

Mr. COHEN. Right. Has the House not provided that inherent contempt? Is there something we need to do?

Mr. GARVEY. So, there are no existing rules that lay that out. The House could choose to proactively establish a process, and that is something that actually Congressman Lieu's bill would do, so it would exactly show what the process would look like and what due process would be provided to the contemnor. That is an option. It doesn't have to work that way. I mean, tomorrow the House could pass an inherent contempt resolution, calling, or authorizing, the Sergeant at Arms to detain someone and the House could just go forward with that resolution after resolution, sort of ad hoc-ly establishing the procedures for that proceeding.

Ms. BEAN. Could I—

Mr. COHEN. Please. Please. Yes, Ms. Bean.

Ms. BEAN. I think you might be—one of the issues with criminal contempt, inherent criminal contempt, is we can't enforce it. With respect to the Executive Branch, in particular, the Justice Department, despite the law, says, I am not going to comply with the law. I am not going to prosecute against an Executive Branch official because I have prosecutorial discretion. So, one of the solutions to that is Congress could hire a private sector attorney, a former prosecutor, to prosecute these cases, and you could do that either through having a statute, or I think you could even do it through House rules and see if the court would accept that.

So, criminal contempt has become unavailable because the Department of Justice simply won't use it when it comes to an Execu-

tive Branch official. So, you could have a private sector person do it.

Mr. COHEN. Thank you, Ms. Bean.

The inherent contempt, there is no reason not to pass Mr. Lieu's bill then, is there?

Ms. BEAN. I would have to look at that bill. I can't remember all the provisions in it, but I think his mostly has to do with civil fines, which is different than criminal contempt. I don't think his bill actually creates an authority if you need to do it in statute, to hire a private sector attorney to do a criminal contempt case in court.

Mr. COHEN. Thank you.

Let me ask. Ms. Lofgren asked a question about how did—when did this go so far off the cliff? When was it, do you believe, Ms. Bean or Mr. Garvey, who might have the history of it just as well or better, I don't know, that we started to get into all these problems? When did we lose collegiality and/or normal function and get to so averse? Was there a time?

Ms. BEAN. Well, we had decades of time where there was not a court case filed. Although people were unhappy with some things, it is only in the last 10, 12 years that we have started to see these court cases, because, as Mr. Hungar said, "it isn't that the courts have changed. It is that the Executive Branch is becoming increasingly disrespectful of the accommodations process."

Mr. COHEN. Well, you said 10–12 years. That would take it back to Mr. Obama. Wasn't Mr. Bush—

Ms. BEAN. Well, Fast and Furious was really a watershed moment when the Administration just said we are just not going to cooperate, and you went through this seven-year journey through the courts.

Mr. COHEN. How was Harriet Miers' case, that wasn't really exactly hunky-dory, was it?

Ms. BEAN. That is true, but you did get a pretty quick District Court decision.

Mr. JOHNSON of Georgia. The gentleman's time has expired, but the Witness may complete her answer to the question.

Ms. BEAN. I saw Mr. Hungar nodding as well that I thought in the Miers case, you got a pretty quick decision from the District Court.

Mr. JOHNSON of Georgia. Thank you. The time has expired.

I will now move to the gentleman from Wisconsin, Mr. Fitzgerald, for five minutes.

Mr. FITZGERALD. Thank you, Mr. Chair.

On the heels of what Congressman Cohen just brought up, the criminal contempt, a question for Mr. Hungar and then for Ms. Bean, I guess. What are some of the pitfalls or consequences associated with Congress immediately issuing subpoenas rather than exhausting some of the other things that might be available to us? I mean, anybody that, whether they are private or public, would suddenly find themselves being served Congressional Subpoena. I would think that everyone would advise, guess what, you need an attorney and you need an attorney now.

So, I don't want to lose the gravity of what a Congressional Subpoena is, and it seems to be today in our hearing it is being dimin-

ished by the idea that people aren't complying. There is still a lot there, isn't there, Mr. Hungar or Ms. Bean?

Mr. HUNGAR. I certainly agree that except in perhaps in rare circumstances, Congress normally proceeds, which is to ask for the information, not demanding it, if it is appropriate. As I said, courts are more likely to be willing to act expeditiously to enforce subpoenas when it is clear that the Committee has gone through an appropriate effort to obtain the information voluntarily, and to negotiate a reasonable solution unless it has been unable to do so but nothing in the Constitution precludes the issuance of a subpoena from day one. It is just not necessarily the most effective or appropriate way to proceed.

Ms. BEAN. The only thing I would add is I agree with that completely, and we would always ask before issuing a subpoena. There are rare circumstances if you are trying to get information from a bank, if you are trying to follow the money, banks do require subpoenas from the very beginning. You can't just ask them to give you somebody's banking records. They won't do it. You have to have a subpoena.

Mr. FITZGERALD. Very good. Just one other thing. In *Committee on the Judiciary v. Miers*, the court rejected the idea that Executive Privilege absolutely shields Senior White House staff from compliance with Congressional Subpoenas. Are there any unique considerations for Congress' ability to use civil enforcement in the context of Executive Branch officials?

I would also open that up to Mr. Fernandes and Mr. Garvey.

Mr. GARVEY. I would just say, Congressman, that whenever we are talking about lawsuits filed by Congress against the Executive Branch, so when we are talking about subpoenas issued to Executive Branch officials, there are unique judicial considerations, and they are the considerations that often are what cause these cases to take so long, and they are just justiciability considerations. So, it is things like standing, cause of action, jurisdiction, and separation of powers. These are all difficult, thorny questions, and it seems, especially in the appeals, those are the specific issues that have been delaying a lot of these cases.

Mr. FITZGERALD. Mr. Fernandes, do you have a comment on that?

Mr. FERNANDES. No, I agree with what Mr. Garvey said. I don't have anything additional to offer.

Mr. FITZGERALD. Very good.

Mr. Chair, I don't know if the Ranking Member has any other questions, Mr. Issa. I would yield to Mr. Issa.

Mr. JOHNSON of Georgia. Well, I am sure Mr. Issa has some more questions.

Mr. ISSA. Well, I appreciate it. Thank you for yielding, and I will be brief.

The nature of this bipartisan discussion today seems to be very good, and the options we are being given seem to be very good. The one question I would have for our Witnesses is, in my opening statement, I talked about speed of the current FOIA law, and often Executive Branch essentially tells us they are treating us as FOIA. Over the last few years, the speed with which Freedom of Information Act request—and we will include the last Administration and

the two before it—has often been faster than Congress. Can any of you explain why an ordinary FOIA request can often get into court before a judge and a judge-ordered discovery to be turned over faster than in a congressional investigation?

Mr. HUNGAR. I think part of the reason is that the law is well-established in that area and the courts view themselves as having an obligation to proceed with reasonable speed to effectuate the public interest and the Justice Department doesn't have the whole panoply of arguments that they throw up every time the Congress goes to court against them, because the issues have been resolved. It is really just a fight about what is or isn't privileged under the FOIA statute.

So, I think the legislation that has been discussed here today would help by, for instance, establishing that it is clear there is a cause of action, which should be clear anyway, but the Justice Department continues to deny. It would help eliminate some of the obstacles that prevent the courts from proceeding as expeditiously as they do in the FOIA context.

Mr. ISSA. So, in closing, it would be fair to say that we should take the successes of FOIA and incorporate it in any legislation that we were to move forward with.

Mr. HUNGAR. Yes.

Mr. JOHNSON of Georgia. The time has expired, and the gentleman may answer the question—the Witness.

Mr. ISSA. I thank you, again.

Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you.

With that, we will go now to the gentleman from New York, Mr. Jones, for five minutes.

Mr. JONES. Thank you, Mr. Chair, and thank you to each of our distinguished Witnesses for joining us this morning. We are still in the morning time.

Look, I am really excited what is yet, again, a bipartisan discussion about how to solve complicated issues. My great thanks to everyone on the Full Judiciary Committee who has advanced legislative proposals for actually restoring congressional oversight authority over the past several years, including Representatives Dean, Lieu, and Ranking Member Issa, or Issa, excuse me. I am looking forward to working with all of you.

I just want to acknowledge that the American people have the right to know what our government does. In fact, our democracy depends on it, but our right to know is only as real as our power to bring the truth to light. Over the last several decades, Presidents of both parties have exposed that Congress does not have the power we need to uncover the truth.

When a Congressional Committee like ours wants to know what the Executive Branch is up to, we can ask an official to testify. If they refuse, we can issue a subpoena. A subpoena is a legal order. It is not optional. So, in principle, when we issue a subpoena, the official is supposed to show up and answer our questions. In practice, refusal has become all too commonplace.

Say we subpoena someone, and the President orders that person not to show up. Maybe the President did something wrong and doesn't want us to hear from a key witness. I know it is hard to



imagine, right? Let's just suppose. In that all-too-common scenario, we are stuck with four inadequate options.

We can withhold funding or refuse to approve nominations, but then the American people pay the price for the President's obstruction. We can threaten to use our inherent authority to arrest someone for contempt. They will call our bluff, as we have seen. Congress has not used that power in over 80 years, as we have heard. We can ask the Federal prosecutors to bring criminal charges, but those prosecutors work for the very Administration we would be asking them to prosecute, as we have also heard today, and the conflict of interest speaks for itself in that regard.

Finally, we can take defiant officials to court the way that this Committee just did in the Mr. McGahn case. The President can delay its civil enforcement case for years, running out the clock.

The Trump Administration perfected this playbook, obstructing our inquiries over 30 times. As my esteemed colleague, Representative Lieu, underscored earlier in this hearing, the problem is bipartisan and the solution should be, too. We should not have to ask the President's permission to exercise our constitutional authority. We need to prepare for the worst, not assume the best, to design our democracy to be resilient to its greatest threats, rather than dependent on norms of good faith and cooperation between the branches that we can no longer count on.

So, the time for a bipartisan effort and bipartisan legislation to reinvigorate our oversight powers is now in this Congress while we have a President committed to the Constitution, the rule of law, and our democracy.

So, Ms. Bean, in your written testimony, you suggested that one way we could expedite judicial review of civil enforcement actions would be to enact a statute directing courts to apply a deferential standard of review to Congressional Subpoenas. Could you say more about how such a statute would work, and how it would help address this problem?

Ms. BEAN. So, I was talking about that in the context of having civil fines, if Congress imposed a civil fine. You could also specify the standard of review by the courts, for example, you could use a—say the only way you can overturn a civil fine is if there is an abuse of discretion. That is a commonly understood standard out there, and that is one that you could specify. Otherwise, the courts would go through a very long process, trying to decide what the correct standard of review is.

You could also bar a de novo review of any factual finding. In other words, a court should not relitigate the facts. They should accept the facts as Congress found them. That would be another way that you could expedite judicial review, by taking those things off the table. You decide what the standard review is. You say fact-finding, you have to accept what the Congress has found, again, unless there is an abuse of discretion.

Mr. JONES. Thank you for that.

You also mentioned authorizing Congress to file a civil enforcement action directly in the D.C. Circuit Court of Appeals. Could you walk us through how that would help?

Ms. BEAN. Well, this was an idea in some other legislation out there. They suggested having a three-judge panel on the District

Court, and then going directly from there to the Supreme Court, which has been done in other contexts. Another way you could do it is, if Congress decides that they are going to have a subpoena, you could have a—because Congresses can constitutionally fashion the jurisdiction of the courts, you could just specify that any dispute over subpoena goes directly to the Appellate Courts, and then from there to the Supreme Court. So, it is just an alternate way of thinking about it.

Mr. JONES. Thank you.

Thank you, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. I am sorry. I was on mute.

We will now resort to the gentleman from Oregon, Mr. Bentz, for five minutes.

Mr. BENTZ. Thank you, Mr. Chair. Thanks to the Witnesses. Thanks to all the Witnesses for an excellent hearing.

The question I was going ask was just asked by the last Congressman, and it goes right to the question of how best to design our court's review system to be more expeditious, and I think that area has been exhausted.

With that, Mr. Chair, I will yield back. I will yield to Mr. Issa if he would like. If not, I yield back to the Chair.

Mr. ISSA. No, I would like. Thank you very much. Everyone is being very generous.

Ms. Bean, I want to follow up with something I think originated from you. Correct me if I am wrong. As we look at the idea that the Executive Branch opines, Department of Justice on their own ideas, rulings, standards, precedences, and that we don't have a countering part, would you, because the House and the Senate always has a difficulty coming together, would you suggest that the Senate have its own deliberative body, the House have its own deliberate body, but that in fact, we have a bicameral body that would deal at, if you will, the 10,000-foot level, and hopefully codify House and Senate rules and procedures so that there was some similarity between the two? Because currently, as you know, the Senate subpoenas are dealt with slightly differently than the House subpoenas.

Ms. BEAN. Well, I think you can go either way. The House and the Senate could have their separate ways of issuing official legal opinions on particular issues. I think it would be even more powerful in a court if it was bicameral, and it doesn't—it could be, you have people litigating in the House and litigating in the Senate. You could select a small number of issues that both sets of litigators know is a problem and get them together and use their best judgment to come out with a single opinion.

So, I think that is the best way to go if you are going to influence the court. Again, you could have one process in the House and one process in the Senate, either way.

Mr. ISSA. You do believe that a bicameral, bringing together of these two standards—the House and the Senate, Chairmen and Ranking Members, often, the rules of these two bodies are inherently going to be different. Just to reiterate, I believe you are saying appropriately that if we were to form a bicameral group to harmonize at least some of these opinions, that would be the most powerful.

Ms. BEAN. Yes. I am not suggesting that they would issue procedural rules for any committees. I am just saying it would mostly be on third parties, on the Executive Branch or private parties that are contesting congressional oversight to have some general opinions about their constitutional obligations to cooperate with Congress.

Mr. ISSA. I just want to follow up quickly for the record, because there is always a discussion about how—and I think Mr. Massie brought this up—Congress will subpoena a private individual or a bank record and so on. Isn't it true that, essentially, the Executive Branch has a number of tools, including, when they issue a subpoena, you do have to compel? If they go to the FISA court, they can essentially use material not even necessarily available to the defendant when they receive a subpoena or a subject to a warrant. Aren't those tools that, in fact, Congress doesn't have, that certainly, in the balance of power should—Congress should have something close to the equivalent when they are investigating the Executive Branch?

Ms. BEAN. As I understand your question, it is: Should Congress have the ability to use subpoenas to get classified information? Is that what you are asking me?

Mr. ISSA. I am, because, as you know, the Executive Branch has no shortage of the ability to compel that, including from Congress, notwithstanding speech and debate.

Ms. BEAN. Yes. I think Congress should have the ability to subpoena or compel information including classified information.

Mr. ISSA. Lastly, the Executive Branch in several cases, but we will just use William Jefferson, has not historically felt that speech and debate prohibited them from using their subpoena and warrant capability for criminal investigations of Members of Congress, including entering the House to take computer records and the like.

Ms. BEAN. I am not an expert in that area. Perhaps Mr. Hungar knows more, but I know that there have been cases litigating those issues.

Mr. ISSA. Yeah. Mr. Hungar, although there is an agreement, is there any—has there been any statute that has updated the ability to limit the Executive Branch when they enforce warrants and subpoenas since the days of the—William Jefferson?

Mr. JOHNSON of Georgia. The time has expired, but the gentleman can answer the question quickly.

Mr. HUNGAR. Thank you.

I don't believe there is any such statute, and that was an area of recurring concern for the House when I was a general counsel, and I suspect that those problems still remain today.

Mr. ISSA. Thank you.

Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you.

Now, we come to a part of the hearing where we have all been waiting so anxiously for. It is the five minutes for the gentlelady from North Carolina, Ms. Ross.

You may proceed.

Ms. ROSS. Well, thank you very much, Mr. Chair and Ranking Member. Such an important hearing and really good questions.

I just have a few, and they are pretty technical questions, but I think they are important, because so many of these issues have been going to the courts. My first question is for Mr. Garvey. In *Trump v. Mazars*, the Supreme Court said in dicta that recipients have long been understood to retain common-law privileges with respect to certain materials, such as attorney/client communications, and the opinion cited a number of CRS reports to support that statement. Is it your understanding that the CRS reports that the court cited actually support this dicta?

Mr. GARVEY. Thanks for that question, Congresswoman.

The reports that were cited were from 2003, which was before I arrived here at CRS. I have looked at that report, and I would say, no, I don't think the report supports that proposition. Congress' position has long been that it is not bound by common-law privileges. Instead, Congress has said that it is at the discretion of the Committee Chair as to whether or not to accept that type of a privilege. In fact, there are multiple House Committees who have that specifically in their Committee's rules. So, you know, I think that line in *Mazars* is an odd one, and it is one that has been subject to a lot of criticism.

Ms. ROSS. Okay. Ms. Bean, does the court's dicta square with your experience in congressional investigations?

Ms. BEAN. It does not. For my entire 30 years, my understanding was that the Congress is not bound by common-law privileges, and part of the reason why is our oversight does not have to do with personal liability, criminal or civil. We are gathering information for policy purposes, for legislative purposes, and, therefore, that is a reason why those common-law privileges that were developed in the courts we thought did not apply to Congress.

Ms. ROSS. That is great.

Then, Mr. Hungar, would you like to weigh in on this?

Mr. HUNGAR. Sure. Yes. Certainly, it was always the position of the General Counsel's Office at the House and I am sure still is that the House is not obligated to recognize common-law privileges, that dictum in the *Mazars* decision, though, may well come up in future cases that are litigated. So, it is maybe something that Congress would want to address legislatively, just to remove any doubt.

Ms. ROSS. Thank you very much for that.

That was really my only question, though I do want to say to Mr. Fernandes, as a graduate of Brown University and the University of North Carolina, you have a very fine pedigree.

Mr. FERNANDES. Thank you, Congresswoman.

Ms. ROSS. Thank you very much.

I yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady.

Mr. Issa, I am extremely reluctant to order a second round of questioning for fear that Members on the congressional side would show up and yield you all their time and you would be overexposed to the Witnesses. So, with that in mind, I will refrain from a second round.

I will thank the Witnesses for appearing before us today and thank my colleagues for being here today, and this will conclude our hearing.

Without objection, all Members will have 5 legislative days to submit additional written questions for the Witnesses, or additional materials for the record.

With that, the hearing is adjourned.

[Whereupon, at 12:13 p.m., the Subcommittee was adjourned.]

