Congressional Research Service
Informing the legislative debate since 1914

TESTIMONY

Statement of

Todd Garvey
Legislative Attorney

Before

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

Hearing on

"Civil Enforcement of Congressional Authorities"

June 8, 2021

Congressional Research Service
7-5700
www.crs.gov
<Product Code>

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

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

Through its investigative powers, Congress gathers information it considers necessary to oversee the implementation of existing laws or to evaluate whether new laws are necessary.[2] This "power of inquiry" is essential to the legislative function and derives directly, though implicitly, from the Constitution's vesting of legislative power in the Congress.[3]

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

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

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

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

[4] The Supreme Court has stated that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *McGrain*, 273 U.S. at 175.

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

[6] *McGrain*, 273 U.S. at 175.

[7] *Id.*

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

[9] *Id.* Each standing committee has been delegated subpoena power by House or Senate rule. *See* CLERK OF THE HOUSE OF

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

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

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

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

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

[11] *McGrain*, 273 U.S. at 174 (observing that the "process to enforce" the investigatory power is "essential" to the "legislative function").

[12] 2 U.S.C. §§ 192, 194.

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

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

[15] *See infra* "The Current Process in Use."

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

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

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

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

Criminal Contempt of Congress

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

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

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

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

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

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

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

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

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

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

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

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

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

Civil Enforcement of Subpoenas

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

---

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

[25] 2 U.S.C. § 194. The DOJ has previously obtained convictions under 2 U.S. C. § 192 against executive branch officials pursuant to plea deals without a vote of the House or Senate. *See Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Gov't'al Relations of the H. Comm. on the Judiciary*, 98th Cong. 23–24 (1983).

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

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

[28] 2 U.S.C. § 192.

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

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

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

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

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

The Current Process in Use

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

The Miers and Bolten Subpoenas

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

[31] 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365.

[32] 28 U.S.C. § 1365.

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

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

[35] *See, e.g.*, H.R. Res. 706, 112th Cong. (2012); H.R. Res. 980, 110th Cong. (2008).

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

[37] 18 U.S.C. §§ 401–02.

[38] *See* H.R. REP. NO. 110-423, 110th Cong., at 4–7 (2007).

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

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

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

[40] H.R. REP. NO. 110-423, 110th Cong., at 5 (2007).

[41] *See* H.R. Res. 979, 110th Cong. (2008); H.R. Res. 980, 110th Cong. (2008); H.R. Res. 982, 110th Cong. (2008).

[42] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 63–64 (D.D.C. 2008).

[43] *Id*.

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

[45] *Id*. at 99. The court also ordered Mr. Bolten to "produce more detailed documentation concerning privilege claims." *Id*. at 98.

[46] *Id.* at 105.

[47] *Id*.

[48] *Id*. at 107.

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

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

The Holder Subpoena

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

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

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

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

[52] H.R. REP. NO. 112-546, 112th Cong., 39–40 (2012).

[53] *See* H.R. Res. 711, 112th Cong. (2012); H.R. Res. 706, 112th Cong. (2012).

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

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

[56] *Id*. at 4.

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

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

[59] *Id*. at 104.

[60] *Id*. at 112, 115.

[61] *See id*. at 104 (citing *Holder*, No. 12-1332, 2014 U.S. Dist. LEXIS 200278, at *2–8).

[62] *In re* Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997) (noting that the "deliberative process privilege is primarily a common law privilege").

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

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

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

The Lerner Contempt

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

---

[63] *Lynch*, 156 F. Supp. 3d, at 104 (citing *Holder*, No. 12-1332, 2014 U.S. Dist. LEXIS 200278, at *2).

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

[65] *Lynch*, 156 F. Supp. 3d, at 112–15.

[66] *Id*. at 114.

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

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

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

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

[71] H.R. REP. NO. 113-415, 113th Cong., at 7–9 (2014).

[72] *Id*. at 9–11.

[73] *Id*. at 11–13.

[74] *Id*. at 12–14.

[75] H.R. Res. 574, 113th Cong. (2014).

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

The McGahn Subpoena

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

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

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

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

[77] Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 761 (2020).

[78] *Id*.

[79] *Id.* at 761–62.

[80] *Id*.

[81] *Id*.

[82] *Id*. at 762.

[83] *Id*. at 762.

[84] Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 214–15 (D.D.C. 2018).

[85] *Id*. at 215.

[86] Comm. on the Judiciary v. McGahn, 951 F.3d 510, 516 (D.C. Cir. 2020).

[87] Comm. on the Judiciary v. McGahn, 968 F.3d 755, 760–61 (D.C. Cir. 2020).

[88] Comm. on the Judiciary v. McGahn, 973 F.3d 121, 123 (D.C. Cir. 2020).

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

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

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

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

Barr and Ross Subpoena

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

Implications of Recent Practice

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

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

[90] Comm. on the Judiciary v. McGahn, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020).

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

[92] *Id*. at 1.

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

[94] *Id*. at 2.

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

[96] *See* H.R. Rep. No. 116-125, 116th Cong. (2019).

[97] H.R. Res. 497, 116th Cong. (2019).

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

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

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

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

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

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

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

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

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

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

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

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

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

[107] *See* Agreement Concerning Accommodation, Comm. on the Judiciary v. McGahn, No. 19-5331 (D.C. Cir. May 12, 2021).

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

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

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

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

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

[111] CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey, at 29–44 (discussing alternative subpoena enforcement frameworks).

[112] *Id*. at 30–36.