

**Testimony of Hon. James H. Townsend  
Director of the Levin Center for Oversight and Democracy**

**Hearing Before**

**Senate Judiciary Subcommittee on  
Federal Courts, Oversight, Agency Action, and Federal Rights**

**On Breaking the Logjam Part 3: Restoring Transparency and Accountability  
to the Accommodation Process**

September 20, 2023

Thank you, Chairman Whitehouse, Ranking Member Kennedy, and the other members of this subcommittee for the opportunity to comment on restoring transparency and accountability to the accommodation process. I am here today on behalf of the Carl Levin Center for Oversight and Democracy, an institute headquartered at Wayne State University Law School in Detroit, Michigan, whose primary mission is to support and promote bipartisan, fact-based oversight by Congress and the 50 state legislatures.<sup>1</sup>

Many of you on this subcommittee served with our namesake, Senator Carl Levin, and are personally aware of his deep commitment to Congress' ability to get the information it needs to represent and act on behalf of the American people. There were many times over his 36-year career where he battled with the executive branch – regardless of who was president – over access to documents. Most of those were resolved through negotiation and at times that included a recognition on his part of executive privilege. But in the end, he worked hard to make sure Congress got what it needed to act in an informed manner.

My colleagues and I at the Levin Center are honored to carry on to the extent possible his remarkable legacy. Before becoming director of the Levin Center, I spent over 30 years in various roles in the public and private sectors. I served as a congressional staffer in both the House and the Senate, as a product planner and marketer in the automotive industry, as an attorney in private practice, and as an elected member of the Michigan House of Representatives where I was vice chair of the oversight committee. There was never a position I held where accurate information wasn't of paramount importance to do my job. I'm sure you all feel the same way, which is why you are holding this hearing.

As Senator Levin said, to have good government you need good oversight. And good oversight is virtually impossible without timely and useful information from the Executive Branch. Today I will focus on recommended options for strengthening Congress' ability to compel needed information and for reinvigorating the accommodations process between Congress and the executive branch. These ideas are also summarized in an exhibit appended to this testimony.

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<sup>1</sup> While the Levin Center is affiliated with Wayne State University Law School, its views do not present the institutional views, if any, of Wayne State University or the Law School.

Fortunately, as you know, the Supreme Court has long recognized Congress' need for information to carry out its Article I constitutional responsibilities.<sup>2</sup> Nearly 100 years ago, in an 8-0 opinion upholding a congressional subpoena seeking information related to 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.”<sup>3</sup>

As the Supreme Court recognized then and more recently in the *Mazars* case,<sup>4</sup> Congress must be able to compel information if it is to make informed decisions based on the facts. And we know Congress has several options when it comes to enforcement, outside of using the appropriations and nominations processes, which it can for many different disputes with the executive branch.

The most serious one, of course, is when Congress approves a contempt of Congress resolution and uses its own police force to imprison recalcitrant executive branch officials, an action last taken 100 years ago. 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. While Congress shouldn't unilaterally disarm by taking off the table jailing contemnors, detaining officials risks much higher political costs than seeking an orderly judicial resolution of interbranch information disputes.

There is also criminal contempt. 2 U.S.C. 194 requires U.S. attorneys to prosecute criminal contempt cases brought to them by Congress, the exact language being, “whose duty it shall be to bring the matter before the grand jury for its action.” In many cases, the Justice Department has refused to comply with the law if the subject of the contempt action is an executive branch official. In 2021 and 2022, however, the Justice Department departed from that pattern when it prosecuted Peter Navarro and Steve Bannon for contempt of Congress for refusing to provide documents and testify in response to subpoenas from the House select committee investigating the January 6<sup>th</sup> attack on the U.S. Capitol.<sup>5</sup> But those prosecutions involved individuals who served in a prior administration. They do not indicate that the Justice Department has reconsidered its refusal to prosecute current members of the executive branch.

The option that has been used most in the past few decades is civil enforcement of congressional subpoenas by the federal courts. Unfortunately, while the courts overwhelmingly

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<sup>2</sup> To track litigation affecting Congress' power to obtain information, see Carl Levin Center for Oversight and Democracy, Oversight Case Law (<https://levin-center.org/case-list/>).

<sup>3</sup> *McGrain v. Daugherty*, 273 U.S. 135,174-175 (1927).

<sup>4</sup> *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

<sup>5</sup> See Carl Levin Center for Oversight and Democracy, Oversight Case Law, Navarro and Bannon cases (<https://levin-center.org/case-list/>).

recognize and uphold Congress' right to compel information, the time it takes to get a final judicial ruling can defeat its value. Years can pass and in the interim administrations and circumstances change. One such example is the Fast and Furious case initiated under the leadership of Congressman Darrel Issa ten years ago. A lawsuit filed in 2012 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.<sup>6</sup> By then, the Administration to whom the subpoena was issued was long gone.

And 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 accommodation process, calculating that a refusal to turn over information will have few, if any, consequences. I hope there is agreement, therefore, that something must be done – Congress' ability to get timely information from the executive branch must be strengthened.

As Congress explores options for bolstering subpoena 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 responsibilities. In addition, two Article III provisions explicitly authorize Congress to establish and regulate the jurisdiction of federal courts.<sup>7</sup>

## **Avenues for Strengthening Civil Enforcement of Subpoenas**

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. There are also a few additional actions Congress can take in this arena that I will discuss toward the end of my testimony.

### **1. 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.

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<sup>6</sup> 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.

<sup>7</sup> 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.”).

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.<sup>8</sup> The Supreme Court in *Mazars* and the en banc D.C. Circuit Court in *McGahn* recently upheld that proposition, 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,<sup>9</sup> and H.R. 6079 which was introduced in the last Congress by Rep. Madeleine Dean.<sup>10</sup> These bills explicitly authorize Congress to file civil actions in federal court to enforce congressional subpoenas.<sup>11</sup> One issue with the wording in these bills is that neither explicitly refers to executive branch agencies or officials when establishing the right of Congress to file a civil enforcement action in court but only identifies penalties that would apply to a “head of government agency” that fails to comply with a subpoena. On the other hand, the bills do not exempt the executive branch as is now done in the Senate’s civil enforcement statute.<sup>12</sup> 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. Accordingly, 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. 6079.<sup>13</sup> 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

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<sup>8</sup> 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 1365 to file civil an enforcement action in court against the executive branch.

<sup>9</sup> H.R. 4010 (115<sup>th</sup> Cong.), section 2 (proposing a new 28 U.S.C. 1365a(a)).

<sup>10</sup> H.R. 6079 (117<sup>th</sup> Cong.), section 3 (proposing a new 28 U.S.C. 1365a(a)). See also §§ 403, 404, and 525 of H.R. 5048 which was introduced by Rep. Schiff and contains language virtually identical to the Issa and Dean bills.

<sup>11</sup> The wording in H.R. 6079 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.

<sup>12</sup> Compare H.R. 6079, 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.

<sup>13</sup> See H.R. 4010 (115<sup>th</sup> Cong.), section 3 (proposing a new 2 U.S.C. 105(a)); H.R. 6079 (117<sup>th</sup> 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.

available, within 48 hours of a written request by a committee, subcommittee, or member of Congress.

Congress could also 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.<sup>14</sup> 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 136 introduced by Rep. Ted Lieu, Congress could specify that executive privilege may be asserted only by the president "personally and in writing."<sup>15</sup> Congress could also adopt the approach taken in H.R. 4010 and H.R. 6079 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.<sup>16</sup> The bill also specifies the information that must be provided in the privilege log.<sup>17</sup> Those provisions could help curb inappropriate and excessive claims of executive privilege to justify withholding subpoenaed information.<sup>18</sup>

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 accommodation process, making it more likely the executive branch would negotiate rather than ignore or defy Congress' informational needs.

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<sup>14</sup> Codifying this principle would resolve the issues raised by *In re Application of the Committee on the Judiciary*, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, Carl Levin Center for Oversight and Democracy, Oversight Case Law (<https://levin-center.org/mueller-grand-jury-case/>).

<sup>15</sup> H.Res. 136 (118<sup>th</sup> Cong.) (proposing a new clause 7.(g) to House Rule XI).

<sup>16</sup> H.R. 4010 (115<sup>th</sup> Cong.), section 2 (proposing a new 28 U.S.C. 1365a(c)). See also H.Res. 136 (118<sup>th</sup> 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. 6079 (117<sup>th</sup> Cong.), section 3 (proposing a new 28 U.S.C. 1365(d)).

<sup>17</sup> H.R. 4010 (115<sup>th</sup> Cong.), section 3 (proposing a new 2 U.S.C. 105(b)). See also H.Res. 136 (118<sup>th</sup> 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. 6079 (117<sup>th</sup> Cong.), section 4 (proposing a new 2 U.S.C. 105(b)(2)).

<sup>18</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477699).

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 accommodation process with an overly restrictive procedural framework. Our experience suggests that codifying a detailed set of procedures risks pushing 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. 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.

## 2. 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 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.<sup>19</sup> An initial issue is whether the fine would be imposed by Congress itself or by a court in receipt of a request from Congress.<sup>20</sup> 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,<sup>21</sup> who would decide on whether and how much of a fine to impose,<sup>22</sup> and whether the House or Senate as a whole would have to vote to ratify the decision. Similar considerations also would apply if Congress were to include detention as one of the penalties available to punish noncompliance with a congressional subpoena.<sup>23</sup>

Because the imposition of any fine or detention would likely be contested in court by the executive branch, if Congress itself were to initiate the penalty, it would need to ensure that its decision-making process was 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 penalty.

In particular, choosing whether to have a court or Congress impose civil fines for noncompliance with a congressional subpoena requires weighing several factors. If imposed by

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<sup>19</sup> See, e.g., H.Res. 136 (118<sup>th</sup> Cong.) (proposing a new clause 7.(j) in House Rule XI); H.R. 6079 (117<sup>th</sup> Cong.), section 3 (proposing a new 28 U.S.C. 1365a(c)); H.R. 4010 (115<sup>th</sup> Cong.), section 2 (proposing a new 28 U.S.C. 1365a(b)).

<sup>20</sup> Compare H.Res. 136 (authorizing Congress) with H.R. 6079, section 3, and H.R. 4010, section 2 (authorizing the courts).

<sup>21</sup> Compare H.R. 4010 (using a willful standard) with H.R. 6079 (using a knowing standard).

<sup>22</sup> 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).

<sup>23</sup> See H. Res. 136 (118<sup>th</sup> Cong.) in proposed clause 7.(j) in House Rule XI).

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 or detention 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. Explicit authorization of congressional detention as a subpoena enforcement option would, again if it survives judicial review, revive a long-dormant enforcement tool. Both concepts offer fresh enforcement options that could help revitalize the accommodation process by convincing the executive branch that it would be better to negotiate than contest a civil penalty.

### **3. Streamlining Judicial Review.**

Another 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 potentially 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.”<sup>24</sup> The more recent bill, H.R. 6079, also requires the Judicial Conference and Supreme Court to “prescribe rules of procedure to ensure the expeditious treatment” of congressional civil enforcement actions.<sup>25</sup> 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 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 timelier adjudication of the issues.

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<sup>24</sup> H.R. 4010 (115<sup>th</sup> Cong.), section 2 (proposing a new 28 U.S.C. 1365a(a)(2)).

<sup>25</sup> H.R. 6079 (116<sup>th</sup> Cong.), section 3 (proposing a new 28 U.S.C. 1365a(e)).

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.”<sup>26</sup>

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.”<sup>27</sup> 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.”<sup>28</sup> In another 2019 decision, Justice Ketanji Brown Jackson, then of the D.C. District Court, 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.”<sup>29</sup> 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 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.<sup>30</sup>

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

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<sup>26</sup> *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)).

<sup>27</sup> *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 44 (D.C.C. 2018).

<sup>28</sup> *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).

<sup>29</sup> *Comm. on the Judiciary, United States House of Representatives v. McGahn*, 415 F. Supp. 3d 148, 192 (D.D.C. 2019).

<sup>30</sup> 140 S. Ct. 2036.



significantly reduce the delays that now make judicial review such a frustrating and often inept enforcement option.

## **Other Steps to Strengthen Congress' Ability to Obtain Information**

In addition to codifying Congress' right to file civil enforcement actions in federal court, specifying rules governing executive branch responses to congressional subpoenas, and streamlining judicial review, there are several other actions Congress could take which would strengthen its ability to obtain information from the executive branch and which could help restore the balance and vitality of the accommodation process. They include establishing a congressional office of legal counsel, revising several statutes to clarify congressional intent regarding civil enforcement of its subpoenas, and employing private attorneys to pursue criminal contempt of Congress cases against executive branch officials who refuse to comply with congressional subpoenas.

**Congressional OLC.** One key step Congress could take is to establish a bicameral, bipartisan congressional counterpart to the Office of Legal Counsel (OLC) of the Department of Justice (DOJ).<sup>31</sup> The DOJ OLC has been producing legal opinions for decades on oversight issues, most of which favor the executive branch over the legislative branch.<sup>32</sup> 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 in 2021,<sup>33</sup> 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. In December 2021, the Modernization Committee asked the Government Accountability Office (GAO) to issue a report with options for establishing a Congressional OLC, and GAO has undertaken significant work to produce that study.<sup>34</sup>

**Clarifying Statutory Language.** Congress needs to resolve several statutory interpretation issues affecting congressional civil enforcement authority. First is an issue that

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<sup>31</sup> The Department of Justice Office of Legal Counsel (OLC) issues official legal opinions that provide binding guidance to executive branch agencies on how to respond to congressional information requests. See <https://www.justice.gov/olc>.

<sup>32</sup> 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](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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477699). The Justice Department nevertheless continues to use its OLC opinions not only to control 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.

<sup>33</sup> 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>.

<sup>34</sup> Select Committee on the Modernization of Congress, "Final Report" (No. 116-562 Oct. 2020), p. 236.

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.<sup>35</sup> 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,<sup>36</sup> and enacting one option does not limit or preclude use of another. The provision could use language similar to that in H.R. 6079 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.<sup>37</sup>

Congress should also eliminate the executive branch exception to civil enforcement actions by the Senate now included in 28 U.S.C. 1365.<sup>38</sup> 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.

**Reviving Criminal Contempt Actions.** Finally, Congress may want to consider reviving 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 generally refuses to comply with the law if the subject of the contempt action is an executive branch official. As noted earlier, at Congress’ request and in a departure from its usual practice, the Justice Department did prosecute both Steve Bannon and Peter Navarro for contempt of Congress, but it also simultaneously declined Congressional requests to prosecute Administration officials Mark

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<sup>35</sup> *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).

<sup>36</sup> 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).

<sup>37</sup> H.R. 6079 (117<sup>th</sup> 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 (115<sup>th</sup> Cong.), section 4 (“Nothing in this Act shall be interpreted to diminish Congress’ inherent 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.”).

<sup>38</sup> 28 U.S.C. 1365(a) (“This section shall not apply to an action to enforce ... any subpoena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity.”).

Meadows and Daniel Scavino, demonstrating the Department’s continuing refusal to comply fully with the law as written.<sup>39</sup>

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.

## **Setting Priorities for Strengthening Congressional Subpoena Enforcement**

Strengthening enforcement of congressional subpoenas can be accomplished in many ways, as set out in the above list of 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 critical 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 may increase interbranch conflicts and political tensions. It is also essential to reviving the accommodation process for resolving interbranch information disputes. With the Supreme Court’s reaffirmation in the *Mazars* case of the constitutional necessity for Congress to be able to compel information and have the means to do it, now is the perfect time to take on this critical issue.

Thank you for your work on this important matter. The Levin Center for Oversight and Democracy stands ready to assist this Subcommittee as it continues to develop approaches that can strengthen Congress’ capacity to obtain information, revitalize the accommodation process between the legislative and executive branches, and enable Congress to fulfill its duty to serve as the eyes and voice of the American people.

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<sup>39</sup> See, e.g., “DOJ declines to charge Meadows, Scavino with contempt of Congress for defying Jan. 6 committee,” Josh Gerstein, Kyle Cheney, and Nicholas Wu, *Politico* (June 3, 2022), <https://www.politico.com/news/2022/06/03/doj-declines-to-charge-meadows-scavino-with-contempt-of-congress-for-defying-jan-6-committee-00037230>.

## EXHIBIT 1

### Options for Strengthening Enforcement of Congressional Subpoenas and Reviving the Accommodation Process

See e.g., H.R. 4010 (115<sup>th</sup> Cong.), H.R. 6079 (117<sup>th</sup> Congress), H.R. 5048 & H. Res. 136 (118<sup>th</sup> Cong.)

#### Codify Congress's Civil Enforcement Powers

- Explicitly authorize Congress to file civil actions to enforce subpoenas but amend to specify that this power applies to suits against the executive branch.
- Establish rules and timelines for how the executive branch should respond to subpoenas.
- Address abuses of executive privilege by requiring that only the president may assert such privilege, must do so in writing, and must accompany the assertion with a privilege log.

#### Authorize New Civil Penalties to Deter Noncompliance with Congressional Subpoenas

- Establish civil fines and detention for noncompliance with a congressional subpoena.
- Consider the issues raised by choosing to empower Congress to impose fines or having a court levy the fines.
- Recognize that regardless of which branch authorizes the penalty, actual execution will likely come after judicial consideration of the case.

#### Streamline Judicial Review

- Specify in statute that the trial and appellate courts have a duty to expedite to the greatest extent possible disposition of civil actions and appeals concerning enforcement of congressional subpoenas.
- Consider provisions that streamline the judicial review process by requiring the court to issue specific rules to accomplish this and by removing either the trial court or the circuit court from the process.
- Provide language that explicitly bars a trial or appeals court from conducting a line-by-line review of a congressional subpoena during a civil enforcement action, limiting the court to considering the subpoena's essential relevance to any lawful purpose of a congressional committee.

#### Other Steps to Strengthen Congress's Ability to Obtain Information

- Establish a bipartisan, bicameral congressional office of legal counsel capable of thoughtful, well-supported, bipartisan legal opinions on oversight matters, including congressional subpoenas. This would help Congress to build its own oversight norms and culture, inform the executive branch of Congress's expectations, and strengthen Congress's hand in court.
- Clarify certain statutory language to remove doubt about Congress's broad and varied options for enforcing its subpoenas.
- Revive Congress's criminal contempt power by authorizing the use of private attorneys to bring criminal prosecutions against current executive branch personnel who defy congressional subpoenas.



## About the Levin Center

The Carl Levin Center for Oversight and Democracy was established in 2015 to carry on the legislative oversight legacy and public vision of U.S. Senator Carl Levin, who represented Michigan in the U.S. Senate for 36 years, longer than any other Michigan senator. The Levin Center is headquartered at Wayne State University Law School in Detroit with an office in Washington, D.C.

## Advancing Oversight. Strengthening Democracy.

The Levin Center works to build capacity in legislative bodies at all levels — federal, state, and abroad — to expose public and private sector abuses, ensure effective governance, and bring critical facts to light for the benefit of all. The Levin Center has developed a reputation as a leader in this area by helping to train congressional and state lawmakers and their staff from both parties on how to conduct bipartisan, fact-based oversight; conducting and supporting research on important issues; and educating future leaders about the value and practice of legislative oversight. The Center is working to inspire and train a new generation in the techniques of bipartisan, fact-based oversight to ensure public and private institutions operate with integrity, transparency, and accountability.

## Our mission

To strengthen the integrity, transparency, and accountability of public and private institutions through the promotion and support of bipartisan, fact-based legislative oversight; to advance good governance, particularly with respect to the legislative process; and to promote civil discourse on current issues of public policy.





## Home of the State Oversight Academy

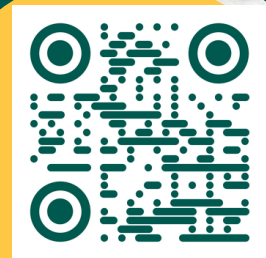
The State Oversight Academy is the first and only national institution dedicated to promoting effective bipartisan fact-finding and oversight by state legislatures as essential to good governance and democracy. SOA builds a national community of practitioners, scholars, good government advocates, and the public interested in advancing transparent and accountable government and mitigating disinformation that can foster extremism and stymy dialogue across the political divide.

## Civic Education - “Learning by Hearings”

The Levin Center’s civic education program, Learning by Hearings, provides robust, experiential education opportunities where participants learn about history, government, and current events while developing their capacity for critical thinking and working with people from diverse backgrounds and viewpoints. Its centerpiece is a legislative oversight committee hearing where participants role play as state legislators, executive branch officials, members of the media, and others participating in an investigation into a contemporary issue. Our civic education classroom modules and after-school programs give participants the tools and support to prepare and conduct a mock investigative hearing, learn about the separation of powers, hone their critical thinking skills, and realize the value of factual consensus.

## Other Programs and Resources

- Summer Legal Internships for Wayne Law Students
- Non-Residential Oversight Fellowships
- Award for Excellence in Oversight Research
- Carl Levin Award for Effective Oversight
- Congressional Oversight Records Database
- State Legislative Oversight Wiki
- Portraits in Oversight Series
- Oversight Case Law
- Events, Panel Discussions, and Symposia



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