Testimony of Elise J. Bean
Director of the Washington Office of the Levin Center at Wayne Law

Hearing Before

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

On

Civil Enforcement of Congressional Authorities

June 8, 2021

Thank you, Chairman Johnson, Ranking Member Issa, and the other members of this Subcommittee for the opportunity to comment on civil enforcement of congressional authorities.

I am here today on behalf of the Levin Center at Wayne Law whose primary mission is to support bipartisan, fact-based oversight by Congress and the 50 state legislatures. Before becoming director of the Levin Center's Washington Office, I worked for nearly 30 years as an investigator for Senator Carl Levin, including as his staff director and chief counsel on the Permanent Subcommittee on Investigations. Over the last six years at the Center, I've been leading oversight training workshops which have helped more than 300 Republican and Democratic staffers sharpen their investigative skills and support subcommittees like this one.

I would like to commend the Subcommittee for holding this hearing and for recognizing that Congress needs to strengthen its ability to acquire information from the executive branch. Good government is virtually impossible without good oversight. And good oversight of the government is virtually impossible without timely and useful information from the executive branch.

Our country's Founders named Congress in Article I of the U.S. Constitution and empowered it to legislate, spend taxpayer dollars, confirm senior executive branch officials, and provide for the common defense and general welfare of the country. The Founders also gave Congress a vital role in the American system of checks and balances, including the ability to curb executive branch abuses. To fulfill those sacred constitutional obligations, Congress needs information.

The Problem

The problem is that the ability of Congress to obtain useful information from the executive branch has deteriorated, not only because federal agencies have ignored or defied congressional information requests, but also because Congress has had a difficult time enforcing its subpoenas.

This problem isn't new. Getting information from the executive branch has been a challenge for Congress since the country's inception. Fortunately, the Supreme Court has long recognized Congress' need for information to carry out its responsibilities. Over 100 years ago, in an 8-0 opinion upholding a congressional subpoena seeking information about the Attorney General, the Supreme Court wrote:

> "[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. … A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who 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."[1]

As the Supreme Court recognized then and more recently in the *Mazars* case,[2] Congress must be able to compel information if it is to make informed decisions based on the facts.

At the same time, the practical reality is that compelling information from the executive branch has become increasingly difficult. A few examples illustrate the problem.

Refusing to Provide Agency Reports. Today, some federal agencies refuse to produce information to Congress even when required to do so by law. In one 2019 case, a bipartisan group of eight senators led by Senator Pat Toomey (R-PA) filed an amicus brief urging a federal court to compel the Commerce Department to provide to Congress and the public a report on automobile tariffs which a statute requires to be published in the Federal Register.[3] The Commerce Department not only continues to refuse to release the report, the Justice Department continues to stand by a legal opinion justifying the Commerce Department's intransigence.[4] And despite the passage of two years, the U.S. district court has yet to issue an opinion in the case.[5]

---

[1] *McGrain v. Daugherty*, 273 U.S. 135,174-175 (1927).
[2] *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).
[3] *Cause of Action Inst. v. Commerce Dep*'t, No. 19-CA-778 (CJN) (D.D.C. Mar. 6, 2020), Brief of Amici Curiae Senator Pat Toomey and Members of Congress in Support of Plaintiff (signed by Senators Grassley, Wyden, Cassidy, Johnson, Lee, Sasse, Toomey, and Warner).
[4] *Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security*, U.S. Department of Justice Office of Legal Counsel (Jan. 17, 2020), https://www.justice.gov/olc/opinion/file/1236426/download.
[5] For another example, see *Comm. on Ways and Means, U.S. House of Rep. v. U.S. Dep't of the Treasury*, Case No. 19-cv-01974-TNM (D.D.C. 2019)(seeking to compel the Treasury Department to produce certain tax returns to the committee under a statute explicitly requiring Treasury to do so upon request); *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, U.S. Department of Justice Office of Legal Counsel (June 13, 2019), https://www.justice.gov/olc/file/1173756/download ((justifying Treasury's refusal to produce the tax returns).

Refusing to Provide Testimony. Interbranch conflicts are not confined to disputes over documents; they also extend to congressional requests for oral testimony. The most prominent dispute involves the *McGahn* case which examines the extreme claim that current and former senior advisors to the president are absolutely immune to congressional testimonial subpoenas, despite judicial precedents to the contrary.[6] While that case was initiated under the Trump administration, the same position was taken by the Obama administration and past presidents from both parties,[7] and may be asserted by future presidents.

Moreover, the executive branch's refusal to provide oral testimony to Congress has not been limited to senior White House officials. Last year, the Department of Justice informed the House Judiciary Committee that three DOJ officials, Assistant Attorney General (Civil Rights) Eric Dreiband, Bureau of Prisons Director Michael Carvajal, and U.S. Marshals Service Director Donald Washington, would not appear at an October 1, 2020 oversight hearing, because the Committee had—according to the DOJ letter—"squandered its opportunity to conduct a meaningful oversight hearing with the Attorney General" in September.[8] Three days later, the head of an independent agency that supervises Voice of America and other broadcast institutions defied a bipartisan testimonial subpoena issued by the House Foreign Affairs Committee and refused to appear at a committee hearing.[9]

Blocking Access to Grand Jury Materials. In another matter, when the House Judiciary Committee initiated impeachment proceedings and, as part of that inquiry, asked a federal court for access to certain grand jury materials from a closed criminal investigation related to the executive branch official, the Justice Department intervened to oppose a court order granting access. It is hard to understand why Congress, as part of the Constitution's

---

[6] *Comm. on the Judiciary of the United States House of Representatives v. McGahn*, Case No. 19-5331 (D.C. Cir. 2019). See also *Testimonial Immunity Before Congress of the Former Counsel to the President*, U.S. Department of Justice Office of Legal Counsel (May 20, 2019), https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-20-test-immun-fmr-whc-2_1.pdf.

[7] See, e.g., *Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President*, Department of Justice Office of Legal Counsel (July 12, 2019), https://www.justice.gov/olc/file/1183271/download (noting "the Executive Branch has invoked this immunity for nearly 50 years"); *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, Department of Justice Office of Legal Counsel (July 15, 2014), https://www.justice.gov/file/30896/download ("The Executive Branch's longstanding position, reaffirmed by numerous Administrations of both political parties, is that the President's immediate advisers are absolutely immune from congressional testimonial process.").

[8] Letter from Stephen Boyd, Assistant Attorney General (Legislative Affairs), to House Judiciary Committee (Sept. 21, 2020), https://int.nyt.com/data/documenttools/doj-letter/ceaede3b0830c34b/full.pdf.

[9] See, e.g., *Head of government media agency flouts subpoena, angering Democrats and Republicans*, Washington Post (Sept. 24, 2020 1:15 PM), https://www.washingtonpost.com/national-security/head-of-government-media-agency-flouts-subpoena-angering-democrats-and-republicans/2020/09/24/d5aa8296-fe76-11ea-b555-4d71a9254f4b_story.html.

system of checks and balances, can't review information from a closed criminal inquiry about an executive branch official under consideration for impeachment. Yet that dispute has also been pending before the courts for two years without resolution.[10]

Glacial Court Reviews. Even when courts determine that Congress has a right to information, the courts have moved so slowly that justice delayed has meant justice denied. For example, in the Fast and Furious case initiated under the leadership of Congressman Issa ten years ago, a 2012 lawsuit filed by the House Oversight and Government Reform Committee to enforce a subpoena for Justice Department records was actively litigated until 2016 and formally closed in 2019, a total of seven years.[11] By then, the president when the subpoena was issued was long gone.

At the same time, the norms surrounding executive branch compliance with congressional information requests have continued to erode. As the Supreme Court noted in *Mazars*: "Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'"[12] But in recent years, interbranch subpoena battles have increasingly landed in court. In the *McGahn* case, the en banc D.C. Circuit Court upheld Congress' right to file suit to enforce its subpoenas, in part because those suits "would preserve, rather than disrupt, th[e] historical practice of accommodation."[13] The court reasoned: "Without the possibility of enforcement of a subpoena issued by a House of Congress, the Executive Branch faces little incentive to reach a negotiated agreement in an informational dispute. Indeed, the threat of a subpoena enforcement lawsuit may be an essential tool in keeping the Executive Branch at the negotiating table."[14]

That analysis rings true, but as the members of this Subcommittee know all too well, when courts take years to act and the executive branch gains confidence that the courts won't enforce congressional subpoenas in a timely manner, senior officials become more dismissive of the accommodations process, calculating that a refusal to turn over information will have few, if any, consequences.

The executive branch's disregard for Congress' constitutional authority to compel information not only undermines the accommodations process, it deprives Congress of important information. The foreseeable result is that Congress is increasingly forced to make decisions without full information, flying partially blind when legislating, spending taxpayer dollars, and

---

[10] *In re Application of the Comm. on the Judiciary, U.S. House of Rep., for an Order Authorizing the Release of Certain Grand Jury Materials*, Case No. 19-5288 (D.C. Cir. 2019), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1328.html.

[11] Committee on Oversight and Reform of the United States House of Representatives v. Barr, (D.C. Cir. May 8, 2019), Motion for Voluntary Dismissal with Prejudice.

[12] 140 S. Ct. 2029.

[13] *Comm. on the Judiciary of the United States House of Representatives v. McGahn*, 968 F. 3d 755, 770-771 (D.C. Cir. 2020) (en banc).

[14] Id. at 771.

evaluating military and national security issues. Denying the legislature's access to factual information is a dangerous course of action that is not sustainable in a functioning democracy.

Strengthening Civil Subpoena Enforcement

In response, some supporters of Congress urge the House and Senate to revive actions last taken nearly 100 years ago to imprison recalcitrant executive branch officials for contempt of Congress. Others urge use of aggressive political tools to force compliance with congressional subpoenas including by withholding appropriations, derailing the president's legislative agenda, rejecting nominees, or impeaching offending officials. While the Supreme Court has upheld the inherent authority of Congress to punish contempt and lock up offenders, that type of heavy-handed response is an extreme solution. Other aggressive political tools are not only unwieldy and disruptive, but may escalate political tensions, increase the public's dismay with government, and even do harm to the country. While Congress shouldn't unilaterally disarm by taking aggressive tactics off the table, detaining officials, defunding programs, or sidelining nominees risk much higher political costs than seeking an orderly judicial resolution of interbranch subpoena disputes.

The better approach is the one being considered today at this hearing: taking steps to strengthen Congress' ability to employ civil enforcement mechanisms to defend its right to information and revitalize the accommodations process. Both the Supreme Court and D.C. Circuit Court have recently affirmed the right of Congress to obtain information from the executive branch.[15] That affirmation makes it an appropriate time for Congress to secure stronger subpoena enforcement mechanisms, especially when working with a president who personally understands the constitutional importance of congressional oversight.

In fashioning new civil enforcement mechanisms, Congress should keep in mind at least three constitutional provisions that support its authority to do so. First is the Necessary and Proper Clause in Article I, Section 8, which broadly empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its constitutional

[15] See *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2033 (2020) ("'It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served.' *United States v. Rumely*, 345 U.S. 41, 43 (1953)."); *Comm. on Judiciary, U.S. House of Rep. v. McGahn*, 968 F.3d 755, 778, 781 (D.C. Cir. 2020) (en banc) ("Congress cannot intelligently legislate without identifying national problems in need of legislative solution and relying on testimony and data that provide a deeper understanding of those problems, their origins, and potential solutions. It likewise cannot conduct effective oversight of the federal government without detailed information about the operations of its departments and agencies.").

responsibilities. Second and third are two Article III provisions that explicitly authorize Congress to establish and regulate the jurisdiction of federal courts.[16]

Possible Civil Enforcement Mechanisms

To strengthen civil enforcement of its subpoenas, Congress can choose from a variety of measures that may be implemented through changes to House and Senate rules or reforms enacted into law. The available measures fall into three broad categories: (1) codifying better civil enforcement provisions; (2) authorizing new penalties to deter noncompliance; and (3) streamlining judicial review.

Codifying Better Civil Enforcement Provisions. One set of measures to strengthen civil enforcement of congressional subpoenas involves improving existing federal statutes. Key steps include codifying the right of Congress to file civil actions in court to compel information from the executive branch, and spelling out the obligations of the executive branch to comply with congressional subpoenas.

Currently, no federal statute directly addresses the right of Congress to file a civil action in federal court to enforce a congressional subpoena against the executive branch.[17] The Supreme Court in *Mazars* and the en banc D.C. Circuit Court in *McGahn* recently upheld both propositions, but rather than continue to rely on case law, it is time for Congress to codify its civil enforcement authority in statute.

Legislation could draw from H.R. 4010, a bill which was introduced by Rep. Issa and passed the House in 2017,[18] and H.R. 8335 which was introduced in the last Congress by Rep. Dean.[19] Both bills explicitly authorize Congress to file civil actions in federal court to enforce congressional subpoenas.[20] One issue with the wording in both bills is that neither explicitly

---

[16] See Article III, Section 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") and Section 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States .... In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

[17] While a federal statute does generally authorize the Senate to file civil enforcement actions in federal court, that statute includes an exception for actions to enforce a subpoena "issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity." 28 U.S.C. 1365(a). Due to the exception, the Senate cannot rely on Section 1356 to file civil an enforcement action in court against the executive branch.

[18] H.R. 4010 (115th Cong.), section 2 (proposing a new 28 U.S.C. 1365a(a)).

[19] H.R. 8335 (116th Cong.), section 3 (proposing a new 28 U.S.C. 1365a(a)).

[20] The wording in H.R. 8335 is more explicit, stating that the House, Senate, or a committee or subcommittee "may bring a civil action" against the recipient of a subpoena. The wording in H.R. 4010 is slightly less direct, stating that "any civil action" filed "against the recipient of a subpoena" concerning "the failure to comply" is subject to several rules, one of which is that the action "shall be filed" in federal court.

refers to executive branch agencies or officials when establishing the right of Congress to file a civil enforcement action in court; on the other hand, neither bill exempts the executive branch as is now done in the Senate's civil enforcement statute.[21] The better approach would be to name the executive branch in the text of the statute to remove any doubt about the scope of the law, drawing not only on the Supreme Court's ruling that such actions are constitutionally permissible, but also on Congress' constitutional authority to shape the jurisdiction of the federal courts. Enacting such a statute would help solidify the *Mazars* and *McGahn* rulings.

A second problem is that no federal statute currently establishes any rules governing how the executive branch should respond to a congressional subpoena. So another step Congress could take would be to fill that void.

Congress could begin by enacting a statute directing any recipient of a congressional subpoena, including any executive branch recipient, to appear and testify or produce records in a manner consistent with the subpoena. That approach could draw on provisions in both H.R. 4010 and H.R. 8335.[22] Congress could also codify more specific rules. For example, Congress could specify that executive branch reports and other information mandated by law to be provided to Congress must be produced, if not already available, within 48 hours of a written request by a committee, subcommittee, or member of Congress. Congress could codify the principle that no executive branch official has or may assert absolute immunity to a congressional subpoena, ending the executive branch's 50-year effort to convince a court to uphold that extreme position despite judicial precedents to the contrary. Congress could also codify the principle that the executive branch has no authority to file suit to block a congressional application for a court order to gain access to grand jury materials in a closed case. None of those principles is currently laid out in any congressional rule or federal statute.

In addition, Congress could address several issues related to executive privilege. For example, as proposed in House Resolution 406 introduced last month by Subcommittee Member Ted Lieu, Congress could specify that executive privilege may be asserted only by the president "personally and in writing."[23] Congress could also adopt the approach taken in H.R. 4010 stating that any assertion of a privilege by the recipient of a congressional subpoena "may be determined to have been waived" with respect to a particular document if a court finds that the subpoena recipient failed to submit a privilege log with respect to that document.[24] The bill also specifies

---

[21] Compare H.R. 8335, section 3 (proposing a new 28 U.S.C. 1365a(a)) and H.R. 4010, section 2 (proposing a new 28 U.S.C. 1365a(a)) with 28 U.S.C. 1365.

[22] See H.R. 4010 (115th Cong.), section 3 (proposing a new 2 U.S.C. 105(a)); H.R. 8335 (116th Cong.), section 4 (proposing a new 2 U.S.C. 105(a)). Again, neither bill explicitly refers to executive branch agencies or officials, an omission that it might be wise to address.

[23] H.Res. 406 (117th Cong.) (proposing a new clause 7.(g) to House Rule XI).

[24] H.R. 4010 (115th Cong.), section 2 (proposing a new 28 U.S.C. 1365a(c)). See also H.Res. 406 (117th Cong.), section 2 (proposing a new clause 7.(l)(2) stating, in part, that the failure to file "an appropriate and timely privilege log shall be the basis for overruling or disregarding any objection."); H.R. 8335 (116th Cong.), section 3 (proposing a new 28 U.S.C. 1365(d)).

the information that must be provided in the privilege log.[25] Those provisions could help curb inappropriate and excessive claims of executive privilege to justify withholding subpoenaed information.[26]

Provisions mandating executive branch compliance with congressional subpoenas would likely be tested in the courts for their constitutionality. But they would also collectively establish, for the first time, a set of reasonable principles and procedures governing executive branch responses to congressional subpoenas. In so doing, they would provide needed guidance to both legislative and executive branch personnel. Together, they would also change the tenor of the accommodations process, making it more likely the executive branch would negotiate rather than ignore or defy Congress' informational needs.

Some legislative proposals recommend that Congress adopt detailed internal procedures governing how and when a subpoena recipient may object to a specific subpoena request and how Congress must handle those objections. The Levin Center recommends a cautious approach to establishing a set of detailed internal procedures related to subpoena objections, because not all disputes require such formality; it may invite procedural disagreements, delays, and even lawsuits; and it may burden the accommodations process with an overly restrictive procedural framework. To me, it would essentially push the Congress toward an adversarial process more akin to civil litigation over liability issues instead of a congressional process geared to gathering information for policy purposes. My own experience is that complex procedures can easily intensify rather than reduce interbranch disputes. On the other hand, procedures governing assertions of executive privilege, such as the already suggested requirements for a personal, written assertion by the president and submission of a privilege log, are relatively straightforward mechanisms that could foster negotiation, curb executive branch overreach, and facilitate court review.

In addition to strengthening existing statutes, another important step Congress could take in the civil enforcement arena would be to establish a bicameral, bipartisan congressional counterpart to the Justice Department's Office of Legal Counsel.[27] The OLC has been producing

---

[25] H.R. 4010 (115th Cong.), section 3 (proposing a new 2 U.S.C. 105(b)). See also H.Res. 406 (117th Cong.) (proposing a new clause 7.(l)(2) to House Rule XI: "The log shall be in such form as instructed by the committee or, in the absence of such instruction, shall be in the form that would be required by the rules and practice of the United States District for the District of Columbia."); H.R. 8335 (116th Cong.), section 4 (proposing a new 2 U.S.C. 105(b)(2)).

[26] See "The Executive's Privilege," Professor Jonathan David Shaub (2020) (describing the executive branch's increasing use of executive privilege to deny congressional information requests), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477699.

[27] For decades, the Department of Justice Office of Legal Counsel (OLC) has been issuing official legal opinions that provide guidance to executive branch agencies on how to respond to congressional information requests. Criticisms of OLC opinions for excessive secrecy, bias, and overreach have been growing. See, e.g., "Weaponizing the Office of Legal Counsel," Prof. Emily Berman (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455556; "The Executive's Privilege," Prof. Jonathan David Shaub (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477699. The Justice Department nevertheless continues to use its OLC

legal opinions for decades on oversight issues, all of which favor the executive branch over the legislative branch. It is past time for Congress to respond by designing its own process for issuing official legal opinions on pressing oversight issues, including the executive branch's obligation to comply with congressional information requests. As we explained in testimony before the House Modernization Committee earlier this year,[28] if Congress as an institution were to issue thoughtful, well-supported, bipartisan legal opinions on oversight matters, including congressional subpoenas, Congress could help establish its own oversight norms, educate Members and staff, reduce committee disparities, inform the executive branch of Congress' oversight expectations, and advance oversight effectiveness. The opinions would also strengthen the hand of Congress in court.

Codifying Congress' right to file civil enforcement actions in federal court, specifying rules governing executive branch responses to congressional subpoenas, and establishing a congressional counterpart to the OLC are critical steps to strengthening Congress' ability to compel information from the executive branch.

Establishing New Penalties. A very different set of measures to strengthen civil enforcement of congressional subpoenas would be to establish new penalties to deter executive branch noncompliance.

One popular option already included in some legislative proposals is to authorize the imposition of civil fines on any executive branch agency or official (as well as any other party) who defies a congressional subpoena.[29] An initial issue is whether the fine would be imposed by Congress itself or by a court in receipt of a request from Congress.[30] If Congress were to authorize itself to impose fines pursuant to its inherent contempt authority, key issues would include whether to use a willful or knowing standard to trigger the fine,[31] who would decide on whether and how much of a fine to impose,[32] and whether the House or Senate as a whole would have to vote to ratify the decision.

Because any fine would likely be contested in court by the executive branch, if Congress itself were to initiate the fine, it would need to ensure that its decisionmaking process was

---

opinions not only to unify how federal agencies respond to Congress, but also to try to persuade courts to favor the executive branch over the legislative branch when disputes arise.

[28] House Select Committee on the Modernization of Congress, Virtual Discussions, "Modernization Fix Congress Cohort Listening Session" (March 25, 2021), https://modernizecongress.house.gov/committee-activity/virtual-discussions/meeting-modernization-cohort-listening-session.

[29] See, e.g., H.Res. 406 (117th Cong.) (proposing a new clause 7.(j) in House Rule XI); H.R. 8335 (116th Cong.), section 3 (proposing a new 28 U.S.C. 1365a(c)); H.R. 4010 (115th Cong.), section 2 (proposing a new 28 U.S.C. 1365a(b)).

[30] Compare H.Res. 406 (authorizing Congress) with H.R. 8335, section 3, and H.R. 4010, section 2 (authorizing the courts).

[31] Compare H.R. 4010 (using a willful standard) with H.R. 8335 (using a knowing standard).

[32] See, e.g., 2 U.S.C. 288b (citing the Joint Leadership Group in the Senate) and House Rule 2, clause 8 (citing the Bipartisan Legal Advisory Group in the House).

bipartisan, supported by a preponderance of the evidence, and ratified by the House or Senate. In addition, Congress may want to specify a deferential standard for judicial review that, for example, might bar de novo judicial review of any congressional factfinding and set an abuse of discretion standard for overturning a fine.

Choosing whether to have a court or Congress impose civil fines for noncompliance with a congressional subpoena requires weighing several factors. If imposed by a court, the fines would be more likely to pass judicial muster and would free Congress from having to establish an internal process and use that process to assess fines. On the other hand, leaving the fines to a court would compel Congress to continue to rely on the judiciary to enforce its subpoenas rather than rely on its own inherent contempt authority. In contrast, if the fines were imposed by Congress, the House and Senate would have to go through the complex work of establishing and using a bipartisan, evidence-based procedure to assess the fines, but they would also control the nature and timing of the process to prevent extended delays. Before a fine could be collected, however, its assessment would likely have to undergo judicial review anyway, with the attendant delays and unpredictability. In short, the decision on whether the courts or Congress should impose civil fines on noncompliant subpoena recipients is neither easy nor obvious.

No matter which approach is used, authorizing civil fines to deter noncompliance with congressional subpoenas is an innovative civil enforcement mechanism that, if it survives court challenge, would strengthen Congress' ability to compel information. Civil fines offer a fresh enforcement option that could help revitalize the accommodations process by convincing the executive branch that it would be better to negotiate than contest a civil penalty.

Streamlining Judicial Review. A final set of measures to strengthen civil enforcement of congressional subpoenas focuses on streamlining judicial standards and procedures to resolve interbranch disputes.

Today, one of the biggest problems with congressional civil enforcement is that courts take months and sometimes years to decide a dispute. A simple but effective response to that problem is to establish an expedited court review process. H.R. 4010, for example, which passed the House in 2017, states that if the House or Senate files a civil action to enforce a congressional subpoena, "[i]t shall be the duty" of the federal district courts, circuit courts, and Supreme Court "to advance on the docket and to expedite to the greatest possible extent the disposition of any such action and appeal."[33] The more recent bill, H.R. 8335, also requires the Judicial Conference and Supreme Court to "prescribe rules of procedure to ensure the expeditious treatment" of congressional civil enforcement actions.[34] No such statutory requirements now exist, and together they could help reduce the delays that now plague congressional enforcement cases.

In addition, both bills authorize Congress to request a three-judge district court panel to adjudicate the enforcement action and then skip the D.C. Circuit and lodge any appeal directly with the Supreme Court. An alternative would be to authorize Congress to file a civil

[33] H.R. 4010 (115th Cong.), section 2 (proposing a new 28 U.S.C. 1365a(a)(2)).
[34] H.R. 8335 (116th Cong.), section 3 (proposing a new 28 U.S.C. 1365a(e)).

enforcement action directly with the D.C. Circuit Court, skipping the district court stage, and then file any appeal with the Supreme Court. Both approaches would shorten the judicial appellate review process and help ensure a more timely adjudication of the issues.

Another important statutory provision would state explicitly that federal courts may not conduct a line-by-line review of a congressional subpoena during a civil enforcement action, but must instead limit their analysis to whether the information sought by the subpoena is, in the words of the Supreme Court, "'not plainly incompetent or irrelevant to any lawful purpose [of the Committee] in the discharge of [its] duties.'"[35]

This limitation would be in line with existing judicial precedent granting deference to Congress' constitutional authority to conduct oversight. For example, in 2018, D.C. District Court Judge Richard Leon wrote: "While … 'Congress' investigatory power is not, itself, absolute' and … it 'is not immune from judicial review,' … this Court will not – and indeed, may not – engage in a line-by-line review of the Committee's requests."[36] In 2019, U.S. District Judge Edgardo Ramos from the Southern District of New York similarly ruled against conducting "a line-by-line review of the information requested" in a congressional subpoena explaining: "[T]he committees have alleged a pressing need for the subpoenaed documents to further their investigation, and it is not the role of the Court or plaintiffs to second guess that need, especially in light of the Court's conclusions that the requested documents are pertinent to what is likely a lawful congressional investigation."[37] In another 2019 decision, D.C. District Judge Ketanji Brown Jackson wrote: "[A]s a committee of Congress, the Judiciary Committee has the 'broad power' under Article I of the Constitution to conduct its investigations however it sees fit, so long as it does not impinge upon the constitutional rights of those it undertakes to question."[38] The Supreme Court held in *Mazars* that "to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary

---

[35] *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp., 17, 20-21 (D.D.C. 1994) (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960)).

[36] *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 44 (D.C.C. 2018).

[37] *Trump v. Deutsche Bank AG*, No. 19 CIV. 3826 (ER), bench opinion, hearing transcript at 70, 85, 2019 WL 2204898 (S.D.N.Y. May 22, 2019), aff'd in part, 943 F.3d 627 (2d Cir. 2019), vacated on other grounds sub nom. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). See also *Trump v. Committee on Oversight & Government Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76, 93 (D.D.C. 2019) (D.C. Judge Amit P. Mehta: "Once a court finds that an investigation is one upon which legislation could be had, it must not entangle itself in judgments about the investigation's scope or the evidence sought. Only an investigative demand that is "plainly incompetent or irrelevant to any lawful purpose of the [committee] in the discharge of its duties" will fail to pass muster. *McPhaul v. United States*, 364 U.S. 372, 381 (1960) (citation omitted) (cleaned up). Importantly, in making this assessment, it is not the judicial officer's job to conduct a "line-by-line review of the Committee's requests. ... 'There is no requirement that every piece of information gathered in such an investigation be justified before the judiciary.'"), aff'd sub nom. *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), vacated on other grounds sub nom. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

[38] *Comm. on the Judiciary, United States House of Representatives v. McGahn*, 415 F. Supp. 3d 148, 192 (D.D.C. 2019).

to support Congress's legislative objective," but did not itself engage in a line-by-line analysis nor require that type of painstaking, time-consuming review.[39]

Together, directing courts to expedite congressional subpoena enforcement cases, requiring the judiciary to issue specific procedural rules to accomplish that objective, and prohibiting line-by-line reviews that second-guess congressional factfinding efforts would significantly reduce the delays that now make judicial review such a frustrating and often inept enforcement option.

A completely different step Congress may want to consider when thinking about using courts to strengthen its enforcement efforts is one that would revive its ability to bring criminal contempt actions in court against executive branch officials who defy congressional subpoenas. Right now, 2 U.S.C. 194 requires U.S. attorneys to prosecute criminal contempt cases brought to them by Congress, but the Justice Department refuses to comply with the law if the subject of the contempt action is an executive branch official. In response, Congress could establish the authority of the House and Senate to hire a private sector attorney to prosecute a criminal contempt action in court under 2 U.S.C. 192. This new provision could rely on the wording now used to permit the Senate to designate a private attorney to commence a civil enforcement action under 28 U.S.C. 1365(d). It might also be possible to make this change by amending House and Senate rules, rather than enacting new legislation.

Finally, Congress needs to resolve several statutory interpretation issues affecting congressional civil enforcement authority. First is an issue that arose in the *McGahn* case, when a three-judge circuit court panel accepted a Justice Department argument that when the Senate enacted a statute governing civil enforcement of Senate subpoenas, that statute also limited the civil enforcement options available to the House.[40] The D.C. Circuit, acting en banc, rejected the panel's reasoning, but Congress could address the issue more broadly via a statutory provision stating that Congress has multiple avenues into court to adjudicate disputes over its right to compel information,[41] and enacting one option does not limit or preclude use of another. The provision could use language similar to that in H.R. 8335 indicating that enacting new subpoena enforcement mechanisms does not limit Congress' inherent authority or foreclose any other means for enforcing compliance with a congressional subpoena.[42]

---

[39] 140 S. Ct. 2036.

[40] *Comm. on the Judiciary of the United States House of Representatives v. McGahn*, 951 F. 3d 510, 522 (D.C. Cir. 2020), vacated 968 F. 3d 755 (D.C. Cir. 2020) (en banc).

[41] Those avenues include a criminal contempt statute (2 U.S.C. § 192), two civil contempt statutes (2 U.S.C. §§ 288b(b) and 288d(a)), a civil enforcement statute (28 U.S.C. § 1365), criminal prohibitions on false statements, perjury, and obstruction (18 U.S.C. §§ 1001, 1505, and 1621), the Declaratory Judgement Act (28 U.S. Code § 2201), and equitable relief under the Constitution (28 U.S.C. § 1331).

[42] H.R. 8335 (116th Cong.), section 5 ("Nothing in this Act may be interpreted to limit or constrain Congress' inherent authority or foreclose any other means for enforcing compliance with congressional subpoenas, nor may anything in this Act be interpreted to establish or recognize any ground for noncompliance with a congressional subpoena.") See also H.R. 4010 (115th Cong.), section 4 ("Nothing in this Act shall be interpreted to diminish Congress' inherent

Congress should also eliminate the executive branch exception to civil enforcement actions by the Senate now included in 28 U.S.C. 1365.[43] That exception prevents the Senate from using that statute's civil enforcement mechanism to resolve disputes with the executive branch and raises an issue about whether it also constricts the House, as explained above. Given the recent rulings by the Supreme Court and D.C. Circuit that federal courts have jurisdiction to adjudicate interbranch subpoena disputes, this exception is no longer appropriate, weakens congressional subpoena enforcement efforts, and creates legal confusion.

Setting Priorities. Strengthening civil enforcement of congressional subpoenas can be accomplished in many ways, as set out in the three categories listing possible measures. When setting priorities among these options, perhaps the most important steps would be to enact a statute that codifies the right of Congress to file civil enforcement actions against the executive branch in federal court and requires expedited judicial review of congressional subpoena disputes. Also important would be to codify a small set of rules related to executive branch compliance with congressional subpoenas, including issues related to absolute immunity and executive privilege, and at the same time establish a bipartisan, bicameral process to issue congressional guidance on a broader set of concerns related to subpoenas and other congressional oversight issues.

Conclusion

Strengthening Congress' ability to civilly enforce subpoenas directed to the executive branch is key to maintaining the checks and balances envisioned in the Constitution, ensuring Congress has the information it needs to fulfill its constitutional responsibilities, and freeing Congress from using more aggressive mechanisms that increase interbranch conflicts and political tensions. The Supreme Court's *Mazars* ruling and a president who understands Congress' need for information make this a good moment to take on this critical issue. Thank you again for delving into it.

---

authority or previously established methods and practices for enforcing compliance with congressional subpoenas, nor shall anything in this Act be interpreted to establish Congress' acceptance of any asserted privilege or other legal basis for noncompliance with a congressional subpoena.").

[43] 28 U.S.C. 1365(a) ("This section shall not apply to an action to enforce ... any subpena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity.").