STATEMENT

OF

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BEFORE THE

HOUSE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE ENERGY AND COMMERCE COMMITTEE

CONCERNING

"THE ACA'S COST SHARING REDUCTION PROGRAM: RAMIFICATIONS OF THE ADMINISTRATION'S DECISION ON THE SOURCE OF FUNDING FOR THE CSR PROGRAM"

PRESENTED ON

JULY 8, 2016

Mr. Chairman and Members of the Committee:

My name is Morton Rosenberg. For over 35 years I was a Specialist in American Public Law with the American Law Division of the Congressional Research Service (CRS). Among my areas of professional concern at CRS were the problems raised by the interface of Congress and the Executive which involved the scope and application of congressional oversight and investigative prerogatives. Over the years I was called upon by committees to advise and assist on a number of significant inquiries, including Watergate, Iran-Contra, Rocky Flats, the organizational breakdown of the Justice Department's Environmental Crimes Program, Whitewater, Travelgate, Filegate, campaign fundraising during the 1996 election, the Clinton impeachment proceeding in the House, informant corruption in the FBI's Boston Regional Office, and the removal and replacement of nine U.S. Attorneys in 2006. I also assisted committee Members and staff, majority and minority, on such matters as the organization of probes, subpoena issuance and enforcement, the conduct of hearings, contempt of Congress resolutions, and the validity of the issuance of House resolutions authorizing civil enforcement of subpoenas. Since my retirement I have written a handbook on investigative oversight entitled "When Congress Comes Calling: A primer on the Principles, Practices, and Pragmatics of Legislative Inquiry," which was funded and published by the Constitution Project in 2009. I am presently updating and expanding that work. I have also continued to comment and testify on matters regarding congressional prerogatives.

You have asked me here today to provide legal and historical background to assist your Subcommittee in assessing the substantiality of the Treasury Department's refusals, even in the face of subpoenas, to provide information, either through documents or the testimony of knowledgeable Department personnel, that would explain the manner and process by which the conclusion was reached that the funding for cost sharing reduction payments under the Affordable Care Act (ACA) would be through the permanent appropriation in 31 U.S.C. § 1324 (b). I will also describe and assess the current problematic situation respecting the enforcement of congressional subpoenas directed executive branch officials.

Background

A letter dated June 29, 2016 from the Treasury Department's Office of Legislative Affairs to the Committees explained that witnesses who have thus far "agreed to be interviewed" have been constrained by a long standing Executive branch policy "that protect[s] from disclosure 'documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" As authority for this stance the Department points to the failure of the Subcommittee (and the House Ways and Means Committee) to strictly adhere to the interbranch accommodation process dictated by the D.C. Circuit in *United States v AT&T Co.*[1];the pendency of an "unprecedented lawsuit by the House on the same subject matter" which purportedly "threatens to compromise the integrity of the judicial proceedings by circumventing the established rules of discovery;" a district court ruling that makes the common law deliberative process privilege applicable to congressional informational demands; and IRS "*Touhy* regulations" which are said to "govern the conditions and procedures by which agency employees may testify about work-related issues" in order to protect internal deliberative processes.

The Flawed Premises of Treasury's Arguments

None of these arguments pass legal muster. My understanding of the historical experiences and legal rulings pertinent to congressional access to information regarding the administration and enforcement activities of executive departments and agencies that are established, empowered and funded by the Congress indicates that such an asserted withholding policy has been consistently overridden in the face of legitimate exercises of a committee's constitutionally based investigatory prerogatives. The law is clear: an inquiring committee need only show that the information sought is within the broad subject

[1] 567 F. 2d 121, 127 (D.C. Cir. 1977).

matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern in order to present an enforceable information demand. This was established by the Supreme Court's 1927 ruling in *McGrain v. Daugherty*[2] which provided the foundational authority for modern congressional investigative oversight. The case emanated from the Teapot Dome inquiries of the mid-1920's which centered on the Department of Justice. As part of its investigation, a Senate select committee issued a subpoena for the testimony of the brother of the Attorney General, Harry Daugherty. After Daugherty failed to respond to the subpoena the Senate sent its Deputy Sergeant at Arms to arrest him and bring him before the Senate. This action was challenged as beyond the Senate's constitutional authority. The case reached the High Court which upheld the Senate's authority to investigate charges concerning the propriety of the Department's administration of its statutory mission. The Court first emphasized that the power of inquiry, with the accompanying process to enforce it, is "an essential and appropriate auxiliary to the legislative function, " and that Congress must have access to the 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 is frequently so—recourse must be had to others who do possess it. Experience has taught that the mere requests for such information often are unavailing, and also that the information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."[3] The Court also made it clear that the target of the Senate investigation, the Department of Justice, like all other departments and agencies, is a creation of the Congress and subject to its plenary legislative and oversight authority in order to determine whether and how it is carrying out its mission:

> [T]he subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers--specific instances of neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.[4]

The Limits of Negotiation and Accommodation

The oft-cited *AT&T* ruling established a number of important precedents. It recognized the authority of the House to allow one of its committees intervene in a court proceeding to protect its constitutionally-based oversight and investigative prerogatives. It also recognized that when core powers of the political branches conflict, a court should be reluctant to intervene and should adjure the political branches to seek accommodation through negotiation. It did rule that, in the situation before it, neither branch had the absolute right to withhold or obtain the sensitive intelligence information at issue. But it

[2] 273 U.S. 135 (1927).
[3] Id.at 174-75.
[4] Id. at 177-78

did not close the door to judicial resolution if there is a legitimate impasse, though it did not define when such an impasse would be reached. It is clear, however, that both sides need not agree that a stalemate has occurred and it is apparent that current circumstances have reached that point. Sixteen months have passed and the Department's actions, together with its June 29 letter, has drawn a clear line that signals that further negotiations would be futile. No court would fault the Subcommittee for moving on to seek compulsory enforcement of its information demands.

The Irrelevance of a Concurrent Investigation and Litigation

Treasury and the Justice Department have characterized the pending House legal challenge to the alleged use of unappropriated funds to support the ACA as "extraordinary" and a basis to refuse unrestricted witness testimony and the production of documents which might prejudice its defense against the House claims. The Supreme Court, however, has long held that congressional inquiries cannot be thwarted by ongoing litigation that may parallel its proceeding. In another Teapot case that reached the High Court, *Sinclair v. United States*[5], a witness at the congressional hearings refused to provide answers and was prosecuted for contempt of Congress.. Based upon a separate lawsuit brought by the government agaiunst the witness' company, the witness had declared "I shall reserve any evidence I may be able to give for those courts…and shall respectfully decline to answer any questions propounded by your committee." The Court upheld the witness' conviction for contempt of Congress. The Court considered asnd and rejected in unequivocal terms the witness' contention that the pending lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves "operated to divest the Senate, or the committee, of power to further investigate the actual administration of the law."[6] The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly, or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in those suits."[7] The Court reiterated its conclusion in *Hutchison v. United States*[8], holding that a committee's investigation "need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding…or when crime or wrongdoing is disclosed."

The Questionable Availability of the Common Law Deliberative Process Privilege

Treasury has not actually asserted the deliberative process privilege (DPP) but it has invoked its essence in justifying its withholding documents that relate to "documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" and by referencing a recent district court recognizing the applicability in the context of a congressional inquiry.[9] The problematic validity of that finding is fully discussed below, but even if it is applicable, it is easily overcome by an investigative body's showing of jurisdiction, authority and a need for the information. A District of Columbia Circuit Court ruling has held that the DPP is a common law privilege that Congress can more easily overcome than the constitutionally rooted presidential communications privilege. Moreover, in congressional investigations the DPP "disappears altogether when there is any reason to believe government misconduct has occurred."[10] The court's understanding thus severely limits the extent to which agencies can rely upon

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[5] 279 U.S. 263 (1929).
[6] 279 U.S. at 295.
[7] Id.
[8] 369 U.S. 599, 617 (1962).
[9] See *Committee on Oversight and Government Reform v. Lynch*, 2016 U.S.Dist.LEXIS 5713 (D.D.C. Jan. 19, 2016.
[10] *In re Sealed Case (Espy*), 121 F. 3d 729,745-46 (D.C.Cir. 1997).The appeals court also stated "[W]hen there is reason to believe the documents sought may shed light on government misconduct, 'the [deliberative process] privilegeis routinely denied' on the ground that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'" Id. at 737-38.

the DPP to resist congressional investigative demands.

Agencies May Not Deny Committee Access to Proprietary, Trade Secret, Privacy or Other Sensitive Information: The Anomaly of "Touhy Regulations"

Congress' authority and power to information, including but not limited to proprietary or confidential information is extremely broad. Upon occasion, Congress has found it necessary and appropriate to limit its access to information it would normally be able to obtain by exercise of its constitutional oversight prerogatives. But where a statutory confidentiality or nondisclosure provision is not made explicitly applicable to the Congress, the courts have consistently held that agencies and private parties may not deny congressional access to such provisions on the basis of such provisions.[11] Ambiguities in such statutes as the Trade Secrets Act and the Privacy Act have been resolved in a committee's favor.[12] Indeed, this Subcommittee has twice in the past voted for contempt citations against Department heads[13] who refused to disclose information under legislation that contained nondisclosure provisions that were silent with respect to congressional access. In both instances the information was supplied soon after the votes was taken.

It is anomalous then that an agency regulation authorized by Congress and designed to regulate record management in the face of subpoenas issued for private sector litigants, and is silent about its application to congressional requests, is allowed to act as a device to impede, or perhaps intimidate, agency employees from freely responding to committee questioning or communicating with committees. It does this at Treasury by its requirement that IRS employees get permission to talk to Congress, and then limits what they can say to Congress to those topics approved by IRS. OMB has a similar Touhy regulation.Although a federal statute, 5 U.S.C. 7211, articulates First Amendment rights of federal employees to petition and communicate with Congress, there is no enforcement mechanism. Annual appropriations limitations have provided protections against the abuse of the nondisclosure regulations but I am unaware of any active utilization of the protections. It is possible that the understandable fear of "whistleblower" retaliation limits the incentive to utilize it.

The Current State of Investigative Oversight

Throughout its history, Congress has engaged in oversight of the Executive Branch—the review, monitoring, and supervision of the implementation of public policy. Congress's right of access to executive branch information is constitutionally based and is critical to the integrity and effectiveness of our scheme of separated but balanced powers. The first several Congresses inaugurated such important oversight techniques as special investigations, reporting requirements, resolutions of inquiry, and use of the appropriations process to review executive activity. In the face of Executive challenges to its authority, the legislature's capacity and capabilities to check on and check the Executive have increased over time. Supreme Court and lower court rulings have recognized the institutional importance and necessity for its broad inherent authorities of information gathering and self-protection against

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[11] See, *e.g., FTC v. Owens-Corning Fiberglass Corp*., 626 F. 2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. FTC*, 589 F. 2d 582,585-86 (D.C. Cir. 1978), *cert, denied* , 441 U.S. 943 (1979); *Ashland Oil v. FTC*, 548 F. 2d 977. 979 (D.C. Cir. 1976).

[12] See, *e.g., Devine v. United States*, 202 F. 3d 547,551 (2d Cir. 2000);*FTC v. Owens-Corning Fiberglass corp*., *supra*; *Exxon Corp. v FTC, supra*; *Ashland Oil v. FTC, supra*.

[13] See, Hearings, "Contempt Proceedings Against Secretary of Commerce Rogers C.B. Morton" before the Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 94th Cong. 1st Sess.1975); "Contempt Proceedings Against Secretary of HEW Joseph Califano. Jr., " Business Meeting of the of the Subcomm. on Oversight and Investigations, House Commm. On Interstate and Foreign Commerce, 95th Cong., 2d Sess. 19780 (Comm. Print No. 95-76).

aggrandizement by the coordinate branches. Public laws, congressional rules, and historical practices have measurably enhanced Congress's implied power under the Constitution to conduct oversight.

The Essential Premise of Successful Investigative Oversight

The enduring practical lesson I learned in my 35 years with CRS is that committees wishing to engage in successful oversight must establish their credibility with the White House and the Executive departments and agencies that they oversee early, often and consistently, and in a manner evoking respect, if not fear. Thus, although standing and special committees have been vested with an array of formidable tools and rules to support their powers of inquiry, and have developed an efficacious nuanced, staged investigatory process, one that proceeds from one level of persuasion or pressure to the next to achieve a mutually acceptable basis of accommodation with the Executive, it has been absolutely critical to the success of the investigative process that there be a credible threat of meaningful consequences for refusals to provide necessary information in a timely manner. In the past that threat has been the possibility of a citation for criminal contempt of Congress or a trial at the bar a House of an official, either of which could result in imprisonment and fines. There can be little doubt that such threats were effective in the past, at least until 2002. But though the formidable rules, tools and authorities remain intact, that threat, and the continued efficacy legislative oversight, has now come into serious question.

Congress Under Siege

Congress is presently under literal siege by the Executive. The last decade and a half has seen, among other significant challenges, an unlawful FBI raid on a Member's congressional office to obtain alleged incriminating documents; Department of Justice (DOJ) criminal prosecutions of Members that have successfully denied Members Speech or Debate protections for legislative actions; the presidential cooption of legislative oversight of agency rulemaking; refusals to ensure the faithful execution of enacted statutory directions; an attempted usurpation of the Senate's exclusive confirmation prerogative; failures to submit timely nominations for vacant Inspector General positions thereby allowing unconfirmed acting officials to hold such sensitive positions, often for years; the issuance of a DOJ Office of Legal Counsel (OLC) opinion that authorizes heads of agencies and departments to decline Inspector General requests for information necessary to perform their investigative and audit authorities; and OLC opinions asserting expanded presidential control over agency decision making through broad interpretations of the concept of a unitary executive and of the traditional understandings of the scope of executive privilege claims that have been utilized by departments and agencies to delay or deny congressional access to requested information.

With particular respect to congressional investigative oversight of the actions of the Executive Branch, there has been the adoption of an aggressive stance, first officially enunciated by OLC in 1984[14], that the historic congressional enforcement processes of criminal and inherent contempt, designed to ensure officials' compliance with its core information gathering prerogative, are unconstitutional and unavailable to a committee if the president unilaterally determines that such officials need not comply. In such instances, DOJ will not present contempt citations voted by a House to a grand jury as is required by law. A more recent DOJ opinion declared that it has determinative authority whether to prosecute an executive official found in contempt of Congress even in instances when presidential privilege has not been invoked.[15] The consequence has been that committees have been forced to seek subpoena compliance through civil court enforcement actions, a tactic that has been shown in two recent cases to cause intolerable delays that undermine the effectiveness of timely committee oversight and opens the

[14] Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. Off. Legal Counsel 101 (1984)(Olson Memo). See also, Responses to Requests for Information Made Under the Independent Counsel Act, 10 Op. Off. Legal Counsel 68 (1986)(Cooper Memo).

[15] Letter to The Honorable John A. Boehner, Speaker, U.S. House of Representatives, from Ronald C. Machen, Jr., United States Attorney, District of Columbia, dated March 31, 2015.

door to aberrant judicial rulings.

The Miers Litigation

The first of those cases, *Committee on the Judiciary v. Miers*[16], involved an inquiry into whether the presidential firings of nine U.S. Attorneys in 2006 were politically motivated. The sensitivity of the allegations forced the highest echelons of the Justice Department to testify before the Committee without the necessity of subpoenas either in public or in executive sessions. But it soon became apparent that all roads led to the White House and its role in the matter. Several lower level aides were subpoenaed and some were granted immunity. Focus soon centered on the former White House Counsel, Harriet Miers, and political advisor Karl Rove. They were subpoenaed, along Chief of Staff Joshua Bolten, who was the White House custodian of documents. The President claimed presidential privilege and then ordered them not to appear to testify or produce documents, asserting that his invocation of privilege cloaked them with absolute immunity from compulsory process. The House voted Miers and Bolten in contempt of Congress. The Attorney General advised the Speaker that any contempt citation issued would not be presented to a grand jury. As a consequence, the House was forced, for the first time in history, to institute a civil suit to enforce a subpoena against executive officials. Members of the minority party leadership filed an *amicus* brief arguing that the suit should be dismissed.

The district court ruled that the House had inherent constitutional power to authorize a civil action to enforce committee subpoenas and that a presidential invocation of privilege did not provide, as claimed, absolute immunity for White House aides which shielded them from responding in any way to the Committee's subpoenas. The court did not reach the question of the validity of the presidential privilege claim itself. The suit also did not challenge the validity of the refusal to present the contempt citation to a grand jury. A change of administration resulted in a settlement that allowed limited *in camera* testimony and document disclosures in March 2009 that mooted a pending appeal. The investigation and litigation spanned over two years with an inconclusive resolution. However, the cloud remaining respecting the likelihood of Executive repetition of the obstructive tactic made the victory appear Pyhrric. That fear was shortly confirmed.

The Fast and Furious Litigation

The next such case, *House Committee on Oversight and Government Reform v. Lynch*,[17] arose out of an investigation commenced in January 2011 following the disclosure that DOJ's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) was engaging in a law enforcement program, denominated Operation Fast and Furious, in which the ATF knowingly allowed firearms purchased illegally in the United States to be unlawfully transferred to third-parties and transported into Mexico. The goal of the operation was to let the guns "walk" without interdiction so as to enable ATF to follow the flow of the firearms to the Mexican drug cartels that purchased them. This tactic was publically exposed after guns that had been illegally purchased were recovered at the scene of a December 2010 firefight in Arizona in which a U.S. Customs and Border Protection agent was killed. Congressional inquiries in January 2011 to ATF requested information about allegations that the agency had knowingly used these inappropriate law enforcement tactics. A DOJ Assistant Attorney General replied on February 4, 2011 on behalf of ATF and flatly denied that the agency had ever "sanctioned or otherwise knowingly allowed the sale of assault weapons to a straw purchaser." The House Committee on Oversight and Government Reform (COGR) was skeptical of the reply and continued its investigation. The inquiry was re-invigorated in December of 2011 when DOJ withdrew its February 4 letter, conceding that it had contained "inaccurate information" about the depth of DOJ's knowledge of ATF's actions and that the operation itself was fundamentally

[16] 558 F. Supp. 2d 53 (D.D.C. 2008).

[17] 2016 U.S. Dist. LEXIS 5713 (D.D.C. Jan.19, 2016). The original defendant, former Attorney General Eric Holder, left office and his successor was substituted as the defendant of record.

flawed.

The concession shifted the focus of COGR's investigation to the questions as to how DOJ had initially provided the Committee with such inaccurate information; why it took almost ten months to correct the mistake; and whether the agency had sought to obstruct the Committee's inquiry by providing misleading information. COGR then narrowed its attention to documents created after the February 4th letter relating to DOJ's response to COGR's investigation. There followed subpoenas and negotiations and an ultimate refusal by Attorney General Holder to turn over key documents, which was supported by a presidential claim of privilege. The full House voted Holder in contempt on June 28, 2012. Following the vote DOJ advised the Speaker that, as in *Miers*, no action would be taken to prosecute the Attorney General. In anticipation of DOJ's stance the House had passed a resolution authorizing a civil suit, which was instituted on August 13, 2012. On December 20, 2012 five prominent Members of the House minority party filed an amicus brief in support government's motion to dismiss the Committee's suit.

Several important rulings have been issued by the district court since the institution of the litigation. On September 30, 2013, the court initially ruled that the Committee had standing to institute its suit to enforce its subpoena demands[18], essentially following the similar ruling in *Miers*, and rejected political question and prudential arguments for dismissing the complaint. The next critical issue to be faced was whether the government's asserted deliberate process privilege (DPP) is constitutionally based or is solely a common law creation. District of Columbia Circuit Court rulings have established that the constitutional presidential communications privilege (PCP) encompasses the deliberative process privilege but only when the communications relate to a "quintessential and non-delegable presidential power" that requires direct presidential decision making and must have been authored or solicited and received by the President or a close White House advisor who has operational proximity to the President. Heads of departments and agencies are not deemed "close advisers."[19] Otherwise, the DPP is a common law privilege.[20] In a longstanding and consistent congressional committee practice, acceptance of the DPP asserted by executive agencies, as with other common law privileges, has been subject to the discretion of the individual committees on a case-by-case basis. In such instances, a committee only needs to show that it has jurisdiction and authority and that the information sought is necessary to its investigation. But a plausible showing the existence of fraud, waste, abuse or maladministration would, in any event, conclusively vitiate an agency assertion of the privilege.

In an August 20, 2014 Order dismissing cross motions for summary judgment, the Court ruled that DOJ could assert the DPP as to deliberative documents not involving presidential communications. Judge Jackson determined "that there is a constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege [therefore may] be properly invoked in response to a legislative demand." This "dimension" or aura was seen to derive from the fact that both the PCP and DPP are "closely affiliated" in that "[both] are executive privileges designed to protect executive branch decision making."[21] The Court, however, avoided both the immediate necessity of balancing the legislative and executive interests involved and determining whether agency misconduct vitiated the claim. Instead it found that DOJ's "blanket assertion" of privilege was insufficient. DOJ was directed to review all the withheld documents and either produce them to COGR or provide a detailed privilege log substantiating each assertion of deliberative process.

Sixteen months later, on January 19, 2016, the Court issued an opinion and order in response to

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[18] *Committee on Oversight and Government Reform v. Holder,* 979 F. Supp. 2d 1 (D.D.C. 2013). The basis of the court's standing ruling differed from that rendered in *Miers* which found the cause of action was based on the Constitution's inherent vestment of investigatory power in Congress.

[19] *In re Sealed Case (Espy),* 121 F. 3d 729 (D.C. Cir. 1997); *Judicial Watch, Inc. v. Department of Justice,* 365 F. 3d 1108 (D.C. Cir. 2004).

[20] *Espy,* 121 F. 3d at 745-46.

[21] Citing *Espy* out of context.

the Committee's motion to compel production of the withheld documents. It reiterated its prior ruling that the deliberative process privilege could be invoked in response to COGR's demands. It then detailed the results of the Court's perusal of the list and descriptions of 10, 446 documents withheld in whole or part. It concluded that 5342 were sufficiently documented to be properly covered by the DPP but declined to rule upon 5096 documents which were withheld by DOJ on the grounds that they contain attorney-client privileged material, attorney-work product, private information, law enforcement sensitive material, and foreign policy sensitive material. The remaining eight documents, which provided no reasons at all for their withholding, were ordered to be disclosed.

With respect to the DPP documents, however, the Court determined that it was not necessary for it to engage in the usual process of balancing the competing interests of the two branches with respect to the legitimacy of COGR's investigation or the Committee's need for the information against the impact that the revelation of any record could have on candor in future executive decision making. DOJ, it found, had repeatedly acknowledged the legitimacy of COGR's investigative concerns. Further, it concluded, by requesting and complying with a parallel DOJ Inspector General investigation, "any harm that might flow from the public revelation of the deliberations at issue here has already been self-inflicted: the emails and memoranda that are responsive to the subpoena are described in detail in a report by the Department of Justice Inspector General that has already been released to the public….Since any harm that would flow from the disclosures sought here would be merely incremental, the records must be produced." As a further consequence of this rationale, the Court saw no need to confront the issue of agency misconduct: "The Court emphasizes that this ruling is not predicated upon a finding of misconduct." Finally, the Court refused to rule on DOJ's withholding of the 5096 documents raising privilege claims other than the DPP, reasoning that only the DPP claim had been the subject of the original complaint. It suggested that for resolution of that matter the parties should engage in further negotiations which, if unsuccessful, might be presented to the Court.

Arguably, the unusual ruling perhaps reflects that the judge may have had second thoughts about her initial ruling on the applicability of the DPP to congressional demands and was attempting to foreclose an appeal. That is, since the Committee would have gotten all it originally asked for, arguably that potentially mooted any appeal. Similarly, since DOJ had garnered an important privilege precedent that would be available for agencies to rely on for some time to come, it might wish to allow it to stand until at least the inevitable next challenge. At the urging of the Committee, however, the Court issued a " FINAL, APPEALABLE ORDER" on February 8, 2016. On April 8, the Committee filed a notice of appeal with the D.C. Circuit. At that point the investigation and subsequent litigation had spanned over five years with no satisfactory resolution in sight.

The Urgent Need for Constitutional Clarity Respecting Congress's Investigative Enforcement Authority

The portent of *Miers* has been realized in the Fast and Furious litigation. The DOJ tactic for undermining effective congressional investigative oversight by forcing committees to seek civil court enforcement of information gathering subpoenas has succeeded. The inevitable attendant extensive delays in accessing information respecting legitimate oversight inquiries has rendered its ultimately untimely availability essentially useless.[22] The dubious ruling by the Fast and Furious court, approving the invocation of the common law deliberative process privilege in these enforcement proceedings, has now invited future such claims by agencies as a matter of right in investigative inquiries, with the likelihood of the assertion of a panoply of other common law and policy claims that heretofore have been

[22] *See* Stanley Brand & Sean Connelly, *Congressional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials,* 36 Cath, U.L. Rev. 71, 81, 84 (1986)(noting the effect of delay in hindering congressional oversight).

acceptable only at the discretion of committees.

The continued use of the tactic by executive agencies in the future is all but certain. There is accumulating current evidence of agency slowdowns in responding to committee information requests and an uptick in claims resting on the deliberative process privilege. Continued congressional acquiescence to the DOJ tactic will result in inestimable, if not irreparable, damage to its core legislative functions, responsibilities and the public's confidence in the institution's competence and authority. A commentator writing shortly after the unsatisfactory resolution of the *Miers* litigation, but before the Fast & Furious rulings, bluntly put forward its implications: "To put it succinctly, Congress cannot win in court—even if the courts ultimately side with it over the executive branch, the Administration can insure that those final rulings come far too late to allow Congress effectively to oversee executive branch operations….But Congress's self-inflicted wounds may well go deeper. In seeking the aid of the judiciary, the House was announcing to the world its belief in its own impotence….And the House, in choosing to invoke the court's authority has played right into this perception. It has reinforced the idea that the judiciary is the domain of reasoned, principled judgments that must be respected, while congressional action in defense of its powers is 'unseemly'."[23] Justice Kennedy has warned that Congress cannot expressly abdicate its core responsibilities but by inaction or acquiescence it can be effectively ceded elsewhere.[24]

The constitutional basis of Congress's virtually plenary oversight and investigative powers is irrefutable. The courts have consistently recognized that in order to perform its core constitutional responsibilities, Congress can and must acquire information from the President and the departments and agencies of the Executive Branch.[25] The structure of the checks and balances rests on the principle that Congress has a right to know everything that the executive is doing, including all the policy choices and all the successes and failures in the implementation of those policies. The Supreme Court has made it clear that Article I presupposes Congress's access to information so that it can responsibly exercise its obligations to make laws requiring or limiting executive conduct, to fund the programs supporting the executive policies of which it approves, to deny funds to those policies of which disapproves, and to pursue investigations of executive behaviors that raise concerns.[26] Without knowledge of the policy choices and activities of the Executive Branch, which is often unavailable unless provided by the Executive, Congress cannot perform those duties the Framers envisioned. Finally, the Supreme Court and appellate courts have approved practices and processes Congress has adopted for the conduct of its oversight and investigative hearings that do not accord witnesses the entire panoply of procedural rights enjoyed by witnesses in adjudicatory proceedings,[27] as well as mechanisms, such as inherent and statutory

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[23] Josh Chafetz, *Congress's Constitution,* 160 U. Pa. L. Rev. 715, 740-41 (2012)(Chafetz).

[24] *Clinton v. City of New York,* 524 U.S. 417, 452 (1998)("That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less than those of other Congresses to follow….Abdication of responsibility is not part of the constitutional design.")(Kennedy, J., concurring in the Court's rejection of a congressional delegation of line item veto authority to the President).

[25] See, e.g., *Barenblatt v. United States*, 360 U.S. 109,111 (1959)(noting that the power of Congress to inquire is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927)(remarking that the legislature has all the necessary power under the Constitution to perform the legislative function, including compelling appearance and testimony).

[26] See, e.g., *Barenblatt*, 360 U.S. at111; *Watkins v. United States*, 354 U.S. 178, 187 (1957); *McGrain*, 273 U.S. at174.

[27] *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971)(Witnesses have no right of cross-examination of adverse witnesses or to discovery of materials utilized by a committee as the basis for questions); *Hannah v. Larch*, 363 U.S. 420, 445 (1971)(observing that "only infrequently have witnesses…[in congressional hearings] been afforded procedural rights normally associated with an adjudicatory proceeding."}.

criminal contempt proceedings[28], all of which are intended to encourage and support the expeditious gathering of information for legislative purposes from officials and private parties.

The current situation is not an interbranch impasse to be resolved by negotiation. It is an Executive challenge to the long understood and established constitutional allocation of core powers between the political branches. In this case it involves the refusal of the Executive to recognize and adhere to the historic, constitutionally recognized coercive mechanisms designed to assure timely congressional access to information necessary carry out its legislative function by insisting that it is unconstitutional to utilize the criminal or inherent contempt processes against federal officials when the President has invoked executive privilege. A committee's sole recourse now is to seek compliance by means of a civil enforcement action. A committee is given no other timely, effective choice. The result is that the critical lines of constitutional authority in this vital area have become unclear and the uncertainty is having, and will continue to have, a paralyzing effect on congressional oversight. Until it is resolved it raises the specter of the concomitant danger of Executive encroachment and aggrandizement.

The Rationale for a Constitutional Challenge

In a seminal essay, Professors Eric A. Posner and Adrian Vermeule examine the political phenomenon of "constitutional showdowns" and attempt to provide a usable definition of the idea, an analysis of the circumstances under which showdowns will, will not or should occur, observations about whether our constitutional system produces too many or too few showdowns, and what are the socially optimal circumstances for seeking a constitutional showdown.[29] The authors posit that "[s]howdowns occur when the location of constitutional authority for making important policy decisions is ambiguous or contested, and multiple political agents (branches, parties, sections, governments) have a strong interest in establishing that the authority lies with them."[30] Clear allocations of authority, the authors avow, are essential to constitutional stability. "Since institutions share power, whether one institution should press the limits of its power depends to a great extent on whether other institutions are misusing their powers. It is hard to see how ambiguity about the contours of authority could be desirable in the abstract; its effect is just to create uncertainty among citizens who are regulated by the various institutions. All else equal, uncertainty is a systemic cost, which can only be justified on second-best grounds; what those grounds might be is obscure….Governmental violation of a clear allocation of power can trigger resistance because the stipulated allocation serves as a focal point for resistance. Creeping aggrandizement is more, not less, likely when the constitutional allocation of powers is ill defined."[31]

Posner and Vermuele conclude that the confluence of certain social, legal and political circumstances impel "constitutional showdowns." "Under certain conditions, then—where the value of setting precedents now is especially high, because similar issues will recur in future generations and little new information will be gained by delay—the active virtues are superior to the passive virtues from the social point of view. We do not claim that these conditions are more common than the conditions under which the passive virtues are socially desirable. All we claim is that the theorists of the passive virtues fail to consider the full range of social costs and benefits, and are too sanguine about their conflict-avoiding prescriptions."[32] As will be fully detailed below, the Executive's current tactic of forcing committees to seek civil court actions as the sole means of enforcement of subpoena demands for information has no basis in law or historical practice and thwarts the accomplishment of Congress's core legislative functions and responsibilities. It is an act of Executive usurpation and aggrandizement that threatens the long understood constitutional scheme of separated and balanced powers, one that demands legislative

[28] See, e.g., Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (Recognizing the authority of each House to conduct inherent contempt proceedings to protect its institutional integrity).
[29] Posner & Vermeule, supra note 1 at 992-93, 1010
[30] Id. at 1002.
[31] Id. at 1022.
[32] Id. at 1043.

challenge and judicial redress.

The Constitutional, Legal. Historical and Practical Insubstantiality of Executive Refusals to Recognize and Adhere to Constitutional and Statutorily Established Mechanisms to Enforce Congressional Demands for Information

The formal articulation of the Executive's current position refusing legal recognition of congressional contempt citations issued pursuant to either the legislature's statutory criminal contempt or inherent contempt authorities appears in two opinions rendered by DOJ's Office of Legal Counsel (OLC) in 1984 and 1986.[33] Both have been cited as the basis for Executive non-compliance with the contempt citations in the above-recounted *Miers* and Fast & Furious investigations and litigations.[34] But it has taken the Executive thirty years to attempt to implement a strategic decision that on its face poses profound constitutional separation of powers implications. In order to fully and properly assess the legal substantiality of the stratagem it is useful, and indeed necessary, to understand the immediate context that prompted the preparation of the OLC opinions as well as the intervening three decades of events that apparently impelled effectuation of the tactic.

--The Position of the Justice Department on the Use of Inherent and/or Criminal Contempt of Congress Against Executive Branch Officials: The Immediate Origins of the Olson and Cooper Memoranda

In 1970, in response to the growing perception and alarm over Executive actions, often taken in secret, and all reflective of a disdain for legislative authority and prerogatives in foreign and domestic affairs, Congress began taking counteractions to shore up its ability to know what the Executive is doing and to be able respond effectively and in a timely manner to protect its institutional integrity. The hard earned lessons learned from the Viet Nam war, presidential impoundment tactics, and Watergate and the Nixon impeachment proceedings resulted in congressional measures that expanded its ability to gain access to sources of vital information and to assure its timely receipt. These actions included passage of the Legislative Reorganization Act of 1970[35], the Congressional Budget Act of 1974[36], the War Powers

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[33] *See, Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege,* 8 Op. Off. Legal Counsel 101 (1984)(Olson Memo); and *Response to Congressional Requests for Information Made Under the Independent Counsel Act,* 10 Op. Off. Legal Counsel 68 (1986)(Cooper Memo).

[34] *See, e.g.,* Memorandum for the Counsel to the President, Fred F. Fielding, from Stephen G. Bradbury, Principal Deputy Attorney General, Office of Legal Counsel, *Immunity of Former Counsel to the President from compelled Testimony,* July 10, 2007; Letter to George T. Manning, Counsel for Ms. Miers, from Fred F. Fielding, Counsel to the President, July 10, 20007 (directing Ms. Miers not to appear before the House Judiciary Committee in response to a subpoena); Letter to House Judiciary Committee Chairman John Conyers, Jr., from George T. Manning, counsel for Ms. Miers, July 17, 2007 (explaining legal basis for Ms. Miers refusal to appear); Letter from James M. Cole, Deputy Attorney General, to john Boehner, Speaker of the House, June28, 2012.

[35] 84 Stat. 1156, 1168-71, 1181-85 (making express the duty of all standing committees to engage in oversight on a "continuing basis," strengthening the program evaluation responsibilities of the General Accounting Office (GAO), tripling the personnel complement of the Congressional research Service and directing the hiring of senior level experts in over 20 categories of legislative concern, strengthening its policy analysis role and expanding its other responsibilities to Congress, and increasing the number of permanent staff for standing committees, including a provision for minority staff hirings).

[36] 88 Stat. 302,325, 326,327-29 (further expanding committee oversight authority by permitting them to appraise and evaluate programs by themselves 'or by contract, or [to] require a Government agency to do so and furnish a

Resolution of 1973[37], the Impoundment Control Act of 1974[38], the Inspector General Act of 1978[39], and the Ethics in Government of 1978[40].

Of particular interest here, however, were the historic internal institutional reforms of the committee system in the House installed at the beginning of the 94th Congress in 1975[41] which had the effect of abandoning the seniority system for committees, which had vested absolute control in full committee chairs, by decentralizing and disbursing committee authorities over legislation and oversight to subcommittees and their chairs. As a result, any committee with over 20 members is required to establish a separate committee solely devoted to oversight. Also significant was the appointment in 1977 of the first House General Counsel by Speaker Thomas "Tip" O'Neill to represent institutional interests in court actions and to provide legal guidance to committees, members and the leadership. Remarkably, before that time the Justice Department frequently represented congressional interests in court proceedings, often to the legal detriment of Congress.[42]

The effect of the reforms was immediate, with aggressive committee actions producing important supporting precedents underlining the efficacy and institutional necessity of having available the credible threat of a contempt of Congress citation to support compliance with valid compulsory committee demands for information. Between 1975 and 1998 there were 10 votes to hold cabinet-level executive officials in contempt. All resulted in complete or substantial compliance with the information demands in question before the necessity of a criminal trial.[43] During this period, and indeed until 2002, the very threat of a contempt vote was sufficient to elicit compliance.[44] Four refusals raised executive privilege claims, one asserted a "conditional" claim of constitutional privilege, and the remainder raised claims of statutory exemption or

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report thereon to the Congress;" directing the Comptroller General of GAO to review and evaluate government agency programs and activities on his own initiative or by requests by committees or members and to establish a special office to carry out these responsibilities, and strengthening GAO's role in acquiring fiscal, budgetary and program-related information; and establishing the Congressional Budget Office (CBO) which is authorized to "secure information, data, estimates, and statistics from the various departments, agencies, and establishments of the government to share with the newly established House and Senate budget committees).

[37] Pub. L. 93-148, 87 Stat. 134 (1973)(requiring the prompt reporting to Congress of military actions taken by the President).

[38] 2 U.S.C. 683 (limiting the ability of the President to refuse to obey statutory directions to spend appropriated funds).

[39] Pub. L.. 95-452, *codified at* U.S.C. Appendix 3 (establishing offices of inspectors general in all cabinet and larger agencies to monitor the efficiency and propriety of their administrative actions by means of independent internal audits and investigations that may be reported to Congress).

[40] Pub. L. No. 95-521, 92 Stat.1824 (establishing the process of appointing an independent counsel to investigate and prosecute allegations of criminal conduct at the higher reaches of the executive bureaucracy).

[41] See H. Res. 988, 93d Cong., effective Jan. 3, 1975.

[42] For a discussion of the history legal representation for the House and Senate see Chapter_, *infra* at_.

[43] Secretary of Commerce Rogers C.B. Morton (1975); Secretary of State Henry A. Kissinger (1975); Secretary of Health, Education and Welfare Joseph A. Califano (1978); Secretary of Energy Charles W. Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); Environmental Protection Administration head Anne Gorsuch Burford (1982-83); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996);and Attorney General Janet Reno (1998).The details of these instances may found in Louis Fisher, The Politics of Executive Privilege, 111-134 (2004)(Fisher)..

[44] See Alissa Dolan and Todd Garvey, Congressional Investigations of the Department of Justice, 1920-2012: History Law and Practice, CRS Report R42811, 32-33, 38-39 (Nov. 5, 2012), describing successful investigations of the Rocky Flats Environmental Crimes Plea Bargain and the investigation of the Misuse of Informants at the FBI's Boston Regional Office.

agency policy concerns. There is evidence in some of the cases that the contemnors were reluctant to risk a criminal prosecution to vindicate a presidential claim of privilege or policy, which led to settlements.[45] In addition, in 1976, the House, by resolution, twice authorized Rep. John Moss, chairman of the House Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, to intervene in pending litigation to ensure compliance with issued subpoenas. In both cases the courts accepted the congressional appearances.[46] Those precedents proved to be decisive for the courts in the *Miers* and Fast and Furious litigations in upholding the House's right to authorize *initiation* of civil enforcement proceedings by a House resolution. It may also be noted that Rep. Moss and his Subcommittee were also the motivating force behind the Rogers Morton and Califano contempt proceedings. It was into this almost exuberant atmosphere of successful exercises of congressional authority that President-elect Ronald Reagan warily but prepared stepped.

The advent of the Reagan administration in 1981 marked the beginning of a determined and carefully conceived legal and political effort to retrieve a perceived loss in strength of the presidency.[47] President Reagan campaigned for and sought to implement a broad deregulatory agenda. Implementing that goal required asserting control over administrative agencies. But by the end of 1982 it became readily apparent that this could not be accomplished through legislative means[48] and the administration turned to an aggressive administrative and litigative strategy. Fundamental to this scheme was the establishment of a highly centralized bureaucratic structure of government that would ensure that ultimate control of decision making in all executive branch agencies, including independent regulatory agencies, would rest in the hands of the President or his delegate. In support of this end, the administration and its supporters articulated a constitutionally based theory of a unitary executive, a conception that left no constitutional space for independent agencies—those protected from removal under a good cause standard—much less the new independent counsel statute. It is founded on the notion that that Article II's vesting of "executive power" in the President combined with the President's authority to "take Care that the Laws be faithfully executed", requires that the President have the power to supervise and control the implementation of federal law, and bars Congress from imposing restrictions on his power to fire executive officers at will. The new independent counsel law was seen as an especial intrusion on core presidential prerogatives since it imposed removal restrictions on an officer whose functions are paradigm exercises of executive power: criminal investigations and prosecution.[49]

On this basis the administration began taking a variety of actions to make that idea an operative fact. These included centralizing control of agency rulemaking in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) by executive

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[45] *See, e.g.,* Anne M. Burford, Are You Tough Enough? 145-159 (McGraw Hill 1986)(quoting James Watt's warning about his and Attorney General Smith's contempt experience and Burford's description of her despair at her treatment by the Justice department)(Burford).

[46] See Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 301 (D.D.C. 1976) *aff'd* 548 F. 2d 977 (D.C. Cir. 1976) and United States v. AT&T, 551 F. 2d 384,392 (D.C. Cir.1976). See also Fisher, *supra* at 95-97 discussing *Ashland.*

[47] See Morton Rosenberg, Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive, 57 Geo. Wash. L. Rev.627 (1989)(Rosenberg); Kevin Stack, The Story of Morrison v. Olson: The Independent Counsel and Independent Agencies in Watergate's Wake, Vanderbilt Law School Public Law and Theory, Working Paper Number 09-06, 401-431 (Stack), *accessible at* http://ssrn.com/abstract_id=1340124; Peter l. Strauss, Foreword: Overseer, or "The Decider?" The President in Administrative Law,75 Geo. Wash. L Rev. 696 (2007)(Strauss).

[48] Rosenberg, at 628 n. 2.

[49] Stack at 409-10.

orders;[50]challenging the constitutionality of independent regulatory agencies; asserting the inability of Congress to vest discretionary authority in subordinate executive officials who are free from presidential supervision and control; refusing to implement congressional enactments it deemed unconstitutional; questioning the authority of Congress to vest the appointment of an executive officer with prosecutorial powers in the courts and to provide for removal of that officer only for cause; and denying the authority of Congress to empower an agency to issue statutorily prescribed unilateral compliance orders to sister agencies found in violation of laws and regulations applicable to them or to resort to court action to force compliance with such orders.[51]

It should then come as no surprise that the Reagan Administration would take special umbrage to Congress's exercise of its criminal contempt power against its own cabinet rank officials. The first such citation, against Energy Secretary James Edwards by a House Government Operations Subcommittee, involved documents regarding contract negotiations between the department and a major oil company. Members were concerned the deal was going too fast, but the real conflict was between officials in the administration. The Energy Secretary wanted to sign the contract but wouldn't turn over the documents until it was consummated. On the morning of the scheduled full committee contempt vote the President avoided the potential conflict by siding with the Secretary. The contract was signed and the documents were delivered.[52]

The next citation, against Interior Secretary James Watt, was more contentious and saw the first invocation of executive privilege by President Reagan. At issue were 31 documents relating to a reciprocity provision in a statute that involved Canada. Attorney General Smith argued that the documents should be withheld because the House Energy and Commerce Subcommittee wanted them for oversight and not legislative purposes; the documents would expose pre-decisional deliberative matters and would chill the candor of future deliberations; and the documents related solely to sensitive foreign affairs matters. After the Subcommittee rejected the claims and announced it would prepare a contempt citation all but seven of the documents had been turned over. When the refusals with respect to the remaining documents continued the Subcommittee voted him in contempt. When Watt continued to resist compliance, the full committee voted to hold him in contempt. At that time a compromise was reached whereby Subcommittee members would be able to peruse the documents for four hours and take notes and agreed not to release information that might harm Canada.

The ranking minority member commented that there was nothing sensitive in the documents and that Watt would have turned over the materials had not the White House intervened.[53] This was confirmed by Watt himself in relating his reaction to being told by White House Counsel Fred Fielding that when Attorney General Smith was cited for contempt the administration "didn't want to create any embarrassment for the general, so we gave them the paperwork." Watt said he responded: "*Fred Fielding*! You're telling me that the Attorney General had a case similar to mine, and the principle for which you marched me to the end of the plank is not important enough for him to stand on and get abused like I've been abused?" When Fielding responded "That's the way it goes, Jim," Watt says he retorted: "You get me out within twenty-four hours or I'm going to the Congress personally and hand deliver those papers—because I will not be abused by the White House or the Department of Justice. If the principle is not strong enough for the Attorney General of the United States to fight for, I'm not going to let

[50] See E.O. 12,291, 3 CFR 127 (1981) and E.O. 12,498, 3 CFR 323 (1985).
[51] See Rosenberg at 629-30 and notes 5 through 9 detailing the almost uniform lack of litigation success.
[52] See Fisher at 123.
[53] See Fisher at 124-26.

you guys use me any longer."[54]

The White House and DOJ thought that they were better prepared for the next confrontation which evolved from an investigation by two House committees, the Oversight Subcommittee of the Public Works and Transportation Committee and the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee into the Environmental Protection Agency's (EPA) implementation of provisions of the Comprehensive Environmental Response, Compensation and Liability Act of !980 (Superfund). Initially, EPA voiced no objection to the requests seeking documents contained in its open litigation files regarding enforcement of the Superfund program "so long as the confidentiality of the information in the files was maintained." Shortly thereafter the Reagan administration decided that Congress should not be able to see the documents in active litigation files. A presidential memorandum directed Gorsuch to refuse to turn over the documents, claiming that they represented "internal deliberative materials containing enforcement strategy and statements of the government's positions of various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites" by the EPA or the Justice Department. Subpoenas were issued by both committees seeking the documents. In compliance with the President's directive Gorsuch refused to comply on the ground they were "enforcement sensitive."[55]

The Subcommittee, and ultimately the full House Committee on Public Works, approved a criminal contempt of Congress citation and forwarded it to the full House for consideration. On December 16, 1982, the House voted 259-105 to adopt the citation,[56] the first time in history a cabinet–level officer was ever so charged. But before the Speaker of the House could transmit the citation to the United States Attorney for the District of Columbia for presentation to a grand jury, the DOJ filed a lawsuit suit seeking to enjoin the transmission of the citation and to have the House's action declared unconstitutional as an intrusion into the president's authority to withhold such information from the Congress. According to the Department, the House's action imposed an "unwarranted burden on executive privilege" and "interferes with the executive's ability to carry out the laws."[57]

The District Court for the District of Columbia dismissed the DOJ suit on the grounds that judicial intervention in executive-legislative disputes "should be delayed until all possibilities have been exhausted.[58] In addition, the court noted that ultimate judicial resolution of the validity of the President's claim of executive privilege could only occur during the course of the trial for contempt of Congress."[59] The court urged both parties to devote their energies to compromise and cooperation, not confrontation.[60] After the court's ruling, DOJ chose not to appeal, in part due to Gorsuch's reluctance to continue.[61] Throughout the litigation and subsequent negotiations, however, the U.S. Attorney refused to present the contempt citation to a grand jury

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[54] Burford, *supra* at146-47.

[55] See generally, Congressional Proceedings Against Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, for Withholding Subpoenaed Documents Related to the Comprehensive Response, Compensation and Liability Act of 1980, H.R.Rept. 97-968, 97th Cong., 7-9, 42-43 (1982)(hereinafter Gorsuch Contempt Report).

[56] 128 Cong. Rec. 31,776 (1982).

[57] See generally, *United States v. U.S. House of Representatives,* 556 F. Supp. 150 (D.D.C. 1983).

[58] *Id.,* 556 F. Supp. at 152'

[59] *Id.,* stating that "[c]onstitutional claims and other objections to congressional investigations may be raised as defenses in a criminal prosecution."

[60] *Id.,* at153.

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for its consideration, despite a clear statutory direction to do so.[62] Following a brief period of negotiation with the Public Works and Transportation Committee, it was agreed that the documents would be released to the Subcommittee in stages, beginning first with briefings and redacted copies, and eventually ending with unredacted copies that could only be examined by committee members and up to two designated committee staffers.[63]

The Chairman of the House Energy and Commerce Committee, Rep. John Dingell, refused to accept the agreement between DOJ and the Public Works Committee given its limitations on access and time delays. After a threat to issue new subpoenas and pursue a further contempt citation, negotiations were resumed. The result was an agreement that all documents covered by the initial Energy and Commerce subpoena were to be delivered to the Subcommittee. There were to be no briefings and no multi-stage process of redacted documents leading to unredacted documents. The Subcommittee agreed to handle all "enforcement sensitive" documents in executive session, giving them confidential treatment. The Subcommittee, however, reserved for itself the right to release the documents or use them in public session, after providing "reasonable notice" to the EPA. If the EPA did not agree, the documents would not be released or used in public session unless the Chairman and Ranking Minority Member concurred. If they did not concur, the Subcommittee could vote on the release of the documents and their subsequent use in a public session. Staff access was to be decided by the Chairman and Ranking Minority Member. The agreement was signed by Chairman Dingell, Ranking Member Broyhill, and White House Counsel Fred Fielding.[64] The ultimate agreement is illustrative of the autonomy of jurisdictional committees in the House.

The released documents provided evidence that raised allegations of perjury, conflict of interest, and political manipulation of the agency. As part of the final agreement the House withdrew its contempt citation of Gorsuch and she subsequently resigned along with 20 other top agency officials. One official, Rita Lavelle, the manager of the Superfund program, was found in contempt of Congress for defying a subpoena to testify and was tried and convicted of lying to Congress and received a prison sentence and fine.

The Premises of the Olson and Cooper Memoranda

Theodore Olson was the Assistant Attorney General heading the Office of Legal Counsel (OLC) during the period of the Watt and Gorsuch contempts and is generally credited as the developer of the failed strategy to defeat Congress's use of the threat of citations for criminal contempt to force the compliance by senior executive officials to comply with compulsory demands for testimony and documents. After the Watt and Gorsuch debacles Olson decided to memorialize the legal rationale he developed for use in the future in more amenable situations by means of an OLC opinion issued in 1984. In that opinion he revisited the statutory, legal and constitutional issues that were not resolved by the Superfund dispute. The opinion concludes that, as a function of prosecutorial discretion, a U. S. Attorney is not required to refer a contempt to a grand jury or otherwise to prosecute an executive branch official who is carrying out the President's direction to assert executive privilege.[65] In addition, the opinion determined that a

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[62] See 2 U.S.C. §§ 192 and 194 imposing a "duty" on the U.S. Attorney "to bring the matter before the grand jury for its action."

[63] See Memorandum of Understanding Between the Committee on Public Works and Transportation and the Department of Justice, Concerning documents Subpoenaed from the Environmental Protection Agency, February 18, 1983; see also H. Rept. No. 323, 98th Cong., 1st Sess. 18-20 (1983).

[64] See EPA Document Agreement, CQ Weekly Report, March 26, 1983.

[65] Olson Memo, *supra* 22 at 102, 114-15, 118-28.

review of the legislative history of the 1857 enactment of the criminal statute and its subsequent implementation demonstrates that Congress did not intend the statute to apply to executive officials who carry out a presidential directive to assert executive privilege.[66] Finally, as a matter of constitutional law, the opinion concludes that simply the threat of criminal contempt would unduly chill the President's ability to effectively protect presumptively privileged executive branch deliberations.[67] According to the OLC opinion:

> The Presidents exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim was valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks, even the threat of a criminal prosecution is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.[68]

The 1984 opinion focuses almost exclusively on the criminal contempt statute, as that was the authority invoked by the Congress in the Superfund dispute. In a brief footnote, however, the opinion contains a discussion of Congress's inherent contempt power, summarily concluding that the same rationale that makes the criminal contempt statute inapplicable and unconstitutional as applied to executive branch officials applies to the inherent contempt authority:

> We believe that the same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of executive privilege. The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). Therefore, the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion privilege applies to Congress' inherent contempt powers as well.[69]

The 1986 OLC memo issued by Charles Cooper, Olson's successor, reiterates the reasoning of the Olson Memo, but added the observation that the inherent contempt power had not been used since 1935 (at that time over 50 years) and that "it seems unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an executive branch official who claimed executive privilege."[70] The Cooper opinion also suggest that then current Supreme Court opinions indicated that it was "more wary of Congress exercising judicial authority" and,

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[66] *Id.* at 129-134 (stating that"[t]he Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial or Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.").
[67] See *id.* at 102, 135-142.
[68] *Id.* at 102.
[69] *Id.* at 140 n. 42.
[70] Cooper Memo, *supra* n. 22 at 86.

therefore, might revisit the question of the continued constitutionality of the inherent contempt power.[71]

The Historical and Constitutional Flaws of the Olson and Cooper Memos

The OLC memos rest their conclusions on history that is inaccurate, constitutional theory that has been rejected by the Supreme Court and lower federal courts, and a misapprehension of the core, fundamental constitutional basis of the need for access to all information necessary for Congress to perform its legislative function and the constitutionally recognized mechanisms intended to protect it against intrusions and disruptions of the Framers' separation of powers design.

--*Historical Errors*

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 is not supported by the historical record. The floor debates leading to the enactment of the statute make it clear that the legislation was intended as an alternative to, not a substitute for, the inherent contempt authority. This understanding has been reflected in numerous Supreme Court opinions upholding the use of the inherent contempt process.[72] A close review of the floor debate indicates that Rep. H. Marshall expressly pointed out that the broad language of the bill "proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people." More to the point, Rep. Orr, the sponsor of the bill, specifically stated that "this House has already exercised the power and authority of forcing a disclosure [from executive officials] as to what disposition had been made for the secret-service fund. And it is right and proper it should be so. Under our Government-under our system of laws-under our Constitution-I should protest against the use of any money by an executive authority, where the House had not right to know how every dollar had been expended, and for what purpose."[73]

Rep. Orr had reference to a contentious investigation in 1846 regarding charges that Daniel Webster, while Secretary of State, had improperly disbursed monies from a secret contingency fund used by the President for clandestine foreign operations. The ensuing investigations saw the issuance of subpoenas to two former presidents and a sitting Secretary of State and a request for documents from a sitting President that resulted testimony and/or depositions from the former presidents and sitting Secretary of State and the voluntary production of documents by the sitting President. It therefore appears clear from the 1857 debate that the House was cognizant about its oversight investigative prerogatives vis-a-vis the executive branch and that the contempt statute was not intended to preclude the House's oversight of that branch. A complete examination and analysis of the Webster investigation is appended to the end of this chapter.

The 1857 floor debate is also pertinent to the Executive's persistent claim of the

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[71] *Id. (*citing *INS v. Chadha*, 462 U.S. 919, 962-966 (1983); *Buckley v. Valeo* 424 U.S. 1 (1976); *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303,317 (1940). It is important to note that the cooper memo pre-dates the Supreme Court's rulings in *Morrison v. Olson*, 487 U.S. 654 (1988) and *Mistretta v United States*, 488 U.S. 361 (198), both of which to undercut significant portions of the Cooper Memo's reasoning..

[72] *See, e.g., Journey v. McCracken,* 294 U.S. 125 (1935); *McGrain v. Daugherty,* 273 U.S. 135 (1927); *In re Chapman,* 166 U.S. 661, 671-72 (1897).

[73] 42 Cong. Globe 431 (1857).

applicability of common law privileges before Congress. Specifically, Rep. Orr was asked about the potential instances in which the proposed legislation might interfere with recognized common law and other governmental privileges, such as the attorney-client privilege, in probes like the Webster inquiry which touched on "diplomatic" matters.[74] Rep. Orr responded that the House has and would continue to follow the practice of the British Parliament, which "does not exempt a witness from testifying upon any such ground. He is not excused from testifying there. That is the law of the Parliament."[75] Later in the same debate, a proposed amendment to expressly recognize the attorney-client privilege was overwhelmingly defeated.[76]

Finally, it is asserted that the inherent contempt process has never been utilized against an executive official. In fact it has, twice.[77] The first occurred in 1879 as a result of allegations received by the House Committee on Expenditures in the State Department that George F. Seward, then Minister to China, had misappropriated a large sum of money from the consulate. When Seward returned from China he was subpoenaed for ledger books and his testimony. He refused to comply and asserted his Fifth Amendment rights, which was rejected. At the request of the committee the House ordered that he be arrested and brought to the bar of the House. There he argued that he should not be forced to incriminate himself while there was ongoing impeachment proceeding against him. Articles of impeachment were reported out by the committee but were never acted upon by the Judiciary Committee.

The second instance of an arrest occurred in 1916 of the United States Attorney for Southern District of New York, H. Snowden Marshall, who had been investigating Rep. Frank Buchanan for Sherman act violations. Buchanan had accused Marshall of committing high crimes and misdemeanors. Two weeks later a grand jury convened by Marshall indicted Buchanan under the Sherman Act. Buchanan then introduced a House resolution to investigate Marshall which was adopted. Marshall then instigated a newspaper article accusing the investigating committee of trying to frustrate the grand jury inquiry. He then admitted his role in publishing the article in a letter to the subcommittee that was personally highly offensive. The committee then adopted a resolution declaring the letter "defamatory and insulting" which brought the House into "public contempt" and was guilty of violating "the privileges of the House, its honor and its dignity." The sergeant-at-arms was sent to New York to arrest and bring him to bar of the House. Marshall's habeus petition was denied by Judge Learned Hand but was reversed by the Supreme Court in *Marshall v. Gordon.*[78] It is clear, however, that the Court had no doubt that the House had the "power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given" in the Constitution, but since all that was involved were dignity offenses "not intrinsic to the right of the House to preserve the means of discharging its legislative duties" the citation was inappropriate in those circumstances.[79] Neither the House nor the Court appeared to have any doubt that the House could arrest and hold a federal prosecutor for actions which were appropriately within the scope intended to be protected by Congress's contempt power.[80]

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[74] *Id.* at 431.
[75] *Id.*
[76] *Id.* at 441-43.
[77] *See,* Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chic. L. Rev 1083, 1137-38 (2010)(Chafetz Contempt).
[78] 243 U.S. 521 (1917),
[79] 243 U.S at 541, 545-46.
[80] It is to be noted that between 1857 and 1934 Congress relied on its inherent contempt power almost exclusively, despite the availability of the criminal statute. A detailed history of its usage indicates that in at least 28 instances, witnesses who were either threatened with , or actually charged with, contempt of Congress purged their citations

The Supreme Court Has Thus Far Rejected the Concept of a Unitary Excecutive

As indicated previously, the principal goal of the incoming Reagan administration in 1981 was the establishment, in law and practice, of an administrative regime in which the President has the ultimate power of supervision, direction and control of the entire executive bureaucracy, a true unitary executive. The greatest obstacle was Supreme Court rulings that recognized the authority of Congress to limit removal of presidentially appointed officials in independent regulatory agencies only for cause.[81] The task was finding the proper litigation vehicle for presentation to the High Court at the right time. White House and OLC legal strategists determined that the Independent Counsel statute was the one.

The leading supportive case, *Myers v. United States*[82], in strong dicta indicated that the President must be able to remove at-will officials performing purely executive functions. Eight years later the Court, in *Humphrey's Executor v. Federal Trade Commission*, modified *Myers* to allow for cause removal protections for the commissioners but only because the Court found they performed "quasi-legislative" and "quasi-judicial" functions and not "purely executive"' duties.[83] The removal restrictions on the independent counsel, who exercised prosecutorial duties, a quintessentially pure executive task, was seen as a vulnerable target. In addition, then recent Supreme Court separation of powers rulings indicated it was inclining toward strict construction of core structural constitutional provisions. In *INS v. Chadha*[84] in 1983 the Court held legislative vetoes unconstitutional because Congress may not control the execution rules except through Article I procedures; and in *Bowsher v. Synar*[85] in 1986 it ruled that Congress may not delegate executive functions to an official, the Comptroller General, who is subject to congressional removal.

Indeed, they thought they had the perfect foil as a plaintiff, Theodore Olson, who was part of the team that developed the strategy. After the Gorsuch contempt was settled the House Judiciary Committee commenced a two year inquiry about the role the Justice Department, and particularly Olson, played during the controversy. It wanted to determine whether the Department, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the U.S. Attorney for the District of Columbia not to present the Gorsuch contempt citation to the grand jury for prosecution and had made the decision to sue the House; and, generally, whether there was a conflict of interest in the Department's simultaneously advising the President, representing Gorsuch, investigating alleged executive wrongdoing, and enforcing the congressional criminal contempt statute. It was a contentious inquiry during which Olson was the central figure and target. The Committee issued its final report in December 1985.[86] Among other abuses cited by the Committee were the withholding of relevant documents until the Committee had independently learned of their

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by either testifying or providing documents to the inquiring congressional committees. See Carl Beck, Contempt of Congress: A Study of the Prosecutions Initiated by the Committee on Un-American Activities, 1945-1957, 191-214 (1959)

[81] *See, e.g., Humphrey's Executor v. FTC*, 295 U.S.602 (1935). Constitutional challenges to the prosecutorial authorities of the SEC and FTC in the early 1980's were uniformly rebuffed by lower courts. See Rosenberg, supra n. 36 at 629 n. 5.

[82] 272 U.S. 52 (1927).

[83] *Humphrey's*, 295 U.S. at 628-29.

[84] 462 U.S. 919, 944-45.

[85] 478 U.S. 714, 736.

[86] EPA Withholding Report, H. Rept. 99-435 (1985).

existence, as well as the "false and misleading" testimony before the committee by the head [Olson] of the Department's Office of Legal Counsel." The report led to a request to Attorney General Meese seeking appointment of an independent counsel to investigate possible criminal conduct of Olson and others.

In the Spring of 1986 Meese referred Olson to be the subject of the investigation. It is not clear whether Olson was a willing subject but he played his role well. Independent Counsel Morrison issued a grand jury subpoena for his testimony and he refused to comply, challenging the constitutionality of the Ethics Act. The judicial high water mark was reached in 1988 with the split ruling of a panel of the District of Columbia Circuit Court of Appeals holding that the independent counsel provisions of the Ethics in Government Act were unconstitutional.[87] Although the principal basis for the panel's decision rested upon its interpretation of the Appointments Clause,[88] the majority propounded as an alternate ground of decision the idea of the unitary executive. The appeals court decision represented the first judicial application of the unitary executive concept to the merits of a controversy and the initial recognition of a substantive content to the "take care" clause.[89] That is, for the first time a court acknowledged a constitutionally-based power in the President to direct the actions of subordinate executive officials contrary to the expressed intent of a congressional enactment.

However, any doubt raised by the appeals court ruling were emphatically allayed by the Supreme Court's ruling *Morrison v. Olson*[90] upholding the appointment and removal provisions of the Independent Counsel Act. In an opinion remarkable for its breadth and near unanimity[91], the High Court dealt directly and unequivocally with the notion of a unitary executive. Addressing the argument of dissenting Justice Scalia that "the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President,"[92] Chief Justice Rehnquist held that "[t]his rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known or foreseen by the framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear."[93]

The Court dealt directly and boldly with the argument that an executive officer who is exercising "purely executive" must be subject to direct at-will removal by the President by simply discarding the *Humphrey's Executor* precedent. The Court held that the validity of insulating an inferior officer from at-will removal by the President will no longer turn on whether such an officer is performing "purely executive" or "quasi-legislative," or "quasi-judicial" functions.[94] The issue raised by a "good cause" removal limitation, the majority opinion explained, is whether it interferes with the President's ability to perform his constitutional duty.[95] It is in that light that the function of the official in question must be analyzed. The Court noted that the independent counsel's prosecutorial powers are executive in that they have been "typically" been performed

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[87] *In re Sealed Case,* 838 F.2d 476, *rev'd sub nom. Morrison v. Olson,* 487 U.S. 654 (1988).
[88] It found that the independent counsel was a superior office and thus had to be appointed by the President with Senate advice and consent.
[89] U.S. Const., art II, §3.
[90] 487 U.S. 654 (1988).
[91] The vote was 7-1 with Justice Scalia dissenting. Justice Kennedy had recused himself.
[92] 487 U.S. at 690 n.29
[93] *Id.*
[94] *Id.* at 689--92
[95] *Id.*at 691

by executive branch officials.[96] But, the Court held, the exercise of prosecutorial discretion is in no way "central" to the functioning of the executive branch.[97] In other words, it is not a core constitutional presidential prerogative. Further, since the independent counsel could be removed by the by the Attorney General, this is sufficient to ensure that she is performing her statutory duties, which is all that is required by the "take care" clause.[98] Finally, the limited ability of the President to remove the independent counsel, through the Attorney General, was also seen as providing enough control in his hands to reject the argument that the scheme of the Ethics Act impermissibly undermines executive powers or disrupts the proper constitutional balance by preventing the executive from performing his functions.[99] Although the Court did not define with particularity what would constitute sufficient "cause" for removal, it did indicate that it would at least encompass misconduct in office.

In sum, then, *Morrison* appears to vitiate the essential supporting legal rationale of the unitary executive theory, *i.e*., that the President must have absolute discretion to discharge at will subordinate officials whose functions include purely executive tasks. *Morrison* teaches that there are no rigid categories of officials who may or may not be removed at will. The question that arises in such cases is whether for-cause insulation, together with other prescribed duties of the officer in question, impermissibly undermines executive powers or would disrupt the proper balance between the coordinate branches by preventing the executive from performing his assigned function. Resolution of such agency arrangement cases will be determined by the pragmatic, functional analysis approach exemplified by *Nixon v. Administrator of General Services.*[100] Absent the issue aggrandizement, a court need only satisfy itself that the relative balance between the constitutional actors and the agencies has been maintained.[101]

The next year, in Mistretta v. United States,"[102] the Court reiterated its holding in *Morrison* by rejecting, in an 8-1 ruling, the contention that Congress was without authority to locate an agency, the Sentencing Commission, with no judicial powers, but with authority to promulgate binding rules, in the judicial branch, determining that the separation of powers was not violated by structural arrangements that are either innovative or seemingly innovative.[103]

The Aftermath of Morrison

Executive interpreters of *Morrison,* when commenting at all, have construed it narrowly. A well-known 1996 Office of Legal Counsel (OLC) on separation of powers highlighted the narrow range of officers to which it applied: inferior officers. OLC asserted that the ruling "had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation."[104] An opportunity to revisit *Morrison* in 2010 in *Free Enterprise Fund v. Public*

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[96] *Id.*
[97] *Id.* at 691-92
[98] *Id.* at 693
[99] *Id.* 692.
[100] 433 U.S. 425, 443 (1977).
[101] Any doubt about this reading of the breadth of the majority opinion is invited to peruse Justice Scalia's dissent at 487 U.S at 697-727, and particularly 708-712.
[102] 488 U.S. 361 (1989).
[103] 488 U.S. at
[104] The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, *28 (May, 1996).

Company Accounting Oversight Board,[105] which dealt with a situation where the members of the agency that appointed the members of the Board and exercised substantive oversight over it, the SEC, have for cause protections from at-will removal by the President, and Board members had similar protection from SEC removals. The Court deemed the Board members inferior officers and held that the ”dual for-cause on the removal of Board members contravened the Constitution’s separation of powers” and voided that provision alone. A close reading of the 5-4 opinion’s rationale, which favorably cited the *Myers* ruling, arguably would have sufficed to bring down the SEC’s protection as well.[106] Whether the Court was held back by the fact that PCAOB members were inferior officers or that a one of the Justice’s was unwilling to go that far is matter for speculation. A case in which the constitutionality of the for-cause protections accorded the head of the Consumer Financial Protection Board is a prime issue is now before a panel of the District of Columbia Circuit. Oral argument there centered on the applicability of the *FEF* ruling.[107]

The set back of the *Morrison* ruling effected a subtle change in the tactics by the supporters of the unitarian vision. Thus, much of the post-*Morrison* commentary has focused on the increasingly evident unilateral presidential actions that cross the line of supervision, coordination and oversight to operational direction and control. The emergence of what one scholar has called the “New Presidentialism,”[108] has become a profound influence in administrative and structural constitutional law. It is a combination of constitutional and practical argumentation that holds that most of the government’s regulatory enterprise represents the exercise of “executive power” which, under Article II, can legitimately take place only under the control and direction of the President and is coupled with the claim that the President is uniquely situated to bring to the expansive sprawl of regulatory programs the necessary qualities necessary qualities of “coordination, technocratic efficiency, managerial rationality, and democratic legitimacy” because he alone is elected by the entire nation.[109] It is the incremental, stealth road to the unitary executive.

The nature of the actual, dramatic incursions that are taking place is detailed in a still widely cited 2001 article by the then dean of the Harvard Law School, Elena Kagan,[110] who

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[105] 561 U.S. 477 (2010).

[106] See Neomi Rao, A Modest Proposal : Abolishing Agency Independence in Free Enterprise Fund v. PCAOB, 79 Fordham L. Rev. 101 (2011).

[107] See *PHH Corporation v. CFPB*, No. 15-1177 (D.C. Cir.) on direct appeal from an order of the CFPB. The death of Justice Scalia, part of the majority in *FEF,* may make problematic a revival of the *Myers* view if *PHH* or a similar CFPB challenge should reach the Court.

[108] Cynthia R. Farina, Undoing the New Deal Through the New Presidentialism, 22 Harv. J. of Law and Policy 227 (1988).

[109] For the proposition that the Constitution confers decisional authority on the President see, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L. J. 541, 549-50 (1994); Christopher S.Yoo, Steven G. Calaresi, & Anthony Colangelo, The Unitary Executive in the Modern Era, 1945-2004, 90 Iowa L. Rev. 601, 730 (2005). For the proposition that the Constitution does not confer decisional authority but it should be presumed Congress intends it, given then the realities of modern administration, see, e.g., Elena Kagan, Presidential Administration, 114 Harv. L, Rev. 2245, 2251 (2001(Kagan); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L.. Rev. 1, 2-3(1994). For the proposition that the President, unless directly authorized, in only an overseer, see, e.g., Peter L. Strauss, Foreword: Overseer, or “The Decider”? The President in Administrative Law, 75 Geo,. Wash. L. Rev.696 (2007)(Strauss); Kevin M. Stack, The president’s Statutory Powers to Administer the Laws, 106 Colum. L.. Rev. 263, 267 (2006)(Stack); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi-Kent L. Rev. 987, 987-89(1997).

[110] Kagan, supra n. 97.

posits the foregoing notions and further suggests that when the Congress delegates administrative and lawmaking power specifically to department and agency heads, it is, at the same time making a delegation of those authorities to the President, *unless the legislative delegation specifically states otherwise.* From this flows, she asserts, the President's constitutional prerogative to supervise, direct and control discretionary actions of all agency officials. Kagan states that "a Republican Congress proved feckless in rebuffing Clinton's novel use of directive power—just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process."[111] She explains that "[t]he reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is the same thing, to deny authority to other branches of government."[112] She goes on to effectively deride the ability of Congress to restrain a President intent on controlling the administration of the laws:

> Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without a significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity as this Article earlier has noted. Because Congress rarely is held accountable for agency decisions, its interest is in overseeing much administrative action is uncertain; and because Congress's most potent tools require collective action (and presidential agreement), its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration do not present an either/or choice. Presidential involvement instead superimposes an added level of political control of administration onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.[113]

Former Dean Kagan's observations and theories appear to have been almost a blueprint for understanding the presidential actions taken over the past 15 years.[114] These have included incursions by means of executive orders designed to control rulemaking authority vested in expert agencies; executive directives agencies to act or not act in areas committed to their discretion; signing statements to message limited agency adherence to congressional statutory directions; limitations on intelligence information access to jurisdictional committees and Inspector General access to agency information needed to effectively monitor the efficiency and propriety; and a myriad of OLC opinions that range from defining its perceived scope of the presidential communications privilege for the executive bureaucracy and how they are to deal with congressional information requests to legal support for the President's failed attempt to assert that he can unilaterally declare when the Senate was out of session for recess appointment purposes. There has even been an unsuccessful, unconstitutional raid on a congressional office to avoid the bother of a document subpoena which would have involved the time consuming process of according members their constitutional rights under the Speech or Debate Clause. Indeed, the current effort to block contempt enforcement of information demands through traditional means may be seen as the next, and perhaps ultimate, step in the Executive's effort to establish a unitary executive. If Congress cannot get the information

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[111] Kagan at 2314.
[112] *Id.*
[113] *Id.* at 2347.
[114] See generally, Strauss, supra n. 98.

necessary to perform it legislative functions, it must act blindly or not all. Either way the Executive wins.

The Constitutional Basis of Congress's Exercise of Its Contempt Powers Against Executive Officials

The Supreme Court has developed a long, consistent line of structural separation of powers rulings in which it has invalidated provisions of law or actions that either "accrete to a single branch powers more appropriately diffused among the separate branches or that undermine the authority and independence of one or another coordinate branch."[115] It reflects the Court's continuing concern over "encroachment and aggrandizement that has animated our separation of powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the limits of its power.'"[116] These have included nullifications of attempts by Congress to appoint executive officials[117] and to control the execution of laws by means of legislative vetoes[118] and the President's endeavor to exercise a line item veto[119] and to unilaterally decide when the Senate was out of session in order to exercise his recess appointment authority. In each instance the Court's rulings rested upon the breach of an identified core institutional prerogative recognized by the Constitution: the exclusive powers of presidential appointment, Senate confirmation and congressional law making.

Just as there is no express provision in the Constitution authorizing the conduct of congressional oversight and investigations, there also is an absence of express authority to punish nonmembers for disobedience of the rules and orders of each House or the disruption of their legislative processes. In dealing with both these matters the Supreme Court has firmly established that such powers are so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. With respect to investigative oversight, the Court declared that the "scope of its power of inquiry…is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[120] In Watkins v. United States[121] the Court emphasized that the "power of 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."[122] The Court further stressed that Congress's power to investigate is at its peak when focusing on alleged fraud, abuse, or maladministration within a government department, Specifically, the Court explained that investigative power comprehends probes into departments of the federal government to expose corruption, inefficiency and waste."[123] The court further noted that that the first Congress's held "inquiries dealing with suspected corruption, or mismanagement of government officials."[124]

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[115] *Mistretta v. United States*, 488 U.S. 361, 382 (1989).
[116] *Id.*
[117] *Buckley v. Valeo*, 424 U.S. 1, 128-31 (1976).
[118] *INS v. Chadha*, 462 U.S. 919, 958-59 (1983).
[119] *Clinton v. City of New York*, 524 U.S. 417 (1998).
[120] *Eastland v. United States Servicemen's Fund* , 421 U.S. 491, 504 n.15 (1975)
[121] 354 U.S.178 (1957).
[122] 354 U.S. at187.
[123] *Id.*
[124] *Id*. at 182. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

Court recognition of inherent contempt authority came much earlier but was emphatic as to its important relation to the law making power. Early commentators on the Constitution were surprised at the absence of a congressional power to punish. Joseph Story remarked that that each houses "power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior or disobedience to those rules."[125] Story found it "remarkable" that the Constitution did not explicitly mention a power to punish nonmembers, "yet it is obvious that unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions."[126] Story, moreover, concluded that in America, as was the case in Britain, "the legislative body was the proper and exclusive forum to decide when the contempt existed and when there was breach of its privileges; and that the power to punish followed, as a necessary incident to the power to take cognizance of the offense."[127]

In fact, almost from the beginning of legislative operations both houses of Congress believed they had the constitutional authority to hold nonmembers in contempt[128], and in 1821 in *Anderson v. Dunn*[129] the Supreme Court emphatically upheld the practice. The unanimous Court framed the issue as "whether the House of Representatives can take cognizance of contempts committed against themselves, under any circumstances?" The answer was an unequivocal affirmation because the alternative:

> obviously leads to the annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness and caprice, or even conspiracy, may mediate against it. The result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.[130]

The Court also endorsed the existing parliamentary practice that the contemnor could not be held beyond the end of the legislative session,[131] a limitation that impelled passage of the criminal contempt alternative in 1857.

Although subsequent rulings have tinkered with the permissible scope of congressional contempt against nonmembers, none of those decisions has doubted its existence[132] and in *McGrain v. Daugherty*, the keystone authority for the breadth and importance of contemporary investigate oversight, which arose in the context of an inherent contempt proceeding, the Court

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[125] Joseph Story, 1 Commentaries on the Constitution of the United States § 837 at 607 (Little Brown 5th ed. 1891).
[126] *Id*. §845 at 612-13.
[127] Id. §847 at 615.
[128] See Todd Garvey and Alissa M. Dolan, Congress's Contempt Power and the Enforcement of Congressional Subpoenas : Law History, Practice, and Procedure, CRS Report RL34097 (recounting early utilization).
[129] 19 U.S. (6 Wheat.) 204 (1821).
[130] Id. at 228-29.
[131] Id. at 231.
[132] See *Kilbourn v.Thompson*, , 103 U.S. 168 (1881); *In re Chapman*, 166 U.S. (1897); *McGrain v. Daugherty*, 273 U.S. 135 (1927); and Jurney v. MacCracken, 294 U.S. 125 (1935).

underlined the inextricable constitutional connection of an effective information enforcement process with the accomplishment of Congress's core legislative responsibility:

> 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; or where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be made to others who may have it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed as inhering in it.[133]

Thus, both houses of Congress, as well as the Supreme Court, have concluded that the structural and historical evidence supports the exercise of an inherent power in each house to hold nonmembers, including executive branch officials, in contempt.

The Need for a Congressional Challenge to the Executive's Obstruction of Its Ability to Compel Access to Information by Inherent or Statutory Criminal Contempt Processes is Imperative and Supported by Substantial *Constitutional Authority*

The lessons of the *Miers* and Fast and Furious forced civil enforcement litigations are clear and alarming. Delay is inevitable and that alone inhibits effective oversight which often requires timely access of information for satisfactory remedial legislative actions. The Fast and Furious investigation and litigation has dragged for over five years with no end in sight, an intolerable hindrance. The always present possibility of an aberrant judicial ruling has compounded the situation. The court's recognition of the availability of assertions by agencies of the deliberate process privilege (and possibly other common law privileges) to support withholding defenses militates the necessity for a House appeal, portending more delay in that case. But that ruling, which runs counter to the longstanding understanding of committees that such claims are available only at the discretion of the committees, has now encouraged other agencies under scrutiny to make similar assertions, further widening the instances of investigative delays and the apparent need for judicial assistance. Continued congressional acquiescence to this tactic would be an irresponsible and unnecessary abdication of its constitutional prerogatives.

The foregoing discussion has exposed the flawed historical and constitutional basis on which DOJ bases its position. It has argued that when the criminal contempt statute was enacted in 1857 to supplement (but not supplant) the then established inherent contempt process, there was no intention that it would be utilized against executive branch officials, and that there has never been an instance in which the inherent process ever being used against such officials. In fact, with respect to the first assertion, that very question was raised in the debate and the sponsor of the legislation responded that it was the clear intention of the legislation being applied to cabinet officials and cited a recent investigation House investigation in which subpoenas and requests for documents were successfully used against sitting and former presidents secretaries of state. As to the second assertion, there have been two arrests of federal officials pursuant to inherent contempt proceedings.

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[133] *McGrain,* 273 U.S. at 175; *see also Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Eastland,* 421 U.S. at 504-505.

Moreover, neither the criminal nor inherent contempt processes can be dismissed out of hand as an aspect prosecutorial discretion as DOJ attempts to do. Four Supreme Court rulings since 1821 have concluded and reiterated that each House has the inherent power, and responsibility, to protect itself by punishing for contempt or else it would "be exposed to every indignity and interruption, that rudeness, or even conspiracy, may mediate against it." Those decisions make it abundantly clear that the power derives from and is an integral part of the inviolable, exclusive core constitutional responsibility of the Congress to make all the laws. Such a structural constitutional role assignment can neither be encroached upon by another branch nor abandoned by the devoted branch.[134] The 1857 criminal contempt legislation was passed in light of the same self-protective authority because of the Supreme Court's limitation of punishment under the inherent power to the end of a legislative session. It must be recalled, and taken into account, that there was no Justice Department in 1857 (it was not created until 1870) and United States attorneys at the time were contract employees of the executive. They were simply seen as the vehicle to obtain judicial assistance to vindicate the House's integrity. This situation and rationale did not change with the establishment of the Department.[135]

The similar, well recognized, self-protective authority enjoyed by federal court judges provides an apt analogy. In *Young ex rel. Louis Vuitton et. Fils*[136], the Court recognized that district courts may appoint private attorneys to act as prosecutorial officers for the limited purpose of vindicating their authority. The next year, in its landmark ruling in *Morrison v. Olson*,[137] upholding the validity of the Independent Counsel legislation, it cited *Young* prominently, among other precedents, as authority for court appointment of a private prosecutor "where there is no incongruity between the functions normally performed by the courts and the performance of their duty to appoint."[138] Significantly, the Court also noted that "Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high ranking officers. If it were to remove the appointing authority from the Executive

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[134] *See, e.g., Clinton v City of New York,* 524 U.S. 417,452 (1998)("That a cession of power is voluntary does not make it innocuous. The Constitution is a compact that is enduring for more than out time, and one Congress cannot yield up its own powers, much less those of other Congress's to follow….Abdication of responsibility is not part of the constitutional design.")(Justice Kennedy concurring in the voiding a delegation of line item veto authority to the President); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)(rejecting 9-0 the President's claim that he could unilaterally determine when the Senate was out of session for recess appointment purposes that "the Senate is in session when it says it is.").

[135] See, Hearing, Prosecution of Contempt of Congress, before the House Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, 98th Cong,. 1st Sess. 21-22 (Nov.15, 1983)(testimony of Stanley Brand, former House General Counsel, explaining the refusal of the U.S. Attorney to present the contempt citation of EPA administrator Gorsuch to a grand jury on grounds of prosecutorial discretion "frustrated the congressional intent of the [1857] statute , which is to delegate to the judicial branch the responsibility to prosecute congressional contempts. That is a very important element, because under the U. S. attorney's theory , and the Department's theory, they were claiming it had been delegated to them. It had not been delegated to them; it had been—Congress had enlisted the aid of the judiciary to enforce its subpoenas. …The U.S. attorney is merely the agent through which this matter gets referred to the court, but in this instance, by virtue of the U.S. attorney having completely refused to bring this case under any circumstances, and I would submit that as not any exercise of prosecutorial discretion; that is sheer obstructionism, that this case could never get to court."

[136] 481 U.S. 787 (1987).

[137] 487 U.S. 654 (1988).

[138] 487 U.S. at 676-77.

Branch, the most logical place to put it was in the Judicial Branch."[139] Finally, the *Morrison* opinion made clear that prosecution was not a core presidential authority.[140]

It appears, then, that a strong argument may be made that the notion put forward by Olson and Cooper opinions that it is properly raising a claim of presidential privilege is misplaced. The only defense it should be able to put forth is that it would face a conflict of interest if it is asked to represent the House by presenting a contempt citation to a grand jury against one its clients. But DOJ's own rules provide a solution to such problems: appointment by the Attorney General of a private counsel as prosecutor or appointment of a DOJ counsel who is made independent.[141] A challenge to the next DOJ refusal to present a criminal contempt to a grand jury, asking a court to order the Attorney General to appoint a prosecutor in accordance with its own rules, would appear to be a credible option.

With respect to DOJ's claim that the House's use of traditional inherent contempt practices*, i.e*., arrest, detention and incarceration, would be unconstitutional, the short answer would be that there is no legal authority for the claim as at least four Supreme Court rulings have found to the contrary. Although there is case law, academic, and even congressional, commentaries that arrest, detention and incarceration practices of inherent proceedings are overly tough and onerous,[142] or in the words of Judge Bates in his *Miers* ruling, "unseemly," no court has ever held the process and procedure unlawful and it is agreed that it has not been utilized since 1935 because it took up too much valuable floor time and that criminal contempt was more expeditious and an effective threat. There is, however, no reason why inherent contempt cannot be made "seemly" and still be effective. This can be accomplished by the exercise of the rule making authority of each house.

Although the majority of the inherent contempt actions by both the House and Senate were conducted via trial at the bar of the full body, there is historical evidence to support the idea that this is not the exclusive procedure by which such proceedings can occur. This history, when combined with a 1993 Supreme Court decision addressing the power of Congress to make its own rules for the conduct of impeachment trials,[143] strongly suggests that the inherent contempt process can be supported and facilitated by the conduct of evidentiary proceedings and the development of recommendations at the committee level before any such trial. In addition, again by internal rule making, the penalty for conviction can limited to a monetary fine of the official that effects a direct, immediate reduction in pay, perhaps graduated to the speed of the contemnors compliance.

There are immediate benefits to such a renovated contempt process. It is entirely

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[139] Id. at 677.

[140] Id. at 691-92 ("Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act , we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law the counsel be terminable at will by the President.").

[141] See 28 C.F. R. Part 600 (2015), General Powers of Special Counsel.

[142] See, e.g*., United States v. Fort*, 443 F. 2d 670, 877-78 (D.C. Cir. 1970*), cert. denied*, 403 U.S. 932 (1971); *Tobin* v. *United States*, 306 F. 2d 270,275-776 (D.C. Cir. 1962), *cert. denied* 371 U.S. 902 (1962); *Committee on the Judiciary v. Miers*, 558 F. Supp.2d 53, 92 (D.D.C. 2008); Representation of Congress and Congressional Interests In Court, Hearings before the Senate Judiciary Committee, Subcommittee on Separation of Powers, 94th Cong., 2d Sess. 556-68 (1976); Theodore Sky, Judicial review of Congressional Investigations: Is There An Alternative to Contempt, 31 Geo. Wash. L. Rev. 399, 400 n.3 (1962).

[143] *See United States v. Nixon,* 506 U.S. 224 (1993).

internal to the institution, thereby avoiding the inevitable *habeus corpus* judicial challenge of the traditional inherent contempt procedure because there will be no arrests or detentions. There will also be no need for cooperation of the Executive as there is with criminal contempts. It will be more expeditious with respect to demands of floor time. It will be seen to be "seemly." And after the first successful convictions, the very threat of a such a proceeding will likely see negotiated settlements.[144] Since this is an adjudicatory proceeding with due process protections accorded, a successful Bill of Attainder challenge is unlikely. A Congressional Research Service (CRS) study notes that there was consideration of the use of committees to develop the more intricate details of an inquiry into charges of contempt of Congress that date back to the very first such proceeding in 1795 and that it was in fact utilized in a number of proceedings thereafter. The CRS study also describes hints in several of the Supreme Court's inherent contempt rulings that fines are a possible penalty and refers to the analogy of court imposed fines for disobedience of court orders. Congress also can, and has, disciplined its own members with fines. It would also appear logical that if it has been appropriate to imprison convicted contemnors, the lesser penalty of a fine would not appear out of line.[145]

Recommendations for Future Enforcement of Contempts of Congress

For enforcement of future contempt citations, if the President and the Department of Justice continue to adhere to their refusal to acknowledge the constitutionality and enforceability of the inherent and criminal processes for contempts of Congress, the House should take two courses of action simultaneously: By House resolution authorize the House General Counsel to challenge the refusal to present the citation for criminal contempt to a grand jury and ask the court to direct the Attorney General to appoint an independent prosecutor pursuant to his authority under 28 U.S.C. Part 600. At the same time as the refusal occurs, the House should commence the new "seemly" inherent contempt proceeding. The Supreme Court has ruled, in *In re Chapman*, that both proceedings can be done simultaneously or serially and that there is no double jeopardy problem.[146] Since both contempt processes serve different ends, both should be legitimized and made available as future options. Inherent contempt is meant to encourage compliance in the provision of testimony or documents. An agreement to comply would end pay reductions. Criminal contempt is meant to punish obstructive recalcitrance. Compliance after conviction does not vitiate the sentence.

Both options must be available to investigating committees. In the past, with respect to inherent contempt, there is evidence ample evidence that the threat of such action brought potential contemnors to the bargaining table.[147] Similarly, the experiences of the period between 1975 to 2002 also demonstrate that the credible threat of the utilization of criminal contempt provided sufficient, but not overbearing, leverage to convince the Executive that accommodation was necessary, most often well before a full House vote of contempt. None of the ten instances cited in the above text could be shown to be an illegitimate exercise of the investigative power by the committees involved. A similar observation can be made with respect *Miers* and Fast and Furious inquiries. Indeed, the judge in Fast and Furious expressly found that the Justice Department had conceded the legitimacy of the probe. It is not unfair, callous or cynical to say that it would be a rare agency official would agree to endure the potential risk and personal cost

[144] See Beck, supra n. detailing the high rate of settlements resulting from the credible threat of arrest and detention under the traditional inherent contempt process.
[145] Todd Garvey and Alissa M. Dolan, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, CRS Report RL34097, 11-17 (May 8, 2014).
[146] 166 U.S. 661, 671-74 (1897).
[147] See BecK, supra at n.

of a public trial that could end in possible imprisonment and/or fine for the sake of protecting a presidential desire for secrecy. It has not been so in the past. And the past revelations made as a result of the pressure applied have not ever been shown to have crippled or endangered the presidency or the national interest.

The present circumstances meet the criteria posited by Professors Posner and Vermuele for a "constitutional showdown." The evidence of *Miers* and Fast and Furious litigations have indubitably demonstrated that the Executive's strategy of forcing subpoena enforcement into the courts is crippling Congress's essential information gathering authority and thereby effectively obstructing its core, constitutionally-mandated legislative function. The uncertainty whether committees can impose meaningful consequences for delays or outright refusals to comply with necessary information requests has already fostered an environment of agency slow-walking responses and raising assertions of non-constitutional privilege claims traditionally available only at the discretion of a committee in the first instance and judicially challengeable thereafter only after imposition of a citation of contempt. As with Justice Department subpoenas to Member for documents, the Member and the House must make the initial determination whether privilege applies.

Timely oversight under the present circumstances is inevitably stymied and the long-term costs to the integrity of the institution within our constitutional scheme is incalculable. The continuation of a posture of acquiescence will do no more than encourage further Executive usurpations. The failure to mount immediate constitutional challenges would be an abdication of the Congress's vested responsibilities.