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## REASSERTING CONGRESS' INVESTIGATIVE AUTHORITY

Mort Rosenberg

### EXECUTIVE SUMMARY

Whether acting as a body or through its committees, Congress has the absolute constitutional power and responsibility to make and enforce any demands to the executive branch for information it deems necessary to accomplish its legislative duties. It has established sufficient rules, tools and support mechanisms to identify, analyze and effectively use such information, though it is questionable whether such mechanisms are adequately funded. However, a 15-year-long uncontested strategy by the executive branch of forcing Congress to enforce its documentary and testimonial subpoenas through civil litigation is obstructing Congress' core constitutionally mandated legislative function.

Moreover, the failure of committees to impose meaningful consequences for agency delays or outright refusals to comply with information requests has fostered an environment wherein agencies purposefully employ delay tactics and assert dilatory, nonconstitutional privileges precisely to frustrate Congress's lawful requests.

The recent congressional failure to challenge such blatant

### CONTENTS

Executive summary	1
Congress' plenary investigative authority	1
The executive strikes back	2
Flawed executive branch arguments	3
How Congress can reassert its investigative authority	5
About the author	5

executive usurpation reflects an abnegation of institutional integrity and will. However, Congress can reassert its investigatory authority and should do so by challenging the flawed arguments promulgated by the U.S. Justice Department in the ongoing case, *House of Representatives v. Holder*.<sup>1</sup>

### CONGRESS' PLENARY INVESTIGATIVE AUTHORITY

No court has validated a claim against the merits of a congressional information request since the Supreme Court's 1974 ruling in *U.S. v. Nixon*,<sup>2</sup> which recognized but rejected a presidential claim of privilege. This is for good reason.

The constitutional basis of Congress' nearly absolute oversight and investigatory powers is irrefutable. The courts have consistently recognized that, in order to perform its fundamental responsibilities, Congress can and must be able to acquire information from the president and the departments and agencies of the executive branch. The structure of checks and balances rests on the principle that Congress has the right to know everything the executive is doing. This includes all of its policy choices and the outcomes of their implementation.

The Supreme Court has made it clear that Article I presupposes Congress' meaningful access to information so that it can responsibly exercise its obligations to legislate executive conduct; to fund or defund programs related to executive policy; and to pursue investigations of questionable executive behavior. Without timely knowledge of the executive branch's policy choices and activities, which is often unavailable unless provided directly by the executive, Congress cannot perform the duties the Framers envisioned. In its 1927 ruling in *McGrain v. Daugherty*, the landmark case with respect to the breadth and importance of contemporary investigative oversight, the Supreme Court underscores the ineluctability of an effective information process and Congress' core legislative responsibilities:

1. See, Committee on Oversight and Government Reform, *United States House of Representatives v. Holder*, 979 F.Supp.2d 1 (D.D.C. 2013) and 2016 U.S. Dist. LEXIS 5713 (D.D.C. Jan. 19, 2016). The district court's ruling is presently pending review before a panel of the District of Columbia Court of Appeals (Case No. 16-5078). The nominal defendant is currently Attorney General Jeff Sessions.

2. *U.S. v. Nixon*, 418 U.S. 683 (1974). A "merits decision" refers to a case that was not decided on procedural grounds, but rather proceeded to the crux of the dispute in question.

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to effect or change; or where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be made to others who may have it. Experience has taught that mere requests for such information are often 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. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute to the power to legislate—indeed as inhering in it.<sup>3</sup>

In order to take back its authority in this regard, congressional committees must establish their credibility with the White House and the executive departments and agencies they oversee. This must be done early, often and consistently. They must also do so in a manner that evokes respect, if not fear. What's more, the tools already exist. Standing and special committees are vested with an array of formidable weapons to support their powers of inquiry. These include the power to subpoena testimony and documents and to grant immunity to override a witness's claim of the self-incrimination privilege.

The Supreme Court and appellate courts also have approved specific practices Congress can use to exercise its oversight and to conduct hearings that do not accord witnesses with the full panoply of procedural rights enjoyed by those in adjudicatory proceedings.<sup>4</sup> For example, there is no right to cross-examine adverse witnesses or to discover materials utilized by a committee as the basis for questions. Further, common law privileges, such as the attorney-client or deliberative process privileges, are available only at a committee's discretion. In fact, under new House rules promulgated for the 115<sup>th</sup> Congress, agency witnesses subpoenaed for staff deposition may not be accompanied by agency counsel and agency representatives, and members of the public are not allowed to attend the proceeding.<sup>5</sup>

However, the efficacy of these tools relies on the credible threat of a meaningful consequence for any refusal to provide necessary information in a timely manner. Since 1795, the prevailing threat has been the possibility of citation for criminal contempt of Congress or a trial at the bar of one of

the houses of Congress,<sup>6</sup> either of which could result in fines or imprisonment.

There can be little doubt that such threats were effective in the past, at least until 2002. In particular, between 1975 and 1998, there were 10 votes to hold cabinet-level officials in contempt.<sup>7</sup> All resulted in complete or substantial compliance with the information demands in question without proceeding to trial. In fact, the threat these instances established was so credible that until 2002, even the mention of a subpoena was often sufficient to move an agency to disclose documents and/or to provide testimony of agency or executive office officials. The last such successful instance was the failed presidential claim of privilege during House Oversight Committee Chairman Dan Burton's 2001-2002 investigation of the two decades of informant corruption in the FBI's Boston regional office.<sup>8</sup> Indeed, this was a bipartisan effort wherein a contempt vote was a virtual certainty if executive branch officials did not acquiesce to congressional demands.

## THE EXECUTIVE STRIKES BACK

Congress is presently under a literal siege by the executive and it has not come suddenly. Rather, it is a calculated offensive that has been underway for some time. In particular, the last decade and a half have seen, among other significant challenges, an unlawful FBI raid on a congressional office; DOJ criminal prosecutions of members of Congress that have denied them speech or debate protections during legislative activities; presidential co-option of legislative oversight of agency rulemaking; presidential refusal to execute enacted statutory direction faithfully; and two unsuccessful attempted usurpations of the Senate's appointment power that were eventually held unlawful by the Supreme Court.<sup>9</sup>

Of utmost concern with respect to investigative oversight of executive branch officials has been adoption of a stance

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6. Under the inherent contempt power, the accused individual is arrested and brought before the House or Senate by the sergeant-at-arms, tried in a trial in the House or Senate chamber and then can be imprisoned and/or fined upon conviction. The maximum period of incarceration is the end of the legislative session. The contemnor is accorded due process protections, including representation by counsel and may contest the arrest and detention by seeking judicial review through a habeas corpus petition.

7. Morton Rosenberg, "When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry," *The Constitution Project*, 2017, Chs. 3, p. 27, and ft. 83.. <http://constitutionproject.org/documents/when-congress-comes-calling-2/>.

8. Alissa M. Dolan, "The House Committee on Government Reform Investigation of the FBI's Use of Confidential Informants" in "When Congress Comes Calling, *The Constitution Project*, 2017, pp. 265-73. <http://constitutionproject.org/documents/when-congress-comes-calling-2/>.

9. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) which held that the president's unilateral determination that the Senate is in recess for recess appointment purposes is unconstitutional; the Senate alone makes such determinations through the exercise of its internal rulemaking authority. See also, *NLRB v. SW General, Inc.*, Case No. 15-1251 (March 21, 2017) which held that presidential designation of a temporary appointment to any position that requires Senate confirmation violates the limitations imposed by the Federal Vacancies Reform Act.

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3. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

4. See *Hannah v. Larche*, 363 U.S. 420, 445, (1960); see also *United States v. Fort*, 443 F. 2d 670 (D.C. Cir. 1970, cert. denied, 403 U.S. 932 (1971)).

5. 162 Cong. Rec. H536-37 (daily ed. Jan. 13, 2017).

first enunciated by the DOJ's Office of Legal Counsel (OLC) in 1984 limiting Congress' ability to hold executive branch officers in contempt.<sup>10</sup> The OLC opinion came in response to a court's failure to enjoin the House speaker's transmission of a contempt citation against the administrator of the Environmental Protection Agency. The OLC asserted that the historic congressional processes of contempt, which are designed to ensure compliance with Congress' information gathering prerogative, are unconstitutional and unavailable to Congress if the president unilaterally determines that executive officials need not comply. Accordingly, the OLC declared that, in such instances, it would not present contempt citations to a grand jury, as required by law.

The consequence has been to force committees to seek subpoena enforcement through civil litigation. This stratagem has been shown in two recent cases to cause unnecessary delays that undermine the effectiveness of timely committee oversight. They also open the door to aberrant judicial rulings.

The first such case, *Committee on Judiciary v. Miers* (2008), involved an investigation into whether presidential firings of nine U.S. Attorneys in 2006 were politically motivated.<sup>11</sup> Ultimately, the investigation led to subpoenas for the White House counsel, the president's chief of staff and a close adviser. Subsequently, the president claimed executive privilege and ordered all the subpoenaed parties not to testify or produce documents, asserting that his invocation of privilege cloaked them with absolute immunity from compulsory processes. In response, the House voted both the White House counsel and the chief of staff in contempt of Congress, but the attorney general refused to present the citation to a grand jury, as required by law. The House then authorized its first suit to enforce a subpoena. The presiding district court judge ruled that the House has inherent constitutional power to litigate the enforcement of the subpoena and further, that the presidential invocation of privilege did not extend a cloak of immunity to officials. The government appealed the ruling but the administration changed before the case was heard, thus resulting in a settlement.<sup>12</sup> Nevertheless, the investigation and litigation spanned more than two years, with an inconclusive resolution that would hardly deter future executive behavior; a fact that was confirmed not long thereafter.

Currently on appeal, *House of Representatives v. Holder* (AKA the "Fast and Furious" case) has been under committee investigation and subsequent litigation for more than six and a half years. In an initial decision, the district court ruled that congressional committees *must* recognize agency claims of common law deliberative-process privilege that have traditionally been merely discretionary.<sup>13</sup> This shifted the burden of proof away from the witness or agency in question and onto the congressional committee making the request. As a result, agencies have become generally reluctant to comply in a timely and complete manner, because there is little legal incentive to do so, as such refusals require committees to seek court enforcement.

## FLAWED EXECUTIVE BRANCH ARGUMENTS

The stance first articulated by the DOJ and OLC in the 1980s noted above is historically and constitutionally flawed. Passage of the 1857 criminal contempt law<sup>14</sup> did not, as OLC has suggested, intend to vitiate use of both criminal and inherent contempt against executive branch officials. Moreover, during the legislative debate on the bill—despite the objection of opponents to the sponsors' insistence on a continuance of committee discretion with respect to claims of attorney-client privilege—a proposed amendment to end the practice was rejected.

OLC also argues that when the criminal contempt statute was enacted in 1857 to supplement (but not supplant) the inherent contempt process, Congress' intent was that it would not be used against executive branch officials. The office further argues that there has never been an instance of either process used in that manner. However, that very question was raised during the law's legislative history. Indeed, the sponsors noted that the House had used it 11 years earlier to investigate then-Secretary of State Daniel Webster's handling of expenditures from a "secret service" account provided by law for foreign affairs matters.<sup>15</sup> In that case, the House demanded documents from President James K. Polk, and subpoenas were issued for testimony and documents from former Presidents John Quincy Adams and John Tyler and Secretary of State James Buchanan. The case concluded when all such subpoenas were satisfied either by testimony or through answers to written interrogatories. Moreover, since then, there have been two arrests of federal officials pursuant to inherent contempt proceedings: In 1879, George F. Seward,

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10. See, e.g., "Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege," 8 Op. OLC 101 (1984). See also, "Responses to Requests for Information Made Under the Independent Counsel Act," 10 Op. OLC 68 (1986).

11. *Committee on Judiciary of U.S. House of Representatives v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008).

12. *Committee on Judiciary of U.S. House of Representatives v. Miers*, No. 08-5357, 2009 WL 3568649 (D.D.C. Oct. 14, 2009).

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13. *Committee on Oversight and Government Reform, United States House of Representatives v. Holder*, 979 F.Supp.2d 1 (D.D.C. 2013).

14. 2 U.S.C. §§ 192 & 194.

15. Todd Garvey, "The Webster and Ingersoll Investigations" in "When Congress Comes Calling, *The Constitution Project*, 2017" pp. 287-92.

then-minister to China; and in 1916, H. Snowden Marshall, a U.S. attorney for the Southern District of New York.<sup>16</sup>

Moreover, neither the criminal nor inherent contempt processes should be dismissed out of hand as an aspect of executive prosecutorial discretion. Since 1821, four Supreme Court rulings have concluded that Congress has the inherent constitutional power to protect itself and to punish individuals for contempt. Such power hinges on the argument that failure to do so would “expose [it] to every indignity and interruption, that rudeness, or even conspiracy, may mediate against it.”<sup>17</sup>

The 1857 criminal contempt legislation was passed in the spirit of that same self-protective authority, thanks to the Supreme Court’s limitation in *Anderson v. Dunn* that incarceration after an inherent contempt conviction could not continue beyond the legislative session in which it was imposed. The limits imposed by the *Anderson* decision often meant the punishment was minimal. Congress believed that having the potential for more substantial jail time would increase the meaningfulness of a failure to comply with a subpoena.<sup>18</sup>

An apt analogy can be found in the similar self-protective contempt authority of the federal courts provided by *Young v. U.S. ex rel Vuitton et. Fils* (1987). There, the Supreme Court recognized that courts may appoint private attorneys to act as prosecutorial officers for the limited purpose of vindicating their authority.<sup>19</sup> The next year, in its landmark ruling in *Morrison v. Olson*, the court cited *Young* as a precedent for the court appointment of a prosecutor where there is no “incongruity between the functions normally performed by the courts and the performance of their duty to appoint.”<sup>20</sup> In upholding the validity of the independent counsel legislation, the court noted that:

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16. Rosenberg, “When Congress Comes Calling,” 25; See also Josh Chafetz, “Executive Branch Contempt of Congress,” 76 *U. of Chicago L. Rev.* 1083, 1137-38 (2010); and Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* (New Haven: Yale University Press, 2017), pp.176-79, 191-92. At the time, Seward was the minister to China and was alleged to have misappropriated large sums of money during the time he was consul general in Shanghai. When he refused to turn over ledger books subpoenaed by an investigating committee, he was arrested. Similarly, at the time of his arrest, H. Snowden Marshall was a U.S. district attorney for the Southern District of New York. He had written a newspaper article accusing a congressional subcommittee of attempting to frustrate a grand jury investigation. The House adopted a resolution of contempt and he was arrested for “violating [...] its privileges, its honor, and its dignity.” His writ of *habeas corpus* was upheld by the Supreme Court, but the court expressed no doubt that the House possessed “a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given” in the Constitution. See *Marshall v. Gordon*, 243 U.S. 521, 541 (1917).

17. *Anderson v. Dunn*, 19 U.S. 204 (1821); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *McGrain v. Daugherty*, 273 U.S. 135 (1927); and *Jurney v. MacCracken*, 294 U.S. 125 (1935).

18. *Anderson v. Dunn*, 19 U.S. 204 (1821).

19. *Young v. U.S. ex rel Vuitton et. Fils*, 481 U.S. 787 (1987)

20. *Morrison v. Olson*, 487 U.S. 654, 675-77 (1988)

Congress, of course, was concerned when it created the Office of Independent Counsel with the conflicts of interests that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers. If it were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch.<sup>21</sup>

The *Morrison* opinion also made clear that prosecutorial discretion was not a core presidential authority.<sup>22</sup>

Accordingly, a strong argument can be made that the DOJ’s claim of presidential privilege is misplaced. In fact, the only defense it might properly raise is that it would face a conflict of interest if asked to present a contempt citation to a grand jury against one of its clients. However, DOJ’s own rules<sup>23</sup> provide the solution to such issues of conflict: the appointment of private counsel as prosecutor or of a DOJ independent counsel. For these reasons, a court order that requests the DOJ to exercise those rules would be a credible option to challenge the next refusal to present a criminal contempt.

As to the DOJ’s claim that it would be unconstitutional for Congress to use traditional inherent contempt practices—i.e., arrest and incarceration—against executive officials, the short answer is that there is no legal authority for such a claim. If there is a legitimate legislative basis for the sought-after documents or testimony, at least four Supreme Court rulings support an inherent contempt proceeding. Although there are case law comments that arrest and detention is overly tough and onerous—or, in the words of U.S. District Judge John D. Bates<sup>24</sup> in the *Miers* case, “unseemly”—no court has held the procedure unlawful.

Further, there is no reason that inherent contempt cannot be made “seemly” and still be effective. Currently, there is language in some of the high court’s inherent contempt rulings suggesting that Congress could impose fines.<sup>25</sup> In another case, the court approved substantial fines imposed on a contemptuous union. Indeed, logic dictates that if it is permissible to incarcerate someone found in contempt, certainly fining him or her is within bounds.

The most viable option, however, is still (the threat of) a modified trial at the bar of the House or Senate. In *Nixon v. United States* (1993) the court allowed the Senate to appoint a

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21. *Ibid.*, 677.

22. *Ibid.*, 681.

23. 28 C.F.R., Part 600.

24. *Miers*, 558 F.Supp.2d 53, 78 (D.D.C. 2008).

25. See *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881); *United States v. United Mine Workers*, 320 U.S. 258 (1947). See also Rosenberg, “When Congress Come Calling,” 24-25.

committee to gather evidence and make preliminary findings and suggestions to the body about impeachments before it went to trial before the Senate. This rejected the claim that the entire proceeding must take place before the full body.<sup>26</sup> In cases like these, the contemnor retains all necessary due process protections. If convicted, the punishment is limited to fines. This would make the contempt process entirely internal to the chamber of Congress and would remove the delays associated with *habeas corpus* review. Imposition of the fine after conviction could trigger a point of order that would result in gradual reduction in the officer's pay until he or she complies.

## HOW CONGRESS CAN REASSERT ITS INVESTIGATIVE AUTHORITY

For enforcement of the next contempt citation, Congress should take both courses of action simultaneously. It should first challenge the refusal to present the contempt citation and ask the court to direct the DOJ to appoint an independent prosecutor. At the same time, it should commence the inherent contempt proceeding. The Supreme Court has ruled both processes can be done simultaneously and that there is no double jeopardy problem.<sup>27</sup> Since each contempt process serves a different end, both should be available. Inherent contempt would encourage compliance, while criminal contempt would punish intentionally obstructive recalcitrance.

Both options must be available to investigating committees. In the past, the credible threat that they might be used provided sufficient, but not overbearing, leverage to convince the executive to come to the negotiating table. This occurred, most often, well before a vote of contempt by a full chamber. If such practice were properly used today, it stands to reason that, once again, it would be rare that an agency head would agree to endure the potential risk and personal cost of a public trial that could end in possible imprisonment and/or fine, merely for the sake of protecting presidential secrecy. Any revelations made as a result would not cripple or endanger the presidency any more now than in the past.

Finally, the present circumstances make it the appropriate time for this particular constitutional confrontation, as scholars Eric Posner and Adrian Vermuele have pointed out:

[U]nder certain conditions the active virtues, the embrace of clarifying conflict, should be preferred to the passive virtues, or the evasion of unnecessary conflict. ... As against the passive virtues, however, decisive constitutional conflicts and precedent centered showdowns should actually be encouraged where the

value of waiting for more information is low, where similar issues will frequently recur in future generations (so that the value of settling questions now is high), and where legal uncertainty will impose high cost in the future. ... Where aggregate future conflict, even properly discounted, imposes greater social costs than present conflict, a showdown in the current period would be socially beneficial.<sup>28</sup>

As demonstrated, the *Miers* and “Fast and Furious” litigations have unquestioningly shown that the DOJ's strategy of forcing subpoena enforcement into the courts is crippling Congress' essential information-gathering authority. This obstructs its core legislative functions. The uncertainty about whether committees can impose meaningful consequences for delays or outright refusals to comply has already fostered an environment of agency slow-walking and assertions of nonconstitutional privilege claims. Timely oversight in such circumstances is inevitably stymied and the long-term costs to the integrity of our constitutional institutions are incalculable.

The continuation of a posture of acquiescence will do no more than encourage further executive usurpation. Indeed, the failure to mount immediate constitutional challenges is an abdication of Congress' vested responsibilities.

### ABOUT THE AUTHOR

**Morton Rosenberg** was a specialist in American public law with the American Law Division of the Congressional Research Service (CRS) for more than 35 years. Among his areas of expertise at CRS were the problems raised by the interface of Congress and the executive, particularly with respect to congressional oversight of the executive branch. Mort was called on by committees to advise and assist on a number of significant inquiries, including Watergate, Iran-Contra, Rocky Flats, the organizational breakdown of the Justice Department's Environmental Crimes Program, Whitewater, Travelgate, Filegate, campaign fundraising during the 1996 election, the Clinton impeachment proceeding in the House, corruption in the FBI's Boston Regional Office and the removal and replacement of nine U.S. attorneys in 2006.

26. *Nixon v. United States*, 506 U.S. 224 (1993).

27. *In re Chapman*, 166 U.S. 661, 671-74 (1897).

28. Eric A. Posner & Adrian Vermuele, “Constitutional Showdowns,” 156 *U. Pa. L. Rev.* 991, 1041-42 (2008).