

**MEMORANDUM TO THE COMMITTEE ON PRIVILEGES OF THE HOUSE OF
COMMONS FROM MICHAEL L. STERN, FORMER COUNSEL TO CONGRESS
(SCC0024)**

1. I am a former senior counsel and staffer to the U.S. House of Representatives (1996-2004), the Senate Committee on Homeland Security and Governmental Affairs (2004-05) and House Permanent Select Committee on Intelligence (2006). I write about congressional legal issues at the Point of Order Blog.¹

Executive Summary

2. The purpose of this memorandum is to provide the Committee with an overview of current problems faced by Congress in enforcing its subpoenas and demands for information against nonmembers, and particularly against current and former officials in the executive branch. These issues are highlighted by a recent decision of the U.S. Supreme Court, by several other pending court cases, and by the impeachment and Senate trial of President Donald Trump earlier this year. While the issues presented are varied and complex, from Congress's perspective it is safe to say that "[t]he status quo is unsatisfactory and getting worse," to borrow a phrase from Professor Howarth's memorandum to the Committee.²

3. Congress has found it increasingly difficult to obtain information it needs for oversight of the executive branch. While historically the executive has acknowledged a constitutional duty to provide such information to Congress, the executive today often treats Congress more like a hostile party in litigation than a co-equal branch of government. Congress is at a disadvantage in such situations because the executive both controls the information and has enormous legal resources relative to the legislature.

4. Congress has formal legal mechanisms for enforcing subpoenas and demands for information, but each of them has proved ineffective in disputes with the executive branch. Contempt of Congress is a criminal offense, but prosecuting it requires the cooperation of the executive. Attempts to civilly enforce subpoenas in court have been overly time consuming, and a recent decision of the Supreme Court has further complicated the ability to use this method. Impeachment has long been considered the ultimate tool in Congress's arsenal, but the failure of the House's recent impeachment of President Trump for obstruction of Congress augurs poorly for this method as well.

5. A number of possible solutions have been proposed to address this problem. Some have advocated for reviving the exercise of direct contempt by the legislature, pursuant to which either house of Congress could order recalcitrant witnesses arrested and subject them to fines or imprisonment until its subpoenas are obeyed. Others have

¹ Point of Order Blog, <https://www.pointoforder.com/>.

² Memorandum from Professor David Howarth, Professor of Law and Public Policy, University of Cambridge (SCC0018).

argued for statutory or rules changes to provide for streamlined civil enforcement of subpoenas. Another possible reform would be to provide for independent prosecutors to pursue contempt of Congress criminal charges where the executive branch refuses.

6. Outside of formal enforcement mechanisms, Congress has a variety of options to strengthen its ability to gather information and scrutinize the activities of the executive branch. These include using other powers (such as the power of the purse) as leverage in negotiations with the executive, empowering outside parties (such as inspectors general and whistleblowers within the executive branch) to report information to Congress, investing in its own investigatory and information-gathering capabilities, and developing innovative means of acquiring information, such as sharing information with other legislatures around the world.

7. In short, Congress has faced significant difficulties in enforcing its subpoenas and demands for information, particularly as to the executive. In deciding how to respond, it faces many of the same questions and challenges as Parliament. Should it seek judicial assistance or attempt to avoid judicial involvement altogether? Should it codify procedures to ensure fairness in the subpoena process or seek to maintain maximum flexibility for its committees? Should it seek to enhance compulsory process or can it rely on voluntary compliance? These issues will continue to preoccupy Congress in the years to come.

Overview

Methods of Enforcing Congressional Subpoenas

8. Congress has several means of enforcing its subpoenas. First, either house may exercise its direct power of contempt by trying and imprisoning a recalcitrant witness who refuses to provide testimony or documents demanded by a congressional committee acting within its scope of delegated authority. This power has long been recognized as an inherent attribute of the legislative power, but exercising it is cumbersome and subject to various limitations that diminish its utility. Accordingly, neither house has employed this power since the 1930s, although there are periodic calls to revive its use.³

³ See Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 198 (2017) ("For contempt to be a truly effective tool in interbranch conflicts, Congress should strongly consider leaning more heavily on its own enforcement mechanisms."). It is generally understood that Congress retains this power despite the length of time that has elapsed since it has been employed. *But see Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 86 (1986) ("[W]hile Supreme Court precedents support the right of Congress to imprison individuals for contempt, there is some question whether such authority would continue to be upheld."). There appears to be a more widespread skepticism regarding the continuing validity of this power in the United Kingdom. See Submission from Dr. Sarah Wollaston MP, Chair of the Liaison Committee ([SCC0015](#)), Annex 2, ¶ 6.

9. Second, a willful refusal to provide testimony or documents to either house or an authorized committee thereof may be prosecuted as a crime punishable by up to one year in prison under a federal law originally enacted in 1857.⁴ Either house may initiate this process by adopting a resolution citing the witness for contempt. Actual prosecutions under this statute have been extremely rare over the past several decades, in part due to procedural complexities resulting from Supreme Court cases during the 1950s and 1960s, but the possibility of criminal contempt remains a significant point of leverage with regard to private organizations and individuals.⁵ However, because criminal prosecution requires the cooperation of the executive branch, it is of little use with regard to executive officials or others who act at the instruction of the president.

10. Third, a house of Congress or an authorized congressional committee may bring a civil suit to enforce a subpoena. Resolving such suits takes a long time, however, and there are unsettled legal questions whether the courts can hear such cases, particularly when the suit is against the executive branch. Thus, these suits have proved to be of limited value in obtaining information from the executive branch within the timetable of a two-year legislature.

11. Finally, Congress can use its power of impeachment against an executive officer who flouts its subpoenas or interferes with its investigatory authority. While this power has long been acknowledged by commentators and both political branches, the House relied on this power for the first time when it impeached President Trump in December 2019. The second article of impeachment charged the president with obstruction of Congress based on his directives to subordinates to withhold documents sought by congressional subpoenas and to current and former executive officials not to appear or testify in response to congressional subpoenas. President Trump's defense team argued to the Senate that the subpoenas were invalid for technical reasons and that it was improper to impeach the president for failing to comply with subpoenas unless his objections were first ruled upon by the courts. The Senate acquitted the president on this article of impeachment by a party-line vote in February 2020. It seems likely this result will discourage future efforts to use impeachment as a mechanism for enforcing congressional subpoenas.

⁴ 2 U.S.C. §§ 192, 194.

⁵ In order to sustain a conviction for contempt of Congress, the government must prove (1) the committee's inquiry had a legitimate legislative purpose; (2) the inquiry was within the committee's jurisdiction; and (3) the information sought was pertinent to the subject of the inquiry. See Morton Rosenberg, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of the Legislative Inquiry* 16-18 (2017). In addition, the committee must respect the witness's constitutional right to raise objections and receive clear rulings upon them. See, e.g., *Watkins v. United States*, 354 U.S. 178, 214-15 (1957) ("Unless the subject matter has been made to appear with indisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto."); *Bart v. United States*, 349 U.S. 219, 223 (1955) (if a witness raises objections, committee must make a clear ruling on them so he is "given a clear choice between standing on his objection and compliance with a committee ruling").

12. The waters are further muddied by the Supreme Court's *Mazars* decision on July 9, 2020 regarding the scope of the congressional investigatory power.⁶ This case, which involved congressional subpoenas for documents relating to President Trump's personal finances, marked the first time in history the Court had occasion to consider a congressional subpoena for a president's information, either of a personal or official nature.

13. While the Court reaffirmed Congress's broad authority to conduct investigations for legislative purposes, it held that significant separation of powers concerns were implicated by congressional subpoenas for the president's information, even when the information in question was personal rather than official. It established a multi-factor test for evaluating the validity of the subpoenas that is more rigorous than that applied to subpoenas for records of ordinary citizens. The Court held that in assessing the validity of such a subpoena, the lower courts carefully assess the legislative purpose asserted to justify "the significant step of involving the President and his papers," evaluate whether Congress had submitted detailed and substantial evidence to support that purpose, determine whether the subpoena was no broader than necessary to support the asserted legislative objective and weigh the burdens imposed upon the president by compliance with the subpoena.⁷

14. The Court's opinion was notable for lack of the deference it has traditionally shown to Congress on such matters. The Court did not accept at face value the explanations offered by the congressional committees for why they needed President Trump's personal financial information. Instead, it strongly implied that these explanations were mere rationalizations for politically motivated inquiries, noting "[w]e would have to be 'blind' not to see what '[a]ll others can see and understand': that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved."⁸

15. Whether this skeptical approach to assessing the validity of congressional subpoenas will be limited to cases in which the president's personal information is at issue remains to be seen. It seems inevitable that executive branch lawyers will seize upon some of the Court's language to argue for more demanding standards when Congress seeks nonprivileged executive branch information. Furthermore, the Court's strong preference for resolving information disputes between the political branches by negotiation, rather than litigation, is likely to benefit the executive branch because it ordinarily has possession of the information at issue.⁹

Enforcement Reforms

⁶ See *Trump v. Mazars USA, LLP*, 591 U.S. __ (2020).

⁷ See *Mazars*, slip op. at 19-20.

⁸ *Mazars*, slip op. at 16-17 (citations omitted).

⁹ See *Mazars*, slip op. at 7-11 (approvingly describing how historical disputes between the legislative and executive branches over information have been resolved by negotiation and compromise without involving the courts).

16. These developments suggest that Congress will continue to be frustrated in its efforts to exercise effective oversight of the executive. They are also likely to give impetus to efforts to adopt legislation or rules changes to enhance congressional authority to enforce subpoenas and obtain information from the executive.

17. Because civil litigation to enforce congressional subpoenas has been too slow to produce information in a usable timeframe¹⁰, one potential reform would be to enact a statute expediting judicial proceedings when Congress seeks to civilly enforce a subpoena. For example, the Congressional Subpoena Compliance and Enforcement Act of 2017, which passed the House (but not the Senate) in the last congress, would have significantly streamlined civil enforcement proceedings by either house and, among other things, permitted the court to impose fines upon executive agencies that willfully failed to comply with congressional subpoenas.¹¹

18. Another proposal to streamline civil enforcement would be to modify congressional rules so that executive branch objections to congressional subpoenas would be more fully vetted by committees at an initial stage. By providing a measure of “congressional due process,” establishing reasonable deadlines for resolving objections, and separating significant constitutional issues from more routine objections, this reform would enable courts to quickly resolve cases where there was no assertion of executive privilege by the president.

19. One potential problem with any civil enforcement remedy is that the Department of Justice maintains that under the Constitution neither house has standing to sue the executive branch over subpoenas or anything else. This issue is now pending before the full D.C. Circuit Court of Appeals in a lawsuit brought by the House Judiciary Committee against former White House Counsel Don McGahn. Depending on how the court rules (and whether the Supreme Court grants further review), Congress may or may not be able to pursue civil enforcement of subpoenas in the future.¹²

20. Even apart from facilitating civil enforcement, however, adopting a more structured approach could help restore the prestige of congressional subpoenas and make voluntary compliance more likely and judicial intervention less so. Allowing witnesses a full opportunity to present and argue objections and providing for internal review of committee decisions to hold witnesses in contempt or enforce subpoenas would address some of the concerns reflected in the *Mazars* decision, where the Court was clearly skeptical about the justifications offered for the subpoenas. Checks and

¹⁰ There are currently pending in federal court a number of cases in which information disputes between the House of Representatives and President Trump are being litigated. Although most were filed in the spring or summer of 2019, to date none have been finally resolved or resulted in the production of any information. Moreover, it seems unlikely that they will be resolved before the expiration of this congress in January 2021. See Brian Faler, *Supreme Court may have set back Congress’s effort to get Trump’s tax returns*, Politico (July 9, 2020). One issue common to a number of the suits is whether the House has standing to sue to enforce its subpoenas in court at all, a question currently pending before the full D.C. Circuit Court of Appeals. See Michael L. Stern, *You Can Take this to the (En) Banc*, Point of Order (Mar. 13, 2020).

¹¹ H.R. 4010, 115th Cong. (2017).

¹² See note 10, *supra*.

balances within Congress can ensure that subpoenas are supported by legitimate legislative purposes, do not seek more information than needed to achieve these purposes, and are not enforced without due regard for separation of powers or other countervailing considerations.¹³

21. Another proposal sometimes advanced at times of intense interbranch conflict is for Congress to revive its power of direct contempt. Scholars disagree as to whether this power may constitutionally be applied to an executive official who is asserting an official privilege at the direction of the president.¹⁴ As a practical matter, however, for one house to send its sergeant-at-arms to arrest an executive branch official, who might be protected by a security detail, would be unseemly at best and at worst could result in interbranch violence.

22. To solve this problem, a resolution recently introduced in the House would authorize the imposition of fines, rather than imprisonment, with respect to executive branch officials (and others) who fail to comply with the House's subpoenas.¹⁵ The resolution also includes the "congressional due process" provisions previously mentioned. However, while the resolution would amend House rules and therefore can be adopted by the House unilaterally, the resolution would require judicial assistance to recover the fines imposed by its terms. This would seem to raise some of the same difficulties posed by civil enforcement.

23. Yet another option for strengthening enforcement would be to establish an independent counsel to prosecute contempt of Congress cases when they are referred by either house. At the moment this approach, which would almost certainly require legislation that would likely be vetoed by the president, appears to have little political momentum.

24. Finally, although the House's recent experience may cool interest in this approach for some time, impeachment remains Congress's most potent weapon against

¹³ As one scholar has observed: "Indifference to witnesses' due process concerns undermines the legitimacy of investigations and ultimately impugns Congress itself. Congress could materially enhance its oversight legitimacy by embracing due process norms." Andrew McCause Wright, *Congressional Due Process*, 85 Miss. L. J. 1, 5 (2015). Similarly, Congress could enhance its oversight legitimacy by using "internal separation of powers" to ensure that the need and justification for congressional subpoenas are thoughtfully and fairly considered. See Abbe R. Gluck & Jesse M. Cross, *The Congressional Bureaucracy*, forthcoming 2020 (arguing that Congress uses decentralization of various legislative responsibilities to create an internal separation of powers that transcends narrow partisan interests).

Analogous concepts have been advanced in submissions to this Committee. See Memorandum submitted by Ms. Eve Samson, Principal Clerk, House of Commons (SCC0019) ¶¶ 8, 10; see also Memorandum submitted by Lord Tyrie (SCC0020) ("The fairer and more thorough a House's internal process the less likely the courts are to attempt to intervene.").

¹⁴ Compare Josh Chafetz, *Congress's Constitution* at 198 & 380 n. 253 (arguing that direct contempt may be used against executive officials, including the president) with Todd D. Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. Pa. J. Const. 77, 121-30, 139 (2011) (arguing the contrary).

¹⁵ H. Res. 1029, 116th Cong. (2020) (Congressional Inherent Contempt Resolution).

executive intransigence. However, making it effective requires there be at least a potential of two-thirds vote for conviction in the Senate, which inevitably means persuading some members of the president's party. The House may wish to focus its future efforts on impeaching lower level officers who defy subpoenas in the hope of developing agreed upon standards for compliance with subpoenas.

Other Means of Improving Oversight

25. Beyond direct enforcement of congressional subpoenas, Congress can use political tools to ensure it receives the information needed for legislative purposes. It can use its power of the purse to reduce funding for agencies that have been uncooperative on oversight matters. It can target offices that have been instrumental in thwarting congressional inquiries, such as the White House Counsel's office or the Office of Legal Counsel in the Department of Justice. Unfortunately, such efforts tend to be overwhelmed by more immediate political pressures. Thus, either or both houses may wish to adopt more formal internal procedures to ensure that such considerations are not overlooked in the appropriations process (or in the exercise of other congressional powers such as the Senate's power to advise and consent to the appointment of executive officers).

26. Much of Congress's ability to obtain information depends on laws and executive and legislative offices that augment the limited immediate resources of congressional committees¹⁶. For example, Congress relies heavily on information from inspectors general in the executive branch who are charged by law with keeping Congress informed of risks, deficiencies, abuses and other problems in the departments, agencies and programs for which they are responsible. Congress has made clear that the officers should be free to report information without fear of political retaliation, but recent actions by President Trump to terminate or replace a number of inspectors general without providing a satisfactory explanation to Congress has given impetus to legislation that would provide inspectors general with additional protection.

27. Congress can also improve oversight by investing in its own capacity to acquire and analyze information. There has been significant interest during the current congress, reflected particularly by the House Select Committee on the Modernization of Congress, in enhancing congressional capacity through the funding and training of staff, strengthening congressional support agencies and improving information technology.

28. As has been true for Parliament and other legislatures, the pandemic has required Congress to learn to use technology in new ways. Both houses of Congress, for example, have used videoconferencing to conduct remote hearings since the onset

¹⁶ See William McKay & Charles W. Johnson, *Parliament & Congress: Representation & Scrutiny in the Twenty-First Century* 310 (2010) ("a number of laws directly augment Congress's authority, mandate, and resources to conduct oversight [including] . . . protections to persons providing information to Congress, the creation of independent Congressional agents of oversight such as the Government Accountability Office (GAO) through the Comptroller General and the Congressional Budget Office . . . and mechanisms within the Executive branch such as Inspectors General to monitor their own activities.").

of the pandemic. The increased use of such technology opens opportunities for Congress to acquire information in new and innovative ways. In addition to more easily hearing from knowledgeable experts in remote locations, congressional committees could hold joint hearings with committees in state legislatures or national legislative bodies anywhere in the world.

Conclusion

29. In deciding on the optimal mechanism(s) for enhancing its power to conduct investigations and obtain information, Congress faces many of the same issues as Parliament. Should it depend on its own processes to ensure cooperation with its investigations or should it turn to the courts for assistance? What are the appropriate tradeoffs between rules that guarantee fair processes for witnesses and maintaining needed investigatory flexibility for committees? To what extent can it empower sources within the executive or other outside parties to perform needed oversight or to generate information useful to the legislature? How can it establish (or reestablish) the legitimacy of its investigative processes so as to encourage voluntary compliance by witnesses? Can it find a consensus on its institutional prerogatives that transcends momentary partisan interests?

30. I look forward to providing the Committee with any further information it may find helpful.

29 July 2020