Testimony of Anne Tindall and Grant Tudor Prepared for the Record

"Modernizing Congress's Subpoena Compliance and Enforcement Methods"

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

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

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

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

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

[1] *McGrain v. Daugherty*, 273 U.S. 135, 174, 161 (1927).

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

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

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

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

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

Nullification of Congress's Subpoena Compliance and Enforcement Tools

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

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

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

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

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[2] *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020).
[3] *Id.* (quoting *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957)).
[4] *See McGrain v. Daugherty*, 273 U.S. 135, 174–175 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it.").
[5] *See* Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. Times (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html.
[6] *See* Prosecution for Contempt of Cong. of Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101 (1984).
[7] *See* Response to Cong. Requests for Info. Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (1986).
[8] *See, e.g.*, Josh Chafetz, *Executive Branch Contempt of Congress*, U. Chi. L. Rev., 1083, 1141–1143 (2009) (discussing the OLC memos and noting several deficiencies therein); *see also* Morton Rosenberg & Todd B. Tatelman, Cong. Rsch. Serv., RL34097, *Congress's Contempt Power: Law, History, Practice, and Procedure*, at 11 (2007) ("Factual, legal, and constitutional aspects of these OLC opinions are open to question...").
[9] *See Anderson v. Dunn*, 19 U.S. 204 (1821) (holding that the House of Representatives may punish non-members for contempt); *see also McGrain v. Daugherty*, 174 ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

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

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

In 2012, for instance, the House issued a criminal contempt citation against Attorney General Eric Holder for his failure to overturn subpoenaed documents. According to the criminal contempt statute, citations are to be referred "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."[15] With the attorney general in charge of U.S. Attorneys, this put Mr. Holder in the position of greenlighting prosecution of a citation against himself, which he declined to do. The House thus also brought suit against the Justice Department. A 2016 ruling eventually mandated compliance, but also, and for the first time, validated the Executive Branch's underlying privilege claims as having a constitutional foundation.[16] 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.[17]

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[10] *See* Testimonial Immunity Before Cong. of the Former Counsel to the President, 43 Op. O.L.C. (2019), https://www.justice.gov/olc/opinion/file/1215066/download.
[11] 2 U.S.C. §§ 192, 194.
[12] Between 1975 and 1998, "there were 10 votes to hold cabinet-level executive officials in contempt. All resulted in complete or substantial compliance … before the necessity of a criminal trial," with evidence that in various cases, "contemnors were reluctant to risk a criminal prosecution to vindicate a presidential claim of privilege or policy, which led to settlements." Morton Rosenberg & William J. Murphy, Good Gov't Now, *The Case for Direct Appointment by the House of Outside Counsel to Prosecute Citations of Criminal Contempt of Executive Branch Officials* (Dec. 5, 2019), https://goodgovernmentnow.org/wp-content/uploads/2020/02/The-Case-for-Direct-Appointment-by-the-House-of-Outside-Counsel-to-Prosecute-Citations-of-Contempt-v9.pdf.
[13] *See Comm. on the Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008).
[14] *See* Prosecution for Contempt of Cong., 8 Op. O.L.C. 101, 132 n. 31 ("[A] much more effective and less controversial remedy is available—a civil suit to enforce the subpoena—which would permit Congress to acquire the disputed records by judicial order."); *see also* Response to Cong. Requests for Info., 10 Op. O.L.C. 68, 83 ("The House would have three alternatives available to enforce the subpoena:(1) referral to the United States Attorney for prosecution under 2 U.S.C. §§ 192–194; (2) arrest by the Sergeant-at-Arms; or (3) a civil suit seeking declaratory enforcement of the subpoena. The first two of these alternatives may well be foreclosed by advice previously rendered by this Office.").
[15] 2 U.S.C. § 194.
[16] *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016).
[17] Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, at 9 (2019).

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

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

Judicial Enforcement: Strengthening Civil Actions

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

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

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

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[18] 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.
[19] Andrew Desiderio, *House Holds William Barr, Wilbur Ross in Criminal Contempt of Congress*, POLITICO (July 17, 2019), https://www.politico.com/story/2019/07/17/house-votes-to-hold-william-barr-wilbur-ross-in-criminal-contempt-of-congress-1418900.
[20] H.R. 4010, 115th Cong. (2017); H.R. 3732, 116th Cong. (2019).
[21] *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (affirming District Court's dismissal of the Senate Select Committee's suit to obtain tapes of conversations between President Nixon and White House Counsel John Dean); *see also* 4 Lewis Deschler, *Precedents of the United States of the House of Representatives*, H.R. Doc. No. 94–661, at Ch. 15 § 4 (1994), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V4/pdf/GPO-HPREC-DESCHLERS-V4-1-3-3.pdf (summarizing the Senate Select Committee's efforts at enforcing its subpoena for the tapes through the courts).
[22] *Comm. on the Judiciary v. Miers*.

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

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

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

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

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

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[23] *See* Ann E. Marimow, *Biden Administration, House Democrats Reach Agreement in Donald McGahn Subpoena Lawsuit*, Wash. Post (May 11, 2021), https://www.washingtonpost.com/local/legal-issues/donald-mcgahn-subpoena-lawsuit-settled/2021/05/11/8c445dfe-b2ab-11eb-ab43-bebddc5a0f65_story.html.

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

[25] *See* 28 U.S.C. § 1365.

[26] 973 F.3d 121 (D.C. Cir. 2020).

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

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

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

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

Congressional Enforcement: Modernizing Inherent Contempt

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

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

[28] *Hearing on Operation Fast and Furious: Obstruction of Congress by the Department of Justice Before the H. Comm. on Oversight and Gov't Reform*, 115th Cong. (2017) (statement of Sen. Chuck Grassley of Iowa, Chairman, S. Comm. on the Judiciary 9–10), https://republicans-oversight.house.gov/wp-content/uploads/2017/06/Grassley-Remarks-to-HOGR-about-FF-FINAL.pdf.
[29] Molly E. Reynolds and Margaret L. Taylor, *The Consequences of Recent Court Decisions for Congress*, Lawfare (Oct. 5, 2020), https://www.lawfareblog.com/consequences-recent-court-decisions-congress.
[30] H.Res. 406, 117th Cong. (2021).

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

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

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

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

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

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

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

[33] 19 U.S. 204, 230 (1821).

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

[35] 294 U.S. 125, 127 (1935).

[36] 481 U.S. 787, 796 (1987).

[37] *Id.*

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

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

Executive Enforcement: Modernizing Statutory Contempt

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

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

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

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[38] *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).
[39] *Comm. on Judiciary v. McGahn*, 973 F.3d 121, 125 (D.C. Cir. 2020).
[40] *See* 2 U.S.C. § 192.
[41] *See* 2 U.S.C. § 194.
[42] *See* Rosenberg & Tatelman, Cong. Rsch. Serv., RL34097, *Congress's Contempt Power*, at 7 (2007) ("It is clear from the floor debates and the subsequent practice of both Houses that the legislation was intended as an alternative to the inherent contempt power, not as a substitute for it.").
[43] *See id.,* at 12 ("The assertion that the legislative history of the 1857 statute establishing the criminal contempt process demonstrates that it was not intended to be used against executive branch officials does not appear to be supported by the historical record.").
[44] *See, e.g.,* Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* at 3 (2019) ("Four times since 2008, the House of Representatives has held an executive branch official (or former official) in criminal contempt of Congress for denying a committee information subpoenaed during an ongoing Investigation. In each instance the executive branch determined not to bring the matter before a grand jury.").
[45] *Id.*

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

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

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

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

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[46] *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).

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

[48] 487 U.S. 654 (1988).

[49] Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* at 38 (2019).

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

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

Conclusion

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

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

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

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

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

[51] Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance,* at 2 (2019).
[52] *Jurney v. MacCracken*, 151.

compliance with its investigatory demands would lead to "the total annihilation of the power of the House of Representatives,"[53] given how important this underlying power is to all its others.

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

[53] *Anderson v. Dunn*, 229.