

Testimony of Anne Tindall Prepared for the Record

“Strengthening Congressional Oversight Capacity”

House Select Committee on the Modernization of Congress

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Chairman Kilmer, Vice Chairman Timmons, Members of the Select Committee, thank you for the opportunity to testify at this important and timely hearing.

I serve as counsel at Protect Democracy, a nonprofit working to prevent and respond to actions that undermine our democratic system. We are thus acutely concerned with preventing abuses of executive power.

A key component of that effort is ensuring Congress functions as an effective check on the Executive Branch. That is why Protect Democracy has led a cross-ideological coalition to support the Protecting Our Democracy Act, which includes provisions to strengthen lawmakers’ ability to secure documents and testimony and reassert Congress’s power of the purse, among other provisions focused on reclaiming Congress’s Article I responsibilities and authorities.¹

Congress’s oversight authorities have been under assault for some time. Although the Trump White House took the practice of refusing to comply with congressional inquiries farther than any prior administration,² Administrations of both parties frequently have refused to accommodate congressional requests for information in good faith and worked to undermine Congress’s institutional authority to enforce those requests. But the Executive Branch is not solely to blame for the forces impeding legislative oversight. Congress, too, shares much of the responsibility for the abdication of authorities and underinvestment in oversight capacity.

Today, I would like to cover three general areas of concern regarding opportunities for strengthening congressional oversight capacity: mechanisms for securing information from the Executive branch, including options for modernizing Congress’s subpoena compliance and enforcement tools; consideration of a congressional Office of Legal Counsel, akin to the Justice Department’s Office of Legal Counsel; and more efficient and appropriate access to sensitive material by congressional staff.

The weakening of critical oversight mechanisms have steadily diminished Congress’s leverage over the Executive Branch, leaving congressional oversight to happen largely on the President’s

¹ Protecting Our Democracy Act, H.R. 5314, 117th Cong., tits. IV, V (2021).

² See, e.g., 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>.

terms. This state of affairs undermines our constitutionally mandated system of checks and balances. Protect Democracy therefore views the strengthening of Congress's oversight capacity as essential to the health and survival of our democratic system.

Securing Information

As Members of this committee know all too well, it is often precisely when the Executive Branch is least likely to accommodate congressional requests that Congress is most in need of information. Lawmakers rely not just on the use of subpoenas, but on the credible threat of subpoena enforcement, to compel cooperation with requests for records and testimony from a reluctant Executive Branch.

Traditionally, lawmakers have turned to robust enforcement options when necessary, including Congress's inherent contempt power and a statutory contempt procedure. Because these enforcement tools generated political and material costs to noncompliance with congressional requests, they served as effective incentives during negotiations with their executive counterparts, encouraging officials to accommodate congressional access to pertinent information in good faith. This is by and large no longer the case. As Congress's inherent contempt power fell into disuse, and the Justice Department declined to prosecute executive officials for contempt of Congress as a matter of institutional policy, both enforcement options became largely symbolic. The declining power of these two tools has led Congress in recent years to pursue a third option—civil enforcement of its subpoenas through the courts—which has proven to be neither timely nor effective.

Although Congress currently struggles to enforce its subpoenas against the Executive Branch, this is not because it lacks the power to do so. Congress has at its disposal a robust constitutional toolbox to compel cooperation with its requests, but those tools are in need of reform.

As I outline in greater detail below, Congress should strengthen its enforcement mechanisms within each of the three frameworks for securing compliance: enforcement through its inherent contempt power, through federal law enforcement, and through the courts. Specifically, the Select Committee should consider proposals to modernize Congress's inherent contempt power by levying fines instead of deploying the sergeants-at-arms to detain contemnors; establish a cause of action that expressly provides for the civil enforcement of House subpoenas; and expedite judicial proceedings in the event that disputes over congressional subpoenas reach the courts.

The Select Committee also should move forward with its prior recommendation to have the Government Accountability Office (GAO) examine the viability of a Congressional Office of Legal Counsel. That office could serve as a counterweight to the Justice Department's Office of

Legal Counsel (OLC), the opinions of which outline the legal basis for the Executive Branch’s noncompliance with certain congressional requests and the Justice Department’s refusal to enforce certain legislative subpoenas through the statutory contempt process. Creating a single office to articulate Congress’s institutional prerogatives, and to issue opinions that respond to the OLC positions often cited by the Executive Branch, could help strengthen Congress’s hand in oversight disputes.

Finally, to minimize the informational disadvantage Congress confronts in its oversight of executive operations, especially defense and national security programs, the Select Committee should consider reforms to increase the number of congressional staff with access to Top Secret/Sensitive Compartmented Information (TS/SCI) security clearances, along with adopting a number of the excellent proposals regarding staff capacity, training, compensation, and technology included in the Select Committee’s recommendations in the 116th Congress.³ At a minimum, the Committee should recommend that the House pass a resolution allowing each member of the House Permanent Select Committee on Intelligence to hire a personal staffer with a TS/SCI clearance, as their Senate counterparts may. But more broadly, the Committee should consider the viability of allowing every member of Congress to designate one personal office staffer to be cleared at the TS/SCI level. This would help ensure that members of Congress have the staff support they need to understand and effectively oversee some of the federal government’s most sensitive and consequential programs.

1. Subpoena Compliance and Enforcement

Before examining proposals to strengthen Congress’s subpoena compliance and enforcement tools, it is worth dissecting the flaws in the current inherent and statutory contempt processes and why civil litigation has proved to be an ineffective alternative.

Congress’s inherent contempt power enables either chamber to punish nonmembers for obstructing its work. Historically, Congress did so by deploying the sergeants-at-arms to arrest those individuals.⁴ Although the Supreme Court has repeatedly upheld the constitutionality of inherent contempt and its enforcement,⁵ neither chamber has exercised that power and tried a

³ Select Comm. on Modernization of Cong., *116th Congress Recommendations*, <https://tinyurl.com/m4zv8hns>.

⁴ Following an arrest, the sergeant-at-arms brought the contemnor before the House or the Senate where the individual was tried before the bar of the body; and the entire chamber sat for the testimony at trial, after which lawmakers voted to adopt a resolution adjudicating the guilt of the individual. If convicted, the contemnor would be imprisoned or otherwise sanctioned; the resolution affirming the contemnor’s guilt specifies his punishment. Cong. Rsch. Serv., RL34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 10-11 (2017), <https://tinyurl.com/4ryvymtb>; Rex Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. Rev. 231, 253-54 (1978); see also *Anderson v. Dunn*, 19 U.S. 204 (1821) (upholding House’s exercise of inherent contempt, outlining arrest and trial procedures for contemnor).

⁵ *Anderson*, 19 U.S. 204; *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”).

contemnor before the bar of Congress since 1945.⁶ This was largely due to the cumbersome nature of the process, which Congress itself has described as “time consuming,” and also given the availability of a statutory contempt procedure as a practical alternative for lawmakers, which had since 1857 served as complement to inherent contempt.⁷

In recent decades, OLC has argued that Congress may not use the inherent contempt power to compel the testimony of Executive Branch officials who decline to cooperate because they are complying with an assertion of executive privilege or a presidential directive not to testify.⁸ By not contesting these arguments in practice, Congress has, in effect, acquiesced to them.

Congress’s second enforcement option—statutory contempt—is also today largely ineffective. Congress passed the criminal contempt statute in 1857 as a complement to its inherent contempt authority, which refers contempt citations to a U.S. attorney for prosecution.⁹ These referrals and the threat of prosecution historically served as effective means of encouraging cooperation with congressional requests, including among senior government officials.¹⁰ Indeed, the historical record is clear that Congress intended the statute be used to compel compliance among executive officials. But since the 1980s, the Justice Department has abandoned its obligation to enforce contempt citations when they implicate Executive Branch officials.¹¹ For instance, in 2008, the House issued criminal contempt citations for Harriet Miers, President Bush’s former White House Counsel, and Joshua Bolten, Bush’s White House Chief of Staff, for refusing to comply with House Judiciary Committee subpoenas to testify and produce documents in an investigation

⁶ S. Rep. No. 95-170, at 97 (1977), <https://www.ojp.gov/pdffiles1/Digitization/63796NCJRS.pdf>.

⁷ *Id.*; Cong. Rsch. Serv., *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 12; Lee, *supra*, at 254.

⁸ Prosecution for Contempt of Cong. of Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 131 (1984); Testimonial Immunity Before Cong. of the Former Counsel to the President, 43 Op. O.L.C., slip op. at 20-21 (2019), <https://www.justice.gov/olc/opinion/file/1215066/download>.

⁹ 2 U.S.C. §§ 192, 194.

¹⁰ From 1975 to 1988, “there were 10 votes to hold cabinet-level executive officials in contempt. All resulted in complete or substantial compliance with the information demands in question before the necessity of a criminal trial.” 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* 35 (Dec. 5, 2019), <https://tinyurl.com/hdpdz83p>. In at least some of these cases, “[t]here is evidence... that the contemnors were reluctant to risk a criminal prosecution to vindicate a presidential claim of privilege or policy, which led to settlements.” *Id.*

¹¹ See, e.g., Prosecution for Contempt of Cong., 8 Op. O.L.C. 101; Dan Eggen & Amy Goldstein, *Fight Over Documents May Favor Bush, Experts Say*, Wash. Post (July 21, 2007), <https://tinyurl.com/t8v3j78s> (The Clinton administration “contended, as the Bush administration did this week, that Congress has no power to force a U.S. attorney to pursue contempt charges in cases in which a president has invoked executive privilege to withhold documents or testimony.”); 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> (“There is no real risk the department will pursue” Congress’s criminal contempt charges against Attorney General William Barr and Commerce Secretary Wilbur Ross.); Todd Garvey, Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* 3 (2019), <https://crsreports.congress.gov/product/pdf/R/R45653> (“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.”).

into the firing of several U.S. Attorneys.¹² The criminal contempt statute directs congressional citations 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.”¹³ But the Justice Department, first under Bush and then under President Obama, declined to impanel a grand jury to consider the contempt citations. Instead, the department relied on more than three decades of OLC opinions to justify its refusal to enforce the law.¹⁴

The Justice Department’s declinations to prosecute Executive Branch officials for contempt of Congress—a federal crime—and lawmakers’ decisions not to resort to the vestigial process of inherent contempt in its place, have forced the legislature to use an alternative and historically novel means to enforce its subpoenas against executive officials: judicial enforcement. However, the resulting lawsuits have neither proceeded quickly nor gone especially well for Congress.

Congress filed a civil action to enforce a subpoena against the Executive Branch for the first time in 1973.¹⁵ The courts swiftly ruled for the Executive Branch.¹⁶ Congress did not initiate a second civil suit for more than three decades.

The House Judiciary Committee’s 2008 effort to enforce its subpoena for the testimony of Harriet Miers, President Bush’s former White House Counsel, kicked off the current period in which civil litigation has become the default method of attempting to compel compliance with congressional subpoenas.¹⁷ That lawsuit and subsequent litigation point to at least three overarching challenges hampering civil enforcement. First, the slow pace of litigation prevents Congress from gaining expedient access to the documents and testimony it needs.¹⁸ Second,

¹² H. Res. 979, 110th Cong. (2008).

¹³ 2 U.S.C. § 194.

¹⁴ See Whether Dep’t of Just. May Prosecute White House Offs. for Contempt of Cong., 32 Op. O.L.C. 65 (2008), <https://www.justice.gov/opinion/file/832851/download>.

¹⁵ R.W. Apple, Jr., *Nixon Contests Subpoenas, Keeps Tapes; Hearing Set Aug. 7 on Historic Challenge*, N.Y. Times (July 27, 1973), <https://tinyurl.com/4sd9t4vy>; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521 (D.D.C. 1974).

¹⁶ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (affirming district court’s dismissal of committee’s lawsuit).

¹⁷ See *Committee on Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008).

¹⁸ In *Committee on the Judiciary v. Miers*, 542 F.3d 909, the dispute between Congress and the Executive Branch was resolved more than two years after the House issued the subpoena for Miers’s testimony, when both a new President was in office and a new Congress was in session. *Miers, Rove Will Testify to Judiciary*, Politico (Mar. 5, 2009), <https://www.politico.com/story/2009/03/miers-rove-will-testify-to-judiciary-019644>. Similarly, the House Judiciary Committee’s effort to secure the testimony of former White House Counsel Don McGahn concluded after almost two years of litigation, and only once a new President had taken office and a new Congress was in session. Ann Marimow, *Biden Administration, House Democrats Reach Agreement in Donald McGahn Subpoena Lawsuit*, Wash. Post (May 11, 2021), <https://tinyurl.com/7z39n8fn>. These timelines are relatively short compared to the duration of other subpoena enforcement fights. For instance, it took the House Oversight and Reform Committee and the Justice Department seven years of litigation to resolve their dispute over the committee’s effort to obtain access to records related to the “Fast and Furious” Operation. Josh Gerstein, *Subpoena Fight Over Operation Fast and Furious Documents Finally Settled*, Politico (May 9, 2019), <https://tinyurl.com/w47y5r83>.

unlike the Senate,¹⁹ the House has not enacted a statutory cause of action that expressly enables it to seek judicial enforcement of its subpoenas. This has left thorny jurisdictional issues unresolved, leaving courts greater room to decline to intervene.²⁰ And finally, seeking judicial intervention in disputes with the Executive Branch renders Congress vulnerable to courts ruling against Congress's institutional interests and expanding judicial power at the expense of Congress. In essence, resorting to civil enforcement actions leaves the delineation and protection of congressional interests to another branch of government when Congress is better suited and constitutionally empowered to vindicate itself.²¹

The Supreme Court's decision in *Trump v. Mazars USA, LLP* demonstrates these pitfalls.²² Although the court affirmed "Congress's important interests in obtaining information through appropriate inquiries," it established a new, four-factor test for assessing the validity of congressional subpoenas.²³ This ensured additional rounds of judicial review in that and future lawsuits, provided the Executive Branch with a new defense when contesting legislative subpoenas, and increased Congress's dependence on the courts to effectuate its powers.²⁴

A. Judicial Enforcement: Strengthening Civil Actions

Congress's current, and novel, default method of subpoena enforcement is civil litigation. In the wake of the collapse of its two other longtime enforcement methods—congressional enforcement through inherent contempt and Executive Branch enforcement through statutory contempt—Congress has turned to the third branch: the judiciary.

Congressional lawsuits have encountered several major obstacles. These include the slow pace of litigation, which allows noncompliant individuals to run out the investigative clock; the House's failure to enact an express cause of action empowering it to clearly seek judicial enforcement of its subpoenas; and the now well-evidenced possibility that federal courts will rule in ways that undermine Congress's institutional interests and diminish congressional power. Although the first two obstacles may be addressed through legislation, the third is a much more difficult nut to

¹⁹ 28 U.S.C. § 1365.

²⁰ See, e.g., *Committee on Judiciary v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020).

²¹ See generally Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 Geo. L. Rev. (forthcoming) (2021), <https://tinyurl.com/3v3j87j5>; Molly Reynolds & Margaret Taylor, *The Consequences of Recent Court Decisions for Congress*, Lawfare (Oct. 5, 2020), <https://tinyurl.com/vtd3epk5> (describing *Mazars* as "a mixed bag for Congress" that "set[] a new—and much higher—standard for establishing the legitimacy of congressional investigations generally").

²² 140 S. Ct. 2019 (2020).

²³ See *Mazars*, 140 S. Ct. at 2036 (setting out four factors for courts to consider when evaluating separation-of-powers issues implicated by congressional subpoenas).

²⁴ E.g., Letter from Ryan M. Kaldahl, Acting Assistant Sec'y of State, Bureau of Leg. Affs., to Hon. Eliot Engel, Chairman, H. Comm. on Foreign Affs. (Aug. 7, 2020), <https://tinyurl.com/5xbh3xxb> (citing *Mazars* twice to dispute validity of House subpoena).

crack, and should generally caution against the overreliance on judicial intervention to vindicate legislative authority.

As several cosponsors on the Select Committee already know, the Protecting Our Democracy Act includes provisions to expedite the consideration of congressional subpoenas and create an express cause of action for their enforcement.²⁵ The expedited procedure outlined in the bill requires an enforcement suit to be heard by a three-judge panel convened at the request of Congress; the suit would be reviewable only by direct appeal to the Supreme Court.²⁶ Protect Democracy urges the Members of the Select Committee to support the enactment of these measures.

While Congress should work to expand and sharpen its enforcement toolkit broadly, including correcting for the deficiencies of civil litigation where possible, it should also be acutely aware of each tool's practical limits. For example, expediting consideration of civil actions may in practice have a limited effect on quickening the pace of litigation, as disputes involving complex (and often necessarily voluminous) requests for information and an array of privilege claims take considerable time to parse. In *Committee on Oversight and Government Reform v. Holder*, even when a court mandated compliance with the underlying subpoena and the “Justice Department finally disgorged more than 10,000 documents originally withheld, totaling more than 64,000 pages,” it “took a special master over a year to pore through and address” the relevant privilege claims before the documents could be delivered to the committee.²⁷

Congress also assumes considerable risks in seeking judicial enforcement of its subpoenas, namely precedential case law that diminishes congressional power. Indeed, in no case to date in which a chamber of Congress has brought suit against the Executive Branch in order to enforce a subpoena has the Judiciary unambiguously sided with Congress.

For example, the 2016 ruling that eventually mandated compliance in the “Fast and Furious” case also, and for the first time, validated the Executive Branch’s underlying privilege claims

²⁵ Protecting Our Democracy Act, H.R. 5314, 117th Cong., tit. IV, § 403. The Protecting Our Democracy Act also reinvigorates Congress’s ability to extract both information and policy concessions from the Executive Branch through the constitutional power of the purse. This once robust oversight tool has diminished in our current era of omnibus appropriations and badly needs modernizing. See Molly Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, Brookings Inst. (Dec. 4, 2019), <https://tinyurl.com/ytyxkywc>; Ella Nilsen & Li Zhou, *The Government Is Headed to a Partial Shutdown After the Senate Rejected Trump’s \$5 Billion in Border Wall Funding*, Vox (Dec. 21, 2018), <https://tinyurl.com/sv7akkt2>; Andrew Restuccia et al., *Longest Shutdown in History Ends After Trump Relents on Wall*, Politico (Jan. 25, 2019), <https://tinyurl.com/w3vn558v> (shutdown ends on day 35).

²⁶ *Id.* § 403(b).

²⁷ Morton Rosenberg, *Why Enacting H.R. 4010, the Congressional Subpoena Compliance and Enforcement Act of 2017, Is a Big Mistake*, LegBranch (Jan. 9, 2018), <https://tinyurl.com/2xc339j6>.

as having a constitutional foundation.²⁸ 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.²⁹ As Senator Chuck Grassley reflected, the ruling may have been a victory for the House in practice, but it gave the Executive Branch “a victory on the principle.”³⁰

B. Congressional Enforcement: Modernizing Inherent Contempt

Congress’s past efforts to outsource enforcement of its subpoenas demonstrates the pressing need for crafting an effective way for the legislature to vindicate its interests on its own. To improve Congress’s ability to take effective action unilaterally, Congress should consider modernizing enforcement of its inherent contempt power. It could do so by replacing the practice of deploying the sergeant-at-arms to arrest contemnors with levying fines against them.

The Congressional Inherent Contempt Power Resolution, reintroduced last May, is one proposal to that effect. This reform, which amends House Rule XI, would impose a schedule of monetary penalties on an official whom the House has held in contempt and who has authority to effect compliance with the subpoena at issue.³¹ To give bite to this proposal, the House would have to establish a mechanism to implement it, such as directing the sergeant-at-arms or Office of General Counsel to employ collection agencies if contemnors fail to pay the sum they have been fined. But because the authority to levy penalties derives from a power inherent to Congress, establishing such a mechanism would require a change only to House Rules, not new legislation.

The threat of monetary penalties and a clear mechanism for collecting them could establish a material incentive among senior executive officials to negotiate with Congress and cooperate with requests in good faith. Protect Democracy has joined with numerous organizations across the ideological spectrum to support this enforcement option.³²

To minimize the likelihood of partisan abuse of this enforcement mechanism, the House could specify that only senior officials may be fined if held in contempt. In addition, Congress could provide an express cause of action to allow contemnors to challenge in court the validity of the congressional demands at issue in a subpoena, ensuring that a clear remedy exists if lawmakers misuse this tool.

²⁸ *Committee on Oversight & Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016).

²⁹ Garvey, Cong. Rsch. Serv., *supra*, at 9.

³⁰ *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, Chairman, S. Comm. on the Judiciary, at 9-10), <https://tinyurl.com/3cd57n3r>.

³¹ H. Res. 406, 117th Cong. (2021).

³² *Bipartisan Coalition Letter Urging Congress to Include Inherent Contempt Fines Provision in House Rules Package*, Good Gov’t Now (Oct. 22, 2020), <https://tinyurl.com/njk7prwj>.

Although untested, this modernization of Congress’s inherent contempt power would likely pass constitutional muster. The Supreme Court has upheld Congress’s authority to enforce its contempt power on a number of occasions.³³ Whether Congress may impose fines to effectuate that authority is less certain, as it never has attempted to do so. But support for that proposition may be found in dicta.³⁴ For instance, in *Jurney v. MacCraken*, the Supreme Court stated that Congress’s inherent contempt power “is governed by the same principles as the power of the judiciary to punish for contempt,”³⁵ which includes the ability to levy fines. Indeed, the judicial branch has long emphasized the importance of self-enforcement in this area. The Supreme Court has asserted that “[c]ourts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated; rather, it is “essential” that “the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.”³⁶

Of course, modernizing only Congress’s inherent contempt power would likely be an insufficient step toward increasing Executive Branch compliance with congressional subpoenas. Monetary enforcement alone may fail to secure cooperation, as fines levied on a wealthy official may not impose sufficient costs to change behavior. However, adopting the Congressional Inherent Contempt Power Resolution would provide the legislature with an additional and meaningful tool to vindicate its own oversight authority. And it would send a powerful signal that Congress is committed to drawing on its own powers to defend its institutional prerogatives.

C. Executive Enforcement: Modernizing Statutory Contempt

Amending the statute criminalizing contempt of Congress may make congressional contempt referrals a better complement to the legislature’s inherent contempt authority. Although the House has held seven current and former Executive Branch officials in criminal contempt of Congress since 2008,³⁷ the Justice Department has determined in six of those instances not to bring the matter before a grand jury,³⁸ in contravention of the statute’s plain language and intent.

³³ See *Anderson*, 19 U.S. at 230-31 (determining enforcement of contempt power to be a matter of “self-preservation” for the House); *McGrain*, 273 U.S. at 174 (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”); *Jurney v. MacCraken*, 294 U.S. 125, 148-49 (1935) (Congress may punish acts “of a nature to obstruct the performance of the duties of the Legislature.”); Cong. Rsch. Serv., *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 10-11; *Inherent Contempt Fines Rules*, Good Gov’t Now, <https://tinyurl.com/2zwjdsda> (“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.”).

³⁴ Cong. Rsch. Serv., *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas*, *supra*, at 12.

³⁵ *Jurney*, 294 U.S. at 127.

³⁶ *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

³⁷ H. Res. 979, 110th Cong. (2008) (former White House Counsel Miers and White House Chief of Staff Joshua Bolten); H. Res. 711, 112th Cong. (2012) (Attorney General Holder); H. Res. 574, 113th Cong. (2014) (former Internal Revenue Service official Lois Lerner); H. Res. 497, 116th Cong. (2019) (Attorney General Barr and Commerce Secretary Ross); H. Res. 730, 117th Cong. (2021) (Steve Bannon, former adviser to President Trump).

³⁸ In the seventh case, that of Steve Bannon, the Justice Department is still weighing whether to prosecute. Sadie Gurman & Andrew Restuccia, *Steve Bannon Case Poses Test for Merrick Garland After Biden Weighs In*, Wall St. J. (Oct. 20, 2021), <https://tinyurl.com/4ew6n7bc>.

Congress therefore requires a mechanism to ensure the law is faithfully executed, even when the contemnor is an executive official.

The Congressional Research Service has summarized proposals previously introduced in Congress that would statutorily amend the criminal contempt process to establish a procedure for referring citations concerning executive officials to an independent counsel.³⁹ The Select Committee should consider these proposals as part of a comprehensive effort to sharpen Congress's subpoena enforcement tools.

For example, under these proposals, updated statutory language would allow an independent counsel to make litigation and enforcement decisions pursuant to 2 U.S.C. §§ 192, 194, which outline the criminal contempt of Congress process. Shifting enforcement decisions to an independent attorney significantly more insulated from political pressure would address the longstanding problem of U.S. attorneys facing "subtle and direct pressure" when the contemnor is an executive official.⁴⁰ The independent counsel would, of course, retain prosecutorial discretion and could elect not to pursue charges against executive contemnors if those charges were purely partisan in nature, thereby limiting the potential abuse of that tool.

Several options have been proposed for determining the independent counsel's selection, including a congressional request of appointment from a three-judge panel. This was the model prescribed in the now-lapsed post-Watergate Independent Counsel Act,⁴¹ which the Supreme Court upheld in *Morrison v. Olson*.⁴² It is worth noting that the Independent Counsel Act faced valid bipartisan criticisms for which Congress would have to account if it provides for an independent counsel's enforcement of contempt citations against executive officials. Chief among those concerns was that the independent counsel's jurisdiction was too broad.⁴³ Congress could address this concern by narrowly tailoring new statutory language to limit the independent counsel's remit only to the investigation and prosecution of contempt and efforts to obstruct that work. And as with the ICA,⁴⁴ Congress could subject the independent counsel to the Attorney General's supervision and for-cause removal, subject to judicial review. As the Congressional Research Service has counseled, "it would seem prudent to mirror the Independent Counsel framework approved in *Morrison*, subject to some potential adjustments."⁴⁵

³⁹ Garvey, Cong. Rsch. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance*, *supra*, at 36-39.

⁴⁰ *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).

⁴¹ 28 U.S.C. § 591 et seq.

⁴² 487 U.S. 654 (1988).

⁴³ *E.g.*, 149 Cong. Rec. S12160, 12162 (2004) (statement of Sen. Schumer) (asserting that "the independent counsel law expired because people were worried about" a "runaway counsel").

⁴⁴ 28 U.S.C. § 596.

⁴⁵ Garvey, Cong. Rsch. Serv., *Congressional Subpoenas: Enforcing Executive Branch Compliance*, *supra*, at 38.

However, this Committee should also be aware that any of these proposals may, today, be unlikely to withstand scrutiny by the Supreme Court, at least as currently composed. In particular, many commentators have observed that should *Morrison* be challenged today, the high court would be unlikely to come to its defense. Indeed, after many decades of both executive and judicial branch trimming of congressional authority, particularly on matters of congressional oversight, there appears to be a pressing need for Congress to devise a method for more clearly and forcefully articulating its constitutional prerogatives and responsibilities.

2. Establishing a Congressional Office of Legal Counsel

To aid Congress's ability to assert and vindicate its institutional interests, the Select Committee should move forward with its recommendation that GAO examine the "feasibility and effectiveness" of a Congressional Office of Legal Counsel.⁴⁶ Such an office could provide a useful counterweight to the Justice Department's OLC, which has issued the opinions supporting the Executive Branch's noncompliance with certain legislative requests for documents and testimony and the Justice Department's refusal to prosecute certain executive officials for criminal contempt of Congress. Although this subject undoubtedly is worthy of further study, as it has been the subject of limited scholarly inquiry, the creation of a Congressional Office of Legal Counsel likely would present a number of constitutional and practical issues. I outline some of these below.

Congress has weighed whether to establish a Congressional Office of Legal Counsel on several prior occasions, including during extensive deliberations in the 1970s.⁴⁷ Although the Senate supported one such proposal and sought to include it in the Ethics in Government Act of 1978, the House rejected the idea,⁴⁸ fearing the joint office "would not reflect House preferences on matters that divided the two chambers."⁴⁹ In lieu of a joint Office of the Congressional Legal Counsel, the Senate created an Office of the Senate Legal Counsel to assert and defend its interests in court, establishing this office and an express cause of action to enforce Senate subpoenas via the Ethics in Government Act.⁵⁰ The House did not establish its Office of General Counsel until 1992; it incorporated the Office into House Rules in 1993.⁵¹ These House and Senate offices represent the institutional interests of their respective chambers to this day. However, the narrow jurisdiction of those offices has left the legislative branch without a single entity to champion its overarching institutional interests and opine on the scope of critical

⁴⁶ H. Rep. No. 116-562, at 215, 232 (2020), <https://tinyurl.com/2mcejhz3>.

⁴⁷ S. Rep. No. 95-170, at 18-20 (outlining history).

⁴⁸ 124 *Cong. Rec.* 35,672 (1978).

⁴⁹ Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 *Cornell L. Rev.* 571, 612 (2014). The Congressional Research Service also has stated that the House rejected the joint office because it "perceived the House and Senate to have somewhat different legal concerns." Cong. Rsch. Serv., RS22891, *Office of Senate Legal Counsel* 1 (2014), <https://tinyurl.com/y34kb6>.

⁵⁰ Ethics in Government Act of 1978, Pub. L. No. 95-21, §§ 701-15, 92 Stat. 1824, 1875-85 (1978); 2 U.S.C. § 288; Pub. L. No. 95-21, § 705(f)(1), 92 Stat. at 1879 (cause of action); 28 U.S.C. § 1365 (cause of action).

⁵¹ H. Res. 423, 102d Cong. (1992); Rules of House of Reps., 103d Cong., Rule II(8).

legislative authorities. The accretion over the years of OLC opinions that narrowly construe Congress's powers and offer expansive interpretations of executive authority evince the need for a single congressional office capable of responding forcefully in kind.

As Congress examines whether to establish and how to structure such an office, it should keep several things in mind. First, the Executive Branch has lodged a number of objections to earlier legislative proposals to create a Congressional Office of Legal Counsel. One proposal, outlined in the Separation of Powers Revitalization Act of 1975, would have created an office with the power to defend and prosecute, and to intervene or appear as amicus in, certain civil suits implicating the institutional interests of Congress.⁵² The Congressional Legal Counsel created in the bill would have been jointly appointed by the President Pro Tempore of the Senate and the Speaker of the House, pending the approval of the full House and Senate in a concurrent resolution.⁵³

OLC identified “substantial constitutional infirmities” in that proposal.⁵⁴ First, it contended that the appointment of the Congressional Legal Counsel must be subject to the Article II, Section 2, Clause 2 of the Constitution because the Constitution provides no alternative process “for the appointment of officers serving Congress as such rather than its components.”⁵⁵ The opinion notes that other joint congressional officers—including the Comptroller General (the head of GAO), the Librarian of Congress, and the Public Printer (known now as the Director of the Government Publishing Office)—are appointed precisely in this manner.⁵⁶ OLC added that because the Counsel would be subject to appointment by the President, she also would be subject to the President's removal.⁵⁷

Second, OLC cast doubt on whether a single office should represent the interests of legislative chambers designed by the framers to be separate. The opinion quotes James Madison,⁵⁸ who argued:

“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their

⁵² S. 2731, 94th Cong. (1975).

⁵³ *Id.*

⁵⁴ Constitutionality of Bill Creating an Off. of Cong. Legal Counsel, # Op. O.L.C. 384, 392 (1976), <https://www.justice.gov/file/20871/download>.

⁵⁵ *Id.* at 387-88 (stating “Article I, Sections 2 and 3 of the Constitution provide that the House... and the Senate choose their respective officers,” but not joint officers).

⁵⁶ *Id.* at 389; 31 U.S.C. § 703 (Comptroller General); 2 U.S.C. § 136-1 (Librarian of Congress); 44 U.S.C. § 301 (Director of Government Publishing Office); 2 U.S.C. § 1801 (Architect of the Capitol).

⁵⁷ Constitutionality of Bill Creating an Office of Congressional Legal Counsel, # Op. O.L.C. at 390.

⁵⁸ *Id.* at 388.

common functions and common dependence will admit.... [T]he weight of the legislative authority requires that it should be thus divided....⁵⁹

In short, OLC suggested that an Office of Congressional Legal Counsel may contravene the framers' intent to fragment legislative power by creating a bicameral body.

Despite these objections, history shows that it is possible to get executive signoff on a Congressional Office of Legal Counsel. The Senate managed to do so in 1978, after modifying its proposal "in certain aspects to meet all objections raised by the [Justice] Department."⁶⁰ A detailed description of the resulting office (which the House ultimately refused to support) and its proposed legal authorities can be found in Senate Report 95-170 (1978).⁶¹

The Select Committee should, however, take note of an additional concern. Although lawmakers might intend a Congressional Office of Legal Counsel to represent the institutional interests of the entire legislative branch, it may, in practice, end up highlighting the branch's acute internal divisions over key legal and constitutional questions.⁶² For instance, it seems not only possible but likely that the Office of Senate Legal Counsel or the House Office of General Counsel may contest opinions issued or positions taken by a Congressional Office of Legal Counsel where those offices' views of their chambers' institutional interests differ. Given such contestation—which likely would arise during the thorniest of legal, constitutional, and political disputes—it is difficult to ascertain whether a court would consider Congress's institutional interests meaningfully clarified by the Congressional Office of Legal Counsel.

⁵⁹ The Federalist No. 51 (James Madison).

⁶⁰ S. Rep. No. 95-170, at 8.

⁶¹ *Id.* at 82-108; *see also id.* at 8-18 (need for the office), 18-21 (past congressional concern regarding the office).

⁶² Internal disputes over Congress's institutional interests are quite common. For instance, the Speaker of the House, represented by the House Office of General Counsel, and a large portion of the House Republican caucus are engaged in an ongoing dispute over the constitutionality of the House's proxy voting system. Pet. for Writ of Cert., *McCarthy v. Pelosi*, No. 21-395 (U.S. Sept. 9, 2021). Though courts have dismissed House Republicans' lawsuit on the ground that the Constitution's Speech or Debate Clause bars consideration of the suit, *McCarthy v. Pelosi*, 5 F.4th 34 (D.C. Cir. 2021), the merits issue at the heart of the case is whether the House may change its rules to adapt to a crisis. *See, e.g.*, Br. for Appellees at 1-2, *McCarthy*, No. 20-5240 (D.C. Cir. Sept. 30, 2020) ("This process permits the House to conduct vital business during the crisis and promotes bedrock principles of representative government."). To preserve maximum discretion for the House, the House General Counsel has sought to vindicate "the House's authority 'to determine the Rules of its Proceedings.'" *See id.* at 2. House Republicans, on the other hand, have sought judicial intervention to block the exercise of that authority and establish that courts may second-guess Congress's rulemaking authority to an unprecedented degree. *Cf. United States v. Ballin*, 144 U.S. 1, 5 (1892) (allowing for judicial review of congressional rules only where they "ignore constitutional restraints or violate fundamental rights," or bear no "reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained"). It follows that just as House Republicans have contested the House General Counsel's view of the chamber's institutional interests and authority, so too may the House Office of General Counsel or the Office of the Senate Legal Counsel dispute a Congressional Office of Legal Counsel's conclusion.

These questions, the relevant legislative history, and the Justice Department’s objections to the office are worth GAO’s close study, in accordance with the Select Committee’s recommendation at the close of the 116th Congress.

3. Security Clearances for Congressional Staff

Although executive refusals to comply with legislative subpoenas offer the highest profile examples of the challenges Congress faces in securing the information it needs to conduct oversight, lawmakers face a second (self-imposed) challenge: strict limitations on the number of congressional staff with access to high-level security clearances.

Both chambers restrict who may receive security clearances and the level of clearance particular staff may receive. In the House, each member may have no more than two cleared staff in their personal office; those individuals may receive only a Top Secret (TS) clearance and therefore cannot access Sensitive Compartmented Information (SCI).⁶³ Senators are subject to identical restrictions on personal staff clearances, unless they sit on the Armed Services, Foreign Relations, or Homeland Security and Governmental Affairs Committees, or on the Appropriations Subcommittees on Defense or State, Foreign Operations, and Related Programs.⁶⁴ Senators on those panels may employ an additional cleared staffer to assist with their committee work.⁶⁵ Although committee staff in both chambers may, at the request of committee leadership, receive approval for a TS/SCI clearance,⁶⁶ lawmakers on the Senate Select Committee on Intelligence (SSCI) enjoy a notable staffing advantage over their House counterparts. Each SSCI member is afforded a “staff designee,” who is hired by, and serves at the individual direction of, the member; may receive a TS/SCI clearance; and is paid by SSCI to assist the member’s committee work.⁶⁷

Members of the House Permanent Select Committee on Intelligence (HPSCI) have decried that they cannot also hire a personal, TS/SCI-cleared “staff designee”—emphasizing the “onerous burden” the lack of such staffers places on members, who “are unable to have the assistance of staff at the most crucial times.”⁶⁸ Former Rep. Susan Davis, who sat on the House Armed

⁶³ Mandy Smithberger & Daniel Schuman, Proj. on Gov’t Oversight, *A Primer on Congressional Staff Clearances* (Feb. 7, 2020), <https://www.pogo.org/report/2020/02/a-primer-on-congressional-staff-clearances/>; Mandy Smithberger, Proj. on Gov’t Oversight, *Testimony Before the House Appropriations Committee’s Legislative Branch Subcommittee 1* (Apr. 2, 2019), <https://tinyurl.com/hzxatx5z>; Rep. Susan Davis, *Written Testimony for the House Committee on Appropriations Subcommittee on the Legislative Branch* (Apr. 2, 2019), <https://tinyurl.com/42w3f92c>.

⁶⁴ Smithberger & Schuman, *supra*.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ S. Res. 445, 108th Cong. § 201(g) (2004); Daniel Schuman, *Schiff’s First Order of Business for the House Intelligence Committee*, Just Security (Jan. 29, 2019), <https://tinyurl.com/2d5skbae>; Phillip Lohaus et al., *Improving Congress’s Oversight of the Intelligence Community*, The Hill (Jan. 24, 2017), <https://tinyurl.com/k5are3th>.

⁶⁸ Letter from Eight Members of Cong. to Hon. Tom Graves, Chairman, Subcomm. on Legis. Branch, H. Comm. on Appropriations, and Hon. Debbie Wasserman Schultz, Ranking Member, Subcomm. on Legis. Branch, H. Comm. on Appropriations (Mar. 22, 2016), https://irp.fas.org/congress/2016_cr/hpsci-hac.pdf; Gopal Ratnam, *Staff Security*

Services Committee, similarly attested that the highly classified nature of certain aspects of committee work and the tight restrictions on access to TS/SCI clearances meant that “there are times when I cannot rely on... my personal office staff” to “conduct research for me... and act as a sounding board.”⁶⁹ Davis suggested that this undermined her ability to meet “the obligation to keep abreast” of relevant issues.⁷⁰

In short, the limited staff support lawmakers have at their disposal when dealing with highly classified information severely impedes their capacity to conduct effective oversight of executive defense and national security programs. Unlike lawmakers on other panels, members of congressional national security committees are less able to lean on support from journalists or civil society groups in their efforts to uncover misconduct or oversee the agencies in their jurisdiction. As Rep. Adam Schiff, then the ranking member of HPSCI, explained in 2017: “[B]ecause of the classified nature of the [Intelligence Community], we cannot rely on outside interest groups to raise issues to our attention as other Committees can. We have to find them ourselves—often from agencies very good at keeping secrets.”⁷¹ This underscores the need for members to have personal staff cleared at a level that allows them to undertake the most consequential, and therefore highly classified, oversight work.

To address this issue, the Select Committee should consider reforms aimed at increasing the number of congressional staff with TS/SCI clearances. At a minimum, the Select Committee should support a proposal to provide HPSCI members—like their SSCI counterparts—with “staff designees,” cleared at the TS/SCI level, to support individual members’ committee work.⁷² It appears that all the House must do to make this change is pass a resolution, as the Senate did before it.⁷³

Although this modest adjustment would put intelligence oversight in the House and Senate on similar footing, it would make little dent in the broader lack of lawmaker access to personal staff cleared at the TS/SCI level. Congress could take several further steps to address this problem. It could permit members serving on committees handling defense and national security matters to “designate one staffer at the TS/SCI level,” as Rep. Davis has proposed.⁷⁴ But it also could allow every member of Congress, regardless of their committee assignments, the option to designate

Clearances May Vex House Intelligence Members, Roll Call (Oct. 2, 2019), <https://tinyurl.com/ut32cub5> (“Rank-and-file members of the House Intelligence Committee, who are at the nucleus of the impeachment inquiry into President Donald Trump, likely have no personal aides to consult on the most sensitive information handled in the high-stakes probe.”).

⁶⁹ Rep. Susan Davis, *Written Testimony for the House Committee on Appropriations Subcommittee on the Legislative Branch* (Apr. 2, 2019), <https://tinyurl.com/42w3f92c>.

⁷⁰ *Id.*

⁷¹ Rep. Adam Schiff, *Statement Before the Committee on House Administration: Committee Budget Request for the 115th Congress 1* (Feb. 15, 2017), <https://tinyurl.com/5fv6vwkk>.

⁷² Letter of Eight Members of Cong., *supra*.

⁷³ *Cf.* S. Res. 445, 108th Cong. § 201(g).

⁷⁴ Davis, *supra*, at 4.

one personal staffer to be cleared at the TS/SCI level.⁷⁵ Each chamber could make these changes individually and with only minor increases in annual appropriations to the legislative branch to accommodate the costs associated with the security clearance process.⁷⁶

This recommendation compliments many of the recommendations the Select Committee made during the 116th Congress concerning staff capacity, training, and access to technologies that would streamline oversight and make it more effective.⁷⁷

Conclusion

Despite the challenges Congress faces in strengthening its oversight capacity, lawmakers have a number of options at their disposal to vindicate the legislature's clear constitutional authorities. It is critical that Congress takes swift action to enact some of these proposals, particularly those outlined in Titles IV and V of the Protecting Our Democracy Act, to ensure that the Article I branch of government reclaims its position as a meaningful check on executive power.

I look forward to answering your questions.

⁷⁵ *Id.*; Smithberger, *supra*, at 1.

⁷⁶ As a former congressional national security staffer has testified, it seems “that the cost for providing staff a TS/SCI clearance is largely borne by the CIA, and the cost of investigating and adjudicating TS/SCI clearances is around \$5,000 for someone who has never had a clearance. We do anticipate there would be some funding needed for the legislative branch to maintain records of nondisclosure agreements, store classified documents, and track individuals granted clearance, and we urge the Committee to increase funds for the Sergeant at Arms accordingly. As most of the personal office staff of the relevant committees likely already have TS clearances, providing additional access should not be burdensome.” Smithberger, *supra*, at 2-3.

⁷⁷ See Select Comm. on Modernization of Cong., *116th Congress Recommendations, supra*; H. Rep. No. 116-562, at 155-62.

Modernizing Congressional Oversight Powers — to Save Them

BY DAVID JANOVSKY
NOVEMBER 04, 2021

Thank you for the opportunity to submit testimony to the House Select Committee on the Modernization of Congress. I am David Janovsky, program manager and analyst at The Constitution Project at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

My testimony focuses on how to improve Congress's ability to oversee the executive branch, particularly by improving compliance with congressional subpoenas.¹ Today, I will discuss two reforms the Select Committee is particularly well suited to lead: first, reviving and modernizing Congress's inherent contempt powers, and second, creating an entity to counterbalance the Justice Department's Office of Legal Counsel (OLC), one that can articulate a robust view of congressional legal prerogatives.

Background

Congress has the constitutional authority and responsibility to conduct investigations to support its legislative duties. One of the most important subjects of this investigative power is the executive branch. Without robust oversight, Congress cannot identify shortcomings in the faithful execution of the laws it has passed.

The need for Congress to assert its authority and legislative prerogatives, including by compelling testimony and evidence, is clear. But for decades, presidential administrations have steadily escalated their opposition to congressional oversight. Relying heavily on increasingly aggressive legal theories advanced by the Justice Department's Office of Legal Counsel, the executive branch has erroneously argued that many of Congress's oversight tools violate the Constitution.

For example, the executive branch claims that presidential advisers enjoy absolute immunity from compelled testimony, even after their employment ends.² It tends to broadly define executive privilege,³ and it takes the position that the Justice Department does not have to — and indeed, will not — prosecute executive branch officials who have claimed executive privilege if they are referred by Congress for criminal contempt charges.⁴ The office has also claimed that Members of Congress don't have the authority to request information on government programs or activities unless they chair a committee

or subcommittee, or either chamber of Congress has passed a resolution authorizing such investigation or inquiry.⁵

This executive branch overreach is not a partisan phenomenon. Both Democratic and Republican administrations, dating back at least to Richard Nixon, have endorsed and advanced this campaign, regardless of which party is in the White House or the majority in Congress.

Without robust oversight, Congress cannot identify shortcomings in the faithful execution of the laws it has passed.

Notable instances of executive obstruction in recent memory include the George W. Bush administration's efforts to block the investigation into the firing of U.S. attorneys; the Obama administration's refusal to release documents related to Operation Fast and Furious that resulted in Attorney General Eric Holder being held in contempt; and former Trump White House counsel Don McGahn's flat refusal to testify in connection with the special counsel investigation. Regardless of one's views on any of these investigations, they all represent instances in which Congress was deprived of timely access to information it viewed as essential to its oversight responsibilities.

The executive branch's escalation has far outpaced Congress's ability to enforce its subpoenas, and the tools it currently possesses are simply inadequate. The Justice Department's refusal to pursue criminal contempt charges against executive officials has led committees to file civil suits against intransigent officials, but this is not a sustainable solution. Three of the highest profile of these cases ended in settlements, but they took years to resolve while the Justice Department raised a series of absolutist, procedural objections designed to keep Congress out of the courtroom entirely.⁶ While most lower courts have ruled in Congress's favor in these cases, the lack of controlling opinions from appellate courts ensures future litigation will be similarly protracted. Civil enforcement is a poor vehicle to vindicate Congress's rights. In time-sensitive investigations, it takes far too long to be useful, often outlasting any given Congress, and it puts Congress's prerogatives at the mercy of the judicial branch.⁷

It is true that Congress can, and has, used its other powers, like appropriations and confirmations, to incentivize compliance.⁸ However, not all committees have access to these tools. And more fundamentally, a system in which Congress has the choice of either gumming up the workings of government to carry out its constitutional investigative responsibilities or resigning itself to neglecting those responsibilities — with all the waste, fraud, and abuse of power that a government operating without oversight would entail — can't be what the framers of the Constitution intended.

Solutions

Reinvigorating congressional oversight requires a multipronged approach. First, Congress must develop concrete enforcement procedures that allow it to sidestep roadblocks the

executive and judicial branches have created. Second, Congress must work to restore the balance of powers between itself and the executive branch.

Inherent Contempt

Congress has the authority to enforce its subpoenas without the involvement of the executive or judicial branches. The “inherent contempt” power is well-established in historical practice and Supreme Court precedent. In the past, the House or Senate sergeants-at-arms have actually arrested and imprisoned people who have been held in contempt of Congress.⁹ However, Congress has not used this power in modern times, and the process should be updated to meet current needs.

A modern inherent contempt procedure could be implemented through House (or Senate) rules, and this is an area where the Select Committee’s leadership could be invaluable. POGO has endorsed a two-part proposal developed by Good Government Now and their senior fellow Mort Rosenberg, who is also a congressional scholar at POGO who worked for decades at the Congressional Research Service. That proposal is cited below and attached to this testimony.¹⁰

A modern inherent contempt procedure could be implemented through House (or Senate) rules, and this is an area where the Select Committee’s leadership could be invaluable.

When executive branch officials defy subpoenas, the proposal calls for the creation of bipartisan select committees to determine if contempt charges are warranted and refer those charges to the full House. An accused official would have the opportunity to mount a defense prior to the House vote. Should they be convicted, the general counsel would be empowered to collect fines from them until the contempt is resolved.

The proposal would also create processes for prosecuting contempt should fines prove insufficient. It would provide for a criminal contempt vote in the House, followed by a vote to appoint a private attorney to prosecute the case on behalf of the House in federal court. Again, this process would allow the accused official to present a defense, as in any court procedure.

This proposal would overcome the Justice Department’s obstructionist refusal to prosecute contempt citations against executive branch officials, and it would result in a process where Congress, not the courts, would be the primary driver in the effort to enforce its subpoenas.

A Congressional Office of Legal Counsel

The framers envisioned a government of separate but interdependent powers in which ambition would check ambition. But the terms of the legal debate between Congress and

the executive branch are skewed toward the latter. There has been a bipartisan commitment by presidents to advance the institutional power of the executive branch, an advancement often facilitated by the Office of Legal Counsel (OLC). Even though Congress has equally — or even more — valid institutional interests, it does not have an advocate that consistently advances those interests.

That's why POGO joins a number of experts in endorsing the creation of a congressional office that could play a role comparable to that of the Office of Legal Counsel by articulating Congress's legal positions outside the context of litigation.¹¹

One of the most comprehensive analyses of this dynamic was published last year by Professor Emily Berman.¹² Stated simply, OLC gives the executive branch a significant advantage in oversight disputes because its legal opinions set the terms of the debate. It allows the targets of congressional investigations to point to a preexisting body of work that dismisses Congress's prerogatives and casts executive intransigence as a constitutional mandate, rather than a subversion of checks and balances.

Without the counterweight of a comparable source of work defending Congress's institutional interests, Members and staff are at a disadvantage. They may even take OLC's interpretations at face value, for lack of alternative resources. An example from a non-oversight context is illustrative. OLC asserted in 1974 that conflicts of interest laws don't — and in fact, couldn't — apply to the president and vice president.¹³ Congress then explicitly carved both positions out of legislation that created criminal penalties for violations of conflicts of interest rules governing the conduct of executive branch officials.¹⁴

Without the counterweight of a comparable source of work defending Congress's institutional interests, Members and staff are at a disadvantage.

Congress would need to decide where it would be most appropriate to house a congressional OLC equivalent. Ultimately, we believe the best solution is the one Congress identifies as the most suitable, and the Select Committee is well positioned to lead that effort. However, we will offer some general observations. As Berman notes, there are likely four places to house this office: within the House and Senate counsels' offices, the Government Accountability Office (GAO), the Congressional Research Service (CRS), or a new standalone office.¹⁵

The counsels' offices are relatively small and have a full workload with litigation responsibilities. In addition, part of the reason OLC enjoys a perception — however inaccurate — as a source of independent legal interpretation is its structural separation from the Justice Department's litigation components. A congressional equivalent would likely benefit from a similar separation.

The Government Accountability Office has the advantage of already providing legal interpretations on behalf of the legislative branch, and it has well-established procedures for carrying out that work.¹⁶ However, as Berman notes, its interpretive mandate is limited

primarily to appropriations and spending issues.¹⁷ As a result, it may not have a particular advantage in taking on the work of a congressional OLC.

The Congressional Research Service does have subject-matter expertise, primarily in its American Law Division. However, in recent years public reporting and a hearing before the House Administration Committee have raised concerns that both the service and the division struggle with a culture that is reluctant to take firm stances on contentious issues and has trouble retaining experts.¹⁸ Those qualities would be essential to a congressional OLC, so if these issues within the service are not addressed, it may not be a suitable home for this new office either.

As a result, a standalone office may be preferable. But, however it is implemented, a congressional Office of Legal Counsel is an idea whose time has come.¹⁹

Conclusion

Currently, there are simply too many barriers to effective oversight of the executive branch. Most of these barriers are the result of a concerted effort by presidents and the Justice Department to undercut Congress's constitutional power to investigate. But Congress can push back. A modern inherent contempt procedure would give it the tools to enforce its subpoenas without delay and in the face of executive branch opposition. And an office to articulate and advocate for congressional legal prerogatives would put Congress on a more equal footing with the executive branch going forward. My colleagues at POGO and I look forward to helping the Select Committee take on these important reforms in any way we can. Thank you again for the opportunity to testify.

¹ This testimony does not address enforcement of congressional subpoenas against private individuals. Congress has broad investigative powers in that context as well, but that power must be balanced against individual rights, including those afforded by the First and Fourth Amendments.

² Testimonial Immunity Before Congress of the Former Counsel to the President, 43 Op. O.L.C. ___ (2019), <https://www.justice.gov/olc/opinion/file/1215066/download>; Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. ___ (2014), <https://www.justice.gov/file/30896/download>; Memorandum from William H. Rehnquist, Assistant Attorney General, to John Ehrlichman, Assistant to the President, regarding Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff," February 5, 1971, <https://1wh5e1460wvi1xmab2umuziv-wpengine.netdna-ssl.com/wp-content/uploads/2019/06/Rehnquist-1971-memorandum-.pdf>.

³ See, for example, Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious, 36 Op. O.L.C. 1 (2012), <https://www.justice.gov/file/20591/download>; Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys, 31 Op. O.L.C. ___ (2007), <https://www.justice.gov/file/451161/download>. For a countervailing view based on historical practice and caselaw, see Mort Rosenberg, The Constitution Project, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry*, 2nd ed. (2017), 70-83, <https://archive.constitutionproject.org/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf>.

4 Prosecutorial Discretion Regarding Citations for Contempt of Congress, 38 Op. O.L.C. 1 (2014) <https://www.justice.gov/olc/file/2014-06-16-pros-disc-contempt-cong/download>; Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress, 32 Op. O.L.C. 65 (2008), <https://www.justice.gov/opinion/file/832851/download>.

5 Memorandum from Curtis E. Gannon, Acting Attorney General, about “Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch,” May 1, 2017, <https://www.justice.gov/olc/file/1085571/download>.

6 David Johnston, “Top Bush Aides to Testify in Attorneys’ Firings,” *New York Times*, March 4, 2009, <https://www.nytimes.com/2009/03/05/us/politics/05rove.html>; Josh Gerstein, “Subpoena fight over operation Fast and Furious documents finally settled,” *Politico*, May 9, 2019, <https://www.politico.com/story/2019/05/09/fast-and-furious-documents-holder-1313120>; Ann Marimow, “Biden administration, House Democrats reach agreement in Donald McGahn subpoena lawsuit,” *Washington Post*, May 11, 2021, https://www.washingtonpost.com/local/legal-issues/donald-mcgahn-subpoena-lawsuit-settled/2021/05/11/8c445dfe-b2ab-11eb-ab43-bebddd5a0f65_story.html; David Janovsky, “Congress May Be on Its Own,” Project On Government Oversight, September 3, 2020, <https://www.pogo.org/analysis/2020/09/congress-may-be-on-its-own/>.

7 The Supreme Court has recently shown signs that it prioritizes executive branch interests over those of Congress. David Janovsky and Sarah Turberville, “Congress Needs to Reclaim Its Time From the Courts,” Project On Government Oversight, November 18, 2020, <https://www.pogo.org/analysis/2020/11/congress-needs-to-reclaim-its-time-from-the-courts/>.

8 Courtney Bubl , “Republican Senator Holds Up Nominations While Awaiting IG Firing Explanations,” *Government Executive*, June 5, 2020, <https://www.govexec.com/oversight/2020/06/republican-senator-holds-nominations-while-awaiting-ig-firing-explanations/165963/>; Rosenberg, *When Congress Comes Calling*, 308 [see note 3].

9 Rosenberg, *When Congress Comes Calling*, 24-25 [see note 3].

10 “Inherent Contempt Fines Rule,” Good Government Now, <https://goodgovernmentnow.org/modified-inherent-contempt-enforcement-rule/>.

11 See, for example, Emily Berman, “Weaponizing the Office of Legal Counsel,” *Boston College Law Review*, vol. 62, no. 2 (2021), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3938&context=bclr>; Oona Hathaway, “National Security Lawyering in the Post-War Era: Can Law Constrain Power?” *UCLA Law Review*, vol. 68, no. 2 (2021), <https://ssrn.com/abstract=3530588>; *Article One: Restoring Capacity and Equipping Congress to Better Serve the American People: Hearing Before the House Select Committee on the Modernization of Congress*, 116th Cong. (January 14, 2020) (statement of Elise Bean, Co-director, Levin Center at Wayne Law), <https://www.congress.gov/116/meeting/house/110374/witnesses/HHRG-116-MH00-Bio-BeanE-20200114.pdf>; Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven: Yale University Press, 1990), 169-171.

12 Berman, “Weaponizing the Office of Legal Counsel,” 531-559 [see note 11].

13 Memorandum from Deputy Attorney General Laurence H. Silberman to Richard T. Burgess, Office of the President, about “Conflict of Interest Problems Arising out of the President’s Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution,” August 28, 1974, 2, <https://fas.org/irp/agency/doj/olc/082874.pdf>.

14 18 U.S.C. § 202(c) (2020), [https://uscode.house.gov/view.xhtml?req=\(title:18%20section:202%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:18%20section:202%20edition:prelim)).

15 Berman, “Weaponizing the Office of Legal Counsel,” 562-566 [see note 11].

16 Government Accountability Office, Office of the General Counsel, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (September 2006), <https://www.gao.gov/products/gao-06-1064sp>.

17 Berman, "Weaponizing the Office of Legal Counsel," 563 [see note 11].

18 *Oversight of the Congressional Research Service: Hearing before the House Administration Committee*, 116th Cong. (June 20, 2019), <https://cha.house.gov/committee-activity/hearings/oversight-congressional-research-service>; Chris Marquette, "Public to get rare look inside the Congressional Research Service, with attrition, morale points of contention," *Roll Call*, June 19, 2019, <https://www.rollcall.com/2019/06/19/public-to-get-rare-look-inside-the-congressional-research-service-with-attrition-morale-points-of-contention/>.

19 Congress came close to establishing such an office in the 1970s, but the House and Senate were unable to come to an agreement. Berman, "Weaponizing the Office of Legal Counsel," 563 [see note 11]; The advantages of a congressional OLC would likely extend beyond the oversight context into areas like national security law. Hathaway, "National Security Lawyering in the Post-War Era: Can Law Constrain Power?" [see note 11].

“Article One: Strengthening Congressional Oversight Capacity”

Hearing Before the House Select Committee
on the Modernization of Congress

Thursday, November 4, 2021, 9:00 AM

Testimony of Josh Chafetz
Professor of Law, Georgetown University Law Center

Chairman Kilmer, Vice Chairman Timmons, and Distinguished Members of the Committee:

Thank you for the opportunity to testify today regarding the vitally important topic of congressional oversight. My name is Josh Chafetz, and I am a Professor of Law at Georgetown University Law Center and an Affiliated Faculty Member of both the Government Department and the McCourt School of Public Policy at Georgetown. My research and teaching focus on legislative procedure, the separation of powers, and the constitutional structuring of American national politics. In 2019-2020, I served on the American Political Science Association’s Presidential Task Force on Congressional Reform, which produced a report for this Committee.¹

CONGRESS’S POWER—AND DUTY—TO CONDUCT VIGOROUS OVERSIGHT

Although oversight is not explicitly mentioned in the text of the Constitution, its existence is a necessary structural inference from the powers that are enumerated. Congress is given the power to legislate on all matters within the purview of the federal government,² including matters dealing with the structuring and operations of other parts of the federal government itself;³ to control the raising and disbursing of federal moneys;⁴ to impeach and try impeachments;⁵ and to propose constitutional amendments.⁶ (The Senate is also given the power to confirm principal officers and ratify treaties.⁷) This is a *very* expansive remit.⁸

¹ See AM. POL. SCI. ASS’N TASK FORCE ON CONGRESSIONAL REFORM, TASK FORCE REPORT 8-16 (2019), available at <https://www.apsanet.org/Portals/54/APSA%20RPCI%20Congressional%20Reform%20Report.pdf?ver=2020-01-09-094944-627> [hereinafter APSA REPORT].

² U.S. CONST. art. I, § 8; *id.* art. IV, § 3, cl. 2; *id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; amend. XIX, cl. 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

³ *Id.* art. I, § 8, cl. 18; *id.* art. II, § 1, cl. 4; *id.* § 2, cl. 2; *id.* art. III, § 1; *id.* § 2, cl. 2; *id.* amend. XX, §§ 3-4; *id.* amend. XXV, § 4.

⁴ *Id.* art. I, § 8, cl. 1-2; *id.* § 9, cl. 7.

⁵ *Id.* art. I, § 2, cl. 5; *id.* § 3, cl. 6-7; *id.* art. II, § 4.

⁶ *Id.* art. V.

⁷ *Id.* art. II, § 2, cl. 2.

⁸ See Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. (forthcoming 2021) (manuscript at 18 n.113), available at <https://ssrn.com/abstract=3788366> [hereinafter Chafetz, *Nixon/Trump*] (“Even if one accepts that any given exercise of the congressional investigatory power must be justified with respect to some explicitly enumerated congressional power, however, it does not follow that there is any matter beyond Congress’s capacity to investigate.... [E]ven an investigation for a (currently) unconstitutional purpose could be

Each of these vital constitutional powers requires access to information if it is to be exercised effectively in the public interest. As Senator Fulbright put it, “The power to investigate is one of the most important attributes of the Congress. It is perhaps also the most necessary of all the powers underlying the legislative function.”⁹ As the great legal scholar (and later member of the Federal Trade Commission and member and chair of the Securities and Exchange Commission) James Landis elaborated,

[K]nowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge.¹⁰

Or, more succinctly, “To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness.”¹¹ No sensible constitutional order would require its most representative institution, an institution tasked with carrying out the vital tasks listed above, to blind itself.¹²

Unsurprisingly, then, broad oversight powers have been understood to inhere in the congressional chambers from the earliest days of the Republic. In 1792, the House conducted the first major congressional investigation, inquiring into the defeat of an army force under the command of General Arthur St. Clair by a confederacy of Native American tribes at the Battle of the Wabash.¹³ That investigation, conducted by a special committee, included taking testimony from St. Clair himself and Secretary of War Henry Knox, as well as examining St. Clair’s personal papers and papers from the War Department and the Treasury Department (personally delivered by Treasury Secretary Alexander Hamilton). The committee’s investigation spurred Congress to take remedial action, removing authority for procuring army supplies from the War Department and locating it in the Treasury Department.¹⁴ Importantly, the House conducted the

justified as an investigation that might potentially lead to a constitutional amendment, making that (formerly) unconstitutional purpose constitutional.”)

⁹ J.W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951).

¹⁰ James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 205 (1926).

¹¹ *Id.* at 209.

¹² See also, e.g., JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 152-98 (2017) [hereinafter CHAFETZ, CONGRESS’S CONSTITUTION]; Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529 (2020) [hereinafter Chafetz, *Overspeech*]; Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 WAYNE L. REV. 1 (2018).

¹³ For accounts of the St. Clair investigation and the events giving rise to it, see ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 36-37 (1928); DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER 9-12 (2016); George C. Chalou, *St. Clair’s Defeat, 1792*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, at 3 (Arthur M. Schlesinger Jr. & Roger Bruns eds., 1975); Chafetz, *Overspeech*, *supra* note 12, at 537-38.

¹⁴ An Act Making Alterations in the Treasury and War Departments, ch. 37, § 2, 1 Stat. 279, 280 (1792). See Chalou, *supra* note 13, at 13 (characterizing this statute as “a slap at Knox”). See also KRINER & SCHICKLER,

St. Clair investigation after *rejecting* a proposal that it instead “request[]” that President Washington initiate an investigation into the defeat.¹⁵ As early as the Second Congress, then, it was vitally important to members of Congress that they, and not executive branch officials, be the ones who oversaw the executive branch and remedied any defects they found therein.

In conducting the St. Clair investigation, the House was calling on a long tradition of oversight by Anglo-American legislatures.¹⁶ By the middle of the eighteenth century, it was common to refer to the British House of Commons as “the grand inquest of the nation,”¹⁷ that is, the body tasked with inquiring into national affairs and righting any wrongs it might find. As William Pitt the Elder put it on the House floor in 1741, “We are called the Grand Inquest of the Nation, and as such it is our Duty to inquire into every Step of publick Management, either Abroad or at Home, in order to see that nothing has been done amiss.”¹⁸

Early American constitutional thinkers picked up on this “grand inquest” language and applied it to Congress. Virginia delegate George Mason argued at the Constitutional Convention that Congress should be required to meet once a year because “the Legislature, besides *legislative*, is to have *inquisitorial* powers, which can not safely be long kept in a State of suspension.”¹⁹ In his famous 1790-1791 “Lectures on Law,” Supreme Court Justice James Wilson (who had also played a major role as a Pennsylvania delegate to the Constitutional Convention) echoed: “The house of representatives, for instance, form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.”²⁰ And in the House itself in 1794, Massachusetts Federalist Fisher Ames, who had been a delegate to the Massachusetts ratifying convention, referred to “the character of this House as the grand inquest of the Nation, as those who are not only to impeach those who perpetrate offence, but to watch and give the alarm for the prevention of such attempts.”²¹

Although oversight was understood to be an important congressional power from the earliest days of the Republic, as both early constitutional discourse and the St. Clair investigation make clear, it gained prominence and importance with the rapid growth of the administrative state beginning in the late nineteenth century. Indeed, it was this era that gave rise to the most important Supreme Court decision on the scope of the congressional oversight power, *McGrain*

supra note 13, at 12 (noting that this investigation as a whole “embarrassed and politically damaged the Federalists” and emboldened the Jeffersonian faction in nascent partisan competition).

¹⁵ H.R. JOUR., 2d. Cong., 1st Sess. 551-52 (Mar. 27, 1792).

¹⁶ See Josh Chafetz, “*In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation*”: *Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 YALE J.L. & HUMAN. 181, 188-91, 195-99 (2013) (noting the House of Commons’ use of committees to take evidence and decide contested elections in the mid-sixteenth and early-seventeenth centuries); CHAFETZ, CONGRESS’S CONSTITUTION, *supra* note 12, at 48-49, 157-63, 268 (noting the Commons’ use of their investigatory power as a tool in their clashes with the Stuart monarchs in the seventeenth century).

¹⁷ See Chafetz, *Overspeech*, *supra* note 12, at 538-41 (tracing the development of the “grand inquest” formulation).

¹⁸ 13 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 172 (London, Richard Chandler 1743).

¹⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 199 (Max Farrand ed., rev. ed. 1966) (Madison’s recounting); *accord id.* at 206 (King’s recounting).

²⁰ JAMES WILSON, *Lectures on Law, Part II, Chapter 1: Of the Constitutions of the United States and of Pennsylvania—of the Legislative Department*, in 2 COLLECTED WORKS OF JAMES WILSON 829, 848 (Kermit L. Hall & Mark David Hall eds., 2007).

²¹ 4 ANNALS OF CONG. 930 (1794).

v. Daugherty, which arose out of the Senate’s investigation into the Teapot Dome scandal.²² Justice Willis Van Devanter, for a unanimous Court (with Justice Harlan Stone recused), held that, “[w]e are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”²³ He elaborated:

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 Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.²⁴

Subsequent cases have reaffirmed this holding.²⁵

Institutionally, Congress made a significant statement about the importance of oversight in the Legislative Reorganization Act of 1946, which tasked the standing committees in both chambers with an obligation to conduct oversight:

To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee²⁶

²² 273 U.S. 135 (1927).

²³ *Id.* at 174.

²⁴ *Id.* at 175.

²⁵ *See, e.g.,* *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.”); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (“This Court has often noted that the power to investigate is inherent in the power to make laws Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate.”); *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain* and *Watkins* to similar effect).

²⁶ Legislative Reorganization Act of 1946, § 136, Pub. L. No. 79-601, 60 Stat. 812, 832. On the 1946 Act generally, see CHAFETZ, CONGRESS’S CONSTITUTION, *supra* note 12, at 292-95; ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 140-50 (2001); Roger H. Davidson, *The Legislative Reorganization Act of 1946*, 15 LEGIS. STUD. Q. 357 (1990).

The Legislative Reorganization Act of 1970 reaffirmed this oversight obligation.²⁷ Equally importantly, in these acts and others, Congress began building out its own oversight capacity by regularizing and professionalizing both committee and member staffing;²⁸ directing increased staff and resources to nonpartisan institutions, including the Legislative Reference Service (renamed the Congressional Research Service in the 1970 Act), the Offices of Legislative Counsel, and the General Accounting Office (later renamed the Government Accountability Office);²⁹ and requiring that committees issue biennial oversight reports³⁰ and ensure that, to the greatest extent possible, programs within their jurisdictions were subject to annual appropriations.³¹ Moreover, myriad other statutes contain provisions meant to encourage or facilitate oversight, ranging from protections for whistleblowers,³² to the creation of the Congressional Budget Office,³³ to requiring departments and agencies to have inspectors general and chief financial officers.³⁴

In 1927, the House created a unified Committee on Expenditures in the Executive Department, to replace the eleven committees that previously had jurisdiction to oversee executive expenditures in various departments; in 1952, the committee's name was changed to the Committee on Government Operations—the precursor of today's Committee on Oversight and Reform—in order to emphasize its broader oversight remit.³⁵ In 1948, the Senate likewise transformed its Special Committee to Investigate the National Defense Program (popularly known as the Truman Committee, due to then-Senator Harry S. Truman's chairmanship from 1941-1945) into its Permanent Subcommittee on Investigations.³⁶ Both of these committees are tasked by their

²⁷ Legislative Reorganization Act of 1970, § 118, Pub. L. No. 91-510, 84 Stat. 1140, 1156 (requiring each standing committee to “review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee”). On the 1970 Act generally, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 294-95; SCHICKLER, *supra* note 26, at 213-17; Walter Kravitz, *The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375 (1990).

²⁸ See CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 292-94; Davidson, *supra* note 26, at 367-69; Kravitz, *supra* note 27, at 379, 383, 388.

²⁹ See CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 293-94. On the congressional support agencies as a suite, see Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

³⁰ Legislative Reorganization Act of 1970, § 118, 84 Stat. at 1156.

³¹ *Id.* § 253(a)-(b), 84 Stat. at 1174-75. On the ways in which annual appropriations facilitate congressional control over the executive, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 61-66.

³² E.g., Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 539, 555 (1912); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101(a), 92 Stat. 1111, 1116-17; Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16; Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, §§ 701-02, 112 Stat. 2396, 2413-17.

³³ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. II, 88 Stat. 297, 302-05.

³⁴ Inspector General Act of 1978, Pub. L. No. 95-452, § 5(b), 92 Stat. 1101, 1103; Chief Financial Officers Act of 1990, Pub. L. No. 101-576, § 102(b)(3), 104 Stat. 2838, 2839; *id.* § 202, 104 Stat. at 2840; *id.* § 205, 104 Stat. at 2844; *id.* § 301, 104 Stat. at 2847-48; *id.* § 303(e), 104 Stat. at 2852.

³⁵ See *Guide to House Records, Chapter 11: Records of the Government Operations Committee and Its Predecessors*, NAT'L ARCHIVES & RECORDS ADMIN, CTR. FOR LEGIS. ARCHIVES, <https://www.archives.gov/legislative/guide/house/chapter-11.html> (last visited Oct. 31, 2021).

³⁶ See *Historical Background*, PERMANENT SUBCOMM. ON INVESTIGATIONS 1, <https://www.hsgac.senate.gov/imo/media/doc/PSIHistoricalBackgroundto115th.pdf> (last visited Oct. 31, 2021).

chambers with roving oversight jurisdiction,³⁷ further strengthening the chambers' commitments to vigorous and effective oversight.

INFORMATION DISPUTES BETWEEN CONGRESS AND THE EXECUTIVE

In service of this robust congressional authority to conduct oversight, discussed above, the chambers have developed a number of tools.³⁸ But it has become increasingly apparent across the first three presidencies of the twenty-first century that those tools, as the chambers have chosen to use them, have left a significant hole in Congress's oversight capacity. In particular, one question has arisen with increasing urgency: how can Congress force information from an executive branch that is unwilling to provide it? Any satisfying answer to this question must be sensitive not only to whether the information demanded is *eventually* provided to the chamber demanding it, but also to whether it is ultimately provided on a *timeframe* that is useful to that chamber.

In 2007, the House Judiciary Committee issued subpoenas to former White House Counsel Harriet Miers and then-White House Chief of Staff Joshua Bolten, in connection with the committee's inquiry into the firing of a number of U.S. Attorneys. After they refused to comply, the House voted to hold them in contempt in 2008; the Department of Justice refused to prosecute them;³⁹ and the committee sued, seeking injunctive and declaratory relief. Although the committee "won" before the district court,⁴⁰ the case was ultimately settled while on appeal in March 2009—a month and a half into the next Congress and the next presidential administration.⁴¹ The ultimate resolution clearly did nothing to help Congress oversee the George W. Bush Administration.

In 2011, the House Oversight Committee subpoenaed a number of documents from the Department of Justice in connection with its investigation into the Bureau of Alcohol, Tobacco, Firearms and Explosives's "gunwalking" operation codenamed "Operation Fast and Furious." When DOJ turned over less than the committee thought it was entitled to, the House held Attorney General Eric Holder in contempt in 2012. Once again, DOJ refused to prosecute; once again the committee sued. It was not until 2016 that a trial judge ordered that most of the

³⁷ RULES OF THE HOUSE OF REPRESENTATIVES, 117TH CONG., R. X(4)(c)(1)-(2) (2021); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXV(1)(k)(2) (2013).

³⁸ For discussions of these tools, see Chafetz, *Overspeech*, *supra* note 12, at 545-48; CHRISTOPHER M. DAVIS ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL (2021); MORTON ROSENBERG, THE CONST. PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY (2017).

³⁹ 2 U.S.C. § 194 provides that a U.S. Attorney "shall ... bring" a contempt of Congress citation certified by a chamber's presiding officer "before the grand jury for its action." Despite the seemingly mandatory language, the Department of Justice concluded that Miers and Bolten had properly invoked executive privilege; therefore "non-compliance ... with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers." Letter from Att'y Gen. Michael B. Mukasey to Speaker Nancy Pelosi (Feb. 29, 2008), *available at* <https://www.documentcloud.org/documents/373620-mukasey-letter-to-pelosi-feb-29-2008.html>.

⁴⁰ Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

⁴¹ See CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 185-88 (describing the lifecycle of the controversy).

documents had to be turned over (Holder had stepped down as Attorney General the previous year); fights over some of the remaining records stretched into the Trump Administration.⁴²

While oversight conflicts between the House and the George W. Bush and Obama Administrations focused on particular, discrete issues, the Trump Administration engaged in more systematic, across-the-board stymieing of congressional oversight.⁴³ Even in situations where clear statutory text seemed to impose a duty to comply with congressional information demands, the administration refused. Consider the “rule of seven,” which provides that any seven members of the House Oversight Committee or any five members of the Senate Committee on Homeland Security and Governmental Affairs can request information from any executive agency, which “shall submit any information requested of it relating to any matter within the jurisdiction of the committee.”⁴⁴ In June 2017, eighteen members of the House Oversight Committee demanded that the General Services Administration turn over details of the contract by which the Old Post Office Building in Washington was leased to an entity owned by Trump and his children. That demand was ignored.⁴⁵ Or consider the statutory requirement that the Treasury “shall furnish” the Ways and Means Committee with “any [tax] return or return information specified” in a written request from the committee chair.⁴⁶ The committee made such a request in 2019 for President Trump’s tax returns, and once again the demand was ignored.⁴⁷

In both of those cases, the House committees sued, and both of those cases remain tied up in litigation to this day. In the “rule of seven” case, the D.C. Circuit took until December 29, 2020—about three weeks before President Biden’s inauguration—to rule that the committee members had standing to sue,⁴⁸ but the case has yet to be taken up by the district court on remand. In the tax returns case, six months into the Biden Administration, the Department of Justice’s Office of Legal Counsel issued an opinion concluding that the Treasury “must comply” with the committee’s demand.⁴⁹ Trump moved to block the Treasury from complying, and a hearing is currently scheduled for later this month.⁵⁰ Indeed, judicial pacing and other judicial choices served to slow oversight of the Trump Administration across the board to such an extent as to render it largely impotent.⁵¹ To whatever extent information is eventually turned over, it will obviously come far too late to help with oversight of the Trump Administration.

⁴² See *id.* at 188-89 (describing the lifecycle of this controversy).

⁴³ See, e.g., Charlie Savage, *Trump Is Setting Course to Battle House Oversight*, N.Y. TIMES, Apr. 25, 2019, at A1.

⁴⁴ 5 U.S.C. § 2954.

⁴⁵ The facts are recounted in *Cummings v. Murphy*, 321 F. Supp. 3d 92, 97-99 (D.D.C. 2018).

⁴⁶ 26 U.S.C. § 6103(f)(1).

⁴⁷ See Comm. on Ways & Means v. U.S. Dep’t of the Treasury, No. 1:19-cv-01974, 2019 WL 4094563 (D.D.C. Aug. 29, 2019).

⁴⁸ *Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020).

⁴⁹ Ways and Means Committee’s Request for the Former President’s Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. (slip op. at 39) (July 30, 2021), <https://www.justice.gov/olc/file/1419111/download>.

⁵⁰ See Docket, Comm. on Ways & Means v. U.S. Dep’t of the Treasury, No. 1:19-cv-01974 (D.D.C.) (entry dated Oct. 25, 2021).

⁵¹ See generally Chafetz, *Nixon/Trump*, *supra* note 8 (manuscript at Part II).

The experience of the last 15 years thus holds two important lessons for congressional oversight of the executive branch. First, and perhaps most obviously, the criminal contempt provision⁵² is almost entirely useless as against the executive branch, because the executive branch will not prosecute its own officers. (One could imagine it having some effect if a contumacious official feared that some future administration might prosecute her, but thus far that has not happened and does not appear to have shaped the thinking of any executive-branch contemnor.)

Second, mechanisms for enforcing congressional information demands that rely on the courts are fool's errands.⁵³ Even an eventual substantive “victory” in the courts will almost always come too late for purposes of overseeing the executive branch. And presidents, knowing this, will have every incentive to draw out court fights for as long as possible.

As a result, Congress is very much in need of creative thinking about nonjudicial avenues for forcing the executive branch to produce information.

APPROPRIATIONS-BASED OVERSIGHT

I would suggest that some of the most promising mechanisms for enforcing congressional information demands rely on Congress's power of the purse.⁵⁴ Because only Congress can control the disbursal of money from the Treasury,⁵⁵ and because every part of the executive needs money to function, Congress can use its power of the purse to put significant pressure on the executive to change its behavior in all sorts of ways—including in how the executive responds to congressional information demands.⁵⁶

The simplest and crudest form this might take would be purely retroactive: during an extended controversy with some part of the executive branch over access to information, a chamber could use the next appropriations cycle to put pressure on that agency by squeezing its funding, including perhaps by zeroing out the funding for a particular contumacious official. Of course, the other chamber might not agree with this approach, and the president almost certainly would not. But appropriations bills are must-pass: if the choice is between accepting a bill that funds a substantial portion of the government but also slashes the funding of some targeted agency or office in response to its stonewalling oversight demands, on the one hand, or refusing to pass or vetoing that bill, thereby creating lapses in appropriations for every program covered by that appropriations bill, on the other, simply accepting the bill with the retaliatory cuts may be the least-bad option. In this regard, the practice of annual appropriations of discretionary spending is significantly empowering to each house of Congress.⁵⁷

⁵² 2 U.S.C. §§ 192, 194.

⁵³ See generally Chafetz, *Nixon/Trump*, *supra* note 8.

⁵⁴ For a broader, historically grounded analysis of Congress's power of the purse generally, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 45-77.

⁵⁵ See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

⁵⁶ These proposals draw on testimony I submitted to the House Budget Committee last year. See *Protecting Congress' Power of the Purse and the Rule of Law*, Hearing Before the H. Comm. on the Budget, 116th Cong. 11-74 (March 11, 2020), available at <https://www.govinfo.gov/app/details/CHRG-116hhrg41966/context>.

⁵⁷ See CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 61-73.

One can take this basic insight and then begin to add complexities that might make it less crude and perhaps at the margins less politically fraught. Consider, for example, a change to the standing rules of the House that would create a point of order against an appropriation to pay the salary of anyone who had been held in contempt by the House and whose contempt had not been purged. Of course, as with any point of order, it could be waived, but it would flip the presumption: vigorous use of the power of the purse to enforce information demands would simply be applying House rules, whereas paying the salary of a contumacious official would require an affirmative vote.

Consider also the use of oversight riders: as Senator Blumenthal and I have proposed,⁵⁸ certain appropriations could come with riders requiring that some official or officials provide specified information to Congress. If they fail to provide that information, it could trigger automatic cuts, either to the underlying appropriation or to the salaries of the officials who have failed to comply. And, importantly, these riders should come with explicit *non-severability clauses*, insisting that the rider and the appropriation stand or fall together. Without such a clause, if the Office of Legal Counsel decides that an appropriations rider is unconstitutional, then the executive considers itself free to spend the appropriated funds without the restrictions imposed by the rider.⁵⁹ In effect, the OLC's determination acts as a de facto line-item veto of the rider alone. A non-severability clause would significantly up the cost to the executive of making this determination: it would, in effect, say, "You can decide that this rider is unconstitutional, but in that case you lose the appropriation to which it was attached, as well." (The enforcement of such provisions would be facilitated by a requirement that OLC publish its budget and appropriations law opinions, a requirement that was included in the Congressional Power of the Purse Act introduced in the last Congress.⁶⁰)

While the above suggestions all rely on the threat of *withholding* money as a way to change executive branch behavior, I would also suggest one way Congress might *spend* money to enhance its oversight capabilities: internal capacity building. By increasing its own ability to find facts and uncover abuses, Congress can make itself both less dependent on information shared by the executive and also more aware of when the executive is withholding important information. And yet congressional capacity—as measured by the number of member and committee staff, the number of staff at nonpartisan institutions like the Congressional Budget Office, Government Accountability Office, and Congressional Research Service, staff tenure in office, and staff pay—has been in decline for decades.⁶¹ The American Political Science Association Presidential

⁵⁸ Richard Blumenthal & Josh Chafetz, *Trump is Already Trying to Get Around CARES Act Oversight*, SLATE (Apr. 16, 2020), <https://slate.com/news-and-politics/2020/04/richard-blumenthal-trump-cares-act-oversight.html>.

⁵⁹ For published examples of OLC deciding just that, see, e.g., *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C., 2011 WL 4503236 (Sept. 19, 2011); *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C., 2009 WL 2810454 (June 1, 2009).

⁶⁰ Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 214 (introduced in the House Apr. 28, 2020).

⁶¹ See Josh Chafetz, *Delegation and Time ... And Staff*, REGULATORY REV. (Mar. 4, 2020), <https://www.theregreview.org/2020/03/04/chafetz-delegation-time-staff/>; Josh McCrain, *Congressional Staff Salaries Over Time* (May 31, 2017), <http://joshuamccrain.com/index.php/2017/05/31/congressional-staff-salaries-over-time/>; R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44682, STAFF TENURE IN SELECTED POSITIONS IN HOUSE MEMBER OFFICES, 2006-2016 (2016); R. ERIC PETERSON & SARAH J. ECKMAN, CONG.

Task Force on Congressional Reform recommended significant increases in capacity across the board,⁶² as has this Committee. The FY2022 Legislative Branch Appropriations bill, passed by the House in July,⁶³ would make significant strides in this direction,⁶⁴ but more can still be done, and whatever is done to increase capacity will redound significantly to Congress's benefit overall, and in conducting oversight in particular.

CONCLUSION

Oversight is an absolutely crucial function of Congress in our constitutional order. And to conduct oversight effectively, Congress needs to be able to force information from an executive branch that is at times reluctant to provide it, as the growing conflicts over information between congressional houses and the executive in the last two decades have made increasingly clear. Congress's power of the purse provides it with levers that it can use in these conflicts, and it would be well advised to make creative use of those levers going forward, so as to maintain its proper role in our constitutional system.

Thank you.

RESEARCH SERV., R44688, CONGRESSIONAL STAFF: CRS PRODUCTS ON SIZE, PAY, AND JOB TENURE (2016); MOLLY REYNOLDS ET AL., BROOKINGS INST., VITAL STATISTICS ON CONGRESS ch. 5 (Mar. 2019), *available at* <https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf>.

⁶² APSA REPORT, *supra* note 1, at 8-16.

⁶³ Legislative Branch Appropriations Act, 2022, H.R. 4346, 117th Cong. (passed the House July 28, 2021).

⁶⁴ *See generally* H.R. Rep. No. 117-80 (2021).