

# The Historical and Legal Basis for the Exercise of Congressional Oversight Authority

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## Introduction

With the recent change in leadership of the House of Representatives following the 2018 midterm elections, there has been considerable discussion about what role the 116th Congress will play in holding the Trump Administration and others accountable to the text and values of the U.S. Constitution, as well as to federal law more generally. The simple answer is that the House could, if it chooses, play a significant role—investigating a range of critical matters such as the misuse of funds by cabinet officials, connections between President Trump’s campaign and Russia, whether the President or other officials are improperly benefitting financially from their offices, and whether the Executive Branch is properly enforcing environmental and other public health and safety laws.

After all, Congress’s power to investigate has deep roots in our political tradition, and the ability of Congress to investigate is embedded in our national charter, which gives Congress the power to legislate.<sup>1</sup> As the Supreme Court has recognized, “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.”<sup>2</sup> Given its function, the congressional power

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<sup>1</sup> See U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *id.* § 8, cl. 18 (Congress has power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

<sup>2</sup> *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

to investigate is quite broad, “indeed co-extensive with the power to legislate.”<sup>3</sup> Moreover, should the Executive Branch refuse to comply with congressional requests for information, Congress has tools available to enforce its oversight authority, including bringing a civil action in court against recalcitrant Executive Branch officials.

This Issue Brief discusses the history of congressional investigations, the legal bases for those investigations, and the ways in which Congress can gain the information it needs to effectively conduct such investigations. First, it will trace the history of legislative investigations from the British Parliament, to the American colonial legislatures, to the U.S. Congress, where the power to investigate has been used since the earliest days of the Republic and approved by James Madison and other Framers of the Constitution. Relatedly, the Brief will describe Supreme Court decisions establishing that Congress’s ability to investigate is grounded in Congress’s Article I power to legislate because it fulfills Congress’s need to obtain relevant information in order to legislate effectively.

Second, the Brief will look at one important aspect of Congress’s investigatory power: its authority to enforce subpoenas for documents and testimony by Executive Branch officials. Specifically, the Brief will focus on two significant judicial decisions—one issued during the Bush Administration and one during the Obama Administration—that permitted the House of Representatives to file a civil suit in district court in the face of Executive Branch officials’ refusal to turn over documents or appear before a committee based on assertions of executive privilege. These decisions approving the House’s authority to file suit are important to the House of Representatives’ ability to enforce its subpoenas, and more broadly its ability to fulfill its obligation to thoroughly and effectively oversee the Executive Branch.

In short, the House of Representatives of the 116th Congress can do what the previous House declined to do: engage in robust and vigorous oversight of the Executive Branch. Doing so will ensure that Congress and the American people have a more complete picture of what this Administration is doing, the extent to which it is (or is not) faithfully complying with the U.S. Constitution and federal law, and the ways in which Congress could legislate to correct any wrongdoing and to better serve the American people.

## I. The History and Legality of Congressional Investigations

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### A. The History of Legislative Investigations

The practice of legislative oversight predates the birth of the United States, with “roots [that] lie deep in the British Parliament.”<sup>4</sup> For example, in the 1680s, Parliament investigated issues as diverse as the conduct of the army in “sending Relief” into Ireland during war, “Miscarriage in the Victualing of the Navy,” and the imposition of martial law by a commissioner of the East India Company.<sup>5</sup> These investigations were premised on the idea that Parliament could not properly legislate if it could not

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<sup>3</sup> *Quinn v. United States*, 349 U.S. 155, 160 (1955).

<sup>4</sup> James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926); *id.* (noting that the legislative committee for investigation “is an institution rivalling most legislative institutions in the antiquity of its origin”).

<sup>5</sup> *Id.* at 162.

gather information relevant to the topics on which it wanted to legislate. Thus, for example, a February 17, 1728 entry in the *Commons' Journal* described a parliamentary committee's investigation of bankruptcy laws as follows:

*Ordered*, That the Committee, appointed to inspect what Laws are expired, or near expiring, and to report their Opinion to the House, which of them are fit to be revived, or continued, and who are instructed to inspect the Laws related to Bankrupts, *and consider what Alterations are proper to be made therein*, have Power to send for Persons, Papers, and Records, with respect to that Instruction.<sup>6</sup>

This early British practice of legislative investigation was replicated by American colonial legislatures. “The colonial assemblies, like the House of Commons, very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention.”<sup>7</sup> For example, in 1722, the Massachusetts House of Representatives declared that it was “not only their Privilege but Duty to demand of any Officer in the pay and service of this Government an account of his Management while in the Public Employ.”<sup>8</sup> In exercising that duty, the House called before it two military officers to question them about their “failure to carry out certain offensive operations ordered by the [H]ouse at a previous session,” over the objection of the Governor.<sup>9</sup> Similarly, the Pennsylvania Assembly had “a standing committee to audit and settle the accounts of the treasurer and of the collectors of public revenues,”<sup>10</sup> which had the “full Power and Authority to send for Persons, Papers and Records by the Sergeant at Arms of this House.”<sup>11</sup>

After the founding of the United States, early state legislatures also understood themselves to have the power to investigate, and even to enforce, subpoenas against witnesses. For example, in 1824, the New York House of Representatives appointed a special committee to investigate corruption at the Chemical Bank. In connection with this investigation, the committee required a witness to appear before the committee, and adopted the following resolution when he refused:

*Resolved*, That there was no sufficient ground for his refusal to appear before the committee, and testify; that he was guilty of a misdemeanor and contempt of the House; that the sergeant-at-arms deliver him to the keeper of the jail of the county of Albany; that he be imprisoned until further order of the House, and that the Speaker issue his warrant accordingly.<sup>12</sup>

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<sup>6</sup> *Id.* at 163 (emphasis added) (citation omitted).

<sup>7</sup> C.S. Potts, *Power of Legislative Bodies To Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708 (1926).

<sup>8</sup> *Id.* (citation omitted).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 709.

<sup>11</sup> *Id.* (citation omitted).

<sup>12</sup> *Id.* at 718 (citation omitted).

Similarly, in 1837, the New York legislature held two men guilty of contempt for failure to appear and testify before a committee investigating whether state banks had used funds improperly.<sup>13</sup>

The United States Congress also demonstrated early in the Republic's history that it viewed broadly its authority to investigate, including its authority to investigate the Executive Branch. As the Supreme Court would later recount, the first Congresses used compulsory process to investigate "suspected corruption or mismanagement of government officials."<sup>14</sup>

Only a few years after the adoption of the Constitution, the House created a special committee in March 1792 to inquire into a particular military defeat. Record of the debate in the House shows that a majority of Members believed that Congress should establish a select committee to investigate this matter itself, rather than direct the President to investigate. For example, Representative Thomas Fitzsimons believed it "out of order to request the President . . . to institute . . . a Court of Inquiry," and instead argued that a committee was better suited "to inquire relative to such objects as came properly under the cognizance of this House, particularly respecting the expenditures of public money."<sup>15</sup> Similarly, Representative Abraham Baldwin "was convinced the House could not proceed but by a committee of their own," which "would be able to throw more light on the subject, and then the House would be able to determine how to proceed."<sup>16</sup> Thus, the House rejected a proposal directing the President to carry out the investigation, and instead passed by a 44 to 10 vote a resolution creating its own committee to investigate:

*Resolved*, That a committee be appointed to inquire into the causes of the failure of the late expedition under Major General St. Clair; and that the said committee be empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries.<sup>17</sup>

As the Supreme Court later noted in a case upholding Congress's constitutional power to investigate, "Mr. Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted [in favor of] the inquiry."<sup>18</sup>

Numerous similar congressional investigations took place over the succeeding years. In 1800, a select committee was formed to investigate the circumstances of the Treasury Secretary's recent resignation. Representative Roger Griswold believed such an investigation was important because if there is an investigation "on the retirement of every Secretary of the Treasury from office" about "his official conduct, it will operate as a general stimulus to the faithful discharge of duty."<sup>19</sup> The committee was directed "to examine into the state of the Treasury, the mode of conducting business therein, the

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<sup>13</sup> *Id.* at 719.

<sup>14</sup> *Watkins v. United States*, 354 U.S. 178, 192 (1957).

<sup>15</sup> 3 Annals of Cong. 492 (1792).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 493.

<sup>18</sup> *McGrain*, 273 U.S. at 161 (citing 3 Cong. Ann. 494).

<sup>19</sup> 10 Annals of Cong. 788 (1800).

expenditures, of the public money, and to report such facts and statements as will conduce to a full and satisfactory understanding of the state of the Treasury.”<sup>20</sup>

Similarly, in 1810, the House overwhelmingly passed a resolution to form a committee to “inquire into the conduct of Brigadier General James Wilkinson,” and it gave the committee the “power to send for persons and papers, and compel their attendance and production, and that they report the result to this House.”<sup>21</sup>

Some investigations were even broader in scope. An 1818 committee was formed by the House “to inquire whether any and what clerks or other officers in either of the Departments, or in any office at the Seat of the General Government, have conducted improperly in their official duties.”<sup>22</sup> The House further gave that committee the “power to send for persons and papers.”<sup>23</sup>

Moreover, some early investigations focused specifically on the President and his Cabinet. For example, in 1832, the House created a committee to discover “whether an attempt was made by the late Secretary of War, John H. Eaton, fraudulently to give to Samuel Houston — a contract — and that the said committee be further instructed *to inquire whether the President of the United States had any knowledge of such attempted fraud*, and whether he disapproved of the same; and that the committee have power to send for persons and papers.”<sup>24</sup> Later, in 1860, Congress created a special committee to determine whether “any person connected with the present Executive Department of this Government”<sup>25</sup> improperly attempted to influence legislation in the House “by any promise, offer, or intimation of employment, patronage, office, favors, or rewards, under the Government, or under any department, officer, or servant thereof, to be conferred or withheld in consideration of any vote given, or to be given, withheld, or to be withheld.”<sup>26</sup> The committee had the “power to send for persons and papers, examine witnesses, and leave to report at any time, by bill or otherwise.”<sup>27</sup>

Finally, early Congresses assumed that the individuals who could be held in contempt for refusing to cooperate with investigations were not limited to members of Congress. For example, in 1795, Robert Randall was accused of attempting to bribe three members of the House of Representatives. Randall and one of his associates were brought before the House, which overwhelmingly approved a resolution finding Randall guilty of attempting to corrupt the integrity of Members. The resolution further ordered Randall to be “brought to the bar, reprimanded by the Speaker, and committed to the custody of the Sergeant-at-Arms until further order of this House.”<sup>28</sup> This case was significant because there was “no

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<sup>20</sup> *Id.* at 796-97 (1800).

<sup>21</sup> 21 Annals of Cong. 1606-07 (1810).

<sup>22</sup> 31 Annals of Cong. 783 (1818).

<sup>23</sup> *Id.*

<sup>24</sup> Landis, *supra* note 4, at 179 (quoting H.R. Rep. No. 502, 22d Cong. 1st Sess., Ser. No. 228) (emphasis added).

<sup>25</sup> Cong. Globe, 36th Cong. 1st Sess. 1017-18 (1860).

<sup>26</sup> *Id.* at 1018.

<sup>27</sup> *Id.*

<sup>28</sup> Potts, *supra* note 7, at 719-20 (citation omitted).

division of opinion among the members present, several of whom had been members of the Constitutional Convention, as to the power of the house to punish a non-member for such an offense.”<sup>29</sup>

Similarly, in 1859, a committee created to investigate the raid on Harper’s Ferry attempted to subpoena as a witness Thaddeus Hyatt, and when he refused to appear, the Senate debated and voted on a resolution directing that Hyatt be imprisoned in the House until he was willing to testify.<sup>30</sup> The resolution overwhelmingly passed, with numerous Senators speaking in favor of the Senate’s power to subpoena witnesses as part of an investigation. For example, Senator William P. Fessenden noted that the subpoena power “has been exercised by Parliament, and by all legislative bodies down to the present day without dispute,” and that “the power to inquire into subjects upon which [legislatures] are disposed to legislate” should not be “lost” to the Senate.<sup>31</sup> Senator Fessenden believed that power included the power “to compel [witnesses] to come before us” where the witness “will not give it to us.”<sup>32</sup> Likewise, Senator John J. Crittenden argued that the Senate had “the power of instituting an inquiry,” and that it “ha[s] a right, in consequence of it, a necessary incidental power, to summon witnesses, if witnesses are necessary.”<sup>33</sup>

## B. Judicial Affirmation of Congress’s Power To Investigate

In addition to this long history of Congress extensively using its oversight authority, including to investigate the Executive Branch, the judiciary has repeatedly affirmed Congress’s broad investigatory powers. As the Supreme Court has stated: “The power of the Congress to conduct investigations is inherent in the legislative process,” and “[t]hat power is broad.”<sup>34</sup> Indeed, Congress must have this power because it can “legislate wisely [and] effectively” only with “information respecting the conditions which the legislation is intended to affect or change.”<sup>35</sup> For that reason, “where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.”<sup>36</sup>

Though the Supreme Court did not squarely address the power of Congress to investigate until the twentieth century,<sup>37</sup> many state courts addressed state legislatures’ investigative powers much earlier.

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<sup>29</sup> *Id.* at 720. This Congressional power to punish for contempt was approved by an early Supreme Court decision, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), in which the Court upheld the Speaker’s warrant for the arrest of an individual who attempted to bribe a Member of the House. *Id.* at 224-35.

<sup>30</sup> *McGrain*, 273 U.S. at 161-62.

<sup>31</sup> Cong. Globe, 36th Cong., 1st Sess. 1102 (1860).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1105.

<sup>34</sup> *Watkins*, 354 U.S. at 187.

<sup>35</sup> *McGrain*, 273 U.S. at 175.

<sup>36</sup> *Id.*

<sup>37</sup> A couple of early cases touched on issues related to Congress’s oversight authority. In 1821, the Court upheld Congress’s authority to punish a non-Member for contempt. *Anderson*, 19 U.S. (6 Wheat.) at 224-35. And in 1880, although the Court questioned in passing whether the ability of Congress to hold a citizen in contempt was “necessary to enable either House of Congress to exercise successfully their function of legislation,” the Court noted that this was a “proposition . . . which [it

For example, in 1855, a New York court broadly held that “either house may institute any investigation having reference to . . . any matter affecting the public interest upon which it may be important that it should have exact information, and in respect to which it would be competent for it to legislate.”<sup>38</sup> This was because “[t]he right to pass laws, necessarily implies the right to obtain information upon any matter which may become the subject of a law.”<sup>39</sup> Moreover, the court noted that “the right of either house to compel witnesses to appear and testify before its committees, and to punish for disobedience, has been frequently enforced.”<sup>40</sup>

Similarly, the Supreme Judicial Court of Massachusetts noted in 1859 that “[t]he house of representatives has many duties to perform, which necessarily require it to receive evidence, and examine witnesses.”<sup>41</sup> For that reason, the court found “it clear that [the legislature] has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and to testify” and that “[t]his power to summon and examine witnesses it may exercise by means of committees.”<sup>42</sup>

When the U.S. Supreme Court first had occasion to squarely address the scope of Congress’s power to investigate, it too articulated this legislative investigatory power broadly—as it has done ever since. In the 1927 case *McGrain v. Daugherty*, the Court considered whether the Senate, in the course of an investigation regarding the Department of Justice, could compel a witness—in that case, the brother of the Attorney General—to appear before a Senate committee to give testimony.<sup>43</sup> The Court held that “the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.”<sup>44</sup> As the Court explained, the power to compel witnesses to testify is an essential aspect of the power to legislate:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. 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. . . . Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative

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did] not propose to decide in the present case, because [it was] able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function.” *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880).

<sup>38</sup> *Briggs v. Mackellar*, 2 Abb. Pr. 30 (N.Y. Ct. Com. Pl. 1855).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Burnham v. Morissey*, 80 Mass. 226, 239 (1859).

<sup>42</sup> *Id.*

<sup>43</sup> *McGrain*, 273 U.S. at 150-52.

<sup>44</sup> *Id.* at 154.



function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.<sup>45</sup>

Applying these principles, the Court then asked whether the particular subpoena at issue was designed “to obtain information in aid of the legislative function.”<sup>46</sup> The Court concluded that it was: “the 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.”<sup>47</sup> As the Court explained: “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,”<sup>48</sup> especially in view of the fact that the powers of the Department of Justice and the Attorney General were subject to legislation, and “that the [D]epartment is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed.”<sup>49</sup>

Two years later, the Court reiterated that “the power of inquiry is an essential and appropriate auxiliary to the legislative function.”<sup>50</sup> It thus affirmed an individual’s conviction for contempt of Congress under 2 U.S.C. § 192, which provides for the criminal punishment of witnesses who refuse to answer questions or provide documents pertinent to a congressional investigation. Rejecting the defendant’s claim that the investigation at issue was not related to legislation, the Court stated that because Congress can legislate “respecting the naval oil reserves” and “other public lands and property of the United States,” a Senate committee “undoubtedly” had the power “to investigate and report what had been and was being done by executive departments under the Leasing Act, the Naval Oil Reserve Act, and the President’s order in respect of the reserves and to make any other inquiry concerning the public domain.”<sup>51</sup>

The Court again outlined a broad view of Congress’s power to investigate in its 1955 decision, *Quinn v. United States*. There, the Court considered whether the petitioner could be convicted of contempt of Congress under 2 U.S.C. § 192. As in *McGrain*, the Court described the breadth of Congress’s investigatory powers in unequivocal terms:

There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—

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<sup>45</sup> *Id.* at 175; see *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (reaffirming this language).

<sup>46</sup> *Id.* at 176.

<sup>47</sup> *Id.* at 177.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 178. Though the Court suggested that “[a]n express avowal of the object would have been better,” the Court believed “the subject-matter was such that the presumption should be indulged that [legislation] was the real object. *Id.*”

<sup>50</sup> *Sinclair v. United States*, 279 U.S. 263, 291 (1929).

<sup>51</sup> *Id.* at 294.



Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.<sup>52</sup>

Similarly, in *Watkins v. United States*, the Court again made clear that “an investigation is part of lawmaking,”<sup>53</sup> and once more described the congressional investigatory power expansively:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.<sup>54</sup>

And again, in *Eastland v. U.S. Servicemen’s Fund*, the Court recognized that “the power to investigate is inherent in the power to make laws,” and that the “[i]ssuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate.”<sup>55</sup> Indeed, the Court ruled, the “power of inquiry” is such “an integral part of the legislative process” that the Speech or Debate Clause provides complete immunity for Congressmembers’ decision to issue a subpoena.<sup>56</sup> “The issuance of a subpoena pursuant to an authorized investigation,” as the Court explained, is “an indispensable ingredient of lawmaking.”<sup>57</sup>

Finally, the Court relied on “Congress’ broad investigative power” in upholding a statute that required the preservation of presidential materials from the Nixon Administration. Among the “substantial public interests that led Congress to seek to preserve [these] materials” was “Congress’ need to understand how [our] political processes had in fact operated” during “the events leading to [Nixon]’s resignation . . . in order to gauge the necessity for remedial legislation.”<sup>58</sup>

In short, the House and Senate possess broad investigatory powers rooted in the Constitution’s grant of the legislative power to Congress under Article I. Indeed, even the Executive Branch has agreed. As the Department of Justice’s Office of Legal Counsel has noted, “[i]t is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws.”<sup>59</sup> Describing some of the history above, the Office noted that “[t]his power to obtain information has long been viewed as an essential attribute of the power to legislate, and

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<sup>52</sup> *Quinn*, 349 U.S. at 160-61. Because the witness in *Quinn* asserted the privilege against self-incrimination, and because the committee never specifically ruled on his objection, the Court ruled that the witness could not be said to have intentionally violated 2 U.S.C. § 192. *Id.* at 165-70.

<sup>53</sup> *Watkins*, 354 U.S. at 197.

<sup>54</sup> *Id.* at 187. Precisely because “an investigation is part of lawmaking,” the Court held that it is “subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly,” *id.* at 197, thus ensuring that Congress’s power to investigate is subject to the requirements of the First Amendment.

<sup>55</sup> *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975).

<sup>56</sup> *Id.* at 505, 507.

<sup>57</sup> *Id.* at 505.

<sup>58</sup> *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 453 (1977).

<sup>59</sup> *Scope of Congressional Oversight and Investigative Power with Respect to the Executive Branch*, 9 Op. Att’y Gen. 60, 60 (1985); see *id.* at 61 (“It is now settled that Congress’ power to obtain information necessary to legislate is broad.”).

was so treated in the British Parliament and in the colonial legislatures in this country.”<sup>60</sup> There is therefore agreement among the three Branches that Congress can (and often should) investigate the Executive Branch as part of its mandate to legislate.

Of course, Congress’s investigatory power is not *limited* to matters concerning the Executive Branch. While Congress may inquire into “corruption, maladministration or inefficiency in agencies of the Government,”<sup>61</sup> the scope of its investigatory power is “co-extensive with the power to legislate,”<sup>62</sup> and thus much broader. Indeed, “[t]he power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate.”<sup>63</sup> Congress has, for instance, used its subpoena power to investigate matters as diverse as the “means used to influence the nomination of candidates for the Senate,”<sup>64</sup> alleged “interference with the loyalty, discipline, or morale of the Armed Services,”<sup>65</sup> the problem of “mob violence and organized crime,”<sup>66</sup> and the prevention of “sex trafficking, on the Internet.”<sup>67</sup> “The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”<sup>68</sup>

## II. Congress’s Ability To Enforce Subpoenas

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As described above, the power to subpoena witnesses and compel testimony has long been considered a vital part of Congress’s oversight powers. Early in the nation’s history, the Supreme Court recognized Congress’s power to compel individuals to appear before a House of Congress and to hold such individuals in contempt.<sup>69</sup> Since then, the Court has repeatedly reaffirmed that the issuance of subpoenas in support of legitimate investigations is “an indispensable ingredient of lawmaking.”<sup>70</sup> Of

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<sup>60</sup> *Id.* at 60.

<sup>61</sup> *Watkins*, 354 U.S. at 200 n.33; *see id.* (Congress has “assiduously performed” this oversight function “[f]rom the earliest times in its history”).

<sup>62</sup> *Quinn*, 349 U.S. at 160.

<sup>63</sup> *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

<sup>64</sup> *Reed v. Cty. Comm’rs of Delaware Cty., Pa.*, 277 U.S. 376, 386 (1928).

<sup>65</sup> *Eastland*, 421 U.S. at 500.

<sup>66</sup> *In re Application of U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1233 (D.C. Cir. 1981).

<sup>67</sup> *See Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125, 128 (D.D.C. 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017).

<sup>68</sup> *Barenblatt*, 360 U.S. at 111. “Broad as it is, the power is not, however, without limitations.” *Id.* First, “Congress may only investigate into those areas in which it may potentially legislate or appropriate.” *Id.*; *see Kilbourn v. Thompson*, 103 U.S. 168, 194-95 (1880). Second, “the Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action,” including “the relevant limitations of the Bill of Rights.” *Barenblatt*, 360 U.S. at 112; *see Quinn*, 349 U.S. at 161-63; *Watkins*, 354 U.S. at 195-200.

<sup>69</sup> *Anderson*, 19 U.S. (6 Wheat.) at 224-35.

<sup>70</sup> *Eastland*, 421 U.S. at 505.

course, “[t]o validly issue a subpoena, individual committees or subcommittees must be delegated this authority.”<sup>71</sup> Today, all standing committees and subcommittees are empowered by Senate and House rules to require the attendance and testimony of witnesses and the production of documents.<sup>72</sup>

The power to subpoena documents and witnesses raises the question of how the House of Representatives can enforce these subpoenas. A few avenues are available.<sup>73</sup>

First, the House could rely on its oldest enforcement mechanism: using its inherent contempt authority and its own law enforcement officials to imprison an uncooperative witness. Specifically, the House could “direct the sergeant-at-arms to arrest the witness, try her in the House, and upon conviction, place her in detention in a House facility until she either complied with the subpoena or the term of the Congress expired, whichever came first.”<sup>74</sup> This option has the advantage of not relying on any other branch of government, but it is one that Congress “has not employed . . . in over seventy years.”<sup>75</sup> Moreover, because detention cannot extend beyond a particular session of Congress,<sup>76</sup> a particularly recalcitrant witness could simply choose to remain in detention until the end of a session and thereby avoid testifying.

Second, utilizing a law that criminalizes non-compliance with congressional inquiries, Congress could ask the Executive Branch to prosecute an uncooperative witness. Section 192 of title 2 of the U.S. Code, enacted in 1857 to enhance Congress’s enforcement options,<sup>77</sup> makes it a misdemeanor punishable by fine or imprisonment for a witness summoned by Congress to “willfully make[] default, or . . . refuse[] to answer any question pertinent to the question under inquiry.”<sup>78</sup> Under 2 U.S.C. § 194, Congress can vote to hold a witness in contempt and refer the matter to “the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.”

One shortcoming of this approach is that it requires Congress to rely on the Executive Branch to prosecute delinquent witnesses—and the Executive Branch is likely to decline to enforce the provision against its own officials, particularly when an official raises executive privilege or other objections.<sup>79</sup>

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<sup>71</sup> Fredrick M. Kaiser, et al., Cong. Research Serv., RL30240, *Congressional Oversight Manual* 28 (Jan. 6, 2011).

<sup>72</sup> See Standing Rules of the Senate Rule XXVI § 1; House Rule 51.

<sup>73</sup> See generally Irvin B. Nathan, *Protecting the House’s Institutional Prerogative To Enforce Its Subpoenas*, The Constitution Project 301 (2015).

<sup>74</sup> *Id.* But see *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. Att’y Gen. 68, 86 (1986) (expressing considerable skepticism “that Congress could dispatch the Sergeant-at-Arms to arrest and imprison an Executive Branch official who claimed executive privilege” because such an action had not occurred for a long time).

<sup>75</sup> Brian Wanglin, *Reclaiming Congress’s Contempt Powers over the Executive*, 15 Geo. J.L. & Pub. Pol’y 457, 463 (2017).

<sup>76</sup> See *Watkins*, 354 U.S. at 207 n.45 (“Such imprisonment is valid only so long as the House remains in session.”).

<sup>77</sup> Todd Garvey, Cong. Research Serv., RL 34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 19 (May 12, 2017).

<sup>78</sup> *Id.* at 18 (quoting 2 U.S.C. § 192).

<sup>79</sup> At least one court has suggested that a prosecutor is *required* to submit a section 194 certification to a grand jury. See *Ex parte Frankfeld*, 32 F. Supp. 915, 916 (D.D.C. 1940) (“Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate . . . but made the certification of facts to the district attorney a mandatory proceeding, and it left no discretion with the district attorney as to what he should do about it. He is required, under the language of the statute, to submit the facts to the grand jury.”). However, there are historical examples of the Executive Branch refusing to prosecute. See, e.g., *Prosecution for Contempt of Congress of an Executive*

Another shortcoming is that these criminal provisions are “punitive rather than coercive in nature.”<sup>80</sup> That is, they are designed primarily to punish recalcitrant witnesses and deter similar defiance by others—but not to secure that witness’s testimony. “[T]he witness generally will not be able to purge himself by testifying or supplying subpoenaed documents after he has been voted in contempt,” and so “once a witness has been voted in contempt, he lacks an incentive for cooperating.”<sup>81</sup>

Third, Congress can file a civil action in federal court demanding that an uncooperative witness comply with a subpoena. If a court finds that the witness has no valid basis for his or her refusal and orders compliance with the subpoena, the witness can be held in contempt of court and imprisoned until he or she obeys.<sup>82</sup>

While the Supreme Court has never had occasion to consider this enforcement mechanism, the U.S. Court of Appeals for the D.C. Circuit has long recognized that the House of Representatives “has standing to assert its investigatory power” in court by seeking to ensure compliance with its subpoenas.<sup>83</sup> And two recent decisions—one that arose during the George W. Bush Administration and one during the Obama Administration—both approved of this method of enforcement.

First, in 2008, a court permitted the House of Representatives to bring a civil action to enforce a subpoena of two White House officials, Chief of Staff Josh Bolten and White House Counsel Harriet Miers, as part of the House’s investigation into the resignation of nine U.S. Attorneys.<sup>84</sup> The case arose from the House Judiciary Committee’s extensive investigation into the reason that these U.S. Attorneys were effectively fired, which revealed to the committee that Miers and other White House officials may have “played a significant personal role in the termination decision-making.”<sup>85</sup> The committee directed Miers and Bolten to submit certain documents and correspondence to the committee, and directed Miers to appear to testify.<sup>86</sup> Bolten and Miers refused to comply, both citing executive privilege as a reason to refuse to produce the documents, and with Miers citing an absolute immunity from compelled congressional testimony.<sup>87</sup> After receiving the committee’s recommendation that Miers and Bolton be

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*Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Att’y Gen. 101, 109 (1984), available at <https://www.justice.gov/sites/default/files/olc/opinions/1984/05/31/op-olc-vo08-p0101.pdf> [<https://perma.cc/JP8H-RYCU>] (noting that “the United States Attorney indicated that . . . he would take no further action with respect to the Speaker’s referral of [the EPA Administrator’s] contempt citation”).

<sup>80</sup> *In re Application*, 655 F.2d at 1238 n.26.

<sup>81</sup> See Garvey, *supra* note 77, at 20.

<sup>82</sup> The Senate has statutory authority to bring such a civil action, see 2 U.S.C. § 288d, while the House may pursue civil enforcement pursuant to an authorizing resolution, see *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 63 (D.D.C. 2008); *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 7 (D.D.C. 2013).

<sup>83</sup> *United States v. AT&T Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976). In that case, the House did not initiate legal proceedings to enforce a subpoena; rather, after a House committee subpoenaed documents from AT&T concerning its participation in warrantless government wiretapping, the Executive Branch brought suit to prevent the company from complying with the subpoena. *Id.* at 387-88. In response, the House authorized the committee’s chairman to intervene as a defendant on behalf of the committee and the House. *Id.* at 391.

<sup>84</sup> See *Miers*, 558 F. Supp. 2d 53.

<sup>85</sup> *Id.* at 59.

<sup>86</sup> *Id.* at 59-62.

<sup>87</sup> *Id.* at 62.

held in contempt, the House of Representatives voted to cite Miers and Bolten for contempt of Congress.<sup>88</sup>

At the same time, the House also passed a resolution authorizing the chairman of the House Judiciary Committee to “initiate a civil action in federal court to seek declaratory and injunctive relief ‘affirming the duty of any individual to comply with any subpoena.’”<sup>89</sup> On that basis, the committee filed an action in D.C. district court seeking a declaratory judgment and other injunctive relief.<sup>90</sup> The Executive Branch filed a motion to dismiss raising three distinct issues: standing, lack of a cause of action, and equitable discretion. The district court rejected each.

First, the court held that the House of Representatives had standing to sue.<sup>91</sup> Specifically, the court held that “[t]he injury incurred by the Committee, for Article III purposes, is both the loss of information to which it is entitled and the institutional diminution of its subpoena power.”<sup>92</sup> This harm is directly tied to Congress’s Article I power to legislate. Much like in *McGrain* (discussed above), Congress was conducting a “broader inquiry into whether improper partisan considerations have influenced prosecutorial discretion,” and it “defies both reason and precedent to say that the Committee, which is charged with oversight of DOJ generally, cannot permissibly employ its investigative resources on this subject.”<sup>93</sup> Furthermore, the court held that this dispute is precisely the type that is amenable to judicial enforcement for two reasons: “(1) in essence, this lawsuit merely seeks enforcement of a subpoena, which is a routine and quintessential judicial task; and (2) the Supreme Court has held that the judiciary is the final arbiter of executive privilege,” and that is “the ground[] asserted for the Executive’s refusal to comply.”<sup>94</sup>

Second, the court held that the Declaratory Judgment Act can supply a basis for the committee’s requested relief.<sup>95</sup> Because the committee was seeking to vindicate its constitutional rights—namely, its Article I right to issue and enforce subpoenas—no additional statutory cause of action was needed.<sup>96</sup> And although the committee sought only declaratory relief, not an injunction, the court held that the

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<sup>88</sup> *Id.* at 63.

<sup>89</sup> *Id.* (quoting H. Res. 980, 110th Cong. (Feb. 14, 2008)). The House also passed a resolution directing the Speaker of the House to certify a copy of the Contempt Report to the U.S. Attorney for the District of Columbia. *Id.* at 63. Speaker Nancy Pelosi did so, but Attorney General Michael Mukasey prohibited the U.S. Attorney from bringing contempt charges “because Ms. Miers and Mr. Bolten were acting pursuant to the direct orders of the President.” *Id.*

<sup>90</sup> *Id.* at 64.

<sup>91</sup> *Id.* at 69.

<sup>92</sup> *Id.* at 71.

<sup>93</sup> *Id.* at 77-78. As both sides agreed, the court had subject-matter jurisdiction over the case under 28 U.S.C. § 1331. *See id.* at 64 (Because Congress’s subpoena power “derives implicitly from Article I of the Constitution, this case arises under the Constitution for purposes of § 1331.”).

<sup>94</sup> *Id.* at 71. The Court also noted that Chief Justice Marshall held in 1807 that “the obligation [to comply with a subpoena] . . . is general; and it would seem that no person could claim an exemption.” *Id.* at 72 (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807)); *see Clinton v. Jones*, 520 U.S. 681, 695 n.23 (1997) (“[T]he prerogative [President] Jefferson claimed was denied him by the Chief Justice in the very decision Jefferson was protesting, and this Court has subsequently reaffirmed that holding [in *United States v. Nixon*].”).

<sup>95</sup> *Miers*, 558 F. Supp. 2d at 82 (discussing the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202).

<sup>96</sup> *Id.* at 82-84. For similar reasons, the court held in the alternative that “the committee has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power.” *Id.* at 94.

committee was not seeking an advisory opinion because it “s[ought] actual compliance with the subpoenas.”<sup>97</sup>

Third, the court refused to exercise its equitable discretion to decline to hear the case. Rejecting the Executive’s argument that “the federal judiciary should not enter into this dispute between the political branches,” the court noted that declining to take the case may also “impact the balance between the political branches in this and future settings,” given that a decision not to take the case would “tilt the balance in favor of the Executive.”<sup>98</sup> Furthermore, the court believed that “hearing this case [would not] open the floodgates for similar litigation that would overwhelm the federal courts and paralyze the accommodations process between the political branches.”<sup>99</sup> Finally, the court noted that the record showed that the committee attempted to reach an agreement with the Executive Branch and was repeatedly rebuffed.<sup>100</sup> For all those reasons, the Court denied the Executive Branch’s motion to dismiss and permitted the committee’s civil action to enforce its subpoena to proceed.<sup>101</sup>

A second lawsuit to enforce a House subpoena was brought during the Obama Administration, and another judge permitted the case to move forward.<sup>102</sup> That case arose out of the House Committee on Oversight and Government Reform’s investigation of the so-called Fast and Furious operation—in particular, an inaccurate letter denying the existence of the operation that the Justice Department sent to the committee.<sup>103</sup> In investigating why the inaccurate letter was sent, the committee subpoenaed documents from the Justice Department; however, the President asserted executive privilege over certain documents “because their disclosure would reveal the agency’s deliberative processes.”<sup>104</sup> The House voted to hold Attorney General Eric Holder in contempt, and following the Justice Department’s expression of its intent not to prosecute Holder, the House filed a civil action to enforce the subpoena in federal district court.<sup>105</sup> The district court denied the Executive Branch’s motion to dismiss.

As in the *Miers* case, the court first rejected the Executive Branch’s standing arguments—namely, that hearing a dispute between the legislative and executive branches would “undermine the foundation of our government” or would “lead to the abandonment of all negotiation and accommodation in the future.”<sup>106</sup> Rather, the court viewed the case as “involv[ing] the application of a specific privilege to a

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 95.

<sup>99</sup> *Id.* at 96.

<sup>100</sup> *Id.* at 97.

<sup>101</sup> The Court also granted the committee’s motion for partial summary judgment, rejecting Miers’ claim that she was absolutely immune from testifying before the committee. *Id.* at 99-108. Because the district court’s decision was issued on July 31, 2008, just three months before the 2008 election, the negotiations between the political branches following the issuance of the decision continued into the Obama Administration. That Administration ended up negotiating with the House to permit Miers’ testimony. *See* Nathan, *supra* note 73, at 309. In the end, Miers testified under oath in 2009, with few assertions of privilege. *Id.* at 309-10.

<sup>102</sup> *Holder*, 979 F. Supp. 2d 1.

<sup>103</sup> *Id.* at 3.

<sup>104</sup> *Id.* at 4.

<sup>105</sup> *Id.* at 7.

<sup>106</sup> *Id.* at 11.

specific set of records responsive to a specific request, and the lawsuit d[id] not invite the court to engage in the broad oversight of either of the other two branches.”<sup>107</sup> Moreover, the court observed that “[f]ederal courts are routinely involved in the enforcement of subpoenas, in both civil and criminal litigation,” and that “judges are regularly called upon to rule upon the applicability of privileges or exclusions asserted by the executive” in other contexts.<sup>108</sup>

Second, also as in the *Miers* case, the *Holder* court held that the committee had a valid cause of action because “[i]t is well established that the Committee’s power to investigate, and its right to advance an investigation by issuing subpoenas and enforcing them in court, derives from the legislative function assigned to Congress in Article I of the Constitution.”<sup>109</sup> Thus, the committee could bring a suit under the Declaratory Judgment Act because it alleged “an actual injury to rights derived from the Constitution, giving rise to Article III standing and federal question jurisdiction.”<sup>110</sup> Finally, as in the *Miers* case, the court declined to exercise its equitable discretion and dismiss the case.<sup>111</sup>

Interestingly, the outcome in these two cases mirrors the reasoning of two Office of Legal Counsel memoranda from the Reagan administration. In the first, from 1984, the Office concluded that because of concerns regarding prosecutorial discretion, “the contempt of Congress statute [2 U.S.C. § 192] does not require and could not constitutionally require a prosecution of [an] official, or even, we believe, a referral to a grand jury of the facts relating to [an] alleged contempt.”<sup>112</sup> In so holding, however, the Office emphasized that Congress can “obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena.”<sup>113</sup> In this way, “even if criminal sanctions were not available against an executive official who asserted the President’s claim of privilege, Congress would be able to vindicate its legitimate desire to obtain documents if it could establish that its need for the records outweighed the Executive’s interest in preserving confidentiality.”<sup>114</sup>

Similarly, in 1986 the Office reiterated that Congress may institute “a civil suit seeking declaratory enforcement of [a] subpoena.”<sup>115</sup> The Office noted that “[a]ny notion that the courts may not or should

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<sup>107</sup> *Id.* at 14.

<sup>108</sup> *Id.* at 22.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 23.

<sup>111</sup> *Id.* at 24-25. Following the district court’s decision, both parties filed summary judgment motions regarding the deliberative process privilege, and the district court held that while the Executive Branch could assert privilege over Department of Justice records, it could not assert a blanket privilege over all records generated after a particular date without a specific showing of privilege for each document. *Comm. on Oversight and Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101, 104, 107 (D.D.C. 2016). And in a subsequent decision following the Department’s production of withheld materials, the district court required the Department to produce certain documents it held were not covered by the deliberative process privilege. *Id.* at 104-08.

<sup>112</sup> *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Att’y Gen. 101, 142 (1984).

<sup>113</sup> *Id.* at 137.

<sup>114</sup> *Id.*

<sup>115</sup> *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. Att’y Gen. 68, 83 (1986).



not review [subpoena enforcement disputes] is dispelled by *United States v. Nixon* . . . in which the Court clearly asserted its role as ultimate arbiter of executive privilege questions.”<sup>116</sup>

One important caveat regarding the House’s power to enforce subpoenas through civil suit is that under existing precedent, authorizations for such suits may not be initiated solely by individual legislators or legislative committees. In a 2006 case, minority members of the House Government Reform Committee sought a court order granting them access to certain records at the Department of Health and Human Services.<sup>117</sup> The court held that the Supreme Court’s decision in *Reed v. County Commissioners*—which held that Senators could not bring suit to enforce a subpoena unless the full Senate specifically authorized them to sue<sup>118</sup>—“put Congress on notice that it was necessary to make authorization to sue to enforce investigatory demands explicit if it wished to ensure that such power existed.”<sup>119</sup> In short, following the district court decisions described above, “it appears that all that is legally required for House committees, the House general counsel, or a House-retained private counsel to seek civil enforcement of subpoenas or other orders is that authorization be granted by resolution of the full House.”<sup>120</sup> This power is sure to be a critical aspect of the House’s ability to enforce subpoenas and, more broadly, its ability to fulfill its right to effectively investigate.<sup>121</sup>

## Conclusion

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In sum, it is long-settled that Congress has broad authority to investigate the Executive Branch and others as part of its Article I power to legislate. Moreover, Congress has a variety of tools it can use to enforce subpoenas for documents and testimony by Executive Branch officials when it needs those materials to effectively investigate and legislate. Importantly, these tools include bringing a civil suit in district court, something that the House successfully did during both the Bush and Obama Administrations. These tools will become increasingly important as the House of Representatives of the 116th Congress begins to more robustly investigate the Executive Branch.

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<sup>116</sup> *Id.* at 88-89 n.33.

<sup>117</sup> *Waxman v. Thompson*, No. 04-3467, 2006 WL 8432224, at \*1 (C.D. Cal. July 24, 2006).

<sup>118</sup> *Reed*, 277 U.S. at 389.

<sup>119</sup> *Waxman*, 2006 WL 8432224, at \*11 n.42.

<sup>120</sup> Garvey, *supra* note 77, at 30.

<sup>121</sup> Cases regarding the House’s enforcement of subpoenas are of course likely to raise important questions regarding executive privilege and other immunities. Those issues are beyond the scope of this Issue Brief, except to note that the *Miers* and *Holder* decisions make clear that claims of privilege can be resolved by courts where there is a dispute between Congress and the Executive Branch.